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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

GIFT SURPLUS, LLC, AND SANDHILL AMUSEMENTS, INC., PLAINTIFFS

v.

STATE OF NORTH CAROLINA, EX REL. ROY COOPER, GOVERNOR, IN HIS OFFICIAL CAPACITY; BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT BRANCH OF THE STATE BUREAU OF INVESTIGATION, MARK J. SENTER, IN HIS OFFICIAL CAPACITY; SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY; AND DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, BOB SCHURMEIER, IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. COA18-1140

Filed 15 October 2019

Gambling—electronic sweepstakes—section 14-306.4—"entertaining display"

The trial court erred by concluding that plaintiffs' game kiosks did not violate N.C.G.S. § 14-306.4, and by entering an injunction preventing the State from enforcing that law against plaintiffs. Plaintiffs' game was conducted using a visual display that met the definition of "entertaining display" in the statute. However, the Court of Appeals panel was split on whether the determination of illegality was dependent on the distinction between games of skill or chance—the two concurring judges stated that games would violate the entertaining display prohibition only if they relied on chance, and concluded that the game at issue in this case was dominated by chance and not skill or dexterity.

Judge COLLINS concurring with a separate opinion.

Judge BRYANT concurring in the result with a separate opinion.

Appeal by Defendants from judgment entered 2 February 2018 by Judge Ebern T. Watson III in Onslow County Superior Court. Heard in the Court of Appeals 23 May 2019.

Fox Rothschild LLP, by Elizabeth Brooks Scherer, Kip David Nelson, and Troy D. Shelton; George B. Hyler, Jr.; and Grace, Tisdale, & Clifton, P.A., by Michael A. Grace, for plaintiffs-appellees.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak, Deputy Solicitor General James W. Doggett, and Assistant Solicitor General Kenzie M. Rakes, for defendants-appellants.

MURPHY, Judge.

Plaintiffs-Appellees Gift Surplus, LLC and Sandhill Amusements, Inc. ("Gift Surplus") sued the State, ex rel. Governor Roy Cooper, et al. ("the State") seeking a permanent injunction that would bar state law enforcement from enforcing State gambling and sweepstakes laws against the operators of Gift Surplus's sweepstakes kiosks. In a bench trial, the Superior Court concluded Gift Surplus's kiosks do not violate the State's prohibition of sweepstakes run through the use of an "electronic display" and permanently enjoined the State from enforcing these laws against Gift Surplus. Because we conclude Gift Surplus's kiosks operate sweepstakes through an entertaining display in violation of N.C.G.S. § 14-306.4, we reverse and vacate the trial court's injunction.

BACKGROUND

Gift Surplus has been embroiled in this legal battle with the State over its sweepstakes since 2013, when it sued the Sheriff of Onslow County seeking a declaration that its sweepstakes did not violate the State's gambling laws or its ban on video sweepstakes. After the Onslow County Sheriff's Department seized kiosks loaded with Gift Surplus's sweepstakes games, Plaintiffs received a preliminary injunction barring law enforcement from enforcing state laws that the State contended prohibit the implementation and operation of the sweepstakes. However, that preliminary injunction was overturned by our Supreme Court, which held Gift Surplus's sweepstakes violated N.C.G.S. § 14-306.4. *Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015) (adopting then-Judge Ervin's dissent in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014)).

After the case had been sent back to the trial court, Gift Surplus made adjustments to its sweepstakes games, amended its *Complaint*,

and again placed its games into operation around the State. One such adjustment is a "double nudge" feature that allows players to nudge the game reels as many as two times in order to move them into alignment and win a prize. Other additions included a "winner every time" feature that made 100% of spins winnable, albeit only for a prize of several cents on 75% of spins, and a "final ticket" feature that allowed prizes lost through incorrect nudging to be won back in later turns. Finally, Gift Surplus removed a "governor" feature that had prevented players from winning large prizes in quick succession.

At the second trial in this matter, in 2017, Gift Surplus sought and received a declaration that its sweepstakes do not violate the State's ban on video sweepstakes, codified in N.C.G.S. § 14-306.4. In its unchallenged Findings of Fact, the trial court found that Gift Surplus's kiosks run "video games[.]" These video games are used as a "promotional sweepstakes system" to reveal a potential prize to the playing customer. Based on its Findings of Fact, the trial court concluded: "[p]romotional sweepstakes are legal and lawful in North Carolina" so long as they comport with the applicable state and federal laws; "Plaintiff Gift Surplus'[s] proprietary sweepstakes system comports with all of the regulatory scheme of N.C.G.S. § 14-306.4[;]" and that Gift Surplus is "entitled to permanent injunctive relief, as requested in their . . . Complaint." Having reached those conclusions, the trial court entered a permanent injunction barring the State and its agents from enforcing the criminal law prohibiting electronic sweepstakes against Gift Surplus. The State filed timely notice of appeal.

ANALYSIS

Both arguments on appeal challenge the legal conclusions drawn from the trial court's factual findings and the trial court's order, judgment, and decree of a permanent injunction. The State's ultimate contention on appeal is that the trial court erred in permanently enjoining State law enforcement from enforcing the State's ban on certain electronic sweepstakes against "persons who operate or place into operation any equipment associated with . . . Gift Surplus'[s] sweepstakes system[.]" The State argues the trial court erred in granting Gift Surplus a permanent injunction because Gift Surplus's sweepstakes violate (1) the State's ban on video sweepstakes and, in the alternative, (2) the State's separate ban on gambling operations. We agree that Gift Surplus's sweepstakes do not comply with the State's prohibition of certain video sweepstakes and, as a result, need not reach the second argument on appeal.

The State argues "Gift Surplus's sweepstakes violate section 14-306.4 of the General Statutes." In contrast, the trial court concluded "Gift Surplus'[s] proprietary sweepstakes system comports with all of the regulatory scheme of N.C.G.S. § 14-306.4." "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). After careful review, we hold Gift Surplus's sweepstakes system does not comport with N.C.G.S. § 14-306.4.

In relevant part, N.C.G.S. § 14-306.4 states, "[I]t shall be unlawful for any person to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." N.C.G.S. § 14-306.4(b), (b)(1) (2017). A sweepstakes is "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." *Id.* at (a)(5). An entertaining display is "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play, such as, *by way of illustration* and not exclusion: [video poker, video bingo, video lotto games, video games of chance, etc.]" *Id.* at (a)(3) (emphasis added). There is no dispute that Gift Surplus's game is a sweepstakes. At issue is whether Gift Surplus's sweepstakes are conducted through "an entertaining display" in violation of N.C.G.S. § 14-306.4.

Both in their briefs and in oral argument the parties to this appeal focused on the issue of whether chance or skill predominates in the current iteration of Gift Surplus's sweepstakes. This is likely because our sweepstakes statute explicitly use games of chance as an illustration of an improper electronic display and also because the distinction between games of chance and games of skill has received considerable attention from our appellate courts. *See*, *e.g.*, N.C.G.S. § 14-306.4(a)(3); *Sandhill Amusements*, *Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015); *State v. Gupton*, 30 N.C. 271 (1848); *Crazie Overstock Promotions*, *LLC*, *v. State*, 830 S.E.2d 871 (N.C. Ct. App. 2019). However, we need not decide whether these sweepstakes are chance or skill-based in order to hold that they violate N.C.G.S. § 14-306.4.

The sweepstakes statute explicitly proscribes sweepstakes conducted through electronic display, which is "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play[.]" N.C.G.S. § 14-306.4(a)(3). From there, the statute goes on to set out "by way of illustration and not exclusion" a non-exhaustive list of specific games that fit the definition

of "electronic display."[1] Gift Surplus mischaracterizes this statutory scheme in arguing a sweepstakes game "falls within the 'entertaining display' prohibition *only* when the 'video game is not dependent on skill or dexterity while revealing a prize as the result of an entry into a sweepstakes.' " Regardless of whether it is dependent on skill or dexterity, a sweepstakes falls within the entertaining display prohibition simply if it is "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play[.]" N.C.G.S. § 14-306.4(a)(3).

The sweepstakes in question are run through standalone kiosks that display a video game resembling a reel-spinning slot machine. These kiosks undisputedly display visual information capable of being seen by a sweepstakes entrant. At trial, one of Gift Surplus's expert witnesses went as far as to testify that an individual with "a visual disability" would not be able to win the video game. This is because doing so requires the participant to be able to see the visual information displayed by the kiosks. Furthermore, this visual information takes the form of game play—the entrant's spinning and nudging of virtual reels. Gift Surplus's sweepstakes are run through the use of an "entertaining display." As such, regardless of whether skill or chance predominates over the games at issue, Gift Surplus's kiosks violate N.C.G.S. § 14-306.4 and the trial court's conclusion to the contrary must be reversed.

Having reversed the trial court's conclusion that Gift Surplus's sweepstakes do not violate N.C.G.S. § 14-306.4, we vacate the permanent injunction against the State and its "officers, agents, servants, and employees, and any person in active concert or participation with any of the Defendants or any of their officers, agents, servants, and employees[.]" As a result, we need not reach the State's argument that the sweepstakes are also illegal independent of the video sweepstakes statute because they violate the separate ban on gambling operations codified in N.C.G.S. § 14-292. The trial court did not make specific findings or conclusions regarding the gambling operations statute; the permanent injunction was entirely based upon the sweepstakes' compliance with N.C.G.S. § 14-306.4.

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1. The list of illustrative examples includes a number of games, such as: video bingo, poker, craps, keno, "video game[s] based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player[,]" and "other video game[s] not dependent on skill or dexterity that [are] played while revealing a prize as the result of an entry into a sweepstakes." N.C.G.S. § 14-306.4(a)(3).

CONCLUSION

The trial court erred in concluding Gift Surplus's sweepstakes do not violate N.C.G.S. § 14-306.4 because the sweepstakes in question are run through the use of an entertaining display. We reverse the trial court's order and vacate its permanent injunction.

REVERSED AND VACATED.

Judge COLLINS concurs with a separate opinion.

Judge BRYANT concurs in the result with a separate opinion.

COLLINS, Judge, concurring.

I concur in the majority opinion and agree that, according to the plain language of N.C. Gen. Stat. § 14-306.4, a sweepstakes is conducted through the use of an entertaining display in violation of N.C. Gen. Stat. § 14-306.4(b)(1) simply by using "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play[,]" N.C. Gen. Stat. § 14-306.4(a)(3), regardless of whether it is dependent upon skill or dexterity. However, Judge Ervin, in his dissenting opinion in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014), *rev'd sub nom. Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015) (reversing the Court of Appeals majority opinion for the reasons stated in the dissenting opinion), analyzed a prior version of Plaintiffs' games at issue in this case under N.C. Gen. Stat. § 14-306.4(a)(3)(i). Judge Ervin explained,

> given that the equipment and activities protected by the [] injunction clearly involve the use of electronic devices to engage in or simulate game play based upon which a participant may win or become eligible to win a prize, the only basis upon which Plaintiffs' equipment and activities can avoid running afoul of N.C. Gen. Stat. § 14-306.4(b) is in the event that the game or simulated game involved is "dependent on skill or dexterity."

Sandhill, 236 N.C. App. at 365, 762 S.E.2d at 683 (quoting N.C. Gen. Stat. § 14-306.4(a)(3)(i)). To the extent our Supreme Court's adoption of Judge Ervin's dissent in *Sandhill* signals the Court's determination that a sweepstakes game falls within Gen. Stat. § 14-306.4's "entertaining

display" prohibition *only* when the video game is not dependent on skill or dexterity, I agree with Judge Bryant's concurring opinion in this case that "the games at issue do not amount to games whose outcomes are determined by skill and dexterity, but rather, chance."

Whether a game is one of skill or of chance is a question of law, reviewed de novo. *See Sandhill*, 236 N.C. App. at 367-68, 762 S.E.2d at 685; *see also Collins Coin Music Co. of N.C. v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 408, 451 S.E.2d 306, 308 (1994) (treating the difference between games of chance and games of skill as an issue of law).

According to N.C. Gen. Stat. § 14-306.4, "it shall be unlawful for any person to operate, or place into operation, an electronic machine or device to . . . [c]onduct a sweepstakes through the use of an entertaining display, including the entry process or the reveal of a prize." N.C. Gen. Stat. § 14-306.4(b). As noted in the majority opinion, the question of whether Plaintiffs' games involve "sweepstakes" within the meaning of N.C. Gen. Stat. § 14-306.4(a)(5) is not in dispute, but rather whether the sweepstakes are conducted through the use of an "entertaining display" within the meaning of N.C. Gen. Stat. § 14-306.4(a)(3).

An "entertaining display"

> means visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play, such as, by way of illustration and not exclusion:
>
> . . .
>
> i. Any other video game not dependent on skill or dexterity that is played while revealing a prize as the result of an entry into a sweepstakes.

N.C. Gen. Stat. § 14-306.4(a)(3). The terms "game" and "skill or dexterity" as used in N.C. Gen. Stat. § 14-306.4 are not statutorily defined. However, Judge Ervin adopted the following analysis:

> "A game of chance is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance. A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory. In *State v. Stroupe*, 238 N.C.

34, 76 S.E.2d 313 (1953), a case involving the legality of the game of pool, our Supreme Court stated:

> It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment."

Sandhill, 236 N.C. App. at 368, 762 S.E.2d at 685 (internal quotation marks and citations omitted) (quoting *Collins Coin Music*, 117 N.C. App. 405, 408, 451 S.E.2d 306, 308 (1994) (addressing the meaning of the terms as used in Article 37 of Chapter 14 of the General Statues, a set of provisions governing gambling-related activities that includes N.C. Gen. Stat. § 14-306.4)).

Based on this meaning of the relevant statutory language, the *Collins Coin Music* Court determined that the video poker game in question was one of chance rather than one of skill because, in part,

> although a player's knowledge of statistical probabilities can maximize his winnings in the short term, he cannot determine or influence the result since the cards are drawn at random. In the long run, the video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element.

Collins Coin Music, 117 N.C. App. at 409, 451 S.E.2d at 308 (internal citation omitted). "As a result, the essential difference between a game of skill and a game of chance for purposes of our gambling statutes, including N.C. Gen. Stat. § 14-306.4, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill." *Sandhill*, 236 N.C. App. at 369, 762 S.E.2d at 685.

Similarly, Judge Ervin considered whether version 1.03 of Plaintiffs' sweepstakes game was a game of skill or chance, and "conclude[d] that the element of chance dominates the element of skill in the operation" of Plaintiffs' machines. *Id.* at 370, 762 S.E.2d at 686. Judge Ervin explained:

> As was the case with the video poker game at issue in *Collins Coin Music*, the machines and equipment at issue

> here only permitted a predetermined number of winners. For that reason, a player who plays after the predetermined number of winners has been reached will be unable to win a prize no matter how much skill or dexterity he or she exhibits. In addition, use of the equipment at issue here will result in the playing of certain games in which the player will be unable to win anything of value regardless of the skill or dexterity that he or she displays. Finally, the extent to which the opportunity arises for the "nudging" activity upon which the trial court's order relies in support of its determination that the equipment in question facilitated a game of "skill or dexterity" appears to be purely chance-based. Although Mr. Farley persuaded the trial court that the outcome of the games facilitated by Plaintiffs' equipment and activities depended on skill or dexterity, the only basis for this assertion was the player's ability to affect the outcome by "nudging" a third symbol in one direction or the other after two matching symbols appeared at random on the screen. Assuming for purposes of argument that this "nudging" process does involve skill or dexterity, I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome. In light of these inherent limitations on a player's ability to win based upon a display of skill and dexterity, an individual playing the machines and utilizing the equipment at issue simply does not appear to be able to "determine or influence the result over the long haul."

Id. at 370, 762 S.E.2d at 686 (internal citation omitted).

The version of the games examined in the present case, version 1.22, includes several changes made after the *Sandhill* decision: First, a "governor" that had prevented players from winning large prizes in quick succession in version 1.03 was eliminated. Second, a "final ticket" feature was added, under which prizes lost through incorrect nudging can be won on later turns. Third, a "winner every time" feature was added. In version 1.03, on 75% of turns, players could not win a prize. In version 1.22, kiosks can be set so these turns will generate a token prize. On these turns, a "¢" symbol appears on one of the reels. If the player nudges the "¢" symbol to the middle line, the player receives several cents. Fourth, a "double nudge" feature was added. In version 1.03,

players needed to nudge only one symbol to produce a winning combination. In version 1.22, the kiosks can be set so that two symbols must be nudged. The trial court found that "[t]he primary difference between version 1.03 and version 1.22 is a feature that requires the participant in the Gift Surplus sweepstakes to exercise more skill and more dexterity to realize a prize (i.e., the "double nudge")."

But even with these new features all activated, version 1.22 continues to be a game of chance. First, as in version 1.03, the set of symbols appearing to the player in the first instance is not determined by the player's skill or dexterity, but rather is "purely chance-based." *Sandhill*, 236 N.C. App. at 370, 762 S.E.2d at 686. This set of symbols determines the outcomes potentially available to the player: i.e., whether the player falls into the 25% bucket of players who can win a significant prize, or falls into the 75% bucket of players who can only win a token prize. Chance, rather than skill or dexterity, thus wholly determines whether a significant prize can be won. *See Collins*, 117 N.C. App. 409, 451 S.E.2d at 308 ("[T]he video game's program, which allows only a predetermined number of winning hands, negates even this limited skill element."). The addition of token prizes for what are effectively losing spins does not change the analysis, as their availability, like the availability of significant prizes, is wholly determined by chance. Second, the elimination of the "governor" feature merely amplifies the speed by which chance may provide significant prizes to the player, and thus also fails to change the analysis. Third, the addition of the "final ticket" feature actually diminishes the impact skill plays in version 1.22, by forgiving the player's failure to exercise whatever skill is required to claim the prizes chance makes potentially available. And finally, the addition of a second nudge does not meaningfully distinguish version 1.22 from version 1.03. Even "[a]ssuming for purposes of argument that this 'nudging' process does involve skill or dexterity[,]" *Sandhill*, 236 N.C. App. at 370, 762 S.E.2d at 686, the de minimis amount of skill and dexterity involved in executing two nudges fails to transform a game of chance into one wherein skill and dexterity predominate. As Judge Ervin said regarding the single-nudge feature in version 1.03, "I am unable to see how this isolated opportunity for such considerations to affect the outcome overrides the impact of the other features which, according to the undisputed evidence, affect and significantly limit the impact of the player's skill and dexterity on the outcome." *Id.* at 370, 762 S.E.2d at 686.

Accordingly, as the majority opinion concludes, Plaintiffs' kiosks operate sweepstakes through an entertaining display in violation of N.C. Gen. Stat. § 14-306.4, and the permanent injunction prohibiting law

enforcement officers from enforcing violations of the law against Gift Surplus should be vacated.

BRYANT, Judge, concurring in the result.

Pursuant to General Statutes, section 14-306.4 ("Electronic machines and devices for sweepstakes prohibited"), it is unlawful "to operate, or place into operation, an electronic machine or device to . . . (1) [c]onduct a sweepstakes through the use of an entertaining display, . . . [or] (2) [p]romote a sweepstakes that is conducted through the use of an entertaining display . . . ." N.C. Gen. Stat. § 14-306.4(b)(1), (2) (2017). For the purposes of General Statutes, section 14-306.4, our General Assembly has defined "sweepstakes" to mean "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, the determination of which is based upon chance." *Id.* § 14-306.4(a)(5). The term "entertaining display" has been defined to mean

> visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play, such as . . . :
>
> . . . .
>
> h. A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols *not dependent on the skill or dexterity* of the player.
>
> i. Any other video game *not dependent on skill* or *dexterity* that is played while revealing a prize as the result of an entry into a sweepstakes.

Id. § 14-306.4(a)(3)h., i. (emphasis added).

In a dissenting opinion in *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014), *rev'd sub nom. Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015) (per curiam) (reversing the Court of Appeals majority opinion for the reasons stated in the dissenting opinion), Judge Ervin addressed the categorical terms "skill or dexterity" and "game of chance," framing the issue before the Court as such:

> [I]n order to determine whether . . . [the] [p]laintiffs' equipment and activities were lawful, we must first ascertain the

> difference between a game of skill and a game of chance as those terms are used in our gambling statutes and then determine which side of the resulting line [the] [p]laintiffs' equipment and activities fall on.

Id. at 367–68, 762 S.E.2d at 685 (Ervin, J., dissenting opinion). Acknowledging that the term "skill or dexterity," as used in section 14-306.4, had not been statutorily defined, Judge Ervin noted that the term, as used in Article 37 of Chapter 14 of our General Statutes—"a set of provisions governing gambling-related activities that includes N.C. Gen. Stat. § 14–306.4, ha[d] been addressed by this Court." *Id.* at 367, 762 S.E.2d at 685. In particular, the dissent referred to this Court's reasoning in *Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm'n*, 117 N.C. App. 405, 451 S.E.2d 306 (1994) (addressing whether video poker games were prohibited by General Statutes, section 14-306 (1993)).

> A game of chance is "such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." *State v. Eisen*, 16 N.C. App. 532, 535, 192 S.E.2d 613, 615 (1972) (citation omitted). "A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory." *Id.* at 535, 192 S.E.2d at 615–16 (citation omitted). In *State v. Stroupe*, 238 N.C. 34, 76 S.E.2d 313 (1953), a case involving the legality of the game of pool, our Supreme Court stated:
>
> It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment.
>
> *Id.* at 38, 76 S.E.2d at 316–17.

Sandhill Amusements, 236 N.C. App. at 368, 762 S.E.2d at 685 (Ervin, J., dissenting) (quoting *Collins Coin Music Co.*, 117 N.C. App. at 408, 451 S.E.2d at 308). Judge Ervin opined "the essential difference between a game of skill and a game of chance for purposes of our gambling statutes,

including N.C. Gen. Stat. § 14-306.4, is whether skill or chance determines the final outcome and whether chance can override or thwart the exercise of skill." *Id.* at 369, 762 S.E.2d at 685. *See also State v. Spruill*, 237 N.C. App. 383, 387, 765 S.E.2d 84, 87 (2014) ("Section 14-306.4 seeks to prevent the use of entertaining displays in the form of video games to conduct sweepstakes wherein the prize is determined by chance." (citing N.C. Gen. Stat. § 14-306.4(b)(1))).

Where the exercise of skill and dexterity is the dominant character of a game which determines the final outcome, the game does not satisfy the statutory definition of a sweepstakes, though an element of chance may be present. *See* N.C. Gen. Stat. § 14-306.4(a)(5) (defining "sweepstakes" to mean "any game, advertising scheme or plan, or other promotion, which, with or without payment of any consideration, a person may enter to win or become eligible to receive any prize, *the determination of which is based upon chance*" (emphasis added)); *see also Spruill*, 237 N.C. App. at 387, 765 S.E.2d at 87; *Sandhill Amusements*, 236 N.C. App. at 368, 762 S.E.2d at 685 (Ervin, J., dissenting).

The majority opinion in the current matter states that

> we need not decide whether these sweepstakes are chance or skill-based in order to hold that they violate N.C.G.S. § 14-306.4.
>
> . . . .
>
> Regardless of whether it is dependent on skill or dexterity, a sweepstakes falls within the entertaining display prohibition simply if it is 'visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play[.] N.C.G.S. § 14-306.4(a)(3)."

I believe this reading of section 14-306.4 is too broad.

However, I believe the games at issue do not amount to games whose outcomes are determined by skill and dexterity, but rather, chance. As a result, the games are sweepstakes in violation of General Statutes, section 14-306.4.

Because I agree that the games created by Gift Surplus, as described in the majority opinion are in violation of General Statutes, section 14-306.4 and that the injunction prohibiting law enforcement officers from enforcing violations of law should be dissolved, I concur in the result reached by the majority.

IN RE DUVALL

[268 N.C. App. 14 (2019)]

RE THE MATTER OF APPEAL FOR A CONCEALED HANDGUN PERMIT BY HOWARD DUVALL, III, APPLICANT

No. COA19-197

Filed 15 October 2019

1. Constitutional Law—procedural due process—concealed gun permit—denial of application—basis—lack of prior notice

An applicant for a concealed handgun permit did not receive due process where he received no prior notice that his mental health history, contained in veterans' affairs records, and ability to safely handle a gun would be at issue when he appealed from the denial of his application by the sheriff's office to district court. Whereas the sheriff's office denied the application based on the substance abuse provision contained in N.C.G.S. § 14-415.12(b)(5), the trial court found respondent was unqualified under not only that section but also the safe handling provision in section 14-415.12(a)(3).

2. Firearms and Other Weapons—concealed gun permit application—denial—substance abuse basis—application of federal definition of "addict"

Where an appeal from a trial court's denial of a concealed carry permit was remanded for violation of the applicant's due process rights (for lack of notice that denial might be based on the safe handling provision of N.C.G.S. § 14-415.12(a)(3)), the COA did not reach substantive arguments about a second ground for denial of the permit due to the lack of a transcript, but directed the trial court on remand to use and apply the definition of "addict" contained in 21 U.S.C. § 802, incorporated into section 14-415.12(b)(5) (the substance abuse subsection), before determining the applicant was disqualified under that provision.

Judge DIETZ concurring in result only with separate opinion.

Appeal by petitioner from order entered 4 September 2018 by Judge Alicia D. Brooks in Mecklenburg County District Court. Heard in the Court of Appeals 4 September 2019.

Redding Jones, PLLC, by Ty K. McTier and David G. Redding, for petitioner-appellant.

Womble Bond Dickinson (US) LLP, by Sean F. Perrin, for respondent-appellee Mecklenburg County Sheriff's Office.

TYSON, Judge.

Howard Duvall, III ("Petitioner") appeals from an order denying his application for a concealed handgun permit. We reverse the district court's order and remand.

I. Background

Petitioner is a decorated Vietnam combat veteran, who served in the U.S. Army for five years and received an honorable discharge from his service. He earned a Bachelor's Degree in Industrial Management and a Masters of Business Administration degree. Petitioner developed and owned a real estate development company, which he sold in 2011 and retired in 2013.

Petitioner applied for and received a permit to purchase a handgun from the Mecklenburg County Sheriff's Office ("MCSO") on 15 September 2017. He successfully completed his gun safety training course and then applied for a concealed handgun permit on 16 March 2018. Petitioner completed and filed the sworn, notarized application, checked the appropriate boxes, attached a copy of his DD-214 military service discharge, and paid his application fees. On his application, he checked "Yes" for successful completion of an approved firearms safety and training course and attached his Certificate of Completion.

Petitioner checked the "No" box to indicate he did not "suffer from a physical or mental infirmity that prevents the safe handling of a handgun." This language refers to N.C. Gen. Stat. § 14-415.12(a)(3) (2017) [hereinafter the "safe handling subsection"]. He also checked "No" to indicate he was not "an unlawful user of (or addicted to) marijuana, alcohol, or any depressant, stimulant, or narcotic drug, or any other controlled substance as defined in 21 U.S.C. § 802." This language refers to N.C. Gen. Stat. § 14-415.12(b)(5) (2017) [hereinafter the "substance abuse subsection"].

The record shows a clerk at MCSO cleared Petitioner of any prior criminal or other disabling record on 5 April 2018 and Petitioner was provisionally approved for issuance of a concealed handgun permit, pending final review. On 18 May 2018, MCSO denied his application, citing the substance abuse subsection. The notice of denial also stated, "YOU ARE DENIED BASED ON INFORMATION RECEIVED FROM VETERANS AFFAIRS."

Petitioner's medical records show a diagnosis of acute PTSD following military combat, entered on 12 September 2016. Petitioner also

has a prior record of "alcohol abuse, unspecified drinking behavior." At a therapy session on 12 March 2018, Petitioner had expressed "concerns about his drinking behaviors." At a session on 26 March 2018, Petitioner reported that he "continues to monitor his drinking habits" and would request a referral to Substance Abuse Services, "if he needs or has been unable to make changes on his own."

Petitioner had lost a young child to sudden infant death syndrome and the records show he acknowledged, "having several [suicidal] thoughts in the past, with a plan, but has never acted on any of them." Petitioner denied any history of suicide attempts. This history was not a stated basis for MCSO's denial of Petitioner's application.

After receipt of the denial of his application from MCSO, Petitioner emailed his Primary Care Physician at the Charlotte Veterans Administration ("VA") Clinic on 3 June 2018:

> Apparently, the Sheriff's Department believes that I am an "…unlawful user of or addicted to …[] (a) controlled substance…" based upon "information received from Veterans Affairs."
>
> I am not aware that I am now or ever have been an unlawful user of or addicted to a controlled substance. It is very disturbing that the sheriff has reached this conclusion.
>
> Will you please let me know what is in my records that would lead them to this conclusion and help me correct the information?

The next day, a registered nurse employed at the VA Clinic replied: "I do not see where your primary care provider is prescribing you any controlled substances. I also don't see at first glance what this denial could be in reference to." The nurse recommended Petitioner contact MCSO for more information about the basis of his denial.

On 25 June 2018, Petitioner sent a letter to the Chief District Court Judge in Mecklenburg County, enclosing a copy of MCSO's initial denial and the reply email from his nurse, and asked that the court consider his letter as his appeal. The next day, Petitioner filed *pro se* a formal appeal with the district court. The court set a hearing for 4 September 2018, and served both Petitioner and MCSO with notice. MCSO sent Petitioner a copy of the records submitted to the district court on 22 August 2018.

After the hearing on 4 September 2018, the district court denied Petitioner's appeal. The district court made two findings of fact. In

addition to agreeing with the MCSO's finding that Petitioner was disqualified as being addicted under the substance abuse subsection, it also found he was unqualified under the safe handling subsection. Next to the safe handling finding, the court made a handwritten notation on its order denying Petitioner's appeal: "PTSD + suicidal ideation." On 4 December 2018, Petitioner filed his notice of appeal with the district court, and served MCSO.

II. Jurisdiction

An appeal of right lies with this Court from a final judgment pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

The record in this appeal contains no certificate of service of the district court's judgment. Petitioner filed his notice of appeal three months after the date of judgment by the district court. Although this notice ordinarily would be untimely under N.C. R. App. P. 3(c), "where . . . there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, *appellee* must show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal." *Brown v. Swarn*, __ N.C. App. __, __, 810 S.E.2d 237, 240 (2018) (emphasis original). "Under *Brown*, unless the appellee argues that the appeal is untimely, and offers proof of actual notice, we may not dismiss." *Adams v. Langdon*, __ N.C. App. __, __, 826 S.E.2d 236, 239 (2019). Appellee fails to argue the appeal is untimely or to offer proof of actual notice or service more than thirty days prior to appeal. Petitioner's appeal is properly before us. *Id.*

III. Issues

Petitioner asserts several arguments on appeal: procedural, factual, statutory, and constitutional. All involve the application and interpretation of N.C. Gen. Stat. § 14-415.12 (2017).

Factually, Petitioner argues no evidence supports the district court's conclusion that Petitioner is an unlawful user of or addicted to marijuana, alcohol, or any depressant, stimulant, narcotic drug, or any other controlled substance as is defined in 21 U.S.C. § 802. Statutorily, Petitioner argues that the safe handling subsection was not the proper subsection under which MCSO or the district court could deny an applicant for mental illness or fitness reasons.

Constitutionally, Petitioner argues: (1) due process protections require prior notice and an opportunity to be heard at a meaningful time and manner before denying him a permit; (2) the district court's

application of the safe handling subsection was overbroad and infringes upon any applicant's Second Amendment rights; and, (3) his privacy rights in his mental health records were similarly infringed.

IV. Standard of Review

An appellant's constitutional claims are reviewed *de novo*. *Kelly v. Riley*, 223 N.C. App. 261, 266, 733 S.E.2d 194, 197 (2012) (citing *Piedmont Triad Reg'l Water Auth. v. Summer Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)).

Where the trial court makes both findings of fact and conclusions of law, the standard of review "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." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citation omitted).

Though the record shows Petitioner timely contracted for the preparation of the transcript, no transcript of the hearing appears in the record on appeal. Also, a narrative of the hearing is not provided, as is permitted by N.C. R. App. P. 9(c)(1). When " '[t]he record does not contain [a transcript of] the oral testimony . . . the court's findings of fact are presumed to be supported by competent evidence.' " *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 111, 598 S.E.2d 237, 245 (2004) (citation omitted).

Without a transcript or narrative, our review of the trial court's findings of fact is restricted on appeal, but "[i]ssues of statutory construction are questions of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

V. Analysis

A. Procedural Due Process

[1] Petitioner argues the lack of prior notice and the "bare bones" denial of his application by the district court denied him due process. We agree.

> An important check on the power of the government, the principle of procedural due process requires that the states afford the individual a certain level of procedural protection before a governmental decision may be validly enforced against the individual. Procedural due process safeguards may be invoked when a state seeks to apply its laws in a manner in which individuals are "exceptionally affected, in each case upon individual grounds[.]"

Debruhl v. Mecklenburg Cty. Sheriff's Office, __ N.C. App __, __, 815 S.E.2d 1, 5 (2018) (quoting *Bi-Metallic Invest. Co. v. State Bd. of Equalization*, 239 U.S. 441, 446, 60 L. Ed. 372, 375 (1915)).

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950) (citation omitted). "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho*, 500 U.S. 110, 126, 114 L. Ed. 2d 173, 188 (1991).

In addition to prior notice, a "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 32 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 66 (1965)).

Under the concealed handgun statute, "[i]f the sheriff denies the application for a permit, the sheriff shall, within 45 days, notify the applicant in writing, stating the grounds for denial." N.C. Gen. Stat. § 14-415.15 (2017). In *Debruhl*, MCSO had denied an applicant's renewal of his concealed handgun permit. *Debruhl*, __ N.C. App at __, 815 S.E.2d at 3. The denial consisted of:

> a vague, bare bones written notice advising Petitioner that his application had been denied . . . pursuant to "NCGS 14-415.12(a)—Does not meet the requirements for application." The notice did not specify which subsection of N.C. Gen. Stat. § 14-415.12(a) Petitioner did not satisfy, nor did it provide him with an explanation of the factual basis for the denial.

Id. at __, 815 S.E.2d at 8.

When Debruhl appealed to the district court,

> he noted that "[t]he information provided in the Denial is so minimal that there is no way for Petitioner to know what facts to challenge on appeal." Petitioner was not subsequently provided with any such information, and on appeal the district court merely "reviewed [Petitioner's] . . . relevant information" before finding that Petitioner "suffers from a mental health disorder that affects his ability to safely handle a firearm." It is undisputed that Petitioner

> was first informed of the precise grounds for the denial of his renewal application in the district court's order.

Id.

This Court held the notice provided in *Debruhl*, such as it was, to be "wholly inadequate." *Id.* Here, Petitioner received a reference to a specific subsection for the sheriff's denial, but the mere citation to and recitation of the substance abuse subsection in the statute did little to afford Petitioner a meaningful manner, notice, or opportunity of knowing the basis of the denial and which issues were to be resolved by the adversary process on appeal.

Petitioner had absolutely no prior notice that either his mental health or the safe handling subsection would be at issue during the hearing before the trial court. MCSO did not find Petitioner to be unqualified on that basis or under that subsection. MCSO's denial did not inform Petitioner that any mental or physical infirmity calling into question his ability to safely handle a firearm would be an issue on appeal.

Respondent argues MCSO's denial, which stated Petitioner's VA records provided the basis for the denial of his permit, placed him on notice that anything contained within those records would be at issue on appeal. We disagree.

A reasonable person reading MCSO's denial, which refers to a specific statutory subsection and cites a specific source of information, would not presume to know or be on notice that the entirety of any and all information from that source of information was at issue on further review. Petitioner had no meaningful notice his mental health history would be either at issue or a basis of denial for inability to safely handle a firearm before the trial court. *Id.* The denial of Petitioner's fundamental due process rights mandates reversal.

B. Substance Use

[2] Petitioner also argues MCSO's and the district court's conclusions that Petitioner was disqualified under the substance abuse subsection as addicted to a controlled substance under 21 U.S.C. § 802 (2018) is unsupported.

Our review of this issue is restrained by the lack of a transcript. When this type of transcription issue arises, the Rules of Appellate Procedure permit the parties to create a narrative as a substitute for the verbatim transcript. *See* N.C. R. App. P. 9(c)(1). The parties conceded at oral argument that they never attempted to create one. As a result, we

have no record of what oral testimony evidence, if any, the trial court heard below.

Ordinarily, the burden of creating the appellate record rests with the appellant. Here, the burden shifted to MCSO to show the alleged violation had no impact on the remainder of the proceedings, because MCSO violated Duvall's due process rights. *Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993). Without a transcript or narrative of what occurred at the hearing, MCSO cannot meet that burden.

While it is unnecessary at this time to reach Petitioner's remaining arguments and MCSO's and the district court's conclusions under the substance abuse subsection, on remand MCSO and the district court must use and apply the specifically incorporated definition of "addict" from 21 U.S.C. § 802.

"Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g. 'or'), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them." *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 296, 542 S.E.2d 296, 300 (2001) (quoting *Davis v. N.C. Granite*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963)).

The substance abuse subsection is such a statute, disqualifying an applicant who is either "an unlawful user of, *or* addicted to marijuana, alcohol, *or* any depressant, stimulant, *or* narcotic drug, *or* any other controlled substance as defined in 21 U.S.C. § 802." N.C. Gen. Stat. § 14-415.12(b)(5) (emphasis supplied). The incorporated definitions of § 802 equally apply to all terms falling within the subsection. As noted, MCSO had confirmed Petitioner had no record of prior criminal or other disqualifying history of unlawful use and provisionally approved his application. The only references in Petitioner's VA medical history are of possible substance addiction, not unlawful use.

Under the 21 U.S.C. § 802 definition, an " 'addict' [is] any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1). This specific and incorporated definition provides the standard MCSO and the district court must apply on remand when adjudicating whether an applicant is "addicted" to be disqualified under the substance abuse subsection in the statute. N.C. Gen. Stat. § 14-415.12(b)(5).

VI. Conclusion

Petitioner was not afforded fundamental due process by being provided any prior and meaningful notice that his mental health and ability to safely handle a firearm would be at issue in the district court. The district court on remand, in applying the substance abuse subsection, must use the standard incorporated in the statute from 21 U.S.C. § 802(1).

We reverse and remand for further proceedings for Petitioner to be provided prior and meaningful notice and opportunity to be heard consistent with due process on all the issues to be adjudicated and presented before the district court. The order and judgment appealed from is reversed and remanded for further proceedings consistent with this opinion. *It is so ordered.*

REVERSED and REMANDED.

Judge YOUNG concurs.

Judge DIETZ concurs in result only, with separate opinion.

DIETZ, Judge, concurring in result only.

I agree that the Sheriff violated Duvall's constitutional rights. This is not a close case. The State created a process for reviewing and issuing concealed carry permits. That process requires that, if an application is denied, the Sheriff must "notify the applicant in writing, stating the grounds for denial." N.C. Gen. Stat. § 14-415.15 (2017). As the majority explains, the Sheriff's Office did not follow that process—it sandbagged Duvall by asserting a new ground for denial at the court hearing. That is an obvious violation of the Due Process Clause.

Having found a procedural due process violation, we must reverse the trial court's ruling based on that newly asserted argument at the hearing. We must then ask if this violation prejudiced the remainder of the proceeding. *Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993). We have no way to know. As the majority explains, there is no transcript of the trial court's evidentiary hearing because of problems with the courtroom audio recording. When this type of transcription issue arises, the Rules of Appellate Procedure permit the parties to create a narrative as a substitute for the verbatim transcript. *See* N.C. R. App. P. 9(c)(1). But the parties conceded at oral argument that they never attempted to create one. As a result, we have no record of what evidence the trial court heard below.

Ordinarily, the burden of creating the appellate record rests with the appellant. But because the Sheriff violated Duvall's due process rights, the burden shifted to the Sheriff to show that the alleged violation had no impact on the remainder of the proceedings. *Hill*, 108 N.C. App. at 461, 424 S.E.2d at 206. Without a record of what occurred at the hearing, the Sheriff cannot meet that burden. Accordingly, I fully support the majority's judgment to vacate the trial court's decision in its entirety and remand for further proceedings.

I would end the analysis there and remand for a new hearing in which the Sheriff must proceed solely on the ground for which Duvall received the necessary notice required by law.

IN THE MATTER OF E.B.

No. COA19-158

Filed 15 October 2019

1. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—no juvenile petition—permanency planning orders—void

The trial court lacked subject matter jurisdiction to conduct review hearings and enter permanency planning orders regarding an infant who was in a county department of social services' custody where no juvenile petition was filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). For this reason, the Court of Appeals disregarded any facts related to respondent-father's failure to comply with the permanency planning orders in reviewing the order to terminate his parental rights.

2. Child Abuse, Dependency, and Neglect—grounds for termination—willful abandonment—sufficiency of findings

The trial court did not err by concluding that respondent-father had willfully abandoned his infant child in an order terminating the father's parental rights where, during the six-month determinative period, the father stated that he was going to let his sister handle the child's care and placement, he moved to California without informing the county department of social services (which had custody of the child), he failed to attend hearings regarding the child, and he did not request any visits with the child.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by respondent-father from order entered 30 November 2018 by Judge Kevin Eddinger in Rowan County District Court. Heard in the Court of Appeals 19 September 2019.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.

Miller & Audino, LLP, by Jeffrey L. Miller, for respondent-appellant father.

ZACHARY, Judge.

Respondent-Father appeals from the trial court's order terminating his parental rights. We conclude that there was sufficient evidence to support the trial court's finding of willful abandonment pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Therefore, we affirm the termination order.

Background

The minor child E.B.[1] was born in 2016. The day after her birth, the child's biological mother relinquished custody of her to Petitioner Rowan County Department of Social Services ("DSS") for the purpose of placing her for adoption. The child's biological mother identified Respondent-Father as a potential putative father.

On 23 March 2016, Respondent-Father entered into an "Out of Home Family Services Agreement" with DSS, and on 19 April 2016, a paternity test confirmed that he was the minor child's biological father. Thereafter, the minor child was placed in foster care. Between 12 May 2016 and 25 January 2018, the trial court conducted six Permanency Planning and Review Hearings. The trial court entered six resulting orders that placed numerous requirements on Respondent-Father before he could be reunified with the minor child. Among those requirements were that Respondent-Father engage in various substance abuse, mental health, domestic violence, and parenting education services. No juvenile petition was ever filed in the case.

In April 2017, Respondent-Father requested that his sister, ShaVonnda Young, a California resident, be considered as a placement for the minor child. Placement of the minor child with Ms. Young was approved on 30 May 2018, but DSS did not recommend the placement, and the child

1. Initials are used to protect the identity of the minor child.

remained with her foster family. On 22 January 2018, Respondent-Father moved to California.

DSS filed a petition to terminate Respondent-Father's parental rights on 10 April 2018, alleging grounds of neglect, failure to make reasonable progress, and willful abandonment. The petition came on for hearing before the Honorable Kevin Eddinger over the course of four days between July and November 2018.

By order entered 30 November 2018, the trial court terminated Respondent-Father's parental rights upon findings of grounds of neglect, pursuant to N.C. Gen. Stat. § 7B-1111(a)(1); failure to make reasonable progress, pursuant to N.C. Gen. Stat. § 7B-1111(a)(2); and willful abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Respondent-Father timely filed written notice of appeal.

On appeal, Respondent-Father argues that the trial court erred in concluding that grounds existed to terminate his parental rights. Respondent-Father also filed a petition for writ of certiorari seeking this Court's review of the six Permanency Planning Orders entered in this case. Specifically, Respondent-Father contends that those orders "were entered without subject matter jurisdiction or authority because there was no pending juvenile action for abuse, neglect, or dependency filed under the Juvenile Code at the time the Orders were entered." Accordingly, Respondent-Father contends that the trial court erred in basing the termination of his parental rights on his failure to comply with the terms of those orders. We allowed Respondent-Father's petition for certiorari by order entered 15 August 2019.

Discussion

I. Standard of Review

> This Court reviews a trial court's conclusion that grounds exist to terminate parental rights to determine whether clear, cogent, and convincing evidence exists to support the court's findings of fact, and whether the findings of fact support the court's conclusions of law. If the trial court's findings of fact are supported by ample, competent evidence, they are binding on appeal, even though there may be evidence to the contrary. However, the trial court's conclusions of law are fully reviewable *de novo* by the appellate court.

In re C.J.H., 240 N.C. App. 489, 497, 772 S.E.2d 82, 88 (2015) (citations and quotation marks omitted).

II. Permanency Planning Orders—Subject-Matter Jurisdiction

[1] The trial court entered six Permanency Planning Orders between 14 July 2016 and 8 March 2018 while the minor child was in the custody of DSS. Those orders placed numerous requirements on Respondent-Father to overcome the barriers that the trial court found and impeded his reunification with the minor child, including that Respondent-Father engage in various substance abuse, mental health, domestic violence,[2] and parenting education services. During the 21 months preceding the filing of the termination petition, Respondent-Father complied with some, but not all, of those requirements.

However, Respondent-Father contends, and DSS concedes, that the trial court lacked subject-matter jurisdiction to conduct review hearings or enter the Permanency Planning Orders in this case, in that DSS failed to file a proper juvenile petition consistent with the requirements of N.C. Gen. Stat. §§ 7B-402(a) and 403(a), and thus no juvenile abuse, neglect, or dependency action was ever commenced.[3] *See In re A.R.G.*, 361 N.C. 392, 397, 646 S.E.2d 349, 352 (2007) ("A juvenile abuse, neglect, or dependency action is a creature of statute and is commenced by the filing of a petition, which constitutes the initial pleading in such actions." (quotation marks omitted)); *In re T.R.P.*, 360 N.C. 588, 591, 636 S.E.2d 787, 790 (2006) (noting that "[t]he Juvenile Code sets out the specific requirements for a valid juvenile petition" in order to invoke the court's subject-matter jurisdiction to conduct review hearings and enter permanency planning orders, including that the petition " 'be drawn by the [DSS] director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing' " (alteration in original) (citing N.C. Gen. Stat. § 7B-403(a) (2005)[4])); *see also In re T.P.*, ___ N.C. App. ___, ___, 803 S.E.2d 1, 7 (2017) ("[A] petition in the form required by N.C. Gen. Stat. § 7B-402 ensures that the due process rights of a parent are protected by requiring a petitioner to make specific allegations of abuse, neglect or dependency and set out the relief it is seeking from the court in connection with the juvenile at issue."). Accordingly,

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2. Respondent-Father was previously the victim of domestic violence, and his domestic violence assessment recommended that he complete the "Batterer's Intervention Program."

3. The record reveals that the only pleading filed in this matter prior to the entry of the Permanency Planning Orders was Petitioner's "Motion for Review of Custody and Permanency Planning," which failed to satisfy any of the requirements under N.C. Gen. Stat. §§ 7B-401, -405.

4. The current version of N.C. Gen. Stat. § 7B-403(a) contains the same pertinent language as the 2005 version.

Respondent-Father asserts that "[n]either the court nor DSS had the legal authority to condition [his] custody relationship with [the minor child] prior to the filing of the petition to terminate his rights," and that it was thus "prejudicial error for the court to then use his failure to meet its conditions as the principal basis to terminate his parental rights."

Indeed, because no abuse, neglect, or dependency action was commenced in the instant case by the filing of a proper petition, the trial court was without subject-matter jurisdiction to enter its six Permanency Planning Orders. *See In re T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792 ("A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition."). Accordingly, each of those orders is void, and the requirements imposed on Respondent-Father therein are nugatory. *See id.* at 590, 636 S.E.2d at 790.

We therefore disregard the six Permanency Planning Orders that were entered in this case, and review whether there was clear, cogent, and convincing evidence to support the trial court's findings of grounds to terminate Respondent-Father's parental rights without reference to any facts relating to his failure to comply with the terms of the void orders.

III. Order Terminating Respondent-Father's Parental Rights

[2] Termination of parental rights proceedings are governed by independent jurisdictional prerequisites. *See* N.C. Gen. Stat. § 7B-1101 (2017); *see also In re R.T.W.*, 359 N.C. 539, 553, 614 S.E.2d 489, 497 (2005) ("Each termination order relies upon an independent finding that clear, cogent, and convincing evidence supports at least one of the grounds for termination under N.C.G.S. § 7B-1111. . . . Simply put, a termination order rests on its own merits."), *superseded by statute on other grounds as stated in In re K.L.*, 196 N.C. App. 272, 674 S.E.2d 789 (2009); *In re O.C.*, 171 N.C. App. 457, 463, 615 S.E.2d 391, 395 ("Motions in the cause and original petitions for termination of parental rights may be sustained *irrespective* of earlier juvenile court activity."), *disc. review denied*, 360 N.C. 64, 623 S.E.2d 587 (2005).

N.C. Gen. Stat. § 7B-1101 provides, in pertinent part, that

> [t]he court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.

N.C. Gen. Stat. § 7B-1101; *see also id.* § 7B-1103(a)(4) (2017) (providing that a "county department of social services . . . to which [a] juvenile has been surrendered for adoption by one of the parents . . . of the juvenile[ ] pursuant to G.S. 48-3-701" has standing to file a petition to terminate parental rights). Thus, pursuant to N.C. Gen. Stat. § 7B-1101, the trial court is vested "with exclusive subject matter jurisdiction to determine any petition or motion for termination of parental rights of any juvenile in the legal or physical custody of DSS at the time of the filing." *In re K.J.L.*, 363 N.C. 343, 350, 677 S.E.2d 835, 839 (2009) (Timmons-Goodson, J., concurring) (original emphasis omitted).

In the instant case, in that the minor child was in the custody of DSS by virtue of her biological mother's relinquishment, DSS had standing to file the petition to terminate Respondent-Father's parental rights, thereby vesting the trial court with subject-matter jurisdiction to enter an order terminating Respondent-Father's parental rights. *See In re A.L.*, 245 N.C. App. 55, 60, 781 S.E.2d 856, 860 (2016) (concluding that the trial court had subject-matter jurisdiction to enter an order terminating the respondent's parental rights where, "[b]y virtue of the mother's relinquishment, DSS had standing to file the termination petition pursuant to section 7B-1103(a)(4)").

Under the proper exercise of its subject-matter jurisdiction, the trial court found that three grounds existed to terminate Respondent-Father's parental rights. One such ground was willful abandonment, pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), which provides for termination of parental rights where

> [t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

N.C. Gen. Stat. § 7B-1111(a)(7).

"Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re S.R.G.*, 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009), *disc. review denied and cert. denied*, 363 N.C. 804, 691 S.E.2d 19 (2010). Such a finding must be supported by clear, cogent, and convincing evidence of "conduct on the part of the parent which manifests a willful determination to [forgo] all parental duties and relinquish all parental claims to the child." *Id.*; *see also id.* ("Willfulness is more than an intention to do a thing; there must

also be purpose and deliberation." (quotation marks omitted)). "The findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child." *In re C.J.H.*, 240 N.C. App. at 503-04, 772 S.E.2d at 92.

Relevant factors under subsection (a)(7) may include "a parent's financial support for a child and emotional contributions, such as a father's display of love, care and affection for his children." *In re D.E.M.*, ___ N.C. App. ___, ___, 810 S.E.2d 375, 377 (2018) (quotation marks omitted); *see also In re McLemore*, 139 N.C. App. 426, 429, 533 S.E.2d 508, 509 (2000) ("It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child."). Moreover, while the "determinative period" for adjudicating willful abandonment is the six months preceding the filing of the juvenile petition, "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions." *In re D.E.M.*, ___ N.C. App. at ___, 810 S.E.2d at 378 (quotation marks omitted).

In the instant case, the relevant six-month period ran from 10 October 2017 until 10 April 2018, when the petition to terminate Respondent-Father's parental rights was filed. The trial court made several findings of fact to support its determination that Respondent-Father "willfully abandoned the juvenile pursuant to N.C.G.S. § 7B-1111(a)(7)," which Respondent-Father has not challenged on appeal as unsupported by clear, cogent, and convincing evidence. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) ("Findings of fact to which a respondent did not object are conclusive on appeal.").

The trial court found that, prior to the relevant six-month period, Respondent-Father had "stated . . . that he [was] 'just going to allow [his] sister to handle the situation,' referring to [the minor child's] care and placement." The trial court's findings show that after Respondent-Father made his intention known, and during the relevant six-month period, (1) Respondent-Father moved to California on 22 January 2018, without informing DSS of his move or providing DSS with his new address; (2) Respondent-Father failed to attend the 26 October 2017 Permanency Planning Hearing,[5] and admitted that his absence was "without justifiable

5. Although we disregard Respondent-Father's purported failures to comply with *the terms* of the void Permanency Planning Orders, his failure *to attend* those proceedings is nevertheless illustrative of Respondent-Father having willfully determined to forgo his parental duties.

excuse"; (3) Respondent-Father likewise failed to attend the 25 January 2018 Permanency Planning Hearing, having moved to California three days prior; (4) Respondent-Father was a "no-show" at his scheduled child support hearing in January 2018; (5) Respondent-Father did not request a single visit with the minor child during the six-month period, despite the fact that he was allowed weekly visits; and (6) although the minor child's foster parents allowed Respondent-Father to engage in Skype calls with the child, Respondent-Father did not make any such calls until May 2018, after the termination petition was filed.

Such findings sufficiently demonstrate that Respondent-Father willfully acted in a manner "wholly inconsistent with a desire to maintain custody of the child." *In re S.R.G.*, 195 N.C. App. at 87, 671 S.E.2d at 53; *cf. In re C.J.H.*, 240 N.C. App. at 504, 772 S.E.2d at 92 (holding that the respondent's "last-minute child support payments and requests for visitation" did "not undermine the trial court's conclusion that [the] respondent had abandoned the juvenile," where the trial court's findings otherwise showed that during the relevant six-month period, the respondent "did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile"); *In re McLemore*, 139 N.C. App. at 430-31, 533 S.E.2d at 510-11 (reversing the trial court's conclusion that the respondent did not willfully abandon his child where the respondent "made no contacts with his child" during the relevant six-month period); *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) (concluding that the trial court's finding of abandonment was sufficiently supported where, "except for an abandoned attempt to negotiate visitation and support, [the] respondent made no other significant attempts to establish a relationship with [the child]").

Accordingly, we affirm the trial court's determination that grounds existed to terminate Respondent-Father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7). Because we affirm the trial court's finding of grounds pursuant to N.C. Gen. Stat. § 7B-1111(a)(7), we need not address the remaining grounds for termination found by the trial court. *In re C.J.H.*, 240 N.C. App. at 497, 772 S.E.2d at 88.

Conclusion

For the reasons stated herein, the trial court's order terminating Respondent-Father's parental rights is affirmed.

AFFIRMED.

Judge ARROWOOD concurs.

Judge HAMPSON concurs in part and dissents in part by separate opinion.

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

I fully concur with the majority in this case on two key points: (1) DSS had standing to file a Petition seeking termination of Respondent-Father's parental rights and the trial court had subject-matter jurisdiction over this termination proceeding; and (2) the trial court had no jurisdiction to enter the Permanency Planning Orders imposing conditions and requirements upon Respondent-Father in derogation of his constitutionally protected status as a parent without any judicial adjudicatory proceeding establishing the child to be abused, neglected, or dependent. However, because the grounds for termination alleged by DSS and adjudged by the trial court are inextricably intertwined with the invalid review hearing process, I would conclude the trial court erred in adjudicating grounds upon which to terminate Respondent-Father's parental rights. I would, thus, reverse the trial court's Termination of Parental Rights Order.

Central to my overall reasoning in this case is that crucially, for purposes of asserting ongoing jurisdiction under N.C. Gen. Stat. § 7B-200(b), there was never any adjudication of the minor child as abused, neglected, or dependent. As such, between February or March 2016 until entry of the trial court's Termination of Parental Rights Order, DSS was able to interfere with and deny Respondent-Father's custodial rights without any valid independent judicial determination Respondent-Father had acted inconsistently with his constitutionally protected status as a parent. DSS was then able to control placement of the child and impose requirements on Respondent-Father ultimately leading to its purported establishment of grounds on which to terminate Respondent-Father's parental rights.[1] Indeed, after utilizing the invalid review hearing process and void Permanency Planning Orders in this case over the course of several years, DSS, now with an Order terminating Respondent-Father's parental rights in hand, admits the trial court had no jurisdiction to

1. For example, DSS rejected placement of the child with the child's aunt, who had become a licensed foster parent in California, notwithstanding the fact this relative placement had been assessed and approved under the Interstate Compact on the Placement of Children (ICPC). Instead, DSS continued to seek termination of parental rights to allow the child's current foster parents to commence adoption proceedings.

enter these Permanency Planning Orders restricting and conditioning Respondent-Father's parental rights.

In my view, although DSS was authorized to file its Petition seeking termination of Respondent-Father's parental rights, it should have been required to establish grounds independent from those derived as a result of the invalid review proceedings. Here, DSS did not.

The trial court's Termination of Parental Rights Order rests on three grounds.[2] First, the trial court concluded Respondent-Father had neglected the minor child under N.C. Gen. Stat. § 7B-1111.

> Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.

In re D.L.W., 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016). Here, Respondent-Father has never had custody of the child because DSS has maintained custody of the child since birth, placing her with foster parents. There is no finding by the trial court of past neglect by Respondent-Father and no prior adjudication of neglect that might otherwise serve as evidence of past neglect. *See In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017). Moreover, the trial court's order fails to include any finding of a likelihood of future neglect should the child be placed in Father's custody. Thus, the trial court erred in concluding neglect existed as a ground to terminate parental rights.

Second, the trial court concluded Respondent-Father willfully left the juvenile in foster care or placement outside the home for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances had been made in correcting those conditions that led to the removal of the juvenile under N.C. Gen. Stat. § 7B-1111(a)(2). As an initial matter, the minor child was removed from the mother's custody at birth after testing positive for a number of controlled substances and the mother relinquished her rights to the child almost immediately. No order was ever entered removing the child from the parents and there was no valid order requiring foster care or other placement outside the home. Therefore, Section 7B-1111(a)(2) does not

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2. The majority opinion addresses only one of these grounds because it upheld one ground to terminate parental rights and thus need not reach the remaining grounds.

support termination of parental rights in this case. *In re A.C.F.*, 176 N.C. App. 520, 525–26, 626 S.E.2d 729, 734 (2006) ("[W]e conclude the statute refers only to circumstances where a court has entered a court order requiring that a child be in foster care or other placement outside the home."). In any event, any failure on the part of Respondent-Father to make reasonable progress under the circumstances derives directly from the requirements imposed on him by DSS now rendered nugatory.

Third, the trial court concluded Respondent-Father had willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition by DSS under N.C. Gen. Stat. § 7B-1111(a)(7). In this context:

> "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child" *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986) (citation omitted). Willfulness is "more than an intention to do a thing; there must also be purpose and deliberation." Id. "Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." Id. at 276, 346 S.E.2d at 514.

In re S.R.G., 195 N.C. App. 79, 84, 671 S.E.2d 47, 51 (2009).

> A judicial determination that a parent willfully abandoned her child, particularly when we are considering a relatively short six month period, needs to show more than a failure of the parent to live up to her obligations as a parent in an appropriate fashion; the findings must clearly show that the parent's actions are wholly inconsistent with a desire to maintain custody of the child.

Id. at 87, 671 S.E.2d at 53.

Here, the evidence and findings do not clearly show actions wholly inconsistent with a desire to maintain custody of the child. Again, the whole reason DSS is able to claim abandonment during a six-month period is because, for 33 months, DSS retained custody of the minor child under void orders including giving DSS discretion to dictate and limit Respondent-Father's visitation, which it did. The evidence reflects during this time, Respondent-Father was advocating for a relative placement of the minor child with his sister in California and was still seeking placement and unification with the minor child. While awaiting approval

of the ICPC assessment, Respondent-Father moved to California. Respondent-Father's actions in this case do not manifest a willful determination to forego all parental duties and relinquish all parental claims to the child. *See id.* Thus, Section 7B-1111(a)(7) does not provide a ground to terminate Respondent-Father's parental rights in this case.

Consequently, the trial court's Termination of Parental Rights Order should be reversed.[3] Accordingly, for the foregoing reasons, I respectfully concur in the majority opinion in part and dissent in part.

IN THE MATTER OF F.S.

No. COA18-1237

Filed 15 October 2019

1. Evidence—hearsay—exceptions—residual—required findings—neglect and dependency petition

In an adjudicatory hearing on a juvenile petition alleging neglect and dependency, the trial court erred by admitting testimony, pursuant to the residual hearsay exception (Evidence Rule 803(24)), by one of respondent-DSS's witnesses as to statements the child purportedly made to another social worker and a therapist, based on notes taken by the social worker. The trial court failed to address the child's or the other declarants' availability, whether the hearsay statements would be more probative than having the child testify, or whether the statements were trustworthy. The error was prejudicial because there was otherwise no evidence to demonstrate harm or risk of harm in the child returning to his mother's care.

2. Child Abuse, Dependency, and Neglect—neglect—risk of future neglect—evidentiary support—past substance abuse

The trial court erred by concluding that a juvenile was neglected where there was no support for the trial court's conclusion that there existed a substantial risk of physical, mental, or emotional impairment if the child returned to his mother's custody. There was

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3. I certainly acknowledge that there may well have been grounds to support an initial adjudication of the minor child as abused, neglected, and/or dependent and giving DSS custody. I also acknowledge that grounds independent from DSS' use of what it now admits to be an invalid process may support termination of Respondent-Father's parental rights.

no evidence that the mother's numerous prior hospital stays for alcohol, substance abuse, and withdrawal harmed the child, and, at the time of the hearing, the mother was meeting regularly with the department of social services, was receiving services for substance abuse, and had provided numerous negative drug screens.

3. Child Abuse, Dependency, and Neglect—dependency—present ability to care for child—evidentiary support—past substance abuse

The trial court erred by concluding that a juvenile was dependent where there was no support for the conclusion that his mother, who had previous substance abuse issues, was presently incapable of taking care of the child. While there was some evidence that the mother had experienced short-term memory loss, more recently the mother was meeting regularly with the department of social services, was receiving services for substance abuse, and had provided numerous negative drug screens.

Appeal by respondent from order entered 31 August 2018 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 4 September 2019.

Stephenson & Fleming, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant.

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

TYSON, Judge.

This Court's unanimous opinion reversed the trial court's adjudication of F.S. ("Finley") as a neglected and dependent juvenile. *In re F.S.*, __ N.C. App. __, 810 S.E.2d 411, 2018 WL 1162599 (2018) (unpublished); *see also* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of juveniles). The mandate for that opinion issued 26 March 2018.

On that date, Orange County Department of Social Services ("OCDSS") filed its second juvenile petition alleging Finley was: (1) neglected in that he does not receive proper care, supervision or discipline and that he lives in an injurious environment; and, (2) dependent in

that Respondent-mother is unable to provide care for him and lacks an appropriate alternative arrangement. Respondent-mother appeals from the trial court's 31 August 2018 order adjudicating her minor son, Finley, to be a neglected and dependent juvenile. We reverse.

I. Background

The underlying facts are set forth in detail in our Court's previous opinion. *Id.* Respondent-mother and OCDSS were previously involved in 2010 due to her substance addiction. Finley was returned to Respondent-mother's care until she relapsed with alcohol and marijuana use over five years later in December 2016. Respondent-mother presented for a four-hour visit to the Duke Hospital Emergency Department on 25 December 2016 and OCDSS obtained nonsecure custody of Finley that same night. *In re F.S.*, 2018 WL 1162599 at *1. OCDSS filed its original petition alleging Finley was neglected and dependent on 28 December 2016. *Id.*

A hearing was held in April 2017 and the trial court adjudicated Finley to be neglected and dependent on 15 May 2017 ("15 May Order"). *Id.* Respondent-mother entered notice of appeal and this Court unanimously reversed the adjudication.

In the months after the 15 May Order, Respondent-mother entered into a case plan with OCDSS, submitted to a psychological evaluation, completed a parenting capacity evaluation, and visited with her son. She also was hospitalized at least eight times due to her alcohol addiction and illness and from effects she was suffering from withdrawal.

During the pendency of Respondent-mother's case, her working relationship with her OCDSS social worker, David Byrd, deteriorated. The record contains copies of emails Respondent-mother sent to Byrd and an Order for No Contact and Protective Order filed 15 December 2017.

Periodic review hearings were held and a permanency planning order was entered during the pendency of Respondent-mother's prior appeal. The trial court entered an order designating adoption as the primary plan and reunification as the secondary plan. On 12 January 2018, the court signed an order indicating that the matter "shall come on for Permanency Planning or Termination of Parental Rights on the 19th day of April 2018."

On 26 March 2018, this Court's mandate was filed with the Orange County Clerk of Superior Court. OCDSS filed the instant juvenile petition to prevent Finley's return to Respondent-mother's custody. On 13 July 2018, OCDSS filed notice of its intention to introduce the hearsay statements purportedly made by Finley to a social worker and therapist.

On 19 July 2018, an adjudicatory hearing was held on OCDSS' new petition. Prior to the start of testimony, Respondent-mother's counsel sought a ruling to exclude the proposed introduction and admission of the hearsay testimony. The trial court indicated it would allow the testimony "under the business records rule (inaudible), reliable hearsay rule, or it's going to (inaudible) hearsay rule."

OCDSS Program Manager for Child Welfare Services, Crystal Mitchell, testified to statements purportedly made by Finley to other individuals during his therapy sessions. Finley allegedly related that Respondent-mother would become "unpredictable and angry" when she drank, that he had to take care of her when she drank too much, that he had missed school and that "there were times when he had to act like a grownup."

Over objection, Mitchell also testified about Respondent-mother's 2017 and 2018 hospitalizations at UNC Hospital and Duke Hospital from summaries of Respondent-mother's medical records, and not from the actual records themselves. Also over objection, Mitchell read into evidence redactions from police reports of Respondent-mother's purported interactions with police and her subsequent arrest for assault on a government official in October 2017.

Mitchell had become the point of contact for Respondent-mother after the no contact order with David Byrd was issued. Respondent-mother reached out to Mitchell indicating that she was not doing well and needed an inpatient program. Mitchell became concerned that Respondent-mother continued to be under the influence of alcohol or other impairing substances. Mitchell opined Respondent-mother's thought process was "disjointed and disorganized," and she switched rapidly to differing subjects. Respondent-mother reported to Mitchell she had suffered short-term memory loss. Mitchell testified to her concern about Respondent-mother's ability to be a "fulltime care-giver" for Finley. In January 2018, Respondent-mother telephoned Mitchell and told her that she "would not be okay to take care of Finley at that point in time."

Respondent-mother was offered weekly visitation with Finley until mid-November 2017. Her visitation was suspended purportedly due to missed visits and OCDSS' concerns with Respondent-mother's mental health, stability, and how she may "present" to Finley at visitation. The primary permanent plan of reunification was modified to become the secondary plan behind a primary plan of adoption by court order entered 16 January 2018.

Respondent-mother offered no evidence at the 19 July hearing. On 31 August 2018, the trial court entered an order, which concluded Finley was neglected and dependent. The order required Respondent-mother to continue to participate in recommended substance abuse treatment of group and individual therapy, attend NA/AA meetings, submit to random drug screens, and participate in psychological evaluation and follow all recommendations. The order kept Finley in OCDSS' physical and legal custody. Respondent-mother entered timely notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(3) (2017).

III. Issues

Respondent-mother argues the trial court erred by: (1) admitting hearsay under the residual exception, (2) adjudicating Finley to be neglected, and (3) adjudicating Finley to be dependent.

IV. Analysis

A. Hearsay Evidence

[1] Our Constitution and General Statutes require the trial court to protect the due process rights and the parental rights of the juvenile's parent and of the juvenile at the adjudicatory hearing. N.C. Gen. Stat. § 7B-802 (2017). The rules of evidence apply in adjudication hearings. N.C. Gen. Stat. § 7B-804 (2017).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, 801(c) (2017). Admission of hearsay denies confrontation with the declarant and is inadmissible except by statute or under the Rules of Evidence. N.C. Gen. Stat. § 8C-1, 802 (2017). The trial court made no finding regarding the availability of the declarant.

Hearsay may be admissible under the residual exception where the statement is:

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent

> can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, 803(24) (2017). The statute requires the trial court to make findings of fact of (A), (B) and (C) and to provide the required prior notice to the adverse party. *Id.*

1. Standard of Review

In the absence of a confrontation clause challenge, "[t]he admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, and may be disturbed on appeal only where an abuse of such discretion is clearly shown." *In re W.H.*, __ N.C. App. __, __, 819 S.E.2d 617, 620 (2018) (internal quotation marks and citation omitted). Respondent-mother must show she "was prejudiced and a different result would have likely ensued had the error not occurred." *Id.*

2. Analysis

"Our Supreme Court has often used the following factors in determining a statement's trustworthiness: (1) the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination." *Id.* at __, 819 S.E.2d at 620 (citing *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 852-53 (2003) and *State v. Smith*, 315 N.C. 76, 93-94, 337 S.E.2d 833, 845 (1985)).

In the case of *In re W.H.*, the respondent-father argued the trial court erred in determining the admissibility of his daughters' out-of-court statements concerning their father's sexual abuse of them. *In re W.H.*, __ N.C. App. at __, 819 S.E.2d at 619. The respondent-father also challenged the trial court's conclusion that the statements "possessed circumstantial guarantees of trustworthiness." *Id.* at __, 819 S.E.2d at 620.

The respondent-father pointed to the finding's lack of mention that the daughters had recanted their accusations during forensic evaluations at a children's advocacy center several years prior. *Id.* This Court

recognized our Supreme Court's holding in *Valentine* that the trial court's failure was not fatal where the court's findings and the record revealed the trial court had not abused its discretion in determining that the out-of-court statements were trustworthy. *Id.* (citing *Valentine*, 357 N.C. at 519, 591 S.E.2d at 853).

Here, Mitchell testified to statements Finley had purportedly made to a third party as follows:

> He reported that his mom would become angry and unpredictable when she would drink, and she would yell at him. He also reported that there were times where he had to take care of his mother when she slept too much or was sick, and he referenced, "because of her drinking" and the mold in their home. He also referenced that he felt there were times where he had to act like a grownup. There were times when he missed school due to his mom not feeling well and not being able to take him to school.
>
> And he expressed concerns of being fearful of individuals at times that were brought into the home to stay.

The trial court's order references these statements purportedly made by Finley:

> 8. . . . . Respondent mother would become angry after drinking; brought strangers into the home that made him feel uncomfortable and scared; and he had to miss school to take care of Respondent mother due to her drinking.
>
> . . . .
>
> 33. . . . Respondent mother would become angry and unpredictable when she was intoxicated, and he was afraid of her because of her explosive and unpredictable behavior. He had to take care of his mother when she slept too much or was sick from drinking alcohol.

OCDSS' pretrial notice of residual hearsay indicates merely, "That the juvenile herein has made statements to social worker D. Byrd and therapist N. Berson regarding the impact of Respondent mother's alcohol use." Neither Finley, Byrd, nor Berson were called to testify and no ruling was made regarding their unavailability as witnesses or explanation why OCDSS had failed to produce those witnesses. At the start of the adjudication hearing, Respondent-mother objected and sought a ruling on the admission of the residual hearsay. Without taking any testimony

or hearing any arguments or making any findings required under Rule 803(24), the trial court indicated it would admit the hearsay statements under the business records rule or reliable hearsay exception.

At the time the statement was offered by Mitchell over objection by Respondent-mother, Mitchell simply testified that the meeting notes taken by Respondent-mother's former social worker, indicated what Finley purportedly stated. None of the statements were witnessed by Mitchell. The notes allegedly taken by Byrd, appear to have been further summarized by Mitchell in court, double hearsay, and do not indicate when Finley reported these feelings, who he told, or where he was.

The OCDSS and the Guardian *ad litem* ("GAL") do not indicate where in the transcript the trial court engaged in the careful consideration and made the required findings on the specific factors required by the residual hearsay exception, Rule 803(24). Further, we utterly reject OCDSS' argument that with respect to Finley's availability, Respondent-mother "failed" to issue a subpoena for Finley. OCDSS, not Respondent-mother, bears the burden of proof. *See* N.C. Gen. Stat. § 7B-805 (2017) ("allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence").

The trial court failed to make any findings regarding the circumstantial guarantees of trustworthiness of the conditions and situation under which the purported statements were made. The court's order makes no reference to the motivation or lack thereof for Berson, Byrd, Finley, or Mitchell to be truthful. The record and findings do not support the trial court's admission of the hearsay evidence under Rule 803(24).

By further comparison, in response to the respondent-father's argument in *In re W.H.* that the trial court had erred in its determination that his daughters were unavailable to testify, this Court pointed to specific findings of the trial court. *In re W.H.*, __ N.C. App. at __, 819 S.E.2d at 621. "The trial court made this determination based on its findings that the out-of-court statements were trustworthy, that testifying would traumatize the daughters, that testifying would cause them confusion, and that there would be a risk that they would not be truthful out of guilt and fear." *Id.*

Here, the court failed to address Finley's or the other declarants' availability or whether the hearsay statement would be more probative than having Finley or them testify. The trial court made no findings that the statements it allowed and admitted were trustworthy. Without the improperly admitted hearsay evidence, the record does not support the trial court's conclusion. *See id.*

Here the trial court failed to properly apply Rule of Evidence 803(24). Respondent-mother has shown she was prejudiced by this failure. Without the hearsay, no findings demonstrate harm or potential risk of harm to Finley returning to Respondent-mother's care.

B. Allegations of Neglect and Dependency

1. Standard of Review

This Court reviews the trial court's adjudication of Finley to be a neglected and dependent juvenile to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citations omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re K.J.D.*, 203 N.C. App. 653, 657, 692 S.E.2d 437, 441 (2010) (citation and quotation marks omitted).

2. Neglect

[2] OCDSS alleged Finley was a neglected juvenile as defined in N.C. Gen. Stat. § 7B-101(15) in that he did not receive "proper care, supervision, or discipline" from Respondent-mother and that he "lives in an environment injurious" to his welfare. N.C. Gen. Stat. § 7B-101(15) (2017).

Respondent-mother argues the trial court erred by adjudicating Finley neglected based upon reasons similar to those reversed in her previous appeal to this Court. *In re F.S.*, __ N.C. App. __, 810 S.E.2d 411, 2018 WL 1162599 ("*In re F.S.* I"). In *In re F.S.* I, this Court held that "[i]n assessing Finley's status as a neglected or dependent juvenile, the court was obliged to determine . . . whether he is exposed to a 'substantial risk of [physical, mental, or emotional] impairment,' " and "whether Respondent 'is unable to provide for [his] care or supervision.' " *Id.* at *3.

We recognized Respondent-mother's prior substance abuse met the minimum standard for relevancy because it provided "context for the incidents described in the petition filed 28 December 2016." *Id.* This Court reversed the trial court's adjudication of neglect because "the facts before the court do not establish that Finley was harmed or placed at substantial risk of harm as a result of her conduct on 25 December 2016." *Id.* at *4.

Our case law requires "there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide 'proper care, supervision, or discipline' in order to adjudicate a juvenile neglected." *In re J.R.*, 243 N.C.

App. 309, 313, 778 S.E.2d 441, 444 (2015) (citations omitted). "[P]arental behavior constituting 'neglect' [is] 'either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile.' " *Id.* at 315, 778 S.E.2d at 445 (citing *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003)).

The 15 May Order initially appealed focused solely on Respondent-mother's alcohol-infused behavior on 25 December 2016. The court's findings showed no nexus of harm or substantial risk of harm to Finley. Respondent-mother argues OCDSS was collaterally estopped from arguing her hospitalizations showed risk of harm to Finley in the instant case. The doctrines of collateral and judicial estoppel would preclude OCDSS from retrying the fully litigated issue that was decided in *In re F.S.* I. *In re Wheeler*, 87 N.C. App. 189, 194, 360 S.E.2d 458, 461 (1987) ("The doctrine of collateral estoppel operates to preclude parties 'from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.' " (citation omitted)). The doctrine of collateral estoppel does not preclude the trial court's adjudication of facts from new allegations and events which transpired after the 15 May 2017 adjudication in *In re F.S.* I.

Since Finley was not in Respondent-mother's custody at the time of the adjudication hearing, the trial court must assess and find the probability that there is substantial risk of future neglect. In assessing the risk of future neglect, the trial court considers the "risk for a particular kind of harm given [the juvenile's] age and the environment in which they reside." *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999); *see also In re A.N.L.*, 213 N.C. App. 266, 272, 714 S.E.2d 189, 194 (2011) (trial court has some discretion in its determination and must "consider the circumstances and conditions surrounding the child" (citation omitted)).

This Court is required to consider the totality of the evidence to determine whether the trial court's findings sufficiently support its ultimate conclusion that Finley is a neglected juvenile. *In re J.R.*, 243 N.C. App. at 315, 778 S.E.2d at 445.

The trial court found that Respondent-mother had been hospitalized numerous times for alcohol and substance abuse and symptoms of withdrawal. Based upon a portion of Respondent-mother's medical records summarized by OCDSS, the court found records indicated Respondent-mother was: (1) hospitalized at UNC Hospital from 27 September 2017 to 4 October 2017; (2) hospitalized at UNC Hospital from 31 October 2017 to 2 November 2017; (3) released from the UNC Emergency Department

on 9 November 2017; (4) presented to the UNC Emergency Department on 24 November 2017; (5) admitted at Duke Hospital on 15 December 2017 to 26 December 2017; (6) admitted at Duke on 1 January 2018 to 7 January 2018; (7) admitted at the Alcohol and Drug Abuse Treatment Center from 22 January 2018 to 2 February 2018; (8) admitted at UNC from 10 February 2018 to 11 February 2018; (9) presented to Duke on 13 February 2018; and, (10) presented to UNC on 14 February 2018. Finley was not in Respondent-mother's care during any of these periods of time.

Notwithstanding our exclusion of double hearsay statements of Finley, there is no support for the court's finding that Finley "is at substantial risk of physical, mental or emotional impairment if returned to her custody." In assessing whether a child is neglected, this Court has held that the trial court must consider "the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent." *In re B.P.*, __ N.C. App. __, __, 809 S.E.2d 914, 920 (2018).

In the case of *In re E.P.*, *M.P.*, 183 N.C. App. 301, 307, 645 S.E.2d 772, 775-76, *aff'd*, 362 N.C. 82, 653 S.E.2d 143 (2007), this Court held evidence of a parent's substance abuse is not in and of itself "clear and convincing evidence that the [parent's] problems created a substantial risk of harm to the child[]." In that case, the trial court "found no instances of neglect or harm to the children [and] the treatment records requested by DSS contained no evidence that actual harm to the children had occurred, or that the parents' substance abuse issues created a substantial risk of harm to the children." *Id.* This Court held DSS had provided no evidence that the children had been harmed because of their parents' substance abuse. *Id.*

Here, OCDSS summarized and paraded Respondent-mother's lengthy hospital records at the adjudication hearing. However, no records show Respondent-mother harmed Finley during these times. Finley was not in Respondent-mother's care. OCDSS' only indication of harm to Finley came from hearsay statements purportedly made long before Respondent-mother had sought and engaged in treatment.

OCDSS Case Supervisor Melissa McDonald testified that Respondent-mother had been meeting with OCDSS regularly since the filing of the petition in March. She had begun to attend UNC's ASAP Services. She was assessed and began their individual and group therapy sessions.

Respondent-mother has provided eight drug screens since entering treatment, and all have been negative. McDonald reported to the court that

Respondent-mother "has been compliant in her treatment" and attending NA and AA meetings weekly and providing proof to her social worker.

No clear and convincing evidence exists of current circumstances or future probability that present a risk to Finley to support the conclusion that to immediately return Finley to Respondent-mother's care would place him "in an environment injurious to the juvenile's welfare." *See* N.C. Gen. Stat. § 7B-101(15). We reverse the trial court's conclusion that Finley is a neglected juvenile. *See* N.C. Gen. Stat. § 7B-805 (2017) (quantum of proof in adjudicatory hearing shall be "by clear and convincing evidence").

3. Dependency

[3] A juvenile may be adjudicated to be dependent when "the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2017). The trial court's findings must address both prongs of the statutory definition. *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005).

It is uncontested the record contains no information on Finley's father or paternal relatives. Respondent-mother does not challenge the court's finding that there was no credible information on Finley's father or paternal relatives or the conclusion that she lacks an appropriate alternative childcare arrangement. She argues OCDSS made no showing that she was presently incapable of taking care of Finley.

Chronic alcoholism may impair a parent's ability to parent her child. In *In re T.B.*, 203 N.C. App. 497, 506, 692 S.E.2d 182, 188 (2010), this Court held the findings supported the trial court's conclusion of dependency where "taken in their entirety" demonstrated the respondent-mother had significant mental health issues, the children had special needs, and the respondent-mother had not "demonstrated the ability to meet the children's special needs or to otherwise care for them in such a way as to produce successful outcomes."

In *T.B.*, the respondent-mother had been diagnosed with paranoid schizophrenia and failed to take her medication as prescribed. *Id.* at 499, 692 S.E.2d at 184. The trial court received into evidence a summary of a psychological evaluation. *Id.* at 501-02, 692 S.E.2d at 185. The court specifically found: "The report indicates that Respondent[-M]other has suicidal ideation and tendencies, that she is in a state of chronic and substantial stimulus overload, and that she suffers from Chronic Post

Traumatic Stress Disorder, Major Depressive Disorder, and Dependent Personality Disorder. Respondent[-M]other's serious psychological problems impair Respondent[-M]other's ability to parent." *Id.*

Here the trial court concludes Respondent-mother is unable to provide for Finley's care or supervision and lacks an appropriate child care arrangement. As set forth *supra*, the trial court's order includes no findings reflecting Respondent-mother's present inability to supervise Finley. While Respondent-mother had been in treatment in April of 2018, the court records showed her last relapse to have been six weeks before, in February 2018.

Respondent-mother contends that since the last finding of hospitalization six weeks before the adjudication hearing, nothing indicates she is presently unable to care for Finley.

The GAL points to Mitchell's testimony that there was ongoing concern about Respondent-mother's ability to care for Finley. Mitchell testified her concerns were developed from a January 2018 voicemail Respondent-mother had left for Mitchell indicating she was experiencing some short term memory loss. More relevant and timely is Supervisor McDonald's testimony that Respondent-mother presently was compliant in her treatment and her case plan. This evidence tends to show an ability or a capability of Respondent-mother to parent Finley, rather than an inability to care for him.

As previously stated, this Court has held that the trial court must consider "the conditions as they exist at the time of the adjudication as well as the risk of harm to the child from return to a parent." *In re B.P.*, __ N.C. App. __, __, 809 S.E.2d 914, 920 (2018). The trial court must look at the situation before the court at the time of the hearing when considering whether a juvenile is dependent.

The only current evidence before the court does not support a finding that Respondent-mother was unable to care for Finley. OCDSS records indicate that all of her recent drug screens had been negative, that she had provided proof of her regular attendance at NA/AA meetings and had obtained a mental health assessment, and had begun cooperating with OCDSS as required by her plan.

We hold no clear and convincing evidence supports the trial court's finding of dependency because Respondent-mother was incapable of providing appropriate care and supervision for Finley.

V. Conclusion

Admission of the statements purportedly made by Finley to Berson and Byrd under the residual hearsay exception was error and prejudiced Respondent-mother. No properly admitted clear and convincing evidence supports the trial court's conclusion that Finley was neglected or dependent. The order appealed from is reversed. *It is so ordered.*

REVERSED.

Judges DIETZ and YOUNG concur.

IN THE MATTER OF J.C.M.J.C., J.J.C.C., C.O.C.

No. COA18-1269

Filed 15 October 2019

1. Child Abuse, Dependency, and Neglect—record on appeal—lacking copies of juvenile petitions—dismissal—writ of certiorari

Respondent-parents' appeal from an order adjudicating their children neglected was dismissed as to two of the children because the record on appeal lacked copies of the juvenile petitions for those two children and thus was silent as to the trial court's subject matter jurisdiction. However, the Court of Appeals elected to consider the merits of the parents' appeal by writ of certiorari (N.C.G.S. § 7A-32(c)).

2. Child Abuse, Dependency, and Neglect—adjudication—findings of fact—from prior proceeding—problematic

The Court of Appeals noted with disapproval that the trial court's order adjudicating respondent-parents' minor children neglected used the findings of fact from a prior proceeding (a seven-day hearing on nonsecure custody) as the sole evidentiary support for most of its adjudicatory findings in lieu of making its own independent findings. Although a trial court may take judicial notice of its own proceedings, the trial court was not bound by the usual rules of evidence at the prior proceeding and the parents had no right to appeal from it.

3. Child Abuse, Dependency, and Neglect—neglect—sufficiency of findings—noncompliance with social services investigation

The trial court's findings did not support its conclusion that respondent-parents' children were neglected juveniles where many of the findings were simply recitations of allegations or reports made to the county department of human services (CCDHS); other findings concerning the parents' obstruction of CCDHS's investigation by refusing to comply had no bearing on whether the juveniles were neglected; the few findings that arguably went toward the issue of neglect—the mother's yelling and cursing at the residence on one occasion and at a school bus driver on another occasion—were insufficient to support an adjudication of neglect; and findings regarding the children's absences from school were insufficient to support the adjudication because there was no evidence regarding the reason for the absences.

Appeal by Respondents from order entered 24 August 2018 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 5 September 2019.

Hartsell & Williams, PA, by H. Jay White and Austin "Dutch" Entwistle III, for Petitioner-Appellee Cabarrus County Department of Human Services.

Garron T. Michael for Respondent-Appellant Mother.

Mary McCullers Reece for Respondent-Appellant Father.

Parker, Poe, Adams & Bernstein L.L.P., by R. Bruce Thompson II, for Guardian ad Litem.

COLLINS, Judge.

Respondents appeal from an order adjudicating their minor children "Jillian", "John", and "Catherine" (collectively, "the children") neglected.[1] We reverse.

On or about 25 April 2018, the Cabarrus County Department of Human Services ("CCDHS") received a Child Protective Services ("CPS") report alleging that 8-year-old John and 5-year-old Catherine were frequently seen playing outside alone after school; Respondent-Father

1. Pseudonyms are used to protect the juveniles' identities. *See* N.C. R. App. P. 42(b).

("Father") smoked marijuana in front of the children; Respondent-Mother ("Mother") was pregnant and may also have been smoking; and the odor of marijuana was detectible from the family's apartment. On 2 May 2018, CCDHS received another CPS report alleging that the family could be heard yelling; there was suspected domestic violence in the home; and the home was unclean and lacked furniture.

CCDHS made multiple unsuccessful attempts to reach Respondents by phone, by mail, and by visits to the residence. Although a social worker spoke to John and Catherine at their school and verified Respondents' address and telephone number, CCDHS was unable to contact Respondents or observe 1-year-old Jillian. Respondents did not respond to CCDHS's phone messages or to multiple "speed messages" left by CCDHS at their apartment.

On 4 May 2018, CCDHS filed a petition[2] under N.C. Gen. Stat. § 7B-303 (2017) accusing Respondents of obstructing or interfering with a juvenile investigation. After a hearing on 7 May 2018, the trial court found Respondents had obstructed or interfered with CCDHS's investigation without lawful excuse and entered a "Juvenile Interference Order" ordering Respondents to allow CCDHS access to their home and the children. The trial court entered additional interference orders after hearings on 14 and 21 May 2018, finding that CCDHS had made additional attempts to contact Respondents by phone and in person and that Father had "told CCDHS to go away and stop harassing the family."

On 22 May 2018, CCDHS obtained nonsecure custody of Respondents' children and filed a petition alleging they were neglected juveniles within the meaning of N.C. Gen. Stat. § 7B-101(15) (2017). After a hearing on 12 July 2018, the trial court entered an "Adjudication/Disposition Order" on 24 August 2018 adjudicating the children neglected, continuing them in CCDHS custody, and approving their existing foster placements. The trial court ordered Respondents to obtain psychological, parenting capacity, and substance abuse assessments and comply with any recommended treatment; submit to random drug screens requested by CCDHS; obtain and maintain sufficient income and suitable housing for the children; provide financial support for the children consistent with state law; attend supervised visitations as prescribed in the order; and remain in bi-weekly contact with their social worker. Respondents each filed timely notice of appeal from the trial court's order.

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2. Although the record on appeal contains only the interference petition filed in Jillian's case, 18 JA 72, the caption of the trial court's interference orders lists all three juveniles and their corresponding case numbers.

I. Subject Matter Jurisdiction

[1] As an initial matter, we note the record on appeal lacks copies of the juvenile petitions purportedly filed by CCDHS with regard to John and Catherine in file numbers 18 JA 73 and 74.[3] "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). Contrary to the requirements of Appellate Rule 9, the record on appeal thus fails to demonstrate the trial court's jurisdiction over the subject matter in 18 JA 73 and 74. *See* N.C. R. App. P. 9(a)(1)(c)-(d) (2018) (requiring record to contain "a copy of the summons with return, or of other papers showing jurisdiction of the trial court . . . or a statement showing same" and "copies of the pleadings . . . on which the case or any part thereof was tried").

Our Supreme Court has established the following doctrine applicable to this circumstance:

> "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." . . . Contrarily, "when the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed."

State v. Petersilie, 334 N.C. 169, 175-76, 432 S.E.2d 832, 836 (1993) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)).

Because the record on appeal in this case is silent with regard to the trial court's subject matter jurisdiction in 18 JA 73 and 74, we dismiss Respondents' appeal in these cases. *See Felmet*, 302 N.C. at 176, 273 S.E.2d at 711. Pursuant to our discretionary authority under N.C. Gen. Stat. § 7A-32(c) (2017), however, we elect to review Respondents' arguments on appeal by writ of certiorari. *See State v. Phillips*, 149 N.C. App. 310, 314, 560 S.E.2d 852, 855 (2002); *Gibson v. Mena*, 144 N.C. App. 125, 127, 548 S.E.2d 745, 746 (2001).

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3. Also absent from the record are copies of any summonses issued or returned in 18 JA 73 and 74. This omission does not affect our review, however, inasmuch as Respondents' participation in the trial court proceedings without objection "'waives any defects in the jurisdiction of the court for want of valid summons or of proper service thereof.'" *Youngblood v. Bright*, 243 N.C. 599, 602, 91 S.E.2d 559, 561 (1956) (quoting *In re Blalock*, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951)).

II. Respondents' Arguments on Appeal

Respondents both claim the trial court erred in adjudicating the children neglected juveniles. They assert that many of the trial court's findings of fact in support of its adjudication were not grounded in clear and convincing evidence as required by N.C. Gen. Stat. § 7B-805 (2017). Respondents further argue that the findings supported by the hearing evidence do not support the court's conclusion that the children are neglected.

We review an adjudication of neglect to determine whether the trial court's findings of fact are based on clear and convincing competent evidence and whether the trial court's findings support its conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). Uncontested findings are deemed to be supported by the evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Erroneous findings unnecessary to the adjudication may be disregarded as harmless. *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). The determination that a child is "neglected" is a conclusion of law we review de novo. *In re J.R.*, 243 N.C. App. 309, 312-13, 778 S.E.2d 441, 443-44 (2015).

The Juvenile Code defines "[n]eglected juvenile," in relevant part, as a child under eighteen years of age "whose parent . . . does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15).

> In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment. Similarly, in order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm. A trial court's failure to make specific findings regarding a child's impairment or risk of harm will not require reversal where the evidence supports such findings.

In re K.J.B., 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) (internal quotation marks and citations omitted).

In adjudicatory findings 2 and 6 of the Adjudication/Disposition Order, the trial court summarized the CPS reports received by CCDHS

on 25 April 2018 and 2 May 2018. The trial court found the following additional facts in support of its conclusion that Respondents' children are neglected:

> 3. Starting on April 26, 2018, CCDHS had gone to the home numerous times for a home visit without success. Each time a speed message was left requesting that the family contact CCDHS or comply with court. When CCDHS would return the next time the speed messages are always removed. CCDHS spoke with [Respondents] who refused to cooperate with the investigation. CCDHS could not ensure the safety and well-being of the children due to the injurious environment, substance use and improper supervision. [John] and [Catherine] were last seen at the Concord Children's Clinic on March 16, 2018. The Concord Children's Clinic had no records for [Jillian, born in May 2017].
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> 4. On April 30, 2018, CCDHS [went to John and Catherine's school and] verified the family's correct phone numbers and address. School person[nel] reported that the children had missed several months of school in Florida prior to transferring to Cabarrus County Schools. School person[nel] reported that [Mother] was sending harassing, threatening, harsh and demeaning emails to the teachers, in such that all communication now went directly to the school princip[al]. School personnel reported that the children were academically behind; however, they were very capable of catching up as long as they attended school regularly. School personnel reported that the children were enrolled in school in January 2018 and had missed 21 days as [sic] of school prior to April 30, 2018.
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> 5. On May 1, 2018, CCDHS sent a certified letter to the family requesting contact upon receipt of the letter. On May 4, 2018, CCDHS received the receipt that the letter was picked up by [Father].
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> . . . .
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> 7. On May 4, 2018, CCDHS filed an Obstruction of a Juvenile Investigation petition. On May 7, 2018, the [trial court] entered an order instructing [Respondents] to cease obstruction of the CCDHS investigation regarding the juveniles and allow CCDHS access to the residence of the juveniles, as well as access to the children.

8. On May 5, 2018, CCDHS arrived at the residence to find that Concord Police Department was on scene responding to a call from [Mother]. Officers on scene verified that [Mother] was in the apartment as she was observed yelling and cursing and instructed to go back into her residence. CCDHS attempted entry to the home by knocking loudly several times with no response.

9. On May 9, 2018, CCDHS arrived at the residence and was able to speak with [Father,] who answered the door [and] stated "stop harassing and threatening us" . . . . CCDHS was able to observe [Father] open the door so that [John] and [Catherine] could enter from the bus. CCDHS was able to see the 1-year-old [Jillian] standing next to [Mother] on the sofa. [Father] stated "that his wife would call when she is good and ready" and closed the door in the Social Worker's face.

10. On May 10, 2018, CCDHS and Concord Police Department arrived at the residence and was able to speak with [Father] . . . . CCDHS attempted to initiate the case and asked to come in; however, [Father] stated "no" and "why would I let a stranger into my home". CCDHS attempted to explain the report allegations; however, [Father] would not allow CCDHS to complete the initiation. A Concord Police Officer spoke with [Father] who later agreed to a home visit . . . [at] 1:00 pm on May 11, 2018.

11. On May 11, 2018, CCDHS arrived at the residence at 1:07 pm and knocked on the door. CCDHS could hear clutter and commotion behind the door; a male voice asked "who is it" and a female voice responded "them". CCDHS waited several minutes and knocked again. [Father] finally answered the door and reported that CCDHS could come in however the Concord Police officer was not allowed in the home. CCDHS did not enter the residence due to safety concerns. . . .

12. On May 17, 2018, CCDHS went to the school and met with [John] and [Catherine]. School person[nel] reported that the family was on an attendance contract and the children had 22 absences. . . . [T]he children stated "that they don't have anything to say to CCDHS".

> 13. Upon information and belief, [Father] had been observed smoking marijuana outside and around the children; that [Mother] beat the children for no reason and yelled at them for no reason; and that [Father] threatened young children and made them cry in the neighborhood.
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> 14. On May 18, 2018, CCDHS received a lengthy voicemail from [Mother] stating "you went up to the school today and interviewed my children privately and I want to know what was discussed and any pictures you took of my children against their will and ours as well cause we did not say that you could; . . . anything you need to say to me you can leave it on the piece of paper that you leave in the hallway when you drop off information . . . . On May 19, 2018, CCDHS contacted [Mother] who reported that she was at a doctor's appointment and would call back later.
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> 15. On May 18, 2018, CCDHS was contacted by school person[nel] reporting that [Mother] was being banned from all Cabarrus County property including bus stops. [Mother] verbally attacked the school bus driver and was standing in the door way keeping other children from boarding the bus. [Mother] was being charged with Misdemeanor Trespass/Impede School Bus. School person[nel] stated that several children, including [John and Catherine], were on or around the bus.

Finding 1, which states "[t]he allegations contained in the petition support a finding that the juveniles are neglected[,]" is in the nature of a conclusion of law and will be reviewed accordingly. *See State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009).

A. Findings of Fact

[2] Respondents collectively challenge Findings 3-6, 8-11, and 13-15 as unsupported by the evidence adduced at the adjudicatory hearing. They note CCDHS called just one witness, social worker Nicole Cleur, and tendered no additional exhibits or documentary evidence in support of the petition's allegations.[4]

4. Contrary to its representation on appeal, CCDHS did not tender its "Disposition Report" to the trial court during the adjudicatory stage of the hearing, but at the subsequent, dispositional stage. *See In re A.W.*, 164 N.C. App. 593, 597, 596 S.E.2d 294, 296-97 (2004) (concluding that a Department of Social Services report that "was not introduced into evidence during the brief adjudicatory phase of the hearing" could not provide evidentiary support for the trial court's adjudicatory findings).

Ms. Cleur's testimony comprises fourteen transcript pages and focuses largely on CCDHS's inability to investigate the CPS reports due to Respondents' refusal to cooperate with the investigation. Our review of her testimony reveals evidentiary support for some portions of the trial court's findings. She described the contents of the 25 April 2018 CPS report in a manner consistent with Finding 2. Ms. Cleur further attested to the following: CCDHS's unsuccessful attempts to contact Respondents in order to conduct its investigation as set forth in Finding 3; her contact with John and Catherine at school as stated in Findings 4 and 12; the report from school personnel that John and Catherine were academically behind and had missed 21 days of school as stated in Finding 4; and CCDHS's filing of a juvenile interference petition and the trial court's entry of the Juvenile Interference Order against Petitioners as stated in the first sentence of Finding 7. Although Ms. Cleur also testified that she personally smelled marijuana outside Respondents' residence and that John and Catherine "and their belongings" smelled of marijuana when they were interviewed at school, the trial court's findings do not reflect this testimony.[5]

CCDHS and the guardian ad litem ("GAL") contend the remainder of the trial court's adjudicatory findings are supported by the court's own prior orders in the cause, specifically by the findings in the 10 May 2018 Juvenile Interference Order and in the "First Seven Day Hearing Order" on nonsecure custody entered by the trial court on 16 June 2018. *See* N.C. Gen. Stat. § 7B-506 (2017). CCDHS shows that each of the challenged adjudicatory findings appears *verbatim* in the "First Seven Day Hearing Order." Given these identical findings, CCDHS insists there can be no "reasonable dispute" that "the trial court took judicial notice of its prior orders . . . ."

Respondents point out that the trial court did not purport to take judicial notice of its prior orders at the adjudicatory hearing; nor was it

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5. Nor would the odor of marijuana detected at Respondents' residence or on the children's clothing or effects support an adjudication of neglect, absent additional evidence that the children were exposed to marijuana or otherwise placed at substantial risk of harm as a result of Respondent's marijuana use. *See In re K.J.B.*, 248 N.C. App. at 356-57, 797 S.E.2d at 519 (reversing adjudication of neglect where "there is no substantial evidence to show [the child] suffered any physical, mental, or emotional impairment, or that he was at a substantial risk of suffering such impairment, as the result of Respondent's substance abuse"); *In re E.P.*, 183 N.C. App. 301, 305-07, 645 S.E.2d 772, 774-76 (concluding the Department of Social Services "failed to present clear and convincing evidence that the parents' [substance abuse] problems created a substantial risk of harm to the children"), *aff'd per curiam*, 362 N.C. 82, 653 S.E.2d 143 (2007).

asked to do so.[6] Even if the trial court based its adjudicatory findings on its own prior non-adjudicatory findings, Respondents argue that "judicial notice of prior orders is not a replacement for the petitioner's burden to present clear and convincing evidence at the adjudicat[ory] hearing that the children were neglected." Otherwise, Respondents suggest, "there would be no need for a petitioner to present any further evidence" at an adjudicatory hearing under N.C. Gen. Stat. § 7B-805. A petitioner could simply ask the court to adjudicate a juvenile as abused, neglected, or dependent "through judicial notice of prior non-adjudicatory orders."

It is well-established that a trial court may take judicial notice of its own proceedings. *E.g.*, *Georgia-Pacific Corp. v. Bondurant*, 81 N.C. App. 362, 367, 344 S.E.2d 302, 306 (1986); *see also* N.C. Gen. Stat. § 8C-1, Rule 201 (2017). "Further, while it is the better practice to give express notice to the parties of the intention to take judicial notice of matters contained in the juvenile's file, it is not required." *In re D.S.A.*, 181 N.C. App. 715, 719, 641 S.E.2d 18, 21 (2007). Given the absence of hearing evidence to support most of the trial court's adjudicatory findings, and the fact that these findings are identical to findings in the court's earlier orders in the cause, we agree with CCDHS that the record tends to show the court took judicial notice of the prior proceedings. *See In re M.N.C.*, 176 N.C. App. 114, 120-21, 625 S.E.2d 627, 632 (2006).

Virtually all of the adjudicatory findings challenged by Respondents have *verbatim* equivalents in the "First Seven Day Hearing Order" entered on 30 May 2018. We note, however, that the trial court's prior orders provide no support for the statement in adjudicatory Finding 3 that John and Catherine were last seen at the Concord Children's Clinic on 16 March 2018 and that the clinic lacked any records for Jillian. This finding is likewise unsupported by Ms. Cleur's hearing testimony. Therefore, we will disregard this portion of Finding 3 for purposes of our review. *See In re T.M.*, 180 N.C. App. at 547, 638 S.E.2d at 240.

Notwithstanding the trial court's plenary authority to take notice of its own orders, we agree with Respondents that it is problematic to allow the trial court's findings of fact in the "First Seven Day Hearing Order" to serve as the sole evidentiary support for the great majority of

6. Because the trial court never indicated its intention to take judicial notice of any material, Respondents had no occasion to request an opportunity to be heard on the matter as provided by N.C. Gen. Stat. § 8C-1, Rule 201(e). We find CCDHS's assertion to the contrary unpersuasive.

the adjudicatory findings in the "Adjudication/Disposition Order."[7] It is true, as CCDHS emphasizes, that the trial court made the findings in the "First Seven Day Hearing Order" by clear and convincing evidence, the same standard of proof that applies at an adjudicatory hearing. *See* N.C. Gen. Stat. §§ 7B-506(b), -805. Unlike at the adjudicatory hearing, however, the trial court was "not . . . bound by the usual rules of evidence" at a seven-day hearing on nonsecure custody. N.C. Gen. Stat. § 7B-506(b); *see also* N.C. Gen. Stat. § 7B-804 (2017) (providing "the rules of evidence in civil cases shall apply" at the adjudicatory hearing in a juvenile abuse, neglect, or dependency proceeding). Furthermore, Respondents had no right to appeal from the "First Seven Day Hearing Order" under N.C. Gen. Stat. § 7B-1001(a) (2017). There is thus no way to ensure that the findings in the "First Seven Day Hearing Order" were based on evidence admissible for purposes of an adjudication. To allow the trial court to find adjudicatory facts simply by taking judicial notice of its prior findings in the nonsecure custody order risks insulating the adjudicatory findings from appellate review and undermines the procedural safeguards for adjudications prescribed by N.C. Gen. Stat. §§ 7B-804 and 7B-805.[8]

B. Conclusion of Law

[3] Even assuming *arguendo* that the findings in the trial court's prior orders suffice to support the corresponding adjudicatory findings, we agree with Respondents that the findings do not support the trial court's conclusion that the children are neglected juveniles. Many of the court's purported findings merely recite allegations or reports made to CCDHS during its investigation and thus "are not even really facts." *In re O.W.*, 164 N.C. App. 699, 702, 596 S.E.2d 851, 854 (2004); *cf. Dunlap v. Clarke Checks, Inc.*, 92 N.C. App. 581, 584, 375 S.E.2d 171,

7. Finding 6, which recaps the CPS report received on 2 May 2018, is also supported by the verified petition filed by CCDHS on 22 May 2018, a document also subject to judicial notice as part of the trial court case file.

8. We acknowledge the decisions of this Court allowing the trial court to take judicial notice of its prior orders "from hearings where the evidence was subject to a lower standard of evidentiary proof." *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005). We cited "the well-established supposition that the trial court in a bench trial is presumed to have disregarded any incompetent evidence," *id.* (citation and quotation marks omitted), as well as the lack of indication in the record that "the trial court failed to conduct the independent determination" of the facts for purposes of the adjudication. *In re J.W.*, 173 N.C. App. 450, 456, 619 S.E.2d 534, 540 (2005). Here, however, most of the trial court's adjudicatory findings are unsupported by *any evidence* other than the "First Seven Day Hearing Order." The record would thus appear to show the court failed to undertake an "independent determination" of these facts.

174 (1989) ("Findings of fact that merely restate a party's contentions or testimony without finding the facts in dispute are not adequate."). As we have explained:

> When a trial court is required to make findings of fact, it must make the findings of fact specially. 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) (internal quotation marks and citations omitted).

Findings 2, 4, 6, 12, and 15 repeat a variety of allegations made to CCDHS about Respondents, including the contents of the CPS reports or things "reported" by "school person[ne]l." Similarly, Finding 13 attributes certain actions to Respondents "[u]pon information and belief" rather than actual knowledge. Such accounts do not constitute affirmative findings of fact that would support a conclusion that the children are neglected. *See In re O.W.*, 164 N.C. App. at 702-04, 596 S.E.2d at 854.

Where the trial court did make affirmative findings, as in Findings 3, 5, 8-11, and 14, they largely describe Respondents' obstruction of the CCDHS investigation by refusing to communicate with CCDHS and denying access to the children and the home. These findings do not support a conclusion that Respondents did "not provide proper care, supervision, or discipline[,]" or that the children were living in an environment injurious to their welfare. N.C. Gen. Stat. § 7B-101(15); *cf. In re Stumbo*, 357 N.C. 279, 282-83, 582 S.E.2d 255, 258 (2003) (distinguishing between conduct constituting neglect and conduct interfering with investigation of reported neglect under N.C. Gen. Stat. § 7B-303); *cf. In re K.C.G.*, 171 N.C. App. 488, 495, 615 S.E.2d 76, 80 (2005) (concluding the filing of a petition alleging parental interference with an investigation under N.C. Gen. Stat. § 7B-303 does not allow the trial court to place a juvenile in nonsecure custody under N.C. Gen. Stat. § 7B-503 (2017)).

The few findings that arguably bear on the question of whether the children are neglected fail to establish neglect. Finding 8, that Concord police observed Mother "yelling and cursing" at the residence on 5 May 2018, and Finding 15, that Mother "verbally attacked the school bus driver" and blocked school children from boarding the bus on 18 May 2018, both speak to the quality of the children's home environment. But they are not enough to support a determination that the children are neglected.

To the extent Findings 4 and 12 may be construed as affirmative statements that John and Catherine missed 21 or 22 days of school, these findings are also insufficient to establish neglect. "It is fundamental that a child who receives proper care and supervision in modern times is provided a basic education[,]" and a child is neglected within the meaning of the Juvenile Code "when he is *deliberately refused* this education[.]" *In re McMillan*, 30 N.C. App. 235, 238, 226 S.E.2d 693, 695 (1976) (emphasis added). In *In re McMillan*, however, the children were held out of school altogether and did not "receive any mode of educational programs alternative to those in the public school."[9] *Id.* at 236, 238, 226 S.E.2d at 694, 695.

In *In re R.L.G.*, 816 S.E.2d 914 (N.C. Ct. App. 2018), this Court held that evidence that the child had missed 25 days of school and was tardy 37 times during the school year was insufficient to show that the child was neglected by virtue of being denied a basic education. *Id.* at 918-19. In vacating the trial court's order adjudicating the child neglected, this Court looked to the absence of "findings as to the reasons for [the child's] missed classes and tardiness or as to how many of [the child's] absences were excused" or "find[ings] that [the child's] failure to pass three classes directly resulted from her absences or from Respondent's failure to provide proper care, supervision, or discipline." *Id.* at 919.

In the present case, the trial court did not make findings contextualizing the children's absences from school in a way showing the children's neglect as a result of being denied an education, and no evidence was presented that could support such findings. Ms. Cleur testified that she went to John and Catherine's school on 30 April 2018 and learned that, "from January 2018 to April 30th, 2018, the children had missed 21 days of school." When asked how the children were doing in school, she replied, "[t]he children were academically behind. Uhm, they had missed

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9. In an unpublished case, this Court has held that a child's frequent absences from school may amount to the denial of a sound basic education. *See In re W.W.*, 219 N.C. App. 224, 722 S.E.2d 14, 2012 WL 538941 (2012) (unpublished) (affirming adjudication of neglect where the respondent was unable to take the child to school and would not allow her to ride the school bus; the child had 75 absences in the first half of the school year, 52 of which were unexcused; and the respondent reneged on an attendance agreement and did not return the child to school prior to the juvenile petition being filed). Generally, however, "the essence of [a juvenile] petition is not to enforce the compulsory school attendance law but to determine and provide for the needs of the children." *In re McMillan*, 30 N.C. App. at 237, 226 S.E.2d at 695. Parents who violate our state's compulsory attendance statute are subject to criminal prosecution under N.C. Gen. Stat. § 115C-380 (2017). Excessive school absences may also be addressed by the initiation of an undisciplined juvenile proceeding under N.C. Gen. Stat. 7B-1500 *et seq. See* N.C. Gen. Stat. § 7B-1501(27)(a) (2017).

several months in school prior in their Florida school they were trying to catch up in their subjects." Ms. Cleur did not provide a reason for the children's missed classes, identify how many of their absences were unexcused, or explain the degree to which the children were "academically behind." Nor did Ms. Cleur give a timeframe for the children's "several months" of missed school in Florida or provide any details about the circumstances of those absences. This evidence, taken as true, does not show John and Catherine are neglected as a result of being denied an education.

III. Conclusion

Because the trial court's findings of fact fail to support a conclusion that the children are neglected, we reverse the adjudication of neglect. We do not remand the cause for additional fact-finding, because we conclude the evidence adduced at the adjudicatory hearing would not support the necessary findings. *See Harnett Cty. ex rel. De la Rosa v. De la Rosa*, 240 N.C. App. 15, 25, 770 S.E.2d 106, 113 (2015) ("In some cases, we may remand a case to the trial court to make additional findings of fact based upon the evidence presented, but here, the lack of findings is due to the lack of evidence itself."); *see also Sergeef v. Sergeef*, 250 N.C. App. 404, 410, 792 S.E.2d 192, 196 (2016). Having reversed the adjudication, we must also reverse the resulting disposition. *In re K.J.B.*, 248 N.C. App. at 357, 797 S.E.2d at 519.

We recognize Respondents' actions frustrated CCDHS's ability to gather evidence in this case. But such misconduct is insufficient to allow a conclusion that the children did not receive proper care or lived in an injurious environment. CCDHS has means at its disposal to gather additional evidence, including obtaining a contempt order for Respondents' failure to comply with the non-interference orders entered in this case. *See* N.C. Gen. Stat. § 7B-303(f).

REVERSED.

Chief Judge McGEE and Judge MURPHY concur.

IN RE J.T.S.

[268 N.C. App. 61 (2019)]

IN THE MATTER OF J.T.S. AND S.C.S.

No. COA18-1214

Filed 15 October 2019

1. Child Abuse, Dependency, and Neglect—permanency planning—waiver of review hearings—section 7B-906.1(n)—"period of at least one year"

In a permanency planning matter, the Court of Appeals interpreted the provision in N.C.G.S. § 7B-906.1(n) that further review hearings may be waived where a child "has resided in the placement for a period of at least one year" to mean a placement of at least twelve months that is continuous and uninterrupted. In this case, where the children's placement with grandparents was periodic and sporadic, that requirement was not met.

2. Child Abuse, Dependency, and Neglect—permanency planning—supervised visitation—associated costs—failure to consider

The trial court erred by entering a permanency planning order requiring visitation to be supervised without taking into account what costs would be associated with supervision, who would bear responsibility for paying those costs, and whether respondent-mother had the ability to pay.

3. Child Abuse, Dependency, and Neglect—permanency planning—visitation schedule—contradictory provisions

The trial court erred by entering a permanency planning order that gave contradictory directives on how long and how often respondent mother could visit with her children.

4. Appeal and Error—preservation of issues—permanency planning—conditions of visitation—delegation of discretion to third party

Respondent mother failed to preserve for appellate review her argument that the trial court erred by imposing certain conditions as a prerequisite to visitation with her children and by delegating discretion over visitation to a third-party abuse center where she expressly consented to the terms in court.

5. Child Abuse, Dependency, and Neglect—permanency planning—guardianship—no concurrent plan of reunification—waiver

The trial court did not err in entering a permanency planning order granting guardianship of children to their grandparents without a concurrent plan of reunification where respondent-mother consented to the cessation of reunification efforts in order to have increased visitation.

Appeal by Respondent-mother from order entered 17 August 2018 by Judge Larry D. Brown, Jr. in Alamance County District Court. Heard in the Court of Appeals 3 September 2019.

Jamie L. Hamlett for Petitioner-appellee Alamance County Department of Social Services.

Deputy Parent Defender Annick Lenoir-Peek and Parent Defender Wendy C. Sotolongo for Respondent-appellant.

Parker Poe Adams & Bernstein LLP, by Fern A. Paterson, for guardian ad litem.

McGEE, Chief Judge.

Respondent, the mother of J.T.S. and S.C.S., appeals from a permanency planning order in which the trial court eliminated reunification as a permanent plan and awarded guardianship of J.T.S. and S.C.S. to their maternal grandparents. Respondent contends the trial court erred in: waiving review hearings, ordering a restrictive visitation schedule without considering costs, and eliminating reunification as a concurrent permanent plan. We affirm the trial court's order in part, and vacate and remand in part.

Factual and Procedural History

Guilford County Child Protective Services received a report on 29 August 2017, alleging J.T.S. and S.C.S. were "being exposed to an injurious environment due to their parents' substance abuse." At that time, the children resided with Respondent and J.T.S.'s father[1] ("father") (collectively the "parents") in Burlington, in a house provided by the children's maternal grandparents (the "grandparents"). The matter was

1. The parental rights of S.C.S.'s father have been previously terminated.

transferred the next day to the Alamance County Department of Social Services ("DSS").

Respondent left J.T.S. and S.C.S. in the care of the grandparents on 7 September 2017, following allegations that father had held Respondent and the children hostage at their home the previous day. Respondent entered into a Temporary Parental Safety Agreement on 26 October 2017, wherein Respondent agreed to allow the children to reside with the grandparents, to refrain from being under the influence of mood-altering substances (unless prescribed by her doctor), and to comply with a visitation arrangement, which allowed for supervised visitation with the children. Thereafter, DSS transferred the case to in-home services.

The parents failed to pay the grandparents rent for the Burlington house and the grandparents evicted Respondent and father in September or October of 2017. From December 2017 to February 2018, DSS social workers sought to meet with Respondent regarding her case but they were unable to locate her. The grandparents expressed concerns to DSS social workers in March of 2018 that Respondent was using illegal drugs and alerted them that, after being evicted, the parents broke back into the home in Burlington and were currently residing there. DSS social workers successfully contacted Respondent via text message, and Respondent agreed to meet with them on 13 March 2018.

At the scheduled meeting, Respondent confirmed she was still using illegal drugs with father, and track marks were observed on her arms, chest, and hands. Respondent admitted she had been assaulted by father on multiple occasions, but denied that he inflicted the visible bruises on her arm. Upon learning father was waiting for Respondent in the parking lot, a social worker asked father if he would speak with them. Father agreed to speak with DSS and, despite the visible track marks on his arm, he denied using illegal drugs. At the request of DSS, the parents submitted to drug tests; father did not produce enough of a specimen to be tested and Respondent tested positive for cocaine and amphetamines.

Respondent also told the social workers that the grandparents frequently interfered with her ability to see her children. As a result, a nine-day visitation plan was put in place, allowing for supervised visits and phone calls between Respondent and the children. Respondent, however, "failed to maintain this schedule," and saw her children only a few times. DSS social workers attempted to contact Respondent and father daily by phone, unannounced home visits at various residences and hotels, and visits to stores where the parents were known to shop. DSS was unable to reach the parents.

DSS filed petitions on 21 March 2018 alleging the children were "neglected juveniles" as defined by N.C. Gen. Stat. § 7B-101(15). Respondent and the grandparents attended a child and family team meeting on 11 April 2018, and a case plan was established. The case plan "sought to address [Respondent's] mental health, substance abuse, housing instability, lack of employment, parenting style, and the medical/mental health needs of the minor children."

An adjudication hearing and a disposition hearing were held on 16 May 2018. At the start of the hearing, the trial court adjudicated the children as "neglected juveniles" based on stipulations made by the parties and information received from counsel. The trial court moved on to the disposition hearing, and entered reports from DSS and the Guardian ad Litem ("GAL") into evidence. The trial court announced from the bench it was adopting the recommendations of DSS and the GAL regarding supervised visitation between Respondent and the children.

The trial court heard arguments from the parties as to whether a permanency planning hearing could immediately follow a disposition hearing. Thereafter, the trial court proceeded with the permanency planning hearing for the rest of the day and the following day. A conflict in the court's schedule prevented the matter from concluding on 17 May and the permanency planning hearing was continued to 18 July 2018.

At the end of the day on 17 May, the trial court announced from the bench it was awarding Respondent visitation with the children for one hour per week at the Family Abuse Services Center. The oral ruling was memorialized in a supervised visitation order, entered 18 May 2018. An adjudication and disposition order was entered 23 May 2018. The order directed Respondent and father to participate in the services ordered by the trial court. Respondent was ordered to: contact Family Abuse Services to enroll in the supervised visitation program, complete a substance abuse assessment and mental health assessment and comply with any recommendations, submit to random drug screens, take medication as prescribed, engage in services to improve parenting skills and procure employment, apply for a specified number of jobs per week, complete a specified number of housing applications per week, and participate in the children's medical, dental, and mental health appointments.

In preparation for the 18 July 2018 hearing, DSS prepared a written addendum to a previously-drafted report. In the addendum, DSS recommended "supervised visits between the minor children and the Respondent Mother be suspended due to her failure to take advantage of and/or engage in the offered visitation, as well as her failure to

adequately address the issues of concern that necessitated the kinship arrangement and court involvement." Respondent, Respondent's attorney, father's attorney, the grandparents, a DSS social worker, and the GAL were present at the 18 July 2018 hearing. At the start of the hearing, DSS's counsel explained the parties had "reached a resolution" which altered DSS's recommendation contained in the addendum. Counsel for DSS addressed the terms of the "resolution" during direct examination of the social worker:

> [DSS'S COUNSEL]: Is it your understanding that the respondent mother is willing to consent at this point to guardianship being granted to her parents if the department and GAL revised their recommendations in regards [sic] to suspension of her visitation?
>
> [DSS SOCIAL WORKER]: Yes.

Thus, DSS agreed to revise its recommendation to suspend Respondent's visitation rights and Respondent consented to guardianship of the children with the grandparents. The GAL adopted DSS's revised recommendation. The social worker read the terms of DSS's revised recommendation in open court:

> That the respondent mother can continue to have visitation once a week for one hour supervised by Family Abuse Services. That if the respondent mother misses two consecutive visits or two out of the five visits . . . the visitation will be suspended and will not be reinstated until further order of the Court. That prior to visitation beginning the respondent mother shall obtain an updated CCA including mental health and substance abuse assessment and submit to a drug screen. She shall enroll in treatment as recommended by the CCA. The respondent mother must admit documentation to Family Abuse Services verifying that she's obtained such and is enrolled in treatment with a state approved treatment program. If the respondent mother appears at visitation and appears to be under the influence the visitation shall be terminated and there should be no further visitation until further order of the Court.

The trial court then addressed the conditions agreed upon by the parties and sought confirmation that Respondent understood the terms:

> THE COURT: And, it[']s my understanding attorney Skeen that your client is going to consent at this point to

> guardianship being placed with the grandparents so long as that modification is changed in relation to being able to have visitation once a week at the Family Justice Center?
>
> [RESPONDENT'S COUNSEL]: That's correct Your Honor.
>
> THE COURT: But your client does understand though that if she fails to provide the necessary criminal backgrounds, the necessary documentation, and setting up at Family Abuse Services and following all of their requirements that that is not going to be the fault of the grandparents. She will not be able to go and have visitation. She understands that?
>
> [RESPONDENT'S COUNSEL]: Yes Your Honor.

DSS's recommendation was accepted by the court without objection. Later in the hearing, the trial court confirmed Respondent's understanding that "[r]eunification stops today." Respondent's counsel responded, "[r]ight, she knew that but, in doing so will allow her to have increased visitation[.]"

The trial court entered a guardianship order on 15 August 2018. The trial court entered a permanency planning order on 17 August 2018, which waived review hearings, eliminated reunification from the permanent plan, and provided for Respondent's visitation with the children pursuant to the recommendations of DSS. Additionally, the trial court entered a supervised visitation order, also reflecting the recommendation of DSS, on 17 August 2018. Respondent appeals from the permanency planning order.

Analysis

I. Waiver of Review Hearings

[1] Respondent asserts the trial court erred in waiving review hearings pursuant to N.C. Gen. Stat. § 7B-906.1(n) because, at the time of the permanency planning hearing, the children had not resided with the grandparents for a continuous "period of at least one year." We agree.

As an initial matter, we address DSS's contention that Respondent failed to properly preserve this argument. Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure provides, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the

specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2017). However, "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." *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). "Accordingly, because [Respondent] contends that the trial court erred in its interpretation and application of statutory provisions, we review the merits of [Respondent's] argument notwithstanding [her] failure to object at trial." *State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014).

"This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 559, 589 S.E.2d 179, 180 (2003).

N.C. Gen. Stat. § 7B-906.1 applies to review and permanency planning hearings and requires that a review hearing be held "at least every six months" after the initial permanency planning hearing "to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile." N.C. Gen. Stat. § 7B-906.1(a) (2017). Subsection (n) allows the court to waive further hearings "if the court finds by clear, cogent, and convincing evidence each of the following:"

> (1) *The juvenile has resided in the placement for a period of at least one year.*
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C.G.S. § 7B-906.1(n) (emphasis added). "The trial court must make written findings of fact satisfying each of the enumerated criteria . . . , and its failure to do so constitutes reversible error." *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015).

In the permanency planning order, the trial entered conclusion of law # 32: "The [c]ourt finds by clear, cogent, and convincing evidence[] that the juveniles have resided in the placement for a period of at least one year[.]" In support of this conclusion, the trial court made the following pertinent findings of fact:

> 14. Both minor children are in a kindship placement with their maternal grandparents[.] They have been placed with their grandparents since October 2017 and have transitioned well into their care. [S.C.S.] has resided with his maternal grandparents for many years of his life and is accustomed to being in his grandparents' care. [J.T.S.] spent the first six months of his life in the home of his maternal grandparents. He also spent some weekends with them over the last several years and has adjusted well to being in their full-time care.
>
> . . . .
>
> 37. That the Court waive the holding of regular review and permanency planning hearings in that the minor child, [J.T.S.], has resided with his maternal grandparents for at least one year and the minor child, [S.C.S.], has resided with his maternal grandparents for more than five years[.]

Respondent contends the above findings of fact do not support conclusion of law # 32 because the "period of at least one year" must be continuous and uninterrupted. DSS and the GAL assert that, pursuant to the plain language of N.C.G.S. § 7B-906.1(n)(1), the children were not required to reside with the grandparents for a continuous or unbroken "period of at least one year." As a result, they argue, the findings of fact establishing the various times each child resided with the grandparents support conclusion of law # 32.

Respondent's appeal presents a question regarding how the "period of at least one year," as it is used in N.C.G.S. § 7B-906.1(n)(1), is calculated. In addressing this argument, we adhere to the following principles of statutory construction: "The paramount objective of statutory interpretation is to give effect to the intent of the legislature." *In re Proposed Assessments*, 161 N.C. App. at 560, 589 S.E.2d at 181 (citation omitted).

"To achieve this end, the court should consider the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Williams v. Alexander Cnty. Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (internal quotation marks and citation omitted). Moreover, "words and phrases of a statute may not be interpreted out of context, but must be interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent, while avoiding absurd or illogical interpretations[.]" *Fort v. Cnty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012) (internal quotation marks and citations omitted).

Pursuant to canons of statutory interpretation, this Court looks first to the plain language of N.C.G.S. § 7B-906.1(n)(1). "[A] period of at least one year" is ambiguous as to whether the period is to be tallied on a continuous or cumulative basis. Therefore, we look to the purposes of the juvenile code as a whole to discern the intent of N.C.G.S. § 7B-906.1(n)(1).

N.C. Gen. Stat. § 7B-100 sets forth the purposes of the juvenile code:

> This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:
>
> (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;
>
> (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.
>
> (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and
>
> (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.
>
> (5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the

> juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

N.C. Gen. Stat. § 7B-100 (2017).

"The [j]uvenile [c]ode . . . must be interpreted and construed so as to implement these goals and policies." *In re Eckard*, 144 N.C. App. 187, 197, 547 S.E.2d 835, 841 (2001). To understand the goals and policies that support waiving review hearings, we look to N.C.G.S. § 7B-906.1 to glean the purpose of a permanency planning hearing and the purpose of a review hearing.

The trial court's purpose in holding a permanency planning hearing is to develop a plan "to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C.G.S. § 7B-906.1(g). Subsequently, the trial court conducts review hearings to "review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile." N.C.G.S. § 7B-906.1(a). The trial court can waive review hearings by making the requisite findings enumerated in N.C.G.S. § 7B-906.1(n). Therefore, the waiver reflects a determination on behalf of the trial court that scheduled review hearings are not necessary, at that time, "to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C.G.S. § 7B-906.1(g).

N.C.G.S. § 7B-906.1(n) reflects the juvenile code's specific goals of providing services that respect "the juveniles' needs for safety, continuity, and permanence" and placing juveniles in a "safe, permanent home." N.C.G.S. § 7B-100(3), (5). These goals are reflected in the findings the trial court is required to make pursuant to N.C.G.S. § 7B-906.1(n) including, *inter alia*, "[t]he placement is stable and continuation of the placement is in the juvenile's best interests"; "[t]he court order has designated the relative or other suitable person as the juvenile's *permanent* custodian or guardian of the person"; and "[n]either the juvenile's best interests nor the rights of any party require that review hearings be held every six months." N.C.G.S. § 7B-906.1(n) (2)-(3), (5) (emphasis added). Consistent with these goals, we interpret the language "for a period of at least one year" to mean a continuous, uninterrupted period of at least twelve months.

In support of this position, we note the evidence gleaned from a continuous period of at least one year would provide the trial court the best evidence of stability and permanency. A child's placement for twelve consecutive months demonstrates commitment on behalf of the

"permanent custodian or guardian of the person" to the child's placement. Moreover, this interpretation is consistent with the policy of the juvenile code to "provide for services" that respect "the right to family autonomy[.]" N.C.G.S. § 7B-100(3). When a child has resided outside the home for a continuous period of at least one year, the parent theoretically has been afforded the opportunity to demonstrate her progress during at least two review hearings. In contrast, when a child has lived outside the home for various short periods of time throughout his life, the parent has not necessarily been provided the same opportunity, afforded by review hearings, to demonstrate her progress or present evidence of changed conditions over the course of a year.

Additionally, measuring "a period of at least one year" by an aggregation of interrupted, sporadic placements could lead to absurd results. Under this interpretation, N.C.G.S. § 7B-906.1(n)(1) could be satisfied in the following situation: a one-year-old child was placed with his aunt for eleven months, was placed with his mother for ten consecutive years and, at age twelve, was placed with his aunt for three months. In that scenario, the child's placement with his aunt for a three-month period preceding a permanency planning hearing would not provide evidence of a permanent and stable placement, and the waiver of review hearings could lead to the "unnecessary or inappropriate separation of [the] juvenile[] from [his] parent[]." N.C.G.S. § 7B-100(4). Therefore, construing N.C.G.S. § 7B-906.1(n)(1) to allow for the waiver of review hearings when a child has resided outside the parent's home for a short period of time would be inconsistent with the objective of review hearings.

DSS and the GAL analogize the issue to this Court's holding in *In re T.P.*, 217 N.C. App. 181, 718 S.E.2d 716 (2011). *In T.P.*, the trial court waived future review hearings pursuant to N.C.G.S. § 7B-906(b),[2] which required the trial court find "[t]he juvenile has resided with a relative . . . for a period of at least one year." *Id.* at 186, 718 S.E.2d at 720. Although the child had resided with his maternal grandparents for a period of time prior to residing with his paternal grandparents for a period of time, this Court upheld the trial court's waiver of review hearings because the child "ha[d] remained with a relative (maternal and paternal grandparents) for more than one year." *Id.* at 187, 718 S.E.2d at 720. DSS contends "if the twelve-month period can be calculated across different relatives, it can be calculated with one set of relatives across the life of the children." We disagree with this assertion for two main reasons.

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2. N.C. Gen. Stat. § 7B-906 (2009) was repealed by Session Laws 2013-129, s. 25, effective 1 October 2013, and replaced with N.C.G.S. § 7B-906.1.

First, the question of how to measure "a period of at least one year" was not addressed by this Court, as there was no dispute as to how long the juvenile had been placed outside the home. Second, *T.P.* was decided under a provision of a predecessor statute, which contained different language than N.C.G.S. § 7B-906.1(n)(1). Specifically, the provision that the "juvenile has resided with a relative or has been in the custody of another suitable person" in N.C.G.S. § 7B-906(b) now reads "[t]he juvenile has resided in the placement[.]" N.C.G.S. § 7B-906.1(n)(1). We cannot say whether this Court would have reached the same result in *T.P.* under N.C.G.S. § 7B-906.1(n)(1). Because this issue is not before us, we limit our discussion of *T.P.* to distinguishing its relevancy in regard to the present case.

Finally, we note that our interpretation is consistent with this Court's treatment of N.C.G.S. § 7B-906.1(n)(1). In *In re P.A.*, 241 N.C. App. at 54-56, 772 S.E.2d at 242-43, a juvenile was placed with his father and his father's girlfriend in September 2011, was placed with only his father's girlfriend in April 2013, was placed with his mother in October 2013, and was placed back with his father's girlfriend in January 2014. In addressing whether the trial court appropriately waived review hearings pursuant to N.C.G.S. § 7B-906.1(n), this Court noted "it would have been impossible for the trial court to make a finding as to the first criterion that '[t]he juvenile has resided in the placement for a period of at least one year' since [the juvenile] had been placed with [the father's girlfriend] for only about 60 days at the time of the March 2014 hearing." *Id.* at 66, 772 S.E.2d at 249. Accordingly, although the juvenile had resided with his father's girlfriend at different times throughout his life, the only period of time considered relevant by this Court in regard to N.C.G.S. § 7B-906.1(n)(1) was the two-month period preceding the permanency planning hearing.

In sum, recognizing that "[o]ur juvenile code balances the important, and sometimes competing interests of family reunification, permanency for the child, and the best interest of the child[,]" *In re J.D.C.*, 174 N.C. App. 157, 161, 620 S.E.2d 49, 52 (2005), we interpret the language "for a period of at least one year" in N.C.G.S. § 7B-906.1(n)(1) to require an uninterrupted period of at least twelve months. Therefore, we hold the trial court's conclusion of law was not supported by adequate findings of fact. Accordingly, we vacate the portion of the permanency planning order waiving future review hearings and remand to the trial court.

II. Visitation Schedule

[2] Respondent contends the trial court erred by failing to consider the costs associated with supervised visitation, entering contradictory provisions as to the duration and frequency of her visitation, requiring her to complete additional requirements as a prerequisite to visitation, and delegating its judicial discretion to Family Abuse Services. We agree the trial court erred by failing to make a determination regarding costs and by entering contradictory provisions as to the frequency of Respondent's visitation. However, Respondent has not preserved for appellate review her arguments that the trial court erred by placing requirements on her visitation and by delegating its judicial authority.

First, Respondent contends the trial court erred by ordering supervised visitation without addressing its cost, who would bear the expense, or Respondent's ability to pay said expense.

As an initial matter, we address whether this issue has been preserved for appellate review. This Court has held a respondent-mother's failure to object to the trial court's award of visitation at the discretion of a third party "is not a failure to preserve the[] issue[] for appeal" because "a party [is not] required to object at the hearing or raise a motion in order to preserve this type of question for appellate review." *In re E.C.*, 174 N.C. App. 517, 520, 621 S.E.2d 647, 650 (2005) *superseded on other grounds by statute as stated in In re T.H.*, 245 N.C. App. 131, 781 S.E.2d 718, 2016 WL 224188, at *5-7 (2016) (unpublished). Therefore, in order to preserve this issue for appellate review, Respondent was not required to object to the trial court's failure to consider the costs associated with supervised visitation.

N.C. Gen. Stat. § 7B-905.1 provides, in pertinent part:

> (a) An order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended.
>
> . . . .
>
> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum

> frequency and length of the visits and whether the visits shall be supervised. The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(a), (c) (2017).

Our Supreme Court has held that, without findings addressing whether a respondent-parent "was able to pay for supervised visitation once ordered[, o]ur appellate courts are unable to determine if the trial court abused its discretion by requiring as a condition of visitation that visits with the children be at [the respondent-parent's] expense." *In re J.C.*, 368 N.C. 89, 772 S.E.2d 465 (2015) (per curiam). In the present case, the trial court awarded Respondent weekly supervised visitation with her children at the Family Abuse Services Center; however, the trial court made no findings as to the costs associated with supervised visitation, who would bear the responsibility of paying such costs, or Respondent's ability to pay the costs. This scenario has been squarely addressed by this Court in *In re Y.I.*, ___ N.C. App. ___, 822 S.E.2d 501 (2018):

> In this case, the trial court did not determine what costs, if any, would be associated with conducting supervised visitation at Gaston County Visitation Center or Carolina Solutions. Given that the trial court relieved DSS of any further responsibility in the case, it appears likely that [the r]espondent-mother would be required to pay for visitation, although the court failed to specify who was to bear any such expense. In the event the trial court intended for [the r]espondent-mother to bear the cost of visitation, the court failed to determine whether [the r]espondent-mother had the ability to pay.

Id. at ___, 822 S.E.2d at 506. Therefore, as we did in *Y.I.*,

> we vacate the portion of the permanency planning order regarding visitation and remand for additional findings of fact, addressing whether Respondent[] is to bear any costs associated with conducting visits at the supervised visitation centers, and if so, whether Respondent[] has the ability to pay those costs.

Id. at ___, 822 S.E.2d at 506.

[3] Respondent next contends the visitation plan in the permanency planning order "is contradictory as to how long and how often [she] can visit her sons." In the permanency planning order, one decretal paragraph

provides Respondent's visitation "should be at a minimum of once a week with both children for two hours," whereas a different decretal paragraph provides Respondent "can continue to have visitation once a week for one hour[.]" Based on the revised recommendation of DSS and the terms of the visitation order, entered 17 August 2018, it appears the trial court intended to grant Respondent visitation with her children for one hour once a week. However, in an abundance of caution, we vacate this portion of the order and remand to the trial court for clear instructions regarding the frequency and duration of the visitation awarded to Respondent.

[4] Finally, Respondent contends the trial court erred by imposing conditions as a prerequisite to visiting her children and by delegating discretion over visitation to Family Abuse Services.

We first address whether this argument was preserved for appellate review. We acknowledge, as discussed above, that by not objecting to the trial court's failure to consider visitation costs, Respondent did not "fail[] to preserve the[] issue[] for appeal." *In re E.C.*, 174 N.C. App. at 520, 621 S.E.2d at 650. In that instance, the costs associated with supervised visitation were neither discussed at the hearing nor consented to by Respondent. In contrast, at the 18 July 2018 hearing, the trial court squarely addressed the conditions of visitation, including the role of Family Abuse Services, and Respondent expressly agreed to the terms.

This Court has addressed preservation in this specific context in the unpublished opinion *In re R.C.*, 196 N.C. App. 789, 675 S.E.2d 720, 2209 WL 1200874 (2009) (unpublished). There, during the permanency planning hearing, the "respondent's counsel specifically advised the court that [the] respondent 'does not have a problem' with the trial court's adopting YFS's recommendation as to [the juvenile] that custody be vested in R.C." *Id.* at *2. This Court held, "[b]ecause [the] respondent consented to the grant of [the juvenile's] custody to R.C. and to divesting YFS of custody over [the juvenile], [the] respondent did not properly preserve for appeal her contentions regarding the permanency planning order as it pertained to [the juvenile]. Simply put, she invited any error." *Id.* at *3.

In the present case, Respondent and DSS entered into an agreement prior to the 18 July 2018 hearing: Respondent consented to "guardianship being granted to her parents if [DSS] and GAL revised their recommendations in regards [sic] to suspension of her visitation[.]" In addition to providing each party a typed copy of DSS's recommendation, a social worker read the recommendation in open court:

> That the respondent mother can continue to have visitation once a week for one hour supervised by Family Abuse

> Services. That if the respondent mother misses two consecutive visits or two out of the five visits . . . the visitation will be suspended and will not be reinstated until further order of the Court. That prior to visitation beginning the respondent mother shall obtain an updated CCA including mental health and substance abuse assessment and submit to a drug screen. She shall enroll in treatment as recommended by the CCA. The respondent mother must admit documentation to Family Abuse Services verifying that she's obtained such and is enrolled in treatment with a state approved treatment program. If the respondent mother appears at visitation and appears to be under the influence the visitation shall be terminated and there should be no further visitation until further order of the Court.

Respondent did not object to the terms of DSS's revised recommendation on visitation. Indeed, the trial court specifically addressed the terms of DSS's recommendation with Respondent's attorney:

> THE COURT: But your client does understand though that if she fails to provide the necessary criminal backgrounds, the necessary documentation, and setting up at Family Abuse Services and following all of their requirements that that is not going to be the fault of the grandparents. *She will not be able to go and have visitation. She understands that?*
>
> [RESPONDENT'S COUNSEL]: *Yes Your Honor.*
>
> . . . .
>
> THE COURT: And, would you like the Court to accept [DSS's] recommendations?
>
> [RESPONDENT'S COUNSEL]: We do accept that she be – the modification where she'd be allowed to have those visits and *we thank the Court for the opportunity to continue the visits.*

DSS's revised recommendation, as agreed upon by the parties and read in open court, was memorialized in the permanency planning order. Therefore, because Respondent consented to the terms of DSS's revised recommendation regarding the conditions required for visitation and the role of Family Abuses Services, she "did not properly preserve for appeal [these] contentions regarding the permanency planning order[.]" *In re R.C.*, 2009 WL 1200874, at *3.

III. Concurrent Plan of Reunification

[5] Respondent contends the trial court erred by not making reunification a concurrent permanent plan. Respondent has not preserved this issue for appellate review.

As discussed above, Respondent agreed to guardianship of her children with the grandparents in exchange for visitation with her children. The trial court expressly addressed this issue at the hearing:

> THE COURT: And, it[']s my understanding attorney Skeen that your client is going to consent at this point to guardianship being placed with the grandparents so long as that modification is changed in relation to being able to have visitation once a week at the Family Justice Center?
>
> [RESPONDENT'S COUNSEL]: That's correct Your Honor.

Subsequently, the trial court stated, "[r]eunification stops today." Respondent's counsel responded, "*[r]ight*, *she knew that* but, in doing so will allow her to have increased visitation[.]" Respondent did not object to the elimination of reunification as a permanent plan. The trial court explicitly stated that reunification would cease on the day of the hearing, and Respondent's counsel acknowledged Respondent's understanding of that fact. Therefore, Respondent consented to the cessation of reunification efforts in order to retain visitation rights. As a result, she has waived review of this issue on appeal.

Conclusion

In sum, because we interpret N.C.G.S. § 7B–906.1(n)(1) as requiring a continuous, unbroken "period of at least one year," we vacate the portion of the permanency planning order waiving review hearings and remand the matter for further proceedings. We also vacate the portion of the permanency planning order pertaining to visitation, and remand for the trial court to make findings as to the cost of supervised visitation, the person responsible for paying the cost and, if that person is Respondent, her ability to pay the cost. Additionally, on remand, we instruct the court to state its clear instructions regarding the duration and frequency of Respondent's visitation rights. The remainder of the permanency planning order is affirmed.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Judges BRYANT and BROOK concur.

IN RE S.B.

[268 N.C. App. 78 (2019)]

IN THE MATTER OF S.B., Z.O.

No. COA19-141

Filed 15 October 2019

1. Child Abuse, Dependency, and Neglect—permanency planning order—guardianship—ceasing reunification efforts—findings of fact

In a neglect and dependency case, where the trial court entered a permanency planning order granting legal guardianship of a mother's two children to their aunt, the court did not err in ceasing reunification efforts with the mother where it made the required factual findings under N.C.G.S. §§ 7B-906.1(d)(3) and 7B-906.2 regarding whether reunification efforts would be unsuccessful or inconsistent with the children's health and safety. Specifically, the court made several findings showing the mother struggled with substance abuse and consistently failed to acknowledge or improve the issue despite its adverse effect on her children. Moreover, because the trial court established guardianship as the permanent plan for the children, there was no need to include a secondary plan of reunification in its order.

2. Child Abuse, Dependency, and Neglect—permanency planning order—aunt—legal guardian—understanding of legal significance—adequate resources

In a neglect and dependency case, the trial court properly entered a permanency planning order granting legal guardianship of a mother's two children to their aunt where competent evidence—including a social worker's testimony and a court summary by the Department of Social Services—showed the aunt understood the legal significance of guardianship and had adequate financial resources to care for the children (N.C.G.S. § 7B-600(c)). The trial court did not need to hear testimony from the aunt to determine whether she understood the legal implications of guardianship.

Appeal by respondent-mother from order entered 9 November 2018 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 19 September 2019.

Stephenson & Fleming, LLP, by Angenette Stephenson, for petitioner-appellee Orange County Department of Social Services.

Dorothy Hairston Mitchell for respondent-appellant mother.

Parker, Poe, Adams & Bernstein, L.L.P., by Mary Katherine H. Stukes, for guardian ad litem.

ARROWOOD, Judge.

Respondent-mother appeals from the trial court's orders granting legal guardianship of her sons S.B. ("Sonny") and Z.O. ("Zion") (collectively, "the children")[1] to their maternal aunt ("Aunt"). For the following reasons, we affirm.

I. Background

Respondent-mother is the biological mother of Sonny and Zion, born on 10 December 2007 and 2 November 2011 respectively. Orange County Department of Social Services ("OCDSS") has been involved with issues related to the care, health, and safety of respondent-mother's children since 2011. OCDSS first formally interviewed the children in 2017 after receiving a report from Truancy Court about Sonny's numerous unexcused absences and tardiness at school and amid concerns of respondent-mother's substance abuse at home around the children.

On 15 May 2017, OCDSS filed juvenile petitions alleging that Sonny and Zion were neglected and dependent. Orders for non-secure custody were filed the same day. The children were adjudicated neglected and dependent at a hearing on 6 July 2017. At a review hearing on 21 September 2017, the trial court determined it was in the children's best interest to remain in OCDSS custody and provided thirteen recommendations. These recommendations included respondent-mother having supervised weekly visitation, participating in weekly therapy to address mental health issues, and taking steps to address her substance abuse problems, such as enrollment in various programs and submitting to random drug screens.

The trial court entered an order for unlicensed placement on 6 October 2017 so that the children could be placed with Aunt. Review hearings were held in September and December of 2017. On 15 March 2018, a permanency planning hearing was held. At this hearing, the trial court determined that Aunt's guardianship would be the primary plan and reunification with respondent-mother would be the secondary plan for the children.

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1. A pseudonym is used to protect the juveniles' privacy and for ease of reading.

The final permanency planning hearing was held on 18 October 2018. The children's social worker Eliza Gibson testified at this hearing and recommended guardianship of the children to Aunt. Ms. Gibson testified that she had discussed with Aunt the legal responsibilities associated with guardianship. She further testified that during their discussion Aunt indicated that she understood these responsibilities. Aunt was present at the hearing but did not testify. On 9 November 2018, the trial court entered an order awarding legal guardianship to Aunt, terminating OCDSS custody, and relieving the guardian *ad litem*. Respondent-mother entered a notice of appeal.

II. Discussion

On appeal, respondent-mother argues the trial court erred by: (1) removing reunification from the permanent plan and granting guardianship to Aunt without making all the required statutory findings under N.C. Gen. Stat. §§ 7B-906.1, 906.2 (2017), and (2) relying on insufficient evidence in its finding that Aunt understood the legal significance of being appointed as the children's guardian and that Aunt would have adequate resources to care for the children. We address each argument in turn.

A. Compliance with the Required Statutory Findings for Orders of Guardianship and Removal of Reunification from the Permanent Plan

[1] Respondent-mother first argues that, in a permanency planning order where reunification of a child with his parent was not a primary or secondary plan, the trial court was required to include explicit findings of fact directly referencing the relevant criterion in N.C. Gen. Stat. §§ 7B-906.1(d)(3) and 906.2(b) regarding whether reunification efforts would be unsuccessful or inconsistent with the children's health and safety. Respondent-mother contends that the trial court was required to "first show how reunification was no longer a viable option before deciding whether or not it was appropriate to eliminate reunification by making another plan the only plan, and actually implementing that other plan." We disagree.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law. The trial court's conclusions of law are reviewable *de novo* on appeal." *Matter of I.K.*, 260 N.C. App. 547, 550, 818 S.E.2d 359, 362 (2018) (internal quotation marks and citations omitted).

1. Whether Reunification Efforts Would Be Unsuccessful or Inconsistent with the Children's Health and Safety

At each permanency planning hearing, the trial court "shall consider the [ ] criteria [of N.C. Gen. Stat. § 7B-906.1(d)] and make written findings regarding those that are relevant[.]" N.C. Gen. Stat. § 7B-906.1(d) (2017). In the instant case, the relevant criterion at issue is "[w]hether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3).

A trial court's determination that reunification will clearly be unsuccessful or inconsistent with the juvenile's health, safety, or need for stability within a reasonable time "is in the nature of a conclusion of law that must be supported by adequate findings of fact." *In re J.H.*, 244 N.C. App. 255, 276, 780 S.E.2d 228, 243 (2015) (citation and internal quotation marks omitted). "[T]he order must make clear that the trial court considered the evidence in light of . . . [this criterion.] The trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 167–68, 752 S.E.2d 453, 455 (2013) (internal citations omitted) (referencing same criterion in N.C. Gen. Stat. § 7B-507(b) regarding placement of children with county departments of social services).

Respondent-mother argues that, "There are no findings that support that [r]espondent-[m]other's lack of progress on her case plan show that she had reached a point where further efforts would be futile and there are no findings that show that her lack of progress has affected the children's safety." We disagree.

The trial court made numerous factual findings to support the conclusion that further efforts to reunite the children with respondent-mother would be unsuccessful. These include, among others:

> 21. On November 3, 2017, Respondent mother told the social worker that her therapist only calls her to check in. Upon verification of this information, it was learned that Respondent mother's last session was September 18, 2017 due to Respondent mother's lack of motivation to change and she did [sic] take responsibility for issues that led to OCDSS custody.
>
> 22. Respondent mother was ordered to complete a psychological evaluation with parental competency upon

sixty (60) days sobriety, but she did not complete the evaluation. During the case, Respondent mother either tested positive or refused requested screens.

23. Respondent mother's therapist, Mr. Daye, diagnosed Respondent mother with alcohol dependence. In June 2017, she entered Freedom House detox, but she did not follow up with scheduling a follow up appointment with Freedom House for recommended treatment. During this month, she also tested positive for cocaine and marijuana.

24. In September 2017, Respondent mother was screened for Family Treatment Court (FTC); however, she was found ineligible because she failed to acknowledge any substance use issues and did not want to engage in treatment.

25. Respondent mother subsequently contacted the FTC Case Manager about participation after she reported some clean time, but she did not attend the December 4, 2017 session. Her referral was due to close [in] February 2018, but OCDSS requested that she be allowed to participate in FTC and she attended the February 26, 2018 session.

26. On May 7, 2018 Respondent mother was terminated unsuccessfully from FTC due to missed screenings, failing to acknowledge a substance use problem, lack of engagement in treatment, and behavior detrimental to the FTC program.

27. Respondent mother was recommended to continue substance abuse support groups at Freedom House, but she did not continue to attend after her discharge from FTC until July 31, 2018. She has since attended six group sessions.

28. Respondent mother's drug screens have been mostly not completed or positive for substances. After termination from FTC, Respondent mother was referred to 8 screens, with 6 not completed, one clean, and results pending at the time of hearing. Respondent mother has specifically requested screens three times which precludes her from referral.

29. Respondent mother was referred to parenting classes with Linda Boldin to whom she was referred by Truancy Court. Although she was supposed to attend weekly classes, Respondent mother stopped meeting with Ms. Boldin in September 2017. After multiple referrals, Respondent mother completed a condensed 1.5-hour sessions instead of six sessions with Ms. Boldin in April 2018. In working with Ms. Boldin, Respondent mother did not take responsibility for agency custody nor acknowledge the progress she needed to make for reunification with the juveniles.

30. Respondent mother has attended [Sonny's] MTSS meetings at his school during the academic school year. Respondent mother has trouble acknowledging the need for behavior interventions which causes some tension with the school at some meetings.

These findings show that respondent-mother is still struggling with a substance abuse problem and has failed to make significant strides to acknowledge her problem or improve her situation. Caretakers with substance abuse issues pose a threat to the safety of children in their care. In fact, respondent-mother's behavior has impacted the children's health and safety in the past. Zion tested positive for marijuana at birth, and respondent-mother has previously left both children in the car unsupervised, leading to a misdemeanor child abuse charge.

Furthermore, the trial court expressly found that "[i]t is not possible for the juveniles to be placed with a parent within the next six months. Such placement is not in the juveniles' best interest because Respondent mother has not successfully engaged in reunification services[.]" It further found that "[r]espondent parents have acted inconsistently with their protected status as parents" and that "[t]he juveniles should remain in the current placement because it is currently meeting their needs and in their best interest." Respondent-mother correctly notes that the former finding more directly addresses N.C. Gen. Stat. § 7B-906.1(e) (listing criteria additional to N.C. Gen. Stat. § 906.1(d) when placement is not with a child's parent), and argues that this finding cannot be used to satisfy N.C. Gen. Stat. § 7B-906.1(d)(3) because it "[did] not address any time beyond [six months]" and should have "relate[d] specifically to [N.C. Gen. Stat.] § 906.1(d)(3)[.]" Pursuant to *In re L.M.T.*, we see no reason why the trial court's findings of fact, taken as a whole, cannot sufficiently address the concerns of multiple statutory criteria without more explicit reference to each. The trial court's findings as to why

reunification would be unsuccessful within the next six months also address the likelihood of success for attempts at reunification beyond that time.

The trial court made numerous factual findings tending to show that: (a) allowing more time for further efforts by respondent-mother towards reunification would be unsuccessful, and (b) respondent-mother's lack of personal progress towards sobriety and failure to acknowledge the role her substance abuse problem has played in the children's current situation would threaten their future health and safety. Therefore, the trial court fulfilled the statutory requirement of N.C. Gen. Stat. § 7B-906.1(d)(3).

2. Removing Reunification as Secondary Plan

Next, respondent-mother argues that the trial court erred by removing reunification from the plan at the final permanency planning hearing in violation of N.C. Gen. Stat. § 7B-906.2 (2017). This argument is without merit.

Concurrent planning is required only "until a permanent plan has been achieved." N.C. Gen. Stat. § 7B-906.2(a1). The trial court established the primary plan of Aunt's guardianship as the permanent plan in its 9 November 2018 order, stating that, "The permanent plan has been achieved. Pursuant to [N.C. Gen. Stat.] § 7B-906.2(a1), concurrent planning is no longer required." Because the trial court established a permanent plan for the children, there was no need to include a secondary plan of reunification in its order. *See Matter of D.A.*, 258 N.C. App. 247, 252, 811 S.E.2d 729, 733 (2018) ("[A] permanent order, without further scheduled hearings, effectively ceases reunification efforts."); *Matter of I.A.*, 259 N.C. App. 250, 812 S.E.2d 730, 2018 WL 1802404, at*3 (2018) (unpublished) (stating that reunification efforts may cease when the permanent plan has been achieved so long as there are statutory findings).

Respondent-mother next contends that reunification should have remained a goal because the trial court failed to make any written findings under N.C. Gen. Stat. § 7B-906.2(b).

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan unless the court made findings under [N.C. Gen. Stat. §] 7B-901(c) or *makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with*

> *the juvenile's health or safety*. The court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C. Gen. Stat. § 7B-906.2(b) (emphasis added).

Section 7B-906.2(d) of the General Statutes describes what those written findings should include:

> At any permanency planning hearing under [N.C. Gen. Stat. § 7B-906.2(b), (c)], the court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d).

Despite respondent-mother's contention to the contrary, the trial court made explicit findings mirroring the language of N.C. Gen. Stat. § 7B-906.2(d):

> Pursuant to [N.C. Gen. Stat.] § 7B-906.2(d), the following demonstrate a lack of success:
>
> a. Respondent mother is not making adequate progress within a reasonable period of time under her plan. Respondent fathers do not have the present ability or desire for custody of either juvenile.
>
> b. Respondent parents have demonstrated some level of cooperation with the plan, the department, and the juveniles' Guardian ad Litem.

c. Respondent parents remain available to the Court, OCDSS, and the juveniles' Guardian ad Litem.

d. Respondent parents' lack of engagement with reunification services is inconsistent with the health or safety of the juvenile.

The trial court's written findings fulfill the relevant statutory requirements and establish that reunification would be inconsistent with the health or safety of the children. As mentioned *supra* section 1, the trial court noted plenty of evidence in its findings to support this conclusion. Therefore, because the trial court made the requisite statutory findings, it did not err in ordering a permanent plan ceasing reunification efforts with respondent-mother.

B. Sufficiency of Evidence for Guardianship Order

[2] Finally, respondent-mother argues that the trial court erred in granting guardianship of the children to Aunt by relying on insufficient evidence that Aunt understood the legal significance of being appointed guardian and would have adequate resources to care for the children. We disagree.

> Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law. Before a trial court may appoint a guardian of the person for a juvenile in a Chapter 7B case, the court must verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile. [T]he trial court need not make detailed findings of evidentiary facts or extensive findings regarding the guardian's situation and resources, . . . [but] some evidence of the guardian's resources is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence. The court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

Matter of N.H., 255 N.C. App. 501, 502-503, 804 S.E.2d 841, 843 (2017) (alterations in original) (internal quotation marks and citations omitted).

1. Aunt's Understanding

Respondent-mother argues that the trial court's finding that Aunt understood the legal significance of guardianship is not supported by adequate evidence. We disagree.

"If the court appoints an individual guardian of the person pursuant to this section, the court shall verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c) (2017).

> 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 [N.C. Gen. Stat. §] 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. Gen. Stat. § 7B-906.1(j) (emphasis added).

In its order, the trial court made the following finding concerning Aunt:

> 45. [Aunt] was present in Court. The Court verified that [Aunt] understands that she is being appointed as guardian of the juveniles, understand [sic] the legal significance of the appointment, and will have adequate resources to care appropriately for the juveniles.

Respondent-mother contends this finding is not supported by actual evidence. While Aunt was present at the hearing, she did not testify. An OCDSS social worker assigned to the children's case testified that:

> [Aunt] has always said she'll care for the children as long as needed. She wants to keep them in their family, she knows they're doing really well with her, she loves them very much. And, of course, we often talk about the fact that we both wish they could be with their mother but that if they can't, you know, this is a really good placement for them and so she's been really consistent of her commitment to the children.

The trial court also admitted the OCDSS court summary into evidence, which states the following:

> [Aunt], proposed guardian for [the children], has been informed of the legal significance of guardianship. [Aunt] is aware that guardianship means she will be responsible for the care, custody, and control of [the children], who will remain in their [sic] care, or she may arrange a suitable placement for [the children].
>
> [Aunt] has demonstrated an understanding that she may represent [the children] in legal actions before any concert and they [sic] may consent to certain actions on the part of [the children] in place of the parent including (i) marriage, (ii) enlisting in the Armed Forces, and (iii) enrollment in school. [Aunt] is aware that they [sic] may consent to any necessary remedial, psychological, medical, or surgical treatment for [the children].
>
> [Aunt] is aware that the role of guardian is permanent.

Respondent-mother argues that there is no way to assess Aunt's actual understanding from the testimony or court summary provided by the social worker. Respondent-mother contends that the only way for the trial court to determine Aunt's understanding was to hear testimony from her at the hearing. Though this may have been best practice, testimony by Aunt was not necessary for the trial court to find that she understood the legal implications of guardianship.

> At each hearing, the court shall consider information from the parents, the juvenile, the guardian, any person providing care for the juvenile, the custodian or agency with custody, the guardian ad litem, and any other person or agency that will aid in the court's review. The court may consider any evidence, including hearsay evidence . . ., or testimony or evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-906.1(c). The testimony of the social worker and the court summary were relevant and reliable evidence.

N.C. Gen. Stat. § 7B-906.1(j) states that the trial court "shall verify" that the guardian "understands the legal significance of the placement or appointment[.]" It does not say that the guardian must demonstrate to the trial court a practical application of this understanding prior to or during the hearing. Therefore, the trial court did not err in finding that Aunt understood the legal significance of her appointment.

2. Aunt's Resources

Respondent-mother further argues that the trial court's finding that Aunt will have adequate resources to care for the children is unsupported by evidence. We disagree.

In its order, the trial court found:

> 46. There is sufficient household income and resources to care appropriately for the juveniles. [Aunt] has cared for the juvenile's [sic] since September 29, 2017, and she is aware of the financial commitment of providing for their care. She is employed part-time, and she receives financial and material support from her family, including Respondent mother. She is aware of her eligibility for child support from Respondent parents.
>
> 47. The juveniles' eligibility for Medicaid will continue with an award of guardianship to [Aunt] to cover the medical, dental, and mental health services.

When asked if Aunt has the ability to meet the children's needs, the OCDSS social worker testified as follows regarding Aunt's financial situation:

> Yes. In fact, she has been, you know, providing for them very well over the past year. As a kinship provider, she does not get a board payment, unfortunately. She gets financial support from her family. [Respondent-mother] provides for the children as well, and so, all of their needs have been able to be met really within their family system.

Because there was evidence in the record that Aunt understood her financial responsibilities, had income from a part-time job, and had financial support from family members, respondent-mother's argument is unsupported. The trial court did not err in finding that Aunt had adequate financial resources to care for the children.

III. Conclusion

For the reasons discussed, we affirm.

AFFIRMED.

Judges ZACHARY and HAMPSON concur.

JUBILEE CAROLINA, LLC, PETITIONER
v.
TOWN OF CAROLINA BEACH, NORTH CAROLINA,
CAROLINA BEACH DEVELOPMENT COMPANY 1, LLC, AND
WILMINGTON HOLDING COMPANY, RESPONDENTS

No. COA18-1108

Filed 15 October 2019

1. Zoning—conditional use permit—issue raised for first time on appeal—lack of jurisdiction

Where a property owner failed to raise an issue at a conditional use permit hearing before a town council—that it had a vested right to interconnectivity which should have been considered before the town granted a permit to the owner of an adjacent property—neither the trial court nor the Court of Appeals had jurisdiction to hear that issue on review.

2. Zoning—conditional use permit—whole record test—substantial evidence

The trial court properly used the whole record test to determine that a town council's decision to grant a conditional use permit without an interconnectivity requirement was supported by competent, material, and substantial evidence and was not arbitrary and capricious.

Appeal by petitioner from order entered 3 May 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2019.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F. E. Smith and S. Leigh Rodenbough IV, for petitioner-appellant.

Craige & Fox, PLLC, by Charlotte Noel Fox, for respondent-appellee Town of Carolina Beach.

Fox Rothschild LLP, by Kip D. Nelson and Thomas E. Terrell, Jr., for respondent-appellee Carolina Beach Development Company 1, LLC.

Ward and Smith, P.A., by Thomas S. Babel, for respondent-appellee Wilmington Holding Company.

BRYANT, Judge.

Where the superior court properly reviewed and determined that the Town Council's decision was based on competent, material, and substantial evidence in the record, we affirm the superior court's ruling.

This matter involves a zoning decision by respondent Town of Carolina Beach ("the Town"), approving a conditional use permit for respondent Carolina Beach Development Company 1, LLC ("CBDC") to develop a Publix grocery store in a shopping center owned by respondent Wilmington Holding Company ("WHC") (collectively referred to as "respondents"), which affected the adjacent commercial parcel owned by petitioner Jubilee Carolina, LLC ("Jubilee").

On 15 February 2017, Jubilee applied for a conditional use permit to construct a Harris Teeter grocery store on its property at Carolina Beach, North Carolina. Jubilee's application included a proposed site plan with respect to the Harris Teeter and provided interconnectivity to common access points between WHC's property and Jubilee's property for vehicular traffic. A hearing was held on Jubilee's request for a conditional use permit on 11 April 2017. A representative of WHC was present and spoke in support of Jubilee's application. The Town Council approved Jubilee's site plan with interconnectivity and granted a conditional use permit ("Jubilee Permit"). As a condition of the Jubilee Permit, Jubilee entered an easement agreement with the Town, which allowed the Town to construct and maintain a storm water facility on Jubilee's property.

Meanwhile, CBDC entered into a contract with WHC to purchase WHC's property, adjacent to Jubilee's proposed Harris Teeter site, and redevelop that property for a Publix grocery store. On 6 November 2017, CBDC applied for a conditional use permit with a proposed site plan that excluded interconnectivity to Jubilee's property. The Town's planning and zoning commission, after reviewing CBDC's application and proposed site plan in advance of the public hearing, recommended approval of CBDC's application on the condition that CBDC provide interconnectivity or a "stub out" to Jubilee's property once it was developed.

On 9 January 2018, the Town Council held a public hearing for consideration of CBDC's application. At the hearing, Jubilee stated its approval of CBDC's application for a conditional use permit provided that interconnectivity was required to Jubilee's property. However, CBDC indicated that it did not intend to provide interconnectivity as the proposed Harris Teeter was "an economic competitor" and, if such interconnectivity was required, CBDC would withdraw the application.

The Town Council approved CBDC's conditional use permit but did not adopt the recommendation to include interconnectivity to Jubilee's property ("CBDC Permit")—finding that "interconnectivity [was] not required under the Town's ordinance."

On 8 February 2018, Jubilee filed a petition for writ of certiorari before the New Hanover County Superior Court seeking review of the decision to grant the CBDC Permit—specifically, asserting that the Town acted arbitrarily and capriciously, that the decision was not supported by substantial evidence, and that Jubilee had a statutory vested right to interconnectivity in its conditional use permit.

On 3 May 2018, the Honorable R. Kent Harrell, Superior Court Judge presiding, issued an order finding that Jubilee's vested rights argument was not properly before the superior court, and upheld the decision to grant the CBDC Permit without interconnectivity. Jubilee appealed.

I

[1] Before this Court, Jubilee argues that the Town Council's findings in support of its decision to grant the CBDC Permit without interconnectivity were erroneous because it favored CBDC's interests over Jubilee. Additionally, Jubilee argues that it acquired a statutory vested right to interconnectivity and the Town Council failed to consider that vested right before granting the CBDC Permit. Conversely, respondents argue that Jubilee failed to assert the vested rights argument before the Town Council, and therefore, this Court does not have jurisdiction to analyze the issue. We first address respondents' argument as to this Court's jurisdiction.

"[A] determination of the 'vested rights' issue requires resolution of *questions of fact*, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures." *Godfrey v. Zoning Bd. of Adjustment of Union Cty.*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986) (emphasis added). "Fact finding is not a function of our appellate courts." *Id.* "The [superior] court, reviewing the decision of a town board on a conditional use permit application, sits in the posture of an appellate court. The [superior] court does not review the sufficiency of evidence presented to it but reviews that evidence presented to the town board." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 626–27, 265 S.E.2d 379, 383 (1980). Thus, "the superior court, and hence this Court through our derivative appellate jurisdiction, [has] the statutory power to review only the issue

of whether the [conditional use permit] was properly denied." *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985).

In the instant case, we agree with respondent: the record reveals that Jubilee raised the issue of vested rights for the first time before the superior court in their petition for writ of certiorari. Jubilee did not argue that it had a vested right to interconnectivity at the CBDC Permit hearing before the Town Council. Rather, Jubilee presented evidence of their site plan and argued that without interconnectivity, the Harris Teeter site plan would need to be redesigned. As such, the issue of vested rights was not properly raised before the Town Council at the CBDC Permit hearing, and therefore, no necessary findings of fact were entered.

Given that the decision to grant the CBDC Permit never addressed whether Jubilee acquired a statutory vested right, it was improper for Jubilee to assert the issue for the first time before the superior court as the review was limited to "errors of law appearing on the face of the record." *Godfrey*, 317 N.C. at 62, 344 S.E.2d at 279. Moreover, as the superior court was without jurisdiction to hear this issue, this Court is, likewise, without jurisdiction.[1]

II

[2] Jubilee also argues that the superior court erred in affirming the Town's decision to grant the CBDC Permit because the findings of fact were not supported by substantial evidence and the Town Council's decision was arbitrary and capricious. We disagree.

"[W]hen sufficiency of the evidence is challenged or when a decision by a city council denying a [conditional use permit] is alleged to have been arbitrary or capricious, the reviewing court must employ the whole record test." *SBA, Inc. v. City of Asheville City Council*, 141 N.C. App. 19, 26, 539 S.E.2d 18, 22 (2000). "The whole record test requires that the trial court examine all competent evidence to determine whether

1. Had this issue of vested rights been properly before us, we would be constrained to reject Jubilee's statutory vested rights argument. A *site plan* alone is not sufficient to acquire a vested right under the Town's ordinances. *See* CAROLINA BEACH, N.C., CODE § 40-397(b)(4), (c)(7)–(8) (2018) (stating that "[a]ny property owner wishing to establish [a] vested right shall make their intentions known in writing to the town at the time of submittal of the *site-specific development plan*" with proper notation that "approval of this site-specific development plan establishes a vested right under G.S. 160A-385.1" (emphasis added)). Nothing in the record shows that Jubilee possessed a site-specific development plan which could form the basis of a statutory vested right.

the decision was supported by substantial evidence." *Hopkins v. Nash Cty.*, 149 N.C. App. 446, 448, 560 S.E.2d 592, 594 (2002). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id.* at 449, 560 S.E.2d at 594 (citation and quotation marks omitted).

On appeal, "[t]his Court's task on review of the superior court's order is twofold: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *SBA*, 141 N.C. App. at 23, 539 S.E.2d at 20 (citation and internal quotation marks omitted). "Our review is whether the [superior] court, in applying the 'whole record test,' properly determined that the [Town Council] made sufficient findings of fact which were supported by the evidence in an effort to prevent decisions from being arbitrary and capricious." *Robertson v. Zoning Bd. of Adjustment for City of Charlotte*, 167 N.C. App. 531, 534, 605 S.E.2d 723, 725 (2004). "The [superior] court's decision may be reversed as arbitrary and capricious if petitioners establish that the [Town Council]'s decision was whimsical, made patently in bad faith, indicate[d] a lack of fair and careful consideration, or fail[s] to indicate any course of reasoning and the exercise of judgment." *Id.* (alterations in original) (citation and quotation marks omitted).

Here, the superior court reviewed the record, considered arguments from the parties, and issued the following findings of fact and conclusions of law:

> There is no evidence in the record that interconnectivity was required between adjoining parcels in order for the decision making board to approve the permit requested.
>
> The recommendations of a town planning staff or zoning commission are not binding on the decision making board, in this case the town council.
>
> . . . .
>
> The findings of fact in the record are based on substantial, material, and competent evidence and indicate a thoughtful and reasoned process. Review of the transcript and of the video recording of these proceedings confirms that the decision of the board was the result of a deliberative process and that consideration was given to the arguments made by [Jubilee] regarding interconnectivity. The fact that those arguments were rejected does not render the decision arbitrary or capricious.

. . . .

> There is no evidence before this Court that any member had a fixed opinion prior to the hearing that was not susceptible to change. Nor is there evidence of undisclosed ex-parte communication, or close familial or business relationships.
>
> [Jubilee] argues that the discussions between members of the board and the applicant over the possible purchase of fill [dirt] from the town for use on the site constituted a financial interest in the outcome of the matter. However, the permit was not issued on condition that the applicant purchase fill material from the town and that same fill material was offered to [Jubilee] for use on its site.
>
> Further, [Jubilee] failed to object in the hearing to further participation by the member of the board who raised the issue.
>
> "Due process rights" relate to the ability of a party to present evidence, cross examine witness[es] and be heard. The record reflects that [Jubilee] was afforded all of those rights during the hearing.
>
> . . . .
>
> Those findings of fact were supported by substantial, material and competent evidence, were not in violation of [Jubilee's] constitutional rights, were not arbitrary or capricious, and were not in excess of the council's statutory authority.

Based on the superior court's findings, it is apparent that the superior court properly reviewed the allegations under the whole record test. There was substantial evidence to support the superior court's findings as the weight of the evidence established that CBDC met the requirements to receive the CBDC Permit and Jubilee did not present any evidence to rebut its issuance. *See Davidson Cty. Broad., Inc. v. Rowan Cty. Bd. of Comm'rs*, 186 N.C. App. 81, 86, 649 S.E.2d 904, 909 (2007) ("If an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a [conditional] use permit [as] *prima facie*[,] he is entitled to it. If a *prima facie* case is established, a denial of the permit then should be based upon findings contra which are supported by competent, material, and substantial evidence

appearing in the record" (citation omitted)). Jubilee stated that it was "in support of the project" as long as interconnectivity was required. However, the Town Council found that the requirement for interconnectivity was not enforced during the deliberation for the Jubilee Permit, and therefore, to require interconnectivity for the CBDC Permit would be improper. While Jubilee contends that the Town Council was motivated by a discriminatory purpose to favor the CBDC Permit because CBDC might use the fill dirt in the possession of the Town, we reject that contention as the evidence supports that Jubilee was offered the same opportunity to use the fill dirt by the Town. Thus, on this record, the superior court properly applied the whole record test and did not err in finding and concluding that the Town Council's decision was based on competent, material, and substantial evidence in the record and was not arbitrary and capricious.

Accordingly, for the aforementioned reasons, we affirm the superior court's ruling.

AFFIRMED.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
HAROLD CLYDE GRIFFIN, JR.

No. COA18-1164

Filed 15 October 2019

Evidence—expert opinion—forensic firearms analysis—Rule 702—reliability

There was no plain error in a murder trial from the admission of testimony from an expert in forensic firearms examination and analysis that gun cartridge casings found at the murder scene came from a firearm recovered in a field near defendant's property. The lengthy testimony demonstrated that the expert conducted her examination of the firearm, bullets, and cartridges according to reliable procedures and methods which she learned during training and which she applied to the facts of this case in order to arrive at her opinion.

Appeal by Defendant from judgment entered 29 March 2018 by Judge Wayland J. Sermons, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 9 May 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Adren L. Harris, for the State-Appellee.

Leslie Rawls for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon a jury's verdict finding him guilty of first-degree murder. Defendant contends the trial court plainly erred by admitting the expert opinion testimony of a forensic firearms examiner because the opinion testimony did not satisfy the standards for expert opinion under the North Carolina Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). We discern no error.

I. Procedural History

On 11 January 2016, Defendant Harold Clyde Griffin, Jr., was indicted on the charge of first-degree murder for the killing of Timothy Leon Stokley, III. On 26 March 2018, Defendant's case came on for trial upon his not guilty plea. That same day, the jury returned a verdict finding Defendant guilty of first-degree murder. The trial court entered judgment upon the jury's verdict, sentencing Defendant to life in prison without the possibility of parole. From entry of judgment, Defendant gave oral notice of appeal.

II. Factual Background

The evidence presented at trial tended to show the following: On the night of 30 December 2015, several individuals, including Defendant, Jessica Skinner, and Lela Reid, decided to go out partying. The party began at Defendant's home, where they hung out and drank alcohol in Defendant's front yard. Skinner and Reid noticed a "dark-skinned man with dreads" speaking with Defendant; they soon learned that the man was Stokley.

Approximately 20 minutes after introducing Skinner and Reid to Stokley, Defendant asked Skinner to give Stokley a ride home. Skinner sat in the driver's seat of her Trailblazer SUV; Reid sat in the front,

passenger-side seat; Defendant sat in the back, passenger-side seat; and Stokley sat in the back, driver-side seat behind Skinner.

At some point, Skinner pulled the Trailblazer off of the road and stopped next to a field. Skinner and Reid had consumed quite a few beers and needed to use the bathroom. Skinner noticed that Defendant and Stokley had both stepped out of the Trailblazer. Skinner had not fully exited the Trailblazer to use the bathroom when she heard three gun shots ring out. Reid heard gun shots, "a thump," and Stokley's scream.

Defendant stepped back into the Trailblazer, and sat behind Skinner in the back, driver-side seat. Defendant pressed a gun into Skinner's side and demanded that she follow his directions. Stokley did not return to the Trailblazer. Defendant instructed Skinner to drive around for a while, and then said to Skinner and Reid, "Instead of one body it will be three."

Defendant instructed Skinner to drive past the area where Stokley's body lay, and then demanded that Skinner drive Defendant back to his home. Skinner complied, drove Defendant back to his property, and watched Defendant remove his Army fatigue jacket and walk off into the darkness. Skinner and Reid left Defendant's property and returned to Skinner's apartment; neither woman contacted law enforcement.

Just before midnight, Andrea Smith Jones spotted something in the middle of the road, and noticed a pair of shoes sticking out from underneath it. Jones then realized that it was a body lying in the middle of the road. When she arrived home, Jones grabbed her husband and the two of them drove back to the scene. When her husband realized that the body was that of a dead human, he called 911.

First responders from the Newland Fire Department and Pasquotank County Sheriff's Office arrived at the scene and found Stokley's body. Upon inspection, the first responders determined that Stokley was unresponsive and had no pulse. Crime scene investigators recovered five cartridge casings from the area around Stokley's body and collected two bullets from Stokley's hair and body.

While the responding officers were still on the scene, dispatch informed them that a suspicious vehicle had been seen leaving the area. Sergeant Steven Judd left the scene and drove around for a short period of time, but did not see a vehicle. As he returned to the scene, Judd watched a vehicle stop at a stop sign on Campground Road and then pull out in front of him; Judd ran the vehicle's tag, which came back as registered to Skinner. Judd did not initiate a traffic stop of Skinner's vehicle, but instead returned to the crime scene.

Around 4 January 2017, Skinner and Reid were contacted by the sheriff's office. Detectives separately interviewed Skinner and Reid, both of whom provided details of the incident during the interview and testified to those details at trial. Based on what detectives learned from Skinner and Reid, the sheriff's office obtained a search warrant for Defendant's home and property on Campground Road. On 5 January 2017, officers executed the search warrant and found a camouflage jacket in a field on the adjacent property; the jacket was wrapped around a firearm and covered with field brush. At trial, Skinner and Reid both identified the camouflage jacket as belonging to Defendant, and Skinner stated that Defendant "had it on the night of the shooting." Investigators sent the firearm, bullets, and cartridge casings to the North Carolina State Crime Lab (the "Crime Lab") to be analyzed.

Elizabeth Fields, an agent in the Firearms Unit at the Crime Lab, was accepted at trial without objection as an expert in forensic firearms examinations and analysis. She testified that based upon her examination of the firearm recovered from the field adjacent to Defendant's property and the cartridge casings recovered from the crime scene, it was her opinion that the cartridge casings came from the recovered firearm.

III. Discussion

Defendant's sole argument on appeal is that the trial court erred by admitting Fields' expert opinion testimony that the cartridge casings found at the crime scene came from the firearm recovered from the field adjacent to Defendant's property. Defendant specifically argues that Fields' testimony did not satisfy the reliability standards for expert opinion under Rule of Evidence 702, *Daubert*, and *McGrady*.[1]

Defendant acknowledges his failure to object at trial to the admission of Fields' testimony and, pursuant to N.C. R. App. P. 10(a)(4), specifically argues on appeal that the trial court's admission of this testimony constitutes plain error. "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

It is the trial court's role to decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2018). Rule 702 of the North

1. This State has adopted the *Daubert* standard applicable to expert opinion testimony as recognized in *McGrady*.

Carolina Rules of Evidence governs testimony by experts. Pertinent to Defendant's argument, Rule 702 provides as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2018). Prongs (a)(1), (2), and (3) together constitute the reliability inquiry discussed in *Daubert*, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9. "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate[.]" *Id.* (internal quotation marks and citations omitted).

> In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, so they do not form "a definitive checklist or test," *id.* at 593. And the trial court is free to consider

> other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150.

McGrady, 368 N.C. at 890-91, 787 S.E.2d at 9-10.

Trial courts are "afforded wide latitude of discretion when making a determination about the admissibility of expert testimony" under Rule 702. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Accordingly, "a trial court's ruling on the admissibility of expert testimony 'will not be reversed on appeal absent a showing of abuse of discretion.' " *State v. Godwin*, 369 N.C. 604, 610-11, 800 S.E.2d 47, 51 (2017) (quoting *McGrady*, 368 N.C. at 893, 787 S.E.2d at 11) (other citations omitted).

The entirety of Defendant's substantive argument on appeal is as follows:

> In the present case, Fields testified to her opinion that the items recovered from the crime scene were fired from the gun recovered from the property adjacent to [Defendant's] home. The State's evidence, however, does not establish that "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." [*McGrady*, 368 N.C. at 885, 787 S.E.2d at 6]. She did testify to her training in firearms identification. Nevertheless, her testimony did not establish that she satisfied the requisite prongs for such expert testimony.
>
> When asked about the processes she applied, Fields said when she is assigned a case, she checks the firearm to be sure it's safe and functional. This evidence does not establish that she uses expert knowledge. More importantly, it does not establish that she applied reliable principles and methods to the testing in this case. She then testified that she fired from the gun into a water tank and compared those projectiles with the ones recovered from the scene. Her testimony did not establish that she'd satisfied *Daubert's* three prongs.
>
> . . . . The testimony was insufficient to show that Fields used reliable principles and methods and applied them to the materials here as required by *McGrady* and *Daubert*. She testified in a summary fashion without establishing

> the scientific community's recognition of the standards applied. Although she testified to her education and training, being well-trained or educated does not alone satisfy the requirements for expert testimony. Therefore, the testimony here was inadmissible, and the trial court erred by admitting it.

Defendant severely misrepresents Fields' opinion testimony by briefly summarizing a few lines of testimony while omitting the bulk of the testimony, and bases his argument on the unsupported and conclusory allegation that the testimony was insufficient to satisfy *Daubert*. Our review of the transcript reveals that Fields' opinion testimony was sufficient to demonstrate the reliability of the principles and methodology she used, *Joiner*, 522 U.S. at 146, and to satisfy the three prongs of the reliability inquiry. *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9.

Fields was accepted by the court, without objection, as an expert in the field of forensic firearms examination based on the following testimony:

> [Fields]: I received my Bachelor of Science Degree in biochemistry, cellular and molecular biology from the University of Tennessee. I received my Master of Science Degree in forensic science from the University of New Haven. While completing my Master's I completed a course in firearm evidence analysis, which covered topics including firearm function, ammunition function, and the relation between firearms and ammunition. I then completed in-house training program with the North Carolina State Crime Laboratory. And I completed this in two phases. The first phase covered history of firearms, safety, ammunition, class characteristics, serial number restoration and microscopy. Those allow me to testify in cases involving firearm function, caliber determination, and serial number restoration. I then completed a second phase of training which covered manufacturing and individual characteristics, as well as presentation of evidence. I then completed that training in July of 2017, and that allowed me to complete cases involving forensic firearm identification.
>
> . . . .
>
> [State]: [Did] you have the opportunity to actually conduct examinations of firearms and ballistics?

[Fields]: Yes, it was part of my training to do practical exercises.

[State]: Did they test you to see if you were proficient at identifying whether a particular bullet or a cartridge was fired from a particular gun?

[Fields]: Yes.

[State]: Did you have to pass that in order to qualify to do this job?

[Fields]: Yes.

[State]: Was this a practical exam or how did it work?

[Fields]: There was practical exams at the end of every module within the unit. And at the end each phase they had a mock case that I completed, which included a whole trial process, mock trial.

[State]: During your career at the North Carolina Crime Lab, how many examinations of firearms, shell casings and cartridges do you believe you performed?

[Fields]: Thousands.

[State]: And with each one of those cases do you generate a report?

[Fields]: Yes.

[State]: And for each one of those cases what is the policy of the lab as far as any type of peer review?

[Fields]: All of our cases go-- undergo a hundred percent review.

[State]: What does that mean?

[Fields]: It means each examination I do, once I reach my conclusion, another examiner will then examine the same evidence and reach a conclusion to make sure that both of our conclusions are the same.

. . . .

[State]: So is their review independent?

[Fields]: Yes. They will have my notes when they do it but they will examine the evidence on their own.

> [State]: So have you ever testified in court before?
>
> [Fields]: Yes.
>
> . . . .
>
> [State]: And were you qualified as an expert in firearms examination?
>
> [Fields]: Yes.

When asked by the State what makes firearms identification possible, Fields testified:

> [A]ll firearms are unique during the manufacturing process. The tools used to create the firearms will have random imperfections and irregularities that will then transfer these unique characteristics to the surface of the firearm. It's much like when you use sandpaper, it will change with each use so each firearm will be slightly different in the individual markings that are left on it. And then during the firing process these marks are then transferred from the surface of the firearm to the surface of the ammunition components . . . . Once I receive evidence I can view these individual things under a comparison microscope.

Fields next explained the procedures and methods she used when analyzing the bullets in the instant case:

> [Fields]: When I first receive the firearm I will first make sure that it's safe and unloaded and then I will begin a function test.
>
> [State]: And what is a function test?
>
> [Fields]: So a function test involves making sure the firearm functions as it's intended. I will check to make sure that there are (sic) no external damage to the firearm, that all safeties that are present are working correctly. I will check for internal damage. I will check the magazine capacity cycling capabilities and create test fires.
>
> . . . .
>
> [Fields]: Once I checked that the firearm was safe to fire, I selected ammunition components that were similar to those submitted for comparison and then I created the test fires by firing into a water tank.

[State]: Why did you fire into a water tank?

[Fields]: When we need to keep the bullets, firing into a water tank prevents the bullets from being damaged in any way.

. . . .

[State]: So after you do a function test on a weapon like K-1 there, what is your next step in the examination?

[Fields]: After the function test and the test fires are created I will then compare the test fire on the microscope to ensure that the details from the firearm are replicating well. And if I'm able to identify the test fires to each other then I will move on to comparing any questioned evidence that I have.

[State]: How many times did you fire that particular firearm for test firing?

[Fields]: I believe it was three times. Six times. I created six test fires.

[State]: And you described firing into water, is that correct?

[Fields]: Yes.

. . . .

[State]: And so what is the purpose of you actually doing these test fires and producing these bullets?

[Fields]: Producing the test fires will confirm that the firearm is functioning properly. And also it will allow items to be created to be compared to any evidence item submitted.

. . . .

[Fields]: I examined [the bullet] for any class characteristics. When I first received the item I labeled the packaging and removed the item and cleaned it of any-- if there is any materials on it and then I weighed it, measured it, diameter and engraved it with case number and my initials.

[State]: When you talk about class characteristics, can you explain to the jury what you are referring to there?

[Fields]: The class characteristics are one of the two characteristics we observe in our examination. Class

characteristics are a more broad group. They're an indicated restrictive group source and they are determined prior to manufacturing.

[State]: So give me an example of what a class characteristic will be?

[Fields]: With bullets, a class characteristic will be caliber, direction of twist or number of lands and grooves.

. . . .

[Fields]: Lands and grooves are what make up the rifling and therefore the direction of twist within the barrel of the firearm and they are just raising the lowered portions that are cut into the barrel that will impart the spin on the bullet.

. . . .

[Fields]: I determined the caliber to be caliber 38 class, nine millimeter. Also determined there to be six land and groove impressions and a right direction of twist.

[State]: And is that under a microscopic exam?

[Fields]: The direction of twist can be determined visually. The lands and grooves are generally used under a stereoscope and the caliber is determined through a combination of the weight and diameter and design.

[State]: So after you did that portion of the examination, what did you do?

[Fields]: After I completed that portion I then began my comparison to the test items I created.

. . . .

[Fields]: So when I examine the test fires I will determine which was producing the characteristics the best compared to the characteristics that I might be looking for on the questioned item. Then I would try to locate an alignment between the test item and the questioned item and alignment meaning the lands and grooves would be like in phases rotating together. In this case I focused on T-4 to the T-6 test fires. The T-1 through T-3 had some slippage which means the land and grooves did not engage properly

> with the bullets when they were fired. So I use a different material to create the next three test fires. I examined the bullet facing to the left and right to determine-- see if the individual characteristics were better viewed with the lighting from one way or another. And I compared like T-4, 5 and 6 all to Q-6.
>
> . . . .

Fields next explained the procedures and methods she used when analyzing the cartridge casings in the instant case:

> Q. How do you do [examine cartridge casings]?
>
> A. It's similar to the way that I would examine the fired bullets. I will examine the cartridge case for class characteristics, usually the caliber stands on the head stamp which is the face of [. . .] where the primer is located. And its class characteristics will be based on the detail left on its breech face.
>
> . . . .
>
> [State]: So, ma'am, please explain the process with these shell casings, cartridge casings, on how you did your comparison between your test fires versus the items sent to you by the Sheriff's Department?
>
> [Fields]: The same way that I examined the test fires to each other just like with the bullets. I first check to be sure the details were producing from the firearm and once I determine that they were, I then compared the questioned items to the test fires on the comparison microscope.
>
> [State]: Did you do that for each of the five shell casings that the Sheriff's Department sent you?
>
> [Fields]: Yes.
>
> [State]: And what did you learn based on your examination?
>
> [Fields]: Q-1, 2, 3, 4, and 5 cartridge casings were fired in the K-1 pistol.
>
> [State]: Make sure I understand that correctly. You're saying that those shell casings came out of that gun, they were fired from that gun?

[Fields]: Yes.

[State]: And did you prepare a report regarding your findings in this case?

[Fields]: Yes.

Fields' opinion testimony shows that: (1) she was formally educated and trained in forensic science and in the field of firearms examination; (2) she tested and analyzed the firearm, bullets, and cartridge casings in keeping with the procedures and methods learned during her specialized training in firearms examination; (3) her tests generated data, which she analyzed and used to form an opinion on whether or not the bullets and casings came from the recovered firearm; and (4) the data and conclusion were described in a written report and subsequently peer-reviewed by one of Fields' colleagues in the Firearms Unit. The trial court has the discretion to "use those factors that it believes will best help it determine whether the testimony is reliable," *McGrady*, 368 N.C. at 890, 787 S.E.2d at 9, and these factors support a determination that Fields' opinion testimony was reliable.

During cross-examination, Defendant's counsel asked Fields about the national standards set forth by the Association of Firearm and Tool Mark Examiners ("AFTE"). Fields explained that she and her peers at the Crime Lab all use the same national standard when completing their work, and that the standard comes from the AFTE. Fields explained that, for firearms examinations in general, there is an accepted error rate of one percent, and that she does not yet have an error rate because, based on her proficiency test and her examinations that are reviewed by another examiner, she has not yet made an error. Fields then testified about various reports and studies conducted on the field of firearms analysis. We note that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking . . . admissible evidence." *Daubert*, 509 U.S. at 596. "These conventional devices, rather than wholesale exclusion . . . are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Id.*

As Fields' testimony shows that her opinion was the product of reliable principles and methods, and that she reliably applied the principles and methods to the facts of the case, we conclude that the trial court did not abuse its discretion, much less plainly err, in admitting Fields' expert opinion testimony on forensic firearms examination. *See Godwin*, 369 N.C. at 611, 800 S.E.2d at 51.

IV. Conclusion

For the reasons stated herein, we hold that the trial court did not err by admitting Fields' expert opinion testimony. Defendant received a fair trial, free of error.

NO ERROR.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
LUIS ALBERTO RESENDIZ-MERLOS

No. COA19-149

Filed 15 October 2019

1. Appeal and Error—preservation of issues—mistrial—double jeopardy

Where defendant's first trial for taking indecent liberties with a child was declared a mistrial and defendant moved to dismiss his second trial for that offense on double jeopardy grounds, his appeal of the order denying his motion to dismiss necessarily included review of the prior mistrial order, even though defendant only appealed the dismissal order. Additionally, defendant's motion to dismiss adequately preserved his double jeopardy argument for appellate review, even though he never used the phrase "I object" when doing so.

2. Constitutional Law—double jeopardy—declaration of mistrial—over defendant's objection—no manifest necessity

In a prosecution for taking indecent liberties with a child, defendant's double jeopardy rights precluded his second trial on the same charge where the first trial, over his objection, was declared a mistrial after the State's key witnesses (including the victim and her mother) failed to appear in court. The State lacked any evidence showing defendant caused the witnesses not to appear, and therefore no manifest necessity existed justifying a mistrial in the first place. Moreover, by impaneling the jury in the first trial despite knowing its key witnesses were absent, the State assumed the risk that defendant would later raise a double jeopardy defense.

Appeal by Defendant from Order entered 21 August 2018 by Judge Gary Gavenus in Watauga County Superior Court. Heard in the Court of Appeals 5 June 2019.

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

Reeves DiVenere Wright, by John B. "Jak" Reeves and Anné C. Wright, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Luis Alberto Resendiz-Merlos (Defendant) appeals from the trial court's Order on Defendant's Motion to Dismiss (Motion to Dismiss Order). The Record tends to show the following:

On 27 November 2017, Defendant was indicted on one count of Indecent Liberties with a Child. The Indictment alleged Defendant took indecent liberties with Y.B.G., who was a minor at the time of the alleged incident. M.G. is the mother of Y.B.G. and her sister A.B.G.,[1] who allegedly witnessed the incident leading to Defendant's Indictment. Given their relationship with Defendant and his alleged criminal conduct, the State intended to call M.G. and her two daughters as witnesses at Defendant's trial.

Defendant's case came on for trial before Judge Alan Z. Thornburg (Judge Thornburg) on 22 May 2018. The same morning, Defendant was arraigned and pleaded not guilty, and later that afternoon at approximately 3:00 p.m., the jury was impaneled. After opening remarks from both the State and defense counsel, Judge Thornburg released the jury for the day. Thereafter, the State requested a show-cause order for M.G., explaining:

> [M.G.] was personally served with a subpoena to be here and appear herself, as well as bring her two minor children. And she was to be here at 2 p.m. today, did not show up. We've tried to call her multiple times, both her cell phone and her place of work. We were told she did not show up for work today.

1. Initials have been used to protect the privacy of the mother and her two daughters.

> We have been in contact with the school who confirmed that the children were at school until around 12:30, I believe, but she checked them out then and there has been no further contact. The interpreter from the school also tried to contact her and there was no answer. I also do have some information from a deputy that went out to her house, and he said it appeared to him someone was home but no one would come to the door. So that is the information from him.

Judge Thornburg then heard from defense counsel regarding the State's motion for a show-cause order. Defense counsel stated, "we're here, ready to proceed. Based upon conversations with the State I think it's pretty readily apparent that the victim's mother does not wish to prosecute this case. My understanding, I don't think any of them do. We'd ask the matter be dismissed." Judge Thornburg then issued an order to show cause why M.G. should not be held in contempt of court and set a hearing for 9:30 a.m. the following morning.

The next morning, on 23 May 2018, M.G. and her two children did not show up to court. Judge Thornburg was informed that a sheriff had visited M.G.'s residence the previous night and that morning but could not locate her. The State requested the trial court issue an order for M.G.'s arrest, and arguing in response, defense counsel apprised the trial court:

> Your Honor. If my client had not been here to start a trial yesterday an order for arrest would have been issued immediately. He was present. He is ready to proceed. We would oppose the case being held open any longer. The case was held open yesterday.
>
> On the record yesterday I asked that the matter be dismissed. Again, I will ask that it be dismissed. I do not think that it would be appropriate to grant a mistrial. If my client hadn't shown I don't [sic] the Court would have granted a mistrial for the defense. So, I would ask that the matter be dismissed and not held open.

Thereafter, Judge Thornburg issued an order for M.G.'s arrest and held the matter open until 12:30 that afternoon.

When the case resumed that afternoon, M.G.'s whereabouts were still unknown. The State moved for a mistrial under N.C. Gen. Stat. § 15A-1063(1), and the trial court heard arguments from both parties regarding the motion. During its argument, the State conceded it did not

have sufficient evidence to assert that Defendant in any way caused the witnesses' absence. Rather, the State asserted M.G., Y.B.G., and A.B.G. were necessary and essential witnesses and that their absence had made it "impossible for the trial to proceed in conformity with law" under Section 15A-1063(1), thereby requiring the trial court to grant a mistrial. In response, defense counsel argued against granting a mistrial, citing applicable case law and statutes. After hearing both sides' arguments, Judge Thornburg found that "all three [witnesses were] unavailable for trial due to no fault of the State or the defendant" and that their absence "deprived the State it's [sic] ability to present its case and to meet its burden of proof." Therefore, Judge Thornburg orally declared a mistrial pursuant to Section 15A-1063(1).

On 5 June 2018, Defendant filed a Motion to Dismiss arguing "that to be tried on this matter again would violate his constitutional protections against double jeopardy." Defendant's Motion to Dismiss came on for a hearing on 12 June 2018 before the trial court. After hearing arguments from both sides, the trial court took the matter under advisement. On 13 June 2018, the trial court entered an Order continuing the hearing on Defendant's Motion to Dismiss until "the entry of any Order by Judge Thornburg granting a mistrial." On 15 June 2018, Judge Thornburg entered a written Order on State's Motion for Mistrial (Mistrial Order) granting the State's motion for a mistrial.

On 5 July 2018, Judge Gary Gavenus (Judge Gavenus) heard arguments regarding Defendant's Motion to Dismiss. Judge Gavenus denied Defendant's Motion to Dismiss in open court, and on 21 August 2018, Judge Gavenus entered his Motion to Dismiss Order, which contained the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That on August 17, 2017, the defendant was charged with Taking Indecent Liberties with a Child.

2. That on May 22, 2018, the defendant entered a plea of not guilty and a jury was subsequently impaneled.

3. That on May 23, 2018, the State made an oral motion for a mistrial based on the fact that the alleged victim in this case, who is a minor child, her sister, who is also a minor child, and the children's mother were not present in court, despite having been subpoenaed, and could not readily be located by law enforcement.

4. That the Defendant objected to the motion on that date and presented argument as to why it should not be granted.

5. That the Honorable Alan Z. Thornburg granted the State's motion over Defendant's objection and entered an Order declaring a mistrial and concluding as a matter of law that the unavailability of all three witnesses made it impossible for the trial to proceed in conformity with the law.

CONCLUSIONS OF LAW

. . . .

2. That in order to grant Defendant's Motion, the Court would have to make a finding that Judge Thornburg's Order for Mistrial was inappropriate;

3. That this Court is not an appellate one and thus, cannot overrule another Superior Court judge's Order[.]

Based on these Findings and Conclusions, Judge Gavenus denied Defendant's Motion to Dismiss.

On 26 September 2018, Defendant filed with this Court a Petition for Writ of Certiorari, Petition for Writ of Supersedeas, and Motion for Temporary Stay Pending Decision (Certiorari Petition). In his Certiorari Petition, Defendant requested this Court issue a "writ of certiorari to the Superior Court of Watauga County to permit review of Judge Gavenus' order denying Defendant's Motion to Dismiss, and Judge Thornburg's Order declaring a mistrial." By Order on 5 October 2018, our Court granted Defendant's Certiorari Petition "for the purpose of reviewing the order entered 21 August 2018 by Judge Gary Gavenus."

Issue

The dispositive issue on appeal is whether Judge Gavenus erred in denying Defendant's Motion to Dismiss on the grounds that double jeopardy barred Defendant's second trial.

Standard of Review

We review double jeopardy issues de novo. *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658 (2008); *see State v. Newman*, 186 N.C. App. 382, 386, 651 S.E.2d 584, 587 (2007) ("The standard of review for [double jeopardy issues] is *de novo*, as the trial court made a legal conclusion

regarding the defendant's exposure to double jeopardy." (citation omitted)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Analysis

I. Preservation Issues

[1] As a threshold matter, the State asserts our review in this case is limited for two reasons. First, the State contends that because our Order granting Defendant's Certiorari Petition only granted review of Judge Gavenus's Motion to Dismiss Order, we cannot address whether Judge Thornburg erred by entering his Mistrial Order. However, as our Supreme Court has made clear, "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges *must be granted*." *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986) (emphasis added) (citations omitted). It necessarily follows that in order to determine whether Judge Gavenus erred by failing to grant Defendant's Motion to Dismiss, we must consider whether Judge Thornburg's "order of mistrial [was] improperly entered over [Defendant's] objection[.]" *Id.* (citations omitted).

We also find support for this position in this Court's decision in *State v. Schalow*, 251 N.C. App. 334, 795 S.E.2d 567 (2016), *disc. rev. improvidently allowed*, 370 N.C. 525, 809 S.E.2d 579 (2018). In *Schalow*, the defendant was charged and indicted for attempted murder. *Id.* at 336, 795 S.E.2d at 570. After the jury was impaneled, the trial judge alerted the parties to the fact that the indictment was potentially fatal. *Id.* at 337, 795 S.E.2d at 570. Thereafter, the State requested the trial court dismiss the indictment as defective, and the defendant objected. *Id.* The trial court then dismissed the indictment and declared a mistrial. *Id.* Prior to the defendant's second trial, the defendant filed a motion to dismiss arguing his prosecution was barred by his right to be free from double jeopardy, which motion the trial court denied. *Id.* at 337-38, 795 S.E.2d at 570.

The defendant in *Schalow* then petitioned this Court for a writ of certiorari, "request[ing] this Court to stay and reverse [the second trial court's] orders denying Defendant's motion to dismiss and habeas relief." *Id.* at 338, 795 S.E.2d at 571. Although our Court erroneously denied the defendant's petition, after the defendant's conviction at his second trial, the defendant appealed, and our Court reviewed the first trial court's

mistrial order to determine whether the second trial court erred by denying the defendant's motion to dismiss based on double jeopardy grounds. *Id.* at 339-43, 795 S.E.2d at 571-74. Thus, even though the defendant only petitioned our Court to review the order denying his motion to dismiss, our review after his second trial encompassed both this order and the first trial court's mistrial order. *Id.* Therefore, in the case *sub judice*, our review of Judge Gavenus's Motion to Dismiss Order necessarily entails a review of whether Judge Thornburg's Mistrial Order was erroneously entered. *See id.*; *see also Odom*, 316 N.C. at 310, 341 S.E.2d at 334.

The State further argues our review is limited in this case because Defendant failed to preserve his double jeopardy claim by not objecting to Judge Thornburg's declaration of a mistrial. According to the State, Defendant was required to state "I object" in order to preserve his double jeopardy argument for appellate review.

In support of this argument, the State cites *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986). Our Supreme Court in *Lachat* held that in "a noncapital case, . . . a defendant is not entitled by reason of former jeopardy to dismissal of the charge against him, where he failed to object to the trial court's termination of his first trial by a declaration of mistrial." *Id.* at 85, 343 S.E.2d at 878 (citation omitted). Our Supreme Court's pronouncement in *Lachat* is in accord with the general rule that "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted). "In order to preserve a question for appellate review, a party must have presented the trial court with a timely *request*, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991) (emphasis added) (citation omitted).

Here, when the State requested a show-cause order on 22 May 2018, Defendant asked the trial court to dismiss the case. The next day, the State asked the trial court for an order for M.G.'s arrest, and Defendant again objected, stating: "We would oppose the case being held open any longer. . . . Again, I will ask that it be dismissed. I do not think that it would be appropriate to grant a mistrial. . . . So, I would ask that the matter be dismissed and not held open." Later that afternoon, the State moved for a mistrial, and Defendant argued against granting a mistrial and cited two cases in support of his argument that there is not "enough [evidence] for the Court to make the finding that there is a manifest necessity for a mistrial in this case." Although Defendant never formally

recited the word "objection" or noted any "exception" to the trial court's declaration of a mistrial, he did "present[] the trial court with a timely request" to deny the State's motion for a mistrial, "stating the specific grounds for the ruling sought[.]" *Id.* (citation omitted). Moreover, Judge Thornburg clearly understood these arguments and defense counsel's request and ruled on those very issues in granting a mistrial. Therefore, Defendant properly raised this issue before Judge Thornburg, which adequately preserved it for appeal.[2] *See* N.C. Gen. Stat. § 15A-1446(a) (2017) ("No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court.").

In any event, the *Lachat* Court recognized the objection requirement was limited to situations where a defendant is given notice and opportunity to object before a mistrial is declared but fails to do so. However, the trial court's declaration of mistrial in *Lachat* was "entered on the trial court's own motion and without prior notice or warning to the defendant." 317 N.C. at 86, 343 S.E.2d at 879. The *Lachat* Court determined that "require[ing the defendant] to go through the formality of objecting after a mistrial had already been declared or lose her protection against double jeopardy would be a triumph of form over substance[,] . . . particularly [where] the defendant properly raised the issue of former jeopardy before the commencement of the second trial by filing her written motion to dismiss the charge against her[.]" *Id.* at 86-87, 343 S.E.2d at 879. Thus, according to *Lachat*, "it was the trial court's denial of [the motion to dismiss at the second trial] which preserved this issue for appeal." *Id.* at 87, 343 S.E.2d at 879. Just as in *Lachat*, Defendant here properly raised his former jeopardy defense before the second trial by filing his Motion to Dismiss on double jeopardy grounds, and it was the trial court's denial of this Motion that preserved this issue for appeal. *See id.*

II. Double Jeopardy

[2] Having determined the issues surrounding Defendant's appeal are properly before us, we now turn to whether Judge Gavenus erred by denying Defendant's Motion to Dismiss. We acknowledge Judge Gavenus did not base his ruling on double jeopardy principles, instead premising the decision on the principle that one superior court judge may not overrule another. However, this line of reasoning runs contrary to our

2. In his Motion to Dismiss Order, Judge Gavenus also expressly found "Defendant objected to the motion on [23 May 2018]" and that Judge Thornburg "granted the State's motion over Defendant's objection[.]"

Supreme Court's edict in *Odom*—"where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges must be granted." 316 N.C. at 310, 341 S.E.2d at 334 (citations omitted). Therefore, the question for this Court becomes whether Defendant's right to be free from double jeopardy precludes his second trial, thereby requiring the trial court to grant his Motion to Dismiss.

"It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) (citations omitted); *see* U.S. Const. amend. V; N.C. Const. art. I, § 19. Under the Double Jeopardy Clause of the Fifth Amendment, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may [not] be tried . . . a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 154 L. Ed. 2d 588, 595 (2003) (citation omitted). "In a criminal prosecution, jeopardy attaches when a jury is impaneled to try a defendant on a valid bill of indictment." *Schalow*, 251 N.C. App. at 343, 795 S.E.2d at 574 (citations omitted).

Ordinarily, "an order of mistrial in a criminal case will not support a plea of former jeopardy." *State v. Battle*, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971) (citation omitted). However, "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial on the same charges must be granted." *Odom*, 316 N.C. at 310, 341 S.E.2d at 334 (citations omitted). "There must be a showing of 'manifest necessity' for an order of mistrial over defendant's objection to be proper." *Id.* (citation omitted); *see State v. Chriscoe*, 87 N.C. App. 404, 407-08, 360 S.E.2d 812, 814 (1987) (analyzing a trial court's declaration of mistrial under N.C. Gen. Stat. § 15A-1063(1)—which allows a trial court to declare a mistrial "if it is impossible for the trial to proceed in conformity with the law"—according to our "manifest necessity" principles). "Although this requirement does not describe a standard that can be applied mechanically, it does establish that the prosecutor's burden is a heavy one." *Chriscoe*, 87 N.C. App. at 407, 360 S.E.2d at 814 (alteration, citation, and quotation marks omitted); *see State v. Cooley*, 47 N.C. App. 376, 384, 268 S.E.2d 87, 92 (1980) ("[W]hen the prosecution seeks a mistrial, it has the burden of showing a high degree of necessity[.]" (citation omitted)).

"Our courts have set forth two types of manifest necessity: physical necessity and the necessity of doing justice." *Schalow*, 251 N.C. App. at 348, 795 S.E.2d at 576 (citation omitted). "For example, physical

necessity occurs in situations where a juror suddenly takes ill in such a manner that wholly disqualifies him from proceeding with the trial." *Id.* (citation omitted). "Whereas the necessity of doing justice arises from the duty of the [trial] court to guard the administration of justice from fraudulent practices and includes the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law." *Id.* at 348, 795 S.E.2d at 576-77 (citation and quotation marks omitted); *see Chriscoe*, 87 N.C. App. at 408, 360 S.E.2d at 814 (listing examples of manifest necessity under N.C. Gen. Stat. § 15A-1063(1), such as "some incapacity of either a member of the court, a juror or an attorney, or evidence of jury tampering" (citations omitted)). Further, as the United States Supreme Court has recognized, when, as here, "the basis for the mistrial is the unavailability of critical prosecution evidence," we must apply "the strictest scrutiny" to the question of manifest necessity. *Arizona v. Washington*, 434 U.S. 497, 508, 54 L. Ed. 2d 717, 730 (1978).

In *Chriscoe*, the defendant was accused of engaging in sexual relations with his stepdaughter, who was then a minor, and his first trial ended in a mistrial after the trial court concluded manifest necessity existed. 87 N.C. App. at 405-07, 360 S.E.2d at 812-13. During the first trial, the State called the alleged victim to testify, and "[a]fter giving her name and answering several general questions, she refused to respond to further questioning by the prosecutor or the trial judge." *Id.* at 405, 360 S.E.2d at 812. The State moved for a mistrial, which the defendant objected to, and the trial court found that manifest necessity existed for granting a mistrial. *Id.* at 405-07, 360 S.E.2d at 812-13. At his second trial, the defendant filed a motion to dismiss for former jeopardy, which the trial court denied. *Id.* at 407, 360 S.E.2d at 813. Thereafter, the defendant was convicted of second-degree sexual offense and appealed to this Court. *Id.*

On appeal, the defendant argued the trial court erred by denying his motion to dismiss for former jeopardy because there was no showing of manifest necessity. Our Court agreed, reasoning:

> We recognize that the prosecutor was placed in a difficult position when his key witness suddenly refused to cooperate. However, the record here is devoid of *any evidence* of misconduct. There is no testimony from anyone to suggest that the witness was influenced improperly. The Court's power to declare a mistrial must be exercised with caution and only after careful consideration of all available evidence and only after making the requisite findings of fact on the basis of

> evidence before the Court at the time judicial inquiring is made. The record here contains innuendo and suspicion only. Although the court followed the mandate to make findings, there is no evidence on which those findings could be based.

Id. at 408, 360 S.E.2d at 814 (citation and quotation marks omitted). Therefore, this Court reversed the trial court's order denying the defendant's motion to dismiss and held: "When a mistrial is improperly ordered over defendant's objection, a plea of former jeopardy must be granted." *Id.* (citation omitted).

As in *Chriscoe*, the State in the present case "was placed in a difficult position when [its] key witness[es] suddenly refused to cooperate. However, the record here is devoid of *any evidence* of misconduct." *Id.* Specifically, the State conceded it did not have sufficient evidence to assert that Defendant in any way caused the witnesses not to appear. Therefore, without any evidence that Defendant instigated the witnesses' absence, no manifest necessity existed, and the trial court erred by denying Defendant's Motion to Dismiss. *See id.*

We also find support for this conclusion from the case of *Downum v. United States*, 372 U.S. 734, 10 L. Ed. 2d 100 (1963). The *Downum* Court explained that the focus of a double jeopardy inquiry is on the State's knowledge at the time the jury is impaneled. Specifically, the Court highlighted that when the State impanels a jury "without first ascertaining" that its witnesses are present, the State "t[akes] a chance." *Id.* at 737, 10 L. Ed. 2d at 103 (citation and quotation marks omitted). Under these circumstances, according to the Court, the State has "entered upon the trial of the case without sufficient evidence to convict[,]" thereby assuming the risk of jeopardy attaching and barring a later prosecution. *Id.* (citation and quotation marks omitted). The Court also noted that in analyzing these types of cases, "[w]e resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." *Id.* at 738, 10 L. Ed. 2d at 104 (citation and quotation marks omitted).

Applying *Downum* to the case *sub judice*, it is clear the State took a chance by impaneling the jury "without first ascertaining" that its witnesses, M.G. and her two children, were present and available to testify. The Record shows the State had subpoenaed all three witnesses prior to the trial commencing on 22 May 2018. At approximately 3:00 p.m. on that day, the jury was impaneled. However, after releasing the jury for the day, the State explained M.G. "was to be here at 2 p.m. today, did

not show up. We've tried to call her multiple times, both her cell phone and her place of work." The State also notified Judge Thornburg that it had contacted the children's school and sent a deputy to M.G.'s house but could not locate her. The State's explanation illustrates it knew that its key witnesses were not present, yet the State proceeded to impanel the jury anyway, thereby assuming the risk of Defendant's later plea of double jeopardy. *See id.* at 737-38, 10 L. Ed. 2d at 103-04 (citations omitted); *see also Washington*, 434 U.S. at 508 n.24, 54 L. Ed. 2d at 730 n.24 ("If . . . a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason, a second prosecution is barred." (citation omitted)).

Thus, applying the "strictest scrutiny" as required by the United States Supreme Court, we conclude no manifest necessity existed and the trial court erred by denying Defendant's Motion to Dismiss. *See Washington*, 434 U.S. at 508, 54 L. Ed. 2d at 730; *see also Chriscoe*, 87 N.C. App. at 407, 360 S.E.2d at 814 (declaring that in establishing manifest necessity, "the prosecutor's burden is a heavy one" (citation and quotation marks omitted)). Therefore, we must reverse the Motion to Dismiss Order and remand to the trial court with instructions to grant Defendant's Motion to Dismiss.

Conclusion

For the foregoing reasons, we reverse the trial court's Motion to Dismiss Order and remand to the trial court with instructions to grant Defendant's Motion to Dismiss.

REVERSED AND REMANDED.

Judges DIETZ and BERGER concur.

STATE v. THOMAS

[268 N.C. App. 121 (2019)]

STATE OF NORTH CAROLINA
v.
DANNY LAMONT THOMAS

No. COA19-25

Filed 15 October 2019

1. Search and Seizure—attenuation doctrine—cell phone location data—intervening circumstances—flagrancy

The trial court properly denied a first-degree murder defendant's motion to suppress where law enforcement officers' use of cell phone location data to find defendant in another state was too attenuated from the discovery of evidence in the house where defendant was staying. Assuming the search of defendant's cell phone location data was unconstitutional, the intervening circumstances (defendant shooting a rifle at officers after the homeowner consented to a search of the home) and the lack of flagrancy in the unconstitutional search (the officers obtaining the information pursuant to a N.C. law that was valid at the time) rendered the evidence seized in the home admissible under the attenuation doctrine.

2. Kidnapping—after commission of another felony—moving victim to another part of the house

There was sufficient evidence to convict defendant of kidnapping where he robbed the victim of her car keys with a dangerous weapon and then continued to move and restrain her beyond what was necessary to rob her, by forcing her at gunpoint to walk through her house to the living room and then attempting to shoot her in the head in front of her children (the gun jammed).

3. Evidence—other crimes, wrongs, or acts—prior violent incident—not formally charged—substantially similar

The trial court did not err by admitting evidence under Evidence Rule 404(b) about a prior violent incident, for which defendant was never formally charged, to prove defendant's identity in a trial for a string of murders and related offenses where the incident was substantially similar to the crimes charged. The common elements included: the perpetrator wearing a white hockey mask with holes in it (which was seized when defendant was apprehended), the targets being suspected drug dealers, the incidents being close in time and location, and the incidents involving matching bullet shell casings (matching the gun seized when defendant was apprehended).

The evidence also was admissible under Evidence Rule 403 because of the similarities and temporal proximity between the incidents.

Appeal by defendant from judgments entered 30 August 2017 by Judge Douglas B. Sasser in Columbus County Superior Court. Heard in the Court of Appeals 19 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Jonathan P. Babb, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant.

ARROWOOD, Judge.

Danny Lamont Thomas ("defendant") appeals from judgments sentencing him to four consecutive life sentences without parole and additional sentences totaling a minimum of 385 months to a maximum of 623 months in prison. On appeal, defendant contends the trial court erred in denying his motion to suppress, motion to dismiss, and in admitting certain evidence under N.C. Gen. Stat. § 8C-1, Rule 404(b). After careful review, we affirm.

I. Background

Defendant was originally tried and convicted of a number of crimes on 5 May 2011. *State v. Thomas*, 230 N.C. 127, 748 S.E.2d 620 (2013). On appeal, we reversed and remanded for a new trial upon concluding defendant was denied his right to remove a juror with a peremptory challenge. *Id.* at 133, 748 S.E.2d at 624. Defendant was re-tried and then convicted on 30 August 2017 of four counts of first-degree murder, one count of attempted first-degree murder, one count of robbery with a firearm, one count of attempted robbery with a dangerous weapon, three counts of second-degree kidnapping, one count of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of first-degree burglary for a string of offenses committed on 20 August 2005, 10 September 2005, and 5 November 2005.

The State's evidence at trial tended to show the following facts. The Durham Police Department issued an arrest warrant for defendant in connection with a homicide committed in Durham in July 2005. After noticing similarities between the Durham homicide and three homicides committed in Columbus County, the Columbus County Sheriff's Office and North Carolina SBI agents also began searching for defendant. U.S. Marshals assisted Durham police officers in tracking a phone number

associated with defendant that was listed under the name "Markeeta Crutchfield." On 8 December 2005, Deputy Steven Warden of the El Paso County Sheriff's Office in Colorado went to 2305 Lexington Village Lane in Colorado Springs to assist the U.S. Marshals in apprehending a fugitive from North Carolina. Deputy Warden and other law enforcement set up surveillance of the residence, which was owned by Yvette Jurnett ("Jurnett"). When Jurnett arrived home, the deputies asked if they could speak to her and she agreed. They showed her a picture of defendant and asked if he was in her home. She told them it looks like the man staying in her house but she knew him as "Santana." Jurnett gave Deputy Warden consent to search her house, adding "[i]f this person is inside of my home, I want them out." Jurnett also told the officers no one other than defendant was in her home, and she had not seen any weapons.

Deputy Warden and other deputies entered the residence through a garage to locate defendant. Upon reaching a stairwell that led down to a basement, they heard a male voice speak in the basement. The deputies announced their presence and ordered the man to come out. Those commands were repeated a few times, with no response. Deputy Warden then called defendant by name, to which defendant responded he was not coming out. Deputy Warden exited the residence and requested the Colorado Springs Police Department Tactical Unit be sent to the scene. Sergeant Jason Hess, still standing in the hallway near the basement, used a mirror to look into the basement and saw defendant holding a rifle. Defendant then yelled, "Back the f*** up; Don't come down here; It's going to be a bloodbath if you guys try to come get me." He also informed the deputies he was loaded with ammunition. The Tactical Unit later arrived to relieve the Sheriff's Office and was able to apprehend defendant.

Despite having the homeowner's consent to search the premises, the officers sought and obtained a search warrant. Upon searching the basement, officers found an SKS rifle, a .45 caliber Ruger handgun, loose bullets, and a backpack which contained 9mm and other bullets, two rolls of duct tape, and a two-way radio. In a bedroom on the second floor of the home, the officers found a duffel bag containing a black stocking cap, a blue-and-white bandana, a red-and-white bandana, and a white-red-and-black foam hockey mask. In addition, they also found a North Carolina driver's license with defendant's name on it in a suitcase.

Defendant was arrested and charged with a string of crimes committed in Columbus County. These included the attempted murder of Terrence Rowell ("Rowell") on 20 August 2005; the murder of Craig Williams ("Williams") and kidnapping of Centia McLeod ("McLeod") on

10 September 2005; and the murders of Dennis Inman, Regina Inman (collectively, "Inman"), and Anthony Martin ("Martin") on 5 November 2005. Testimony about the Rowell and Williams crimes revealed one of the perpetrators was a black man wearing a Jason-style hockey mask with holes in it, similar to the one seized from defendant in Colorado. The man in the hockey mask who attacked Rowell and Williams had a TEC-9 gun with holes in it. Police officers who investigated the Rowell scene found a fired, 9mm Luger shell casing, which was similar to a live round seized in Colorado. Jacqueline Battle testified defendant visited her house on 3 September 2005, and was carrying a gun with holes in it.

Forensic examination showed some 9mm shell casings from the Rowell, Williams, and Inman shootings were all fired from the same gun. The .45 shell casings from the Inman murders also matched a .45 cartridge found near Williams. In addition, Rowell and Martin were both bound with duct tape similar to the duct tape seized in Colorado. The DNA profile generated from a bloody impression on the roll of duct tape seized in Colorado matched the DNA profile of the bloodstain of Martin. Expert testimony revealed a profile from bloodstain cuttings from the hockey mask seized in Colorado matched the DNA profile from Williams.

Over defendant's timely objection, evidence of two other crimes believed to be committed by defendant on 26 December 2004 and 15 July 2005 was also presented at trial for purposes of proving identity. Testimony about the incidents revealed they were committed by a man in a white Jason mask with holes in it, and that bullets from the two crime scenes were fired from the same .45-caliber gun.

On 1 August 2017, defendant filed a motion to suppress all the evidence seized in Colorado as a result of the installation and use of a pen register device on the cell phone he was using. On 14 August 2017, the court orally denied the motion and signed a detailed written order *nunc pro tunc* on 5 October 2017. Defendant presented no evidence at trial, but moved to dismiss all the charges at the close of all the evidence. The jury found defendant guilty of all charges. He was sentenced to four consecutive life sentences without parole for the four murders; 127 months to 162 months for assault with a deadly weapon with intent to kill inflicting serious injury and second-degree kidnapping; 117 months to 150 months for first-degree burglary and second-degree kidnapping; and 251 months to 311 months for attempted murder, robbery with a dangerous weapon, and first-degree kidnapping. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant argues the trial court erred by: (1) denying the motion to suppress evidence seized pursuant to an unconstitutional search based on cell phone information showing defendant's location that was obtained without a warrant; (2) denying the motion to dismiss the charge of kidnapping McLeod where the evidence did not show she was confined or removed beyond that necessary to rob her with a dangerous weapon; and (3) admitting evidence about a prior, violent incident for purposes of proving his identity, absent any proof of the defendant's involvement. We address each argument in turn below.

A. Motion to Suppress

[1] Defendant first argues the trial court erred in denying the motion to suppress evidence seized pursuant to an unconstitutional search based on cell phone information showing defendant's location that was obtained without a warrant. For the following reasons, we reject defendant's contentions.

"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. Jordan*, 242 N.C. App. 464, 469, 776 S.E.2d 515, 519 (2015) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

On 1 August 2017, defendant filed a motion to suppress all evidence obtained from the installation and use of a pen register device on defendant's cell phone without a warrant. He argued the warrantless location tracking constituted an unreasonable search in violation of the Fourth Amendment of the U.S. Constitution. On 5 October 2017, the trial court entered an order *nunc pro tunc* to 14 August 2017 denying defendant's motion to suppress. Defendant now contends the trial court erred in denying his motion.

Defendant was a prime suspect in an investigation of a string of murders that occurred in Columbus County, and there was a warrant for his arrest in connection with a Durham Police investigation of the murder of Ralph Joseph. In order to apprehend defendant, officers sought four court orders compelling telephone companies to provide them with transactional records associated with phone numbers they

believed defendant was using. Specifically, they sought permission to install and use a pen register to gather information about phone activity and also requested the companies provide cell site location information ("CSLI") in order to locate defendant. The requested CSLI was to span a time period from 5 November 2005 to sixty days after the issuance of the orders.

The requests stated "responsible grounds exist to suspect that [defendant] shot Ralph Joseph" and "the information sought is relevant and material to an ongoing criminal investigation" and could assist in the apprehension of a fugitive. Instead of seeking a warrant, law enforcement sought and obtained this information under N.C. Gen. Stat. § 15A-262, which only required a certification the information sought was "relevant" to an ongoing criminal investigation. N.C. Gen. Stat. § 15A-262 (2017). On 5 December 2005, a court order issued pursuant to N.C. Gen. Stat. § 15A-262 directed T-Mobile to provide the transactional records for cellular telephone number (571) 331-****, which was listed under the name "Markeeta Crutchfield." Officers were able to locate defendant through the tracking of that cell phone at 2305 Lexington Village Lane in Colorado Springs, Colorado. There, they arrested defendant and seized evidence tying him to the crimes he was charged with.

In support of his argument the trial court erred in denying his motion to suppress the evidence seized in Colorado, defendant primarily relies on the Supreme Court's decision in *Carpenter v. United States*,584 U.S. __, 201 L. Ed. 2d 507 (2018). There, the Court was presented with the issue of whether orders compelling the production of 7-127 days' worth of historical CSLI constituted a search, thereby triggering the warrant requirement. *Id.* at __, 201 L. Ed. 2d 516. In that case, officers investigating a string of thefts sought and obtained court orders compelling phone companies to hand over historical CSLI records for the defendant, seeking evidence the defendant was present at the robberies. *Id.* at __, 201 L. Ed. 2d at 516. The officers did not have a warrant, but acted pursuant to the federal Stored Communications Act, 18 U.S.C. § 2703(d), which required the government to show "reasonable grounds" for believing the information was relevant and material to an ongoing investigation. *Id.* at __, 201 L. Ed. 2d at 516.

In a narrow ruling, the Court concluded the government needed to first obtain a warrant before accessing a phone company's historical CSLI on its customers. However, the *Carpenter* Court emphasized "[w]e do not express a view on matters not before us: real-time CSLI or 'tower dumps' . . . ." *Id.* at __, 201 L. Ed. 2d at 525. Thus, *Carpenter* only established the government must obtain a warrant before it can access

a phone company's *historical* CSLI; it did not extend its holding to the issue of government acquisition of real-time or *prospective* CSLI.

In the present case, law enforcement requested both historical and prospective CSLI for the phone numbers associated with defendant. Because *Carpenter* was decided only with respect to historical CSLI, it is dispositive on that issue only.[1] Additionally, we decline to extend the holding in *Carpenter* to real-time or prospective CSLI. Though unclear from the Record whether it was the real-time or historical CSLI which allowed law enforcement to obtain defendant's location, it is not necessary for us to make a distinction in this case. Without reaching the question of whether an individual has a reasonable expectation of privacy in his real-time or prospective CSLI, we affirm the trial court's denial of defendant's motion to suppress because of the attenuation doctrine.

In its order denying defendant's motion to suppress, the trial court made the following findings of fact:

> 3. On 5 December 2005, Sgt. David Nobles applied for, and received, an order allowing for the installation and use of a pen register pursuant to [N.C. Gen. Stat.] § 15A-262, however, the State of North Carolina never sought or obtained a search warrant for this information.
>
> . . . .
>
> 5. That the order dated 5 December 2005 does not state the defendant's name and does state that the information sought is relevant and material to an ongoing criminal investigation to locate a fugitive, wanted in connection with violation of North Carolina Criminal Law 14-17 –see defendant's "Exhibit D".
>
> 6. The order directed T-Mobile to furnish agents with transactional records pertaining to cellular/wireless phone number 531-331-[****], all for the time period

1. The State argues *Carpenter* is not applicable here because it was decided thirteen years after law enforcement obtained orders for the historical CSLI under a then-valid statute. However, the Supreme Court has held "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987). Because this case was pending on direct appeal when the rule in *Carpenter* was issued, *Carpenter* is binding precedent.

from 5 November 2005 to present to include sixty days from the order – see defendant's "Exhibit D".

. . . .

8. The defendant, Danny Thomas, was located through the tracking of that cell phone at 2305 Lexington Village in Colorado Springs, Colorado. It is unclear whether the information received was historical or real time.

. . . .

14. Officers of the Regional Fugitive Task Force already had determined that the public utilities account for that residence was in the name of Yvette Jurnett, and that a Volkswagon automobile was registered with the Colorado Department of Motor Vehicles to Yvette Jurnett at that address.

. . . .

20. The officers [ ] showed [Ms. Jurnett] an old arrest photograph of defendant from the State of New York. Ms. Jurnett stated that person in the photograph appeared to be the man who had been staying with her and that he probably was in the residence at that time. The officers told her that defendant was wanted for murder and asked her for consent to search the residence for defendant.

21. Ms. Jurnett replied that she did not want anyone who was charged with murder in her home and gave the officers verbal consent to search the residence.

. . . .

24. Upon entering the residence, [Sherriff's] deputies heard a male voice coming from the basement of the townhome. They heard the male say, "Baby, they're coming in now." Deputy Hess announced, "El Paso Sheriff's Department, come out!" The man replied, "If you come down, I'll shoot you."

. . . .

27. Inside the residence, Deputy Donels removed a mirror from the wall and employed it to look down the stairwell

leading to the basement. In the mirror's reflection, the deputies could see the defendant at the bottom of the stairwell pointing a rifle in their direction.

. . . .

30. At 9:07 pm, Colorado Springs Police Officer Steven Jensen obtained a search warrant (State's Exhibit 5) from the Honorable David L. Shakes, El Paso County District Judge, authorizing officers to enter and search the townhouse for the purposes of arresting defendant [ ]and seizing firearms, ammunition, and "items of indicia as proof of occupancy for 2305 Lexington Village Lane."

31. Shortly after the arrival of that search warrant on the scene, Sgt. Rigdon ordered [ ] defendant to exit the basement. When defendant did not comply, officers introduced chemical agents into the basement. After he fired three rifle shots up the stairway, defendant emerged and the officers immediately apprehended him.

Based on its findings of fact, the trial court concluded:

1. That the court finds by at least a preponderance of the evidence that there has not been a Fourth Amendment violation of the United States Constitution.

2. That even if there has been such a violation, the court finds that through the attenuation doctrine, the evidence discovered was admissible.

As an initial matter, we note the State contests whether defendant has standing to raise this argument because the telephone number used to track his location was listed under someone else's name. However, the State failed to raise this argument at trial, and is therefore precluded from raising it on appeal. *State v. Phillips*, 151 N.C. App. 185, 187-88, 565 S.E.2d 697, 700 (2002) (citing *Steagald v. United States*, 451 U.S. 204, 208-209, 68 L. Ed. 2d 38, 43-44 (1981)).

Assuming, *arguendo*, the CSLI search of the phone defendant was using was unconstitutional, we agree with the trial court's conclusion that the evidence seized in Colorado was nevertheless admissible under the attenuation doctrine.

"Evidence discovered as a result of an illegal search or seizure is generally excluded at trial." *State v. Hester*, 254 N.C. App 506, 513, 803

S.E.2d 8, 14 (2017) (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 455 (1963)). "[T]he exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure' and, relevant 'here, evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.' " *Utah v. Strieff*, 579 U.S. __, __, 195 L. Ed. 2d 400, 407 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804, 82 L. Ed. 2d 599, 608 (1984)). Because the exclusionary rule was adopted for the sole purpose of deterring police misconduct, the Supreme Court carved out several exceptions to the rule, including the attenuation doctrine. *Id.* at __, 195 L. Ed. 2d at 407.

Under the attenuation doctrine, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.' " *Id.* at __, 195 L. Ed. 2d at 407 (quoting *Hudson v. Michigan*, 547 U.S. 586, 593, 165 L. Ed. 2d 56, 65 (2006)). In essence, "[t]he attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence[.]" *Id.* at __, 195 L. Ed. 2d at 408. The Supreme Court has identified three factors to aid in determining whether there was a sufficient intervening event to break the causal link between the government's unlawful act and the discovery of evidence: (1) the "temporal proximity" of the unconstitutional conduct and discovery of evidence, (2) "the presence of intervening circumstances," and (3) "particularly, the purpose and flagrancy of the official misconduct." *Brown v. Illinois*, 422 U.S. 590, 603-604, 45 L. Ed. 2d 416, 427 (1975) (internal citations and footnote omitted).

Here, the first factor, which favors attenuation only when "substantial time" has passed, arguably weighs in favor of excluding the evidence. *Strieff*, at __, 195 L. Ed. 2d at 408 (citing *Kaupp v. Texas*, 538 U.S. 626, 633, 155 L. Ed. 2d 814, 822 (2003)). Just three days after law enforcement obtained CSLI for the phone number associated with defendant, they were able to locate defendant and seize the evidence in Colorado. While three days is more than mere minutes or hours, we think it does not amount to a substantial amount of time in light of the time and resources needed to apprehend defendant in another state.

The second factor, however, weighs in favor of attenuation, as a number of events here constitute intervening circumstances. In *Hester*, this Court considered a defendant's motion to suppress evidence discovered after an unlawful stop by a police officer. 254 N.C. App. at 513, 803

S.E.2d at 14. There, we held the defendant's separate crime of pointing a loaded gun at an officer and pulling the trigger constituted an intervening circumstance under the attenuation doctrine. *Id.* at 513-14, 803 S.E.2d at 14-15. Here, defendant possessed of a number of firearms and ammunition, pointed his gun at officers and threatened to shoot, and then did shoot at officers when they attempted to apprehend him. Similar to *Hester*, this constituted an intervening circumstance sufficient to attenuate the connection between any unconstitutional police conduct and the discovery of evidence. Moreover, although the CSLI allowed law enforcement to locate defendant, it did not provide a basis for which they could search the house defendant was staying in. Ultimately, officers discovered the contested evidence only after obtaining both the consent of the owner of the house and a valid search warrant. All of these facts weigh heavily in the State's favor for finding attenuation.

The third factor, which emphasizes the deterrence function of the exclusionary rule by requiring us to consider the purpose and flagrancy of the official misconduct at issue, also strongly favors attenuation. Here, the misconduct was neither purposeful nor flagrant. In fact, at the time of the CSLI search, it was not considered misconduct at all – it was the law. North Carolina law enforcement acted pursuant to a North Carolina law valid at the time—and which remained valid until thirteen years later—which they had no reason to suspect was unconstitutional. We are unable to imagine how any deterrent function is served by excluding evidence discovered through lawful conduct.

Weighing these factors as a whole, we conclude the trial court did not err in denying defendant's motion to suppress because the CSLI search was too attenuated from the discovery of evidence. *See Strieff*, at __, 195 L. Ed. 2d at 410 (holding attenuation found where two out of three factors supported that conclusion).

B. Motion to Dismiss

[2] Defendant next argues the trial court erred in denying his motion to dismiss the charge of kidnapping McLeod, where the evidence did not show she was confined or removed beyond that necessary to rob her with a dangerous weapon. We disagree.

We review a trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "A motion to dismiss based on insufficiency of the evidence to support a conviction must be denied if, when viewing the evidence in the light most favorable to the State, there is substantial evidence to establish each essential element of the crime charged and that defendant was

the perpetrator of the crime." *State v. Cody*, 135 N.C. App. 722, 727, 522 S.E.2d 777, 780 (1999) (citation and internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Kidnapping is the unlawful confinement, restraint, or removal "from one place to another, any other person 16 years of age or over without the consent of such person" for the purpose of "[f]acilitating the commission of any felony." N.C. Gen. Stat. § 14-39(a) (2017). We have recognized that some crimes, such as armed robbery, cannot be committed without some restraint or removal of the victim. *State v. Fulcher*, 294 N.C. 503, 523-24, 243 S.E.2d 338, 351-52 (1978). Thus "a conviction for kidnapping requires restraint or removal more than that which is an inherent, inevitable part of the commission of another felony." *State v. Warren*, 122 N.C. App. 738, 740, 471 S.E.2d 667, 668 (1996) (citing *State v. Irwin*, 304 N.C. 93, 102-103, 282 S.E.2d 439, 446 (1981)). Whether a restraint was more than that which is an inherent or inevitable part of another felony depends on "whether the victim is exposed to greater danger than that inherent in the armed robbery itself." *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994).

North Carolina courts have on several occasions distinguished when a victim was restrained or removed to an extent beyond that inherent in an armed robbery. In *State v. Stokes*, the defendant completed a robbery and then ordered the victim at gunpoint to go to the back of the store and into a car waiting outside. 367 N.C. 474, 482, 756 S.E.2d 32, 37 (2014). Because the defendant was removing the victim in an attempt to flee, not to facilitate a robbery, the *Stokes* court held the removal could not be considered inherent to the armed robbery. *Id.*; *see also State v. Thompson*, 129 N.C. App. 13, 19-20, 497 S.E.2d 126, 130 (1998) (holding defendant's removal of her victims to another room after she already robbed them was not an inherent and integral part of the armed robbery because none of the property she stole was kept in that room). In addition, by ordering the victim to get into the car after the robbery, "defendant attempted to place [the victim] in danger greater than that inherent in the underlying felony." *Id.*

In *State v. Beatty*, the robbery victim's hands were bound with duct tape and he was kicked in the back twice. 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998). Our Supreme Court held "[b]ecause the binding and kicking were not inherent, inevitable parts of the robbery, these forms of restraint 'exposed [the victim to a] greater danger than that inherent in the armed robbery itself.' " *Id.* (quoting *Irwin*, 304 N.C. at 103,

282 S.E.2d at 446). It further noted the defendant "increased the victim's helplessness and vulnerability beyond what was necessary to enable him and his comrades to rob the [victim]." *Id.*

Here, the evidence, viewed in the light most favorable to the State, shows defendant continued to restrain and remove McLeod beyond what was necessary to rob her. After robbing, beating, and murdering her boyfriend Craig Williams in front of her, defendant forced McLeod at gunpoint to walk through her house into a bedroom where she told him she had placed her car keys. After she gave him the keys, they walked back through the house to the living room, where her children were located. Before leaving, defendant pointed his gun at her head and pulled the trigger twice, but the gun jammed both times. His partner yelled that they needed to leave. Defendant told McLeod not to call anyone, and then drove away in her car. We hold defendant's removal of McLeod from the bedroom to the living room after stealing her car keys constituted restraint and removal "not inherent and integral to" the underlying armed robbery. Once defendant obtained McLeod's car keys, the robbery was complete. Similar to *Stokes*, defendant's continued restraint and removal of McLeod was for the purpose of allowing him to flee the scene, not to facilitate the robbery. Thus, it was not inherent in the robbery.

In addition, defendant "exposed [McLeod] to greater danger than that inherent in the armed robbery itself" when he attempted to murder her after completing the robbery. McLeod complied with every direction defendant gave her to enable him to take her car keys. Yet, after getting the car keys, defendant sought to end McLeod's life. Although some restraint and removal was necessary to force McLeod to give her keys to defendant, shooting her point-blank in front of her young children afterwards was not. Similar to the victim in *Beatty*, defendant's use of force here increased McLeod's vulnerability and helplessness beyond what was necessary to enable defendant to rob her. Accordingly, the trial court did not err in denying defendant's motion to dismiss because there is substantial evidence to establish each essential element of the kidnapping charge, separate and apart from the armed robbery.

C. Admission of Evidence Under Rule 404(b)

[3] Finally, defendant argues the trial court erred in admitting evidence about a prior, violent incident in order to prove his identity, without any proof he was the perpetrator in that incident. Specifically, defendant contends "the evidence ran afoul of Rules [of Evidence] 401 and 404 because it did not tend to make [defendant's] identity in the charged crimes more probable." We disagree.

This Court reviews *de novo* the trial court's legal conclusions that evidence was offered for a proper purpose under Rule 404(b) and is relevant under Rule 401. *State v. Adams*, 220 N.C. App. 319, 323, 727 S.E.2d 577, 581 (2012). We then "determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403." *Id.* (quoting *State v. Martin*, 191 N.C. App. 462, 467, 665 S.E.2d 471, 474 (2008)).

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity . . . ." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017). "[I]n order to be admissible under Rule 404(b) on the issue of identity, '[t]he other crime may be offered on the issue of [the] defendant's identity as the perpetrator when the *modus operandi* of that crime and the crime for which [the] defendant is being tried are similar enough to make it likely that the same person committed both crimes.' " *State v. Moses*, 350 N.C. 741, 759, 517 S.E.2d 853, 865 (1999) (quoting *State v. Carter*, 338 N.C. 569, 588, 451 S.E.2d 157, 167 (1994)). Evidence offered under Rule 404(b) must also be relevant to a material issue in the case. *State v. Hanif*, 228 N.C. App. 207, 213-14, 743 S.E.2d 690, 694-95 (2013). Pursuant to Rule 401, evidence is relevant if it has "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).

Here, evidence of a prior bad act for which defendant was never formally charged was offered at trial for purposes of proving defendant's identity. Shevika Young ("Young") testified at trial that on the night of 26 December 2004, a man in "a white mask with holes in it, kind of like a Jason mask," entered her home with a gun. He and another man fired shots into the home, injuring Young's mother, Shelvia Hastings. They were there looking for Young's boyfriend, Antonio McFadden, who is a suspected drug dealer. They threatened to kill her if he did not come out. The men left upon realizing McFadden escaped through a bedroom window.

Defendant argues there is no evidence he participated in this incident and that it amounts to impermissible character evidence. In support of his argument this incident is irrelevant to proving his identity, he cites to *State v. Carpenter*, 361 N.C. 382, 646 S.E.2d 105 (2007). There, evidence of a prior sale of cocaine by the defendant was held inadmissible under Rule 404(b) because of generic and insufficient similarities between the prior sale and the one for which he was charged. *Id.* at 389,

646 S.E.2d at 110. The *Carpenter* court noted "[w]hen the State's efforts to show similarities between crimes establish no more than 'characteristics inherent to most' crimes of that type, the State has 'failed to show . . . that sufficient similarities existed' " for the purposes of Rule 404(b). *Id.* at 390, 646 S.E.2d at 111 (quoting *State v. Al-Bayyinah*, 356 N.C. 150, 155, 567 S.E.2d 120, 123 (2002)). Unlike in *Carpenter*, however, more than mere generic similarities are present here. More instructive, we think, is our Supreme Court's decision in *Moses*.

In *Moses*, the *modus operandi* of two murders was held similar enough to make it likely the same person committed the two murders where the evidence showed: the victims were associates of the defendant in the drug trade, they were killed in the same manner and locale within two months, they were killed at their homes, they were shot with the same gun, and the gun belonged to the defendant. 350 N.C. at 759, 517 S.E.2d at 865. Similarly, in the present case, the District Attorney pointed out the common elements of the Young incident with the incidents defendant was being charged with: (1) the perpetrator wore a Jason-style white hockey mask with holes in it, similar to the one seized from defendant in Colorado; (2) the targets were all suspected drug dealers or living with suspected drug dealers; (3) the attacks all took place at night at the victims' homes; (4) defendant had an accomplice; and (5) the incidents had both temporal and geographic proximity, most of them taking place within a month or two of each other, and within the same city. In addition, forensic evidence revealed that the cartridge cases found in Young's home matched the .45-caliber gun seized from defendant in Colorado. All of this evidence supports a reasoned conclusion defendant was the perpetrator in this incident, and the common *modus operandi* helps establish his identity in the crimes he was charged with.

We hold the evidence was properly admitted under Rules 404(b) and 401 for purposes of proving defendant's identity. In addition, the trial court did not abuse its discretion in admitting the evidence under Rule 403. Pursuant to Rule 403, evidence deemed admissible under Rule 404(b) may still be excluded if the trial court finds its probative value is substantially outweighed by the danger of undue prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (2017). We will overrule a trial court's admission of evidence under Rule 403 only if the trial court abused its discretion such that its ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Hagans*, 177 N.C. App. 17, 23, 628 S.E.2d 776, 781 (2006) (quoting *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985)). Due to the similarities between the incidents and relatively short time periods between them, we hold the trial court did not abuse

its discretion. *See id.* at 25, 628 S.E.2d at 782 (holding the similarities between two incidents combined with the short time period in which they occurred "support a finding that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.").

III. Conclusion

For the foregoing reasons, we hold defendant had a fair trial free from error.

NO ERROR.

Judges ZACHARY and HAMPSON concur.

DUNG THANG TRANG, PLAINTIFF
v.
L J WINGS, INC. AND WILLIAM ROBERT ERICKSON, DEFENDANTS

No. COA19-142

Filed 15 October 2019

1. Civil Procedure—Rule 51—special jury instruction—highlighting particular evidence—dram shop claim

In a negligence action where employees at defendant corporation's restaurant served too much alcohol to a customer, who then got into a car crash injuring plaintiff, the trial court properly denied plaintiff's request for a special jury instruction on his dram shop claim, which asked the jury to consider evidence regarding whether the restaurant employees followed defendant's internal policies for preventing customer drunkenness. The proposed instruction violated Civil Procedure Rule 51(a) by requiring the court to emphasize a particular aspect of plaintiff's evidence rather than give "equal stress" to both parties' evidence and contentions.

2. Negligence—negligent supervision—directed verdict—prior verdict on dram shop claim—no prejudice

In a negligence action where employees at defendant corporation's restaurant served too much alcohol to a customer, who then got into a car crash injuring plaintiff, the trial court did not commit prejudicial error by entering a directed verdict in favor of defendant on plaintiff's negligent supervision claim. By returning a verdict

finding defendant not liable on plaintiff's dram shop claim, the jury had already determined that the employees had not been negligent, and therefore plaintiff failed to meet his evidentiary burden on the negligent supervision claim.

Appeal by plaintiff from judgment and order entered 1 May 2018 and 26 July 2018, respectively, by Judge J. Thomas Davis in Buncombe County Superior Court. Heard in the Court of Appeals 18 September 2019.

Lakota R. Denton and Lucas T. Baker for plaintiff-appellant.

Pope Aylward Sweeney & Stephenson, LLP, by Jeremy A. Stephenson, for defendant-appellee.

TYSON, Judge.

Dung Thang Trang ("Plaintiff") appeals from the trial court's partial grant of directed verdict in favor of L J Wings, Inc. ("Defendant"). Plaintiff also appeals the trial court's denial of his requested jury instructions. We find no error.

I. Background

Defendant is a North Carolina corporation, which owns and operates a Wild Wing Café franchised restaurant in Buncombe County, North Carolina ("Café"). Defendant's franchisor established and issued policies and procedures regarding North Carolina's dram shop laws and alcohol practices to its franchisees and their employees, including information to monitor and prevent customer intoxication. Practices to prevent intoxication include the employee offering "[f]ood high in fat and/or protein such as . . . chicken wings" and counting the number of drinks each customer has. "If counting drinks will not work, then you must rely on observation to spot signs of intoxication."

The co-defendant, William Erickson, arrived at the Café at about 11 a.m. on 5 August 2015. Erickson was one of the Café's regular customers. In the following six to seven hours, Erickson was served between thirteen-and-a-half and fifteen-and-a-half alcoholic beverages. Two bartenders, Anne Marie Paine and Christopher Nawrocki, served Erickson during this period. Paine served Erickson between eleven and thirteen beverages over roughly six hours, before her shift ended around 5 p.m. Nawrocki replaced Paine around 5 p.m. and served Erickson at least two beverages, and approximately half of a third, before cutting him off.

Nawrocki stopped alcohol sales to Erickson because, "something was just a little different in Bill. . . . It was just something that made me uncomfortable, and when I'm uncomfortable it's time to go." Nawrocki also checked with Paine and learned Erickson had "been there all day." Nawrocki ordered chicken wings for Erickson to eat, and checked to make sure Erickson would not be driving home. Nawrocki also removed a previously served, half-full beer. Erickson ate the wings and left the Café sometime after 6 p.m.

At about 7 p.m., Erickson was driving on Interstate-26 when his car made contact with a Honda Odyssey vehicle Plaintiff was driving, and allegedly injured Plaintiff. Plaintiff brought this negligence action against both Defendants. His claims against Defendant, L J Wings, Inc., included a dram shop claim and a negligent supervision claim as to the bar owner's supervision of its employees, Paine and Nawrocki. Erickson, the customer and driver, stipulated to his negligence liability before the case was submitted to the jury.

At the close of Plaintiff's evidence, Defendant moved for a directed verdict. The trial court denied Defendant's motion to dismiss the dram shop claim, but dismissed all of Plaintiff's other claims, including for negligent supervision.

The trial court's dismissal of the negligent supervision claim was based upon two reasons: primarily, Plaintiff presented insufficient evidence of incompetency or unfitness of either Paine or Nawrocki; and, secondarily, the negligent supervision claim served no independent purpose, as Plaintiff would recover damages upon a verdict of negligently serving an intoxicated patron under the dram shop claim.

Plaintiff requested a special jury instruction, which contained the following sentence:

> In deciding whether this law was, or was not violated, you may consider all of the evidence you have heard, including the evidence presented on the existence of Defendant L J Wings, Inc.'s own voluntarily adopted policies and procedures, and whether or not such voluntarily adopted policies and procedures were followed.

The trial court declined to include the specific proffer in its instructions. The court reasoned it would be improper to ask, or pre-empt, "the jury to focus on a particular aspect of the evidence." The jury returned a verdict, which found Defendant not negligent on 27 March 2018. The court entered its judgment on 1 May 2018.

Plaintiff moved for a new trial on 18 May 2018. He argued, *inter alia*, the partial grant of Defendant's motion for directed verdict and the denial of Plaintiff's requested jury instruction were prejudicial errors of law. The court denied Plaintiff's amended motion for a new trial on 26 July 2018. Plaintiff entered and served his notice of appeal on 23 August 2018. Plaintiff appeals both the judgment, as well as the order denying his motion for a new trial.

II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

III. Issues

Plaintiff asserts the trial court committed reversible error by: (1) denying his request for a special jury instruction; and, (2) granting Defendant's motion for directed verdict on his claim of negligent supervision.

IV. Standard of Review

"A specific jury instruction should be given when: (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citation and internal quotation marks omitted). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Id.* (citation omitted).

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 362, 649 S.E.2d 14, 19-20 (2007) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322–23, 411 S.E.2d 133, 138 (1991)).

V. Analysis

Plaintiff's two arguments interrelate. Counsel conceded at argument in order for the partial grant of directed verdict on negligent supervision to be prejudicial and rise to reversible error, the trial court's failure to provide Plaintiff's requested special instruction must have misled the jury.

A. Jury Instructions

[1] Plaintiff argues the trial court prejudiced him and committed reversible error by denying his request for a special jury instruction, which stated in relevant part:

> In deciding whether this law was, or was not violated, you may consider all of the evidence you have heard, including the evidence presented on the existence of Defendant L J Wings, Inc.'s own voluntarily adopted policies and procedures, and whether or not such voluntarily adopted policies and procedures were followed.

"While the court is not required to give the instruction in the exact language of the request, if request be made for a specific instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *In re Estate of Lowe*, 156 N.C. App. 616, 619, 577 S.E.2d 315, 317 (2003) (quoting *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956)). However, these two requirements of correctness and evidentiary support guarantee neither the entitlement to nor the delivery of all proposed or proffered special instructions.

Under the North Carolina Rules of Civil Procedure,

> In charging the jury in any action governed by these rules, a judge . . . *shall not be required to state, summarize or recapitulate the evidence*, or to explain the application of the law to the evidence. *If the judge undertakes to state the contentions of the parties, he shall give equal stress to the contentions of each party.*

N.C. R. Civ. P. 51(a) (emphasis supplied).

Presuming Plaintiff's proposed special instruction was correct in itself and supported by evidence in the record, the trial court would have been required to highlight and "state, summarize or recapitulate the evidence" as specified by Plaintiff.

As the trial court explained at the charge conference, "it would be an indication that the Court is asking the jury to focus on a particular aspect of the evidence. And as a result thereof, I think that's improper. . . . that instruction invites the Court to focus on and call as important specific evidence that would not be proper."

The trial court's analysis is correct. Plaintiff's proposed special jury instructions run afoul of Rule 51(a)'s plain "equal stress" language. Even if the proposed instruction is correct and is supported in the record,

the requested instructions could have improperly focused the jury on a particular aspect of Plaintiff's evidence. Rather than undertaking to state the contentions of the parties in this sense, the trial court properly declined to give the requested special jury instruction, or to "state, summarize or recapitulate the evidence." *Id.*

While the trial court did not give the instruction in the exact language as requested, the court did properly instruct the jury on its substance. Both parties extensively litigated and argued the voluntarily adopted policies and procedures at trial. All relevant evidence regarding Defendant's policies and procedures was admitted and argued before the jury. The trial court instructed the jury "to consider all the evidence, all contentions arising from that evidence, and the arguments and positions of the attorneys."

If the trial court had instructed the jury with any more specificity, as Plaintiff's special instructions requested, the instructions would have improperly pre-empted or focused the jury's attention, and denied "equal stress to the contentions of each party." *Id.* Plaintiff admitted the employer's policies into evidence, cross-examined the witnesses, and freely argued the purported violations of Defendant's policies by the bartenders to the jury.

The trial court did not err by denying Plaintiff's requested specific wording from the jury instructions. Plaintiff's argument is overruled.

B. Directed Verdict

[2] Defendant argues, viewing the evidence in the light most favorable to Plaintiff, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor, the trial court's ruling that Plaintiff's evidence did not support a claim of negligent supervision as a matter of law was error. We need not reach this issue.

Presuming, *arguendo*, the trial court erred by concluding Plaintiff failed to present sufficient evidence, Plaintiff has failed to show any purported error was prejudicial. An essential element Plaintiff must prove is an employee committed some tortious act proximately causing the injuries. *Waddle v. Sparks*, 331 N.C. 73, 87, 414 S.E.2d 22, 29 (1992) (citation omitted). Here, the jury necessarily found that Defendant's employee had not been negligent in this matter, by returning a verdict Defendant was not liable on the dram shop claim.

Plaintiff's counsel conceded during oral argument that unless this Court holds the jury verdict must be reversed with a new trial on the

dram shop claim due to Plaintiff's assertion of improper jury instructions, his assertion concerning error in the directed verdict on the negligent supervision claim is moot. As we hold there was no error in the jury instructions, there was no reversible error in the trial court's entry of a directed verdict on the negligent supervision claim.

VI. Conclusion

Plaintiff's proposed special jury instruction would have required the court to "state, summarize or recapitulate the evidence" and highlight specified evidence without the trial court giving "equal stress" to the parties' evidence and contentions. N.C. R. Civ. P. 51(a). The trial court properly denied Plaintiff's request to improperly focus or pre-empt the jury's attention. The jury instructions provided were proper.

Plaintiff cannot show any purported prejudice in the trial court's directed verdict as a result of the jury's verdict on negligence. We find no error in the jury's verdict or the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges DILLON and BROOK concur.

GUY UNGER, PLAINTIFF
v.
HEATHER UNGER, DEFENDANT

No. COA18-1234

Filed 15 October 2019

1. Child Custody and Support—child support—arrearages—contempt—relief for void orders

The Court of Appeals rejected a father's argument that he was entitled to relief pursuant to Civil Procedure Rule 60(b)(4) from orders holding him in contempt for past violations of an earlier child support order. The orders were not void because the trial court had jurisdiction and the authority to sentence the father to the suspended 30-day sentence.

2. Child Custody and Support—child support—arrearages—contempt—relief for fraud

The Court of Appeals rejected a father's argument that he was entitled to relief pursuant to Civil Procedure Rule 60(b)(3) from orders holding him in contempt for past violations of an earlier child support order where the claim was time-barred by the one-year statute of limitations in Rule 60(b).

Judge ZACHARY concurring in result only.

Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiff from an order entered 5 July 2018 by Judge Robert J. Stiehl, III, in Cumberland County District Court. Heard in the Court of Appeals 8 May 2019.

Renorda Pryor for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

DILLON, Judge.

This matter is a domestic dispute concerning the child support obligations of Guy Unger ("Father") pursuant to orders entered in 2012. More recently, Father filed a series of motions, including motions pursuant to Rule 60, seeking relief from the 2012 orders. By order entered 5 July 2018, the trial court denied Father's motions. Father appealed. For the following reasons, we affirm.

I. Background

In August 2007, Father filed a complaint for divorce from bed and board, child custody, child support, equitable distribution, and Rule 65 injunctive relief against Heather Unger ("Mother").

In August 2008, the trial court entered an order (the "2008 Order") requiring Father to pay child support in the amount of $2,142.00 per month. However, Father fell behind on his child support obligations, and Mother moved the trial court to hold Father in contempt. The trial court issued an order for Father to appear and show cause why he should not be held in civil or criminal contempt.

In September 2012, prior to the show cause hearing, the parties signed a Memorandum of Judgment (the "2012 MOJ"). In the 2012 MOJ, Father agreed to be held in contempt, and Mother agreed that Father's child support obligation would be reduced to $700.00 per month *going*

forward and that Father could catch up on the arrearages he had accumulated up to that point at a rate of $100.00 per month.

A month later, on 25 October 2012, the trial court entered a written order (the "2012 Order") formalizing the 2012 MOJ. There is evidence, though, that Father immediately fell behind on his modified child support obligations. As a result, on 7 November 2012, the trial court entered an order for Father's arrest (the "2012 Arrest Order"). This 2012 Arrest Order is problematic, as explained below, but Father is not making any argument concerning this Order in the present appeal, and it is unclear from the record the status of the 2012 Arrest Order.

Father did not immediately appeal any of the 2012 orders. But almost six years later, in March 2018, Father filed several motions, including motions for relief under Rule 60, challenging the 2012 orders.

On 5 July 2018, the trial court entered an order dismissing Father's motions, including Father's Rule 60 motions for relief from the 2012 orders. Father timely appealed from this order.

In his appellate brief, Father *only* argues against the denial of his Rule 60 motions. Accordingly, our review is limited to the trial court's denial of Father's Rule 60 motions.[1]

II. Analysis

A. Father's Rule 60(b)(4) Claim

[1] Father moved for relief pursuant to Rule 60(b)(4) of our Rules of Civil Procedure, which allows relief from a judgment where "[t]he judgment is void." N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2018). Specifically, Father argues that the 2012 orders are void because they allowed the trial court the authority to order his arrest for an indefinite time going forward if Mother ever claimed he missed a payment, without giving him the opportunity to be heard on the matter.

Father's argument centers on the provision in the 2012 Order finding him in contempt for his accumulated arrearages, as follows:

> That [Father] is hereby ordered into custody of the Sheriff of Cumberland County, North Carolina for a period of thirty (30) days which shall be suspended by [Father] abiding by the terms of this child support as herein set above or until such time as he purges himself of contempt.

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1. Mother did not file a brief with our Court.

For the following reasons, we conclude that the 2012 Order, though it *might* contain legal errors which could have been the bases of a direct appeal if timely brought, is not void.

In criminal contempt statutes, the General Assembly has authorized trial courts to impose sentences of up to 120 (one hundred and twenty) days for *past* failures to pay child support, "provided the sentence is suspended upon conditions reasonably related to the contemnor's payment of child support." N.C. Gen. Stat. § 5A-12(a)(3)(2012)[2]. Here, in its 2012 MOJ and 2012 Order, the trial court held Father in contempt for his *past* violations of the original 2008 Order, as Father was not yet in violation of the 2012 orders. That is, even though he was not current on his obligations created by the 2008 Order, the 2012 MOJ and the 2012 Order allowed Father to pay those arrearages on a new schedule, with the first payment due in the future, at $100 per month. The trial court, though, under Chapter 5A-12 could (and did) *punish* Father for accumulating those arrearages with a 30-day suspended sentence.

Father, though, takes issue with phrase in the 2012 Order that, if his 30-day suspended sentence was activated, he could shorten the 30-day activated sentence by "purg[ing] himself of contempt." Father contends that this phrase renders the 2012 Order void in its entirety because the Order does not state *how* he would purge himself of the contempt. Indeed, where a person is held in *civil* contempt, he may stay imprisoned indefinitely until he meets the purge condition contained in the order; and where a civil contempt order does not contain a clear purge condition, the order must be vacated. *See Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984).

We disagree that the purge condition renders the 2012 Order void, for two reasons. First, we conclude that the trial court was holding Father in *criminal* contempt for the arrearages he had accumulated up to 2012, ordering a 30-day criminal sentence. Our Supreme Court has noted that "the demarcation between the two [types of contempt] may be hazy at best." *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). Our Supreme Court further instructed as follows, in making the demarcation:

> A major factor in determining whether contempt is criminal or civil is the *purpose* for which the power is exercised.

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2. Under this Statute, though, a trial court need not suspend the sentence if the sentence is thirty (30) days or less. Here, since the sentence imposed on Father was thirty (30) days, the trial court did not have to suspend the sentence, but chose to do so in its discretion.

> Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suiter and to coerce compliance with an order, the contempt is civil.

Id. (emphasis added) (internal citations omitted).

Father argues that the "purge" language transforms the orders to civil since the contempt provision could be construed to compel future obedience. But we have held that a provision that allows for the possibility of early release does not "transform probationary or suspended sentences into civil relief." *Bishop v. Bishop*, 90 N.C. App. 499, 506, 369 S.E.2d 106, 110 (1988) (citing N.C. Gen. Stat. § 15A-1343(b)(4) in which our General Assembly has included the compliance with child support orders as a "regular condition[] of probation" in a criminal context).

The purge condition in this case might have some effect to compel Father's future obedience, but that effect is limited since Father would have to be set free after 30 days anyway (unless he is separately found to be in civil contempt of the future violation). Rather, we construe the trial court's sentence as a 30-day criminal sentence that was being suspended. The purge provision merely allowed Father to shorten the 30-day sentence, if activated based on a future violation, if he cured the future violation while serving his activated criminal sentence. The purge provision, though, did not lengthen the 30-day sentence; that is, if the sentence was activated based on a future violation and Father did not cure the violation, he could still only be held for 30 days *based on the 2012 Order*. Of course, a future court, in activating the 30-day sentence, could also separately find Father to be in *civil* contempt of the 2012 Order for the future violation and order Father to be held indefinitely until he purged himself of *that* contempt.

Second, even if the purge provision transformed the 2012 Order to a civil contempt order, we conclude that the purge condition is not ambiguous. The trial court in 2012 was as clear as it could possibly be in stating that if the 30-day sentence was ever activated based on a future violation, it is *then* that the trial court, in its order activating the sentence, is to state with specificity how Father is in violation and what he must do to purge himself of that future violation.

Father does not make any specific argument concerning the 2012 Arrest Order. We point out, though, that this Arrest Order, based on Father's alleged violation of the 2012 Order, is problematic, for at least two reasons.

First, the 2012 Arrest Order indicates that Father was to be imprisoned until he paid his $700.00 in arrearages, without any indication that he could only be held for a maximum of 30 days. The trial court had no authority under the 2012 Order to order Father to be held for more than 30 days based on the 2012 Order. If the trial court wanted to impose an indefinite sentence of imprisonment to compel Father's obedience to the 2012 Order, it could only do so based on a new contempt finding based on a new show cause hearing.

And, second, there is nothing in the record which indicates that Father was ever given the opportunity to be heard before the 2012 Arrest Order was entered, which activated his 30-day sentence. Indeed, while the trial court is authorized to suspend a sentence based on a finding of contempt, it is a violation of due process to allow the sentence to be activated based on the alleged violation of a probationary condition without the opportunity first to be heard on the matter. *See State v. Hunter*, 315 N.C. 371, 377, 338 S.E.2d 99, 104 (1986) (noting that due process requires a hearing before a suspended sentence can be activated in the probation context).

Nevertheless, in this appeal, Father makes no argument that the 2012 Arrest Order was itself void, but rather only that the 2012 MOJ and 2012 Order were void. And since the trial court had jurisdiction over the parties and the subject matter and had the authority to sentence Father to a suspended 30-day sentence based on the arrearages he had accumulated up to 2012, we conclude that the orders are not void. Therefore, the trial court did not err in denying Father's motion to set aside those orders based on Rule 60(b)(4).

B. Father's 60(b)(3) Claim

[2] Father also argues that the trial court erred in failing to grant him relief from the 2012 orders based on Rule 60(b)(3), which allows relief where there has been "[f]raud." N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (2018). However, Rule 60(b) provides for a one-year statute of limitations for relief from fraud claims, which runs from the date of the order. *Caswell Realty Assocs. v. Andrews Co.*, 121 N.C. App. 483, 485, 466 S.E.2d 310, 312 (1996). Therefore, Father's claim under Rule 60(b)(3) is time-barred. *Id.*

III. Conclusion

The trial court did not err in denying Father's motions. Therefore, we affirm the order of the trial court.

AFFIRMED.

Judge ZACHARY concurs in result only.

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

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

I concur with the majority opinion that Rule 60(b) provides for a one-year statute of limitations for relief from fraud claims, and because no exceptions are set forth in the rule, Guy Unger's ("Appellant") claim under Rule 60(b)(3) is time-barred. However, I respectfully dissent from the remainder of the majority's opinion.

"Appellate review of a trial court's ruling pursuant to Rule 60(b) is limited to determining whether the trial court abused its discretion." *Parris v. Light*, 146 N.C. App. 515, 518, 553 S.E.2d 96, 97 (2001) (citations and quotation marks omitted). "Rendition of findings of fact is not required of the trial court in ruling upon a Rule 60(b) motion absent the request of a party, although it is the better practice to do so." *Id.* at 518, 553 S.E.2d at 98 (citation and quotation marks omitted). Moreover, "Rule 60(b) provides no specific relief for errors of law and our courts have long held that even the broad general language of Rule 60(b)(6) does not include relief for errors of law." *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988) (citation and quotation marks omitted). "The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under N.C.G.S. Sec. 1A-1, Rule 59(a)(8) . . . ." *Id.* at 519, 364 S.E.2d at 193. "[A]n appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought." *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974) (citation and quotation marks omitted).

Appellant seeks relief under Rule 60(b)(4) of the North Carolina Rules of Civil Procedure. He argues that the September 26 Order is void because the trial court lacked both subject matter and personal jurisdiction, and because the trial court exceeded its authority in issuing its contempt order. Although the trial court had subject matter and personal jurisdiction to enter the September 26 order, the majority has declined to address these two arguments except in a conclusory fashion. However, the contempt order is void because the trial court exceeded its authority.

> N.C. Gen. Stat. § 1A-1, Rule 60(b) of the Rules of Civil Procedure provides that upon proper motion, a court may relieve a party or his legal representative from a final judgment, order, or proceeding. . . . A Rule 60(b)(4) motion is only proper where a judgment is "void" as that term is defined by the law. A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. A judgment, if proper on its face, is not void.
>
> The correct procedure for attacking a judgment is dependent upon the type of defect asserted. *If a judgment is void, it is a nullity and may be attacked at any time.* Rule 60(b)(4) is an appropriate method of challenging such a judgment.

Burton v. Blanton, 107 N.C. App. 615, 616-17, 421 S.E.2d 381, 382-83 (1992) (emphasis added) (citations and quotation marks omitted). The burden of proof is on the moving party to demonstrate that the judgment was void for want of jurisdiction or authority. *Howell v. Tunstall*, 64. N.C. App. 703, 705, 308 S.E.2d 454, 456 (1983).

> Ordinarily, where the court has jurisdiction of the parties and of the subject matter and enters a judgment which is not supported by findings of fact, the judgment is, at most, erroneous but not void and may be attacked only by an appeal. Where the court acts *in excess of its authority*, however, the result is different.
>
> If the court was without authority, its judgment . . . is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted, without any special plea.

Allred v. Tucci, 85 N.C. App. 138, 143, 354 S.E.2d. 291, 295 (1987) (emphasis added) (*purgandum*). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982).

Section 5A-21 of the North Carolina General Statutes authorizes courts of this State to enforce its orders through civil contempt proceedings. "Included within that grant of authority are the provisions of [Section 5A-22], which require that," *Tucci*, 85 N.C. App. at 142, 354 S.E.2d at 294, "[t]he order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (2017).

"Civil contempt . . . is employed to coerce disobedient defendants into complying with orders of court, and the length of time that a defendant can be imprisoned in a *proper* case is not limited by law, since the defendant can obtain his release immediately upon complying with the court's order." *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984). "The purpose of civil contempt is not to punish[,]" but to coerce the defendant to comply with the order. *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980).

This court has established the bright line rule that civil contempt implicates "remedial" relief and criminal contempt implicates "punitive" relief. "If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order, and is punitive if the sentence is limited to imprisonment for a definite period." *Bishop v. Bishop*, 90 N.C. App. 499, 504, 369 S.E.2d 106, 108-09 (1988) (citation and quotations omitted). In setting conditions for a party to purge his civil contempt, there are two requirements for a trial court. *Spears v. Spears*, 245 N.C. App. 260, 281, 784 S.E.2d 485, 499 (2016). "First, the trial court must make findings of fact as to defendant's present ability to comply with the purge conditions." *Id.* at 281, 784 S.E.2d at 499. "Second, the trial court must clearly specify what defendant must do to purge himself of contempt and exactly when he must do it." *Id.* at 282, 784 S.E.2d at 499. When a contempt order fails to specify, as required by Section 5A-22(a) of the North Carolina General Statutes, how a party might purge himself of contempt, the order must be vacated. *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984).

Here, in the September 26 Order, the trial court ordered Appellant to be taken into custody for 30 days, a sentence that the trial court suspended provided that Appellant was "abiding by the terms of this child support [order] or until such time as he purges himself of contempt." Because Appellant was to be imprisoned unless and until he performed the affirmative act of purging his contempt, the relief imposed by the trial court was remedial. Therefore, the contempt order was civil in nature.

Because the order was civil, the trial court was required to clearly specify how Appellant could purge himself of contempt. However, the above-quoted provision is as detailed as the trial court gets with respect to the contempt order. The trial court states that Appellant may purge himself of contempt but stops there. Without a clearer statement, it is hard to envision how the Appellant would possibly know how to purge himself of contempt. Under Section 5A-22, the trial court was without authority to issue an order holding Appellant in civil contempt without also stating the means by which such contempt could be purged.

Because the trial court did not specify how Appellant might purge himself of contempt as required by Section 5A-22, the trial court acted beyond its authority with regard to the contempt order included in the September 26 Order. The contempt order entered on September 26, 2012 is void.[1] Thus, the trial court erred in denying Appellant's motion for relief pursuant to Rule 60(b)(4).

1. While the North Carolina Supreme Court has previously held that "[a] valid consent judgment may be set aside only with the consent of both parties, or upon proof that consent was not given or was obtained by fraud or mutual mistake" *Tucci*, 85 N.C. App. at 143-44, 354 S.E.2d at 295 (citing *Holden v. Holden*, 245 N.C. 1, 95 S.E.2d 118 (1956)), "[a] void judgment [ ] binds no one and it is immaterial whether the judgment was or was not entered by consent." *Id.* at 144, 354 S.E.2d at 295 (citation omitted).

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 OCTOBER 2019)

CROMIE v. CROMIE No. 18-1213	Iredell (10CVD2362)	Affirmed
GARRETT v. GOODYEAR TIRE & RUBBER CO. No. 19-228	N.C. Industrial Commission (13-007190)	Affirmed
HOPKINS v. EDGERTON No. 19-169	Henderson (18CVD1234)	Vacated and Remanded
IN RE A.H.A. No. 18-1057	Beaufort (17JA62-63)	Affirmed
IN RE B.N.C. No. 19-2	Buncombe (16JT192) (16JT193) (16JT194)	Affirmed
IN RE J.O. No. 18-1079	Mecklenburg (15JA613)	Affirmed
IN RE L.M.W. No. 19-42	Hyde (18JT10) (18JT11)	Affirmed
IN RE W.J.I. No. 19-1	Cleveland (18JT23)	Vacated and Remanded
LAMONT v. LARSEN No. 19-193	Watauga (15CVD132)	Reversed and Remanded
MORRIS v. MORRIS No. 19-224	Transylvania (11CVD577)	Affirmed.
STATE v. BELL No. 19-60	New Hanover (14CRS53128-29)	No Plain Error in Part, Dismissed in Part
STATE v. BOGER No. 19-220	Iredell (16CRS53224-25) (17CRS828)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. GAMEZ No. 19-237	Durham (11CRS55538) (11CRS55539) (11CRS5826-29)	No Plain Error

STATE v. GRAHAM No. 18-1186	Rowan (17CRS3109) (17CRS53511)	No error in part; No plain error in part; Vacated and remanded in part.
STATE v. GUPTON No. 18-818	Guilford (14CRS24727) (14CRS91914)	No Error
STATE v. HOGAN No. 19-39	Madison (15CRS213) (15CRS50414) (15CRS50418) (17CRS667)	No Error
STATE v. HYMAN No. 18-1015	Alamance (16CRS51749)	Reversed and Remanded
STATE v. MARTIN No. 18-472	Durham (15CRS58505)	No Error
STATE v. SPENCER No. 19-45	Surry (17CRS308) (17CRS50366)	NO ERROR IN PART, AFFIRMED IN PART, DENIED IN PART.
STATE v. STREETER No. 18-1067	Pitt (16CRS2529) (16CRS58516) (16CRS58517) (17CRS22)	No Error
STATE v. WEATHERS No. 19-84	Mecklenburg (17CRS33889)	No Error
SYLLA v. ENOS-SYLLA No. 18-1059	Wake (13CVD3430)	Reversed in Part and Remanded
TUCKER v. CLERK OF COURT OF FORSYTH CTY. EX REL. FRYE No. 18-1228	Forsyth (15CVS6015)	Affirmed in Part and Vacated in Part

CRAGO v. CRAGO

[268 N.C. App. 154 (2019)]

DIETER CRAGO, PLAINTIFF
v.
CANDICE CRAGO, DEFENDANT

No. COA18-1304

Filed 5 November 2019

1. Divorce—equitable distribution—property classification—mechanistic approach—proceeds from former spouse's life insurance policy

In a divorce action, where defendant's prior husband named her the beneficiary of his million-dollar life insurance policy, the trial court did not abuse its discretion by using the mechanistic approach (rather than the analytic approach) to determine that the life insurance proceeds were marital property subject to equitable distribution. Under the mechanistic approach, which courts routinely apply in the insurance context, the trial court properly classified the insurance proceeds as marital property where defendant paid the insurance premiums in part with marital funds, where her prior husband's death and her claim for benefits under the policy arose before she and plaintiff separated, and where she also received the proceeds before the date of separation.

2. Divorce—equitable distribution—property classification—source of funds—proceeds from former spouse's life insurance policy

In a divorce action, where defendant's prior husband named her the beneficiary of his life insurance policy, the trial court did not abuse its discretion in classifying the insurance proceeds as marital property subject to equitable distribution under the "source of funds" rule. Competent evidence showed that defendant paid the insurance premiums with funds from a bank account she opened during her marriage to plaintiff, which included her personal income and money from the parties' joint account. Defendant offered no evidence showing she acquired any of those funds either before the marriage or during the marriage by gift or inheritance, and therefore the trial court properly found that she paid the life insurance premiums with marital property.

3. Divorce—equitable distribution—legal title to marital property by third party—jurisdiction

In a divorce action, the trial court had jurisdiction to distribute a car and a bank trust account at equitable distribution where there

was no evidence supporting defendant's claim that a third party held legal title to both items.

4. Divorce—equitable distribution—property classification—income tax debt

In a divorce action, the trial court properly classified certain income tax debt as marital at equitable distribution where competent evidence showed that, during the last six years of the parties' marriage, they accrued over $60,000 of federal income tax debt and only part of it was the husband's separate debt.

5. Divorce—equitable distribution—distributive award—sufficiency of funds—findings of fact

In a divorce action, the trial court did not abuse its discretion by ordering the wife to make a distributive award of $120,000 to the husband where the court found the wife had sufficient funds for the award in her bank account that, as of the parties' separation, contained $841,784 worth of proceeds she had received under her previous spouse's life insurance policy. Although two years had passed since the parties separated (as of the trial date), it was reasonable for the trial court to conclude from the evidence that at least $200,000 remained in the account.

6. Divorce—alimony—dependency—access to substantial unearned income

In a divorce action, the wife was not entitled to alimony because she was not a dependent spouse where, although the husband was the sole breadwinner during the marriage, the wife had access to over one million dollars of proceeds from her previous husband's life insurance policy. Further, because the trial court found the wife would be able to earn substantial income after her recent job search, the court did not improperly disqualify her from receiving alimony based solely on her ability to support herself through estate depletion.

7. Attorney Fees—divorce—action for alimony—N.C.G.S. § 50-16.4

In a divorce action, the trial court properly denied the wife's request for attorney fees under N.C.G.S. § 50-16.4 after finding she was not a dependent spouse, was not entitled to alimony, and had sufficient means to bear the cost of litigation using proceeds from her prior spouse's million-dollar life insurance policy.

Judge HAMPSON concurring in result in part and dissenting in part.

Appeal by defendant from order entered 19 June 2018 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 19 September 2019.

Rosenwood, Rose & Litwak, PLLC, by Nancy S. Litwak, Erik M. Rosenwood, and Meredith R. Hiller, for plaintiff.

Plumides, Romano, Johnson & Cacheris, P.C., by Richard B. Johnson and John Cacheris, for defendant.

ARROWOOD, Judge.

Candice Crago ("defendant") appeals from an equitable distribution and alimony Order awarding her ex-husband, Dieter Crago ("plaintiff"), $120,000.00, and challenges the denial of alimony and attorney's fees. For the following reasons, we affirm.

I. Background

Plaintiff and defendant were married on 23 June 2007. Plaintiff and defendant both worked as engineers until 2010, when they were laid off. In order to support themselves through unemployment, plaintiff and defendant liquidated their 401(k) accounts and pension plans. Plaintiff later obtained work again and became the sole wage earner for the remainder of the marriage, while defendant enrolled in school to pursue various areas of study. In 2013, plaintiff and defendant opened a joint bank account, from which defendant would sometimes withdraw funds to transfer to her separate account. Defendant would also deposit checks written to her by plaintiff into her separate account. The parties had no children together, but defendant had two children from a previous marriage to Michael Heintz.

On 22 September 2004, defendant and Mr. Heintz took out a $1,000,000.00 life insurance policy on Mr. Heintz's life and named defendant as the beneficiary. During her marriage to plaintiff, defendant paid the insurance premiums partly with funds she received from plaintiff. In October 2015, following Mr. Heintz's death in September, defendant received the payout from the life insurance policy. On 16 January 2016, plaintiff and defendant separated. On 24 June 2016, plaintiff filed a "Complaint" for equitable distribution of the parties' assets. On 20 October 2016, defendant filed a counterclaim for equitable distribution, alimony, and attorney's fees.

A trial was held on 15 March 2018, and the trial court issued an "Order for Equitable Distribution and Alimony" ("Order") in which it determined

the life insurance policy to be marital property, and distributed the property 80% to defendant and 20% to plaintiff. Plaintiff was awarded $120,000.00 in proceeds from the life insurance policy, and was assigned all of the parties' tax debt. Defendant's claims for alimony and attorney's fees were denied. Defendant subsequently appealed.

II. Discussion

On appeal, defendant assigns as error the trial court's: (1) classification of life insurance proceeds, 2012 GMC Sierra, BB&T Trust Account, and certain tax debt as marital property; (2) distribution to plaintiff in the amount of $120,000.00; and (3) denial of defendant's claims for alimony and attorney's fees.

When the trial court sits without a jury, this Court reviews a trial court's equitable distribution order for "whether there was competent evidence to support the trial court's findings of fact and whether those findings of fact supported its conclusions of law." *Casella v. Alden*, 200 N.C. App. 24, 28, 682 S.E.2d 455, 459 (2009) (citing *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004)). "The division of property in an equitable distribution 'is a matter within the sound discretion of the trial court.' " *Cunningham v. Cunningham*, 171 N.C. App. 550, 555, 615 S.E.2d 675, 680 (2005) (quoting *Gagnon v. Gagnon*, 149 N.C. App. 194, 197, 560 S.E.2d 229, 231 (2002)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

A. Classification of the Life Insurance Proceeds

1. The Mechanistic Approach Was Proper

[1] Defendant first argues the trial court abused its discretion when it rejected the analytic approach when determining that the life insurance proceeds were marital property in its equitable distribution Order. We disagree.

"Pursuant to N.C. Gen. Stat. § 50-20 [(2017)], equitable distribution is a three-step process requiring the trial court to '(1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property.' " *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (quoting *Cunningham*, 171 N.C. App. at 555, 615 S.E.2d at 680)). Under North Carolina law, marital property is "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property

determined to be separate property or divisible property[.]" N.C. Gen. Stat. § 50-20(b)(1) (2017). Separate property is that acquired by a spouse before marriage, or acquired by devise, descent, or gift during the marriage. N.C. Gen. Stat. § 50-20(b)(2). Generally, divisible property refers to certain property received after the date of separation but prior to distribution. N.C. Gen. Stat. § 50-20(b)(4).

North Carolina courts have adopted two different approaches for determining what is marital and separate property: the "mechanistic" approach and the "analytic" approach. In *Johnson v. Johnson*, our Supreme Court described the mechanistic approach as:

> literal and looks to the general statutory definitions of marital and separate property and concludes that since the award was acquired during the marriage and does not fall into the definition of separate property or into any enumerated exception to the definition of marital property, it must be marital property.

317 N.C. 437, 446, 346 S.E.2d 430, 435 (1986). In contrast, "[t]he analytic approach asks what the award was intended to replace," focusing on the purpose of the compensation rather than its statutory definition. *Id.*

In support of her argument the trial court erred by not applying the analytic approach, defendant cites several cases concerning classification of personal injury settlements and disability benefits. *See Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986); *Cooper v. Cooper*, 143 N.C. App. 322, 545 S.E.2d 775 (2001); *Finkel v. Finkel*, 162 N.C. App. 344, 590 S.E.2d 472 (2004). However, defendant also acknowledges North Carolina courts have never applied this approach in the context of life insurance proceeds. *See Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988). Nevertheless, she urges us to adopt the analytic approach in this case, based on "important public policy considerations" surrounding whether life insurance proceeds intended to benefit a spouse's children from another marriage should be considered marital property. Furthermore, she argues *Foster* is distinguishable from the present case and therefore should not be binding on this Court.

In *Foster*, the husband and wife had purchased a life insurance policy on their children during their marriage. 90 N.C. App. at 265, 368 S.E.2d at 26. After the parties separated, the husband alone paid the premiums for the policy. During the separation period, one of the children passed away and the life insurance proceeds were paid and placed in a trust account. *Id.* at 265, 368 S.E.2d at 27. In divorce proceedings, the wife claimed the life insurance proceeds were a marital asset because

some of the policy premiums had been paid for with marital funds. *Id.* at 266, 368 S.E.2d at 27. We disagreed, holding that because the claim for death benefits did not arise until after separation, when their son passed away, the policy proceeds were the husband's separate property. *Id.* at 268, 368 S.E.2d at 28. In making our ruling, we noted that, pursuant to N.C. Gen. Stat. § 50-20, "in order for property to be considered marital property it must be 'acquired' before the date of separation and must be 'owned' at the date of separation." *Id.* at 267, 368 S.E.2d at 27.

Defendant argues the present case is distinguishable from *Foster* because that case concerned a life insurance policy on the lives of the parties' own children, whereas the policy in dispute here covered the life of her ex-husband and was intended to be used to care for her children from her prior marriage. However, the relevant fact under the mechanistic approach we applied in *Foster* was whether the property was acquired before the date of separation, not who the policy covered or what its intended purpose was. *See id.*

Here, defendant executed the life insurance policy on her ex-husband prior to her marriage to plaintiff. However, evidence showed defendant paid the insurance premiums in part with money she received from plaintiff. Thus, the insurance premiums were paid in part with marital funds. In addition, the claim for death benefits arose prior to the parties' separation, upon Mr. Heintz's death in September 2015. The proceeds were also paid to defendant prior to her separation from plaintiff in January 2016. In keeping with our holding in *Foster*, whether the property was acquired prior to the parties' separation controls whether it is considered marital or separate property. Accordingly, because defendant received the proceeds before separating from plaintiff, the trial court did not err in concluding the proceeds were marital property. The trial court also did not abuse its discretion in applying the mechanistic approach, which this Court has applied in the insurance context, instead of the analytic approach advocated by defendant.

2. Source of Funds

[2] In the alternative, defendant contends the trial court abused its discretion in its source of funds analysis. We disagree.

In making an equitable distribution determination, "all property must be classified as marital or separate, and when property has dual character, the component interests of the marital and separate estates must be identified[.]" *McIver v. McIver*, 92 N.C. App. 116, 124, 374 S.E.2d 144, 149 (1988). If property is acquired with a mixture of marital and separate property, North Carolina courts apply the "source of funds" rule to

determine whether the property is marital or separate. *Id.* "Under the source of funds analysis, property is 'acquired' as it is paid for, and thus may include both marital and separate ownership interests." *Id.*

Here, the trial court made the following findings of fact:

> i) Wife's State Employee's Credit Union Account (aka "SECU") ending in 3207. The Court finds this account to be marital. The date of separation value of $3,738.00. This was Wife's primary checking account since 2007 and Wife has not overcome the presumption that it is marital property. Her testimony was that the sources of funds for this account were income, liquidated pension, unemployment, sale of her personal property, child support and moneys from the joint account. While the account may have existed prior to the date of the marriage, there is certainly no tracing and the evidence points to the fact that the contents of this account as of the date of separation were marital. The Court distributes this account to the Wife.
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> . . . .
>
> vii) BB[&]T Account ending in 0655 [containing the life insurance proceeds]. . . . The evidence shows that Wife took out the policy on her former husband's life prior to marriage on 9/22/04. She always paid the premiums from the same bank account, which is the SECU account ending 3207 (Item #7). The account was in her name and owned by her prior to marriage. During the marriage, the source of deposits into this account, were: (a) income from liquidated pension; (b) unemployment; (c) transfers from the parties' joint account; (d) proceeds from consignment sale of her personal property; and (e) child support payments from her former husband. . . . In the month before Wife's first husband passed away, per D39, the SECU account had a beginning balance on 8/6/15 of $156.34. There was a deposit on 8/6/15 of $1,000[.00] from the parties' joint account, pursuant to Wife's testimony, and a deposit on 8/6/15 of $705.43 from a child support check from Wife's former husband (D37). There were three debit purchase transactions between 8/6/15 and 8/10/15 totaling $62.67, and an internet debit transfer

> of $1,100[.00] to Wife's savings account on 8/10/15. On 8/11/15, the $364.50 Allstate life insurance premium payment was debited. . . . Even if the Court found her child support to be separate, which it does not, then there is nothing to indicate what the source of the funds was that paid the premium.

Defendant contends "the trial court used an improper analysis under the source of funds rule[.]" Under defendant's proposed source of funds analysis, the trial court should have found there was 36% in separate funds in the account and 64% marital at the time the last insurance premium payment was drafted on 11 August 2015. Based on our decision in *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260 (1985), she argues the trial court should have determined the insurance proceeds to be 36% separate and 64% marital, according to the ratio of separate to marital funds used to pay the last insurance premium. We reject defendant's argument.

Defendant's analysis relies on the assumption there was separate property in the account, which the trial court expressly found was not the case. The evidence showed defendant opened the SECU account ending in 3207 in 2007, the same year she married plaintiff, and used it to pay for the life insurance premiums on Mr. Heintz. Throughout her marriage to plaintiff, defendant funded that account with her income, liquidated pension, unemployment benefits, sale of her personal property, child support, and money from the joint account with plaintiff. Pursuant to N.C. Gen. Stat. § 50-20, marital property is all real and personal property acquired by either spouse after marriage and before separation, with the exception of separate property. N.C. Gen. Stat. § 50-20(b). Defendant presented no evidence showing any of the money in the 3207 account was acquired by devise, descent, or gift, such that it would constitute separate property. *Id.* She also presented no evidence showing any premarital funds still existed in the account after eight years. The trial court acknowledged this fact, finding that "[w]hile the account may have existed prior to the date of marriage, there is certainly no tracing." On the contrary, that defendant has been unemployed for years and was at one point forced to liquidate her pension in order to support herself and plaintiff, indicates nothing of her premarital funds remains. Accordingly, the trial court's finding that the account ending in 3207 was marital, and thus the funds used to pay the last life insurance premium were marital, was not an abuse of discretion.

B. 2012 GMC Sierra and BB&T Trust

[3] Defendant next argues the trial court erred in distributing a 2012 GMC Sierra and a BB&T Trust account ending in 2110 titled in the name of C. Crago Trust because the trial court lacked jurisdiction to do so. We disagree.

Plaintiff contends defendant waived this argument by not raising it at trial. However, "[i]t is well settled that 'the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*.' " *Carpenter v. Carpenter*, 245 N.C. App. 1, 8, 781 S.E.2d 828, 835 (2016) (quoting *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012)). We review a trial court's jurisdiction *de novo*. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citing *Harper v. City of Asheville*, 160 N.C. App. 209, 213, 585 S.E.2d 240, 243 (2003)).

We have previously held that

> [W]hen a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property.

Upchurch v. Upchurch, 122 N.C. App. 172, 176, 468 S.E.2d 61, 63-64 (1996) (citations omitted). More recently, in *Carpenter*, we held that a trial court lacked jurisdiction to distribute a Wells Fargo UTMA account where the party who held legal title to the property was not joined in the action. 245 N.C. App. at 10-11, 781 S.E.2d at 836-37. *See also Nicks v. Nicks*, 241 N.C. App. 487, 496, 774 S.E.2d 365, 373 (2015) (holding the trial court lacked jurisdiction to order distribution of Entrust, LLC where the Trust holding legal title to the property was not made party to the action).

Here, defendant claims the 2012 GMC Sierra and the BB&T Trust account ending in 2110 were titled in the name of the C. Crago Trust. However, there is no evidence in the Record supporting this assertion. In support of her claim, defendant directs us to a vague reference to a GMC vehicle owned by C. Crago Trust, but defendant and plaintiff owned multiple GMC vehicles, and there is no proof the particular vehicle referenced is the 2012 GMC Sierra at issue here. In addition, the Record contains no mention at all of a BB&T Trust account owned by

C. Crago Trust. Although the trial court does reference a BB&T Trust Account in its findings, there is no evidence in the Record a third-party owned the trust. Thus, we reject defendant's argument because there is no evidence the trial court lacked jurisdiction to distribute this property. *See Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986) ("Where the record is silent on a particular point, we presume that the trial court acted correctly").

C. Tax Debt

[4] Defendant next argues the trial court erred in classifying certain income tax debt as marital. We disagree.

"A marital debt . . . is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). "The party who claims that any debt is marital bears the burden of proof on that issue" and "must show both the value of the debt on the date of separation and that it was incurred during the marriage for their joint benefit[.]" *Riggs v. Riggs*, 124 N.C. App. 647, 652, 478 S.E.2d 211, 214 (1996) (internal quotation marks omitted), *disc. review denied*, 345 N.C. 755, 485 S.E.2d 297 (1997).

This Court has previously held that income tax debt incurred during marriage and before separation constitutes marital debt. In *Lund v. Lund*, the Husband owed $2,495.00 in federal taxes in 2012, and the parties did not separate until 2013. 244 N.C. App. 279, 287, 779 S.E.2d 175, 181 (2015). Based on those facts, we held that there was competent evidence to support the trial court's finding that the 2012 tax debt was marital. *Id.* We also upheld the trial court's finding that credit card debt incurred during the same month the parties separated was marital. *Id.* at 288, 779 S.E.2d at 181.

Here, the evidence showed the parties were married on 23 June 2007 and separated on 16 January 2016. From approximately 2010 to 2016, plaintiff was the sole wage earner of the family. During that time, the parties' accrued federal income tax debt totaling $62,783.96, including failure-to-pay penalties. The trial court found that the federal income taxes owed from 2010 to 2015 were marital. It further found that a majority of plaintiff's 2016 tax debt was separate, but a portion amounting to $358.00 on the date of separation was marital. There is competent evidence to support the trial court's findings of fact, thus the trial court did not abuse its discretion.

D. $120,000.00 Distributive Award to Husband

[5] Defendant next contends the trial court abused its discretion by ordering her to make a distributive award of $120,000.00 to plaintiff without first finding if she had sufficient funds to make such distribution. This argument is without merit.

In its finding of fact number 16, the trial court found:

> [T]here is over $200,000.00 remaining in the BB&T account ending in 0655 [containing the proceeds of the life insurance policy]. However, if it is not possible to still do an in-kind distribution from that account so as to distribute $120,000.00 from that account to Husband, then it is to be considered a distributive award of $120,000.00 to be paid to Husband within the next 60 days.

Defendant contends there was no evidence of the amount of funds available in the account as of the date of trial. Citing to our decision in *Embler v. Embler*, 159 N.C. App. 186, 582 S.E.2d 628 (2003), defendant asserts "when an in-kind distribution is rebutted, and the trial [c]ourt orders a lump sum distribution, the trial [c]ourt must make findings that there are sufficient funds available for the distribution." However, in *Embler* we were concerned with a defendant who "had no obvious liquid assets" and that the trial court had not taken into account any adverse financial ramifications that could result from ordering a defendant to pay an award from a non-liquid asset. *Embler*, 159 N.C. App. at 188-89, 582 S.E.2d at 630. We are not faced with the same concerns in this case.

Here, the evidence showed defendant did have "obvious liquid assets" from which to make a distributive award, consisting primarily of the life insurance proceeds in defendant's BB&T bank account. The trial court found there was $841,784.00 remaining in the account as of the parties' date of separation. Defendant testified she had been using the life insurance proceeds to support herself and her children, with her expenses averaging $3,250.00 per month. Though defendant argues two years have passed since the parties separated, based on the evidence, it was reasonable for the trial court to conclude that there was at least $200,000.00 remaining from the $841,784.00. Accordingly, there was competent evidence to support the trial court's finding and the trial court did not abuse its discretion in ordering defendant to make a distributive award of $120,000.00.

E. Alimony and Attorney's Fees

[6] Finally, defendant contends the trial court erred in denying defendant's claim for alimony because it did not make sufficient findings on the parties' financial status and accustomed standard of living. We disagree.

We review a determination of whether a spouse is entitled to alimony *de novo*. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) (citations omitted). The amount of alimony awarded is reviewed for abuse of discretion. *Id.*

Pursuant to N.C. Gen. Stat. § 50-16.3A, "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b)[.]" N.C. Gen. Stat. § 50-16.3A(a) (2017). A dependent spouse is "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2017). The spouse asserting the claim for alimony has the burden of proving dependency. *Williamson v. Williamson*, 217 N.C. App. 388, 392, 719 S.E.2d 625, 627 (2011).

In denying defendant's claim for alimony, the trial court made the following finding of fact:

> 17) Alimony: Husband is representing himself and the first two sentences of his closing argument was "how is she [Wife] dependent upon me if she has a $1,000,000.00." The Court agrees with Husband. Wife does not have all of the $1,000,000.00 but she has $777,851.00 from this distribution. Though Husband was earning money during the marriage, part of Wife's complaint is that Husband was not supporting her during [the] marriage. Nevertheless, Wife got the life insurance proceeds and had them at her disposal of over a $1,000,000.00 while they were still married, kept them and had access and use of those proceeds in any investments [ ] that she could have yielded from those proceeds after the date of separation. The Court finds that she is not a dependent spouse as of the date of trial, which is the date that it is determined and therefore the Court does not award alimony.

In sum, the trial court found defendant was not dependent on plaintiff for her maintenance and support, nor in need of maintenance and support from plaintiff, because she had substantial unearned income in the form of the life insurance proceeds. Defendant produced no evidence to the contrary. In addition, throughout its Order, the trial court made findings concerning the duration of the parties' marriage, education level, earning capacity, debts, assets, standard of living, and plaintiff's contribution to the education and increased earning power of defendant. Reading the trial court's Order as a whole, it is reasonable to conclude the trial court relied on the same findings it used to distribute the parties' property as it did to determine defendant's eligibility for alimony, as both required the court to consider similar factors and were ruled upon in the same Order. *See* N.C. Gen. Stat. §§ 50-20, 50-16.3A(b)-(c) (2017). Accordingly, we hold the trial court's findings of fact were sufficient to meet the requirements of N.C. Gen. Stat. § 50-16.3A.

The dissent, citing to *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980), asserts the life insurance proceeds should not disqualify defendant from receiving alimony because the law does not require she support herself through estate depletion. However, the dissent ignores the context in which the insurance proceeds were used to support the trial court's decision to deny alimony. The *Williams* court held that "the trial court consideration of the 'estates' of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not for the purpose of determining capability of self-support through estate depletion." *Id.* at 184, 261 S.E.2d at 856. Looking at the trial court's findings as a whole, it becomes clear the trial court did consider the life insurance proceeds the way *Williams* intended—as a way to evaluate the earnings and earning capacity of defendant. The trial court found defendant had substantial unearned income from the life insurance proceeds, and also that she "has the ability to earn substantial income." These findings were supported by competent evidence, including defendant's own testimony that she periodically sent out some job applications and was confident she would get a job opportunity soon. Accordingly, the trial court did not, as the dissent argues, simply disqualify defendant from receiving alimony based solely on her ability to support herself through estate depletion.

[7] We also hold the trial court properly denied defendant's request for attorney's fees. "We [have] interpreted [N.C. Gen. Stat. § 50-16.4 (2017)] to require that '[a] spouse is entitled to attorney's fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded

(e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation.' " *Friend-Novorska v. Novorska*, 163 N.C. App. 776, 777-78, 594 S.E.2d 409, 410 (2004) (quoting *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646). "Whether the moving party meets these requirements is a question of law fully reviewable *de novo* on appeal." *Id.* at 778, 594 S.E.2d at 410 (citing *Hudson v. Hudson*, 299 N.C. 465, 473, 263 S.E.2d 719, 724 (1980)).

Here, defendant was found not to be dependent, was not entitled to alimony, and also had sufficient means to bear the cost of litigation using the life insurance proceeds. Accordingly, the trial court's denial of defendant's request for attorney's fees was proper.

III. Conclusion

For the foregoing reasons, we affirm the Order of the trial court.

AFFIRMED.

Judge ZACHARY concurs.

Judge HAMPSON concurs in result in part and dissents in part by separate opinion.

HAMPSON, Judge, concurring in result in part and dissenting in part.

I concur in the result reached by the majority on the Equitable Distribution claim. I dissent from the majority opinion on the Alimony claim. Both of these conclusions stem from the trial court's treatment of the proceeds from the life insurance policy insuring the life of Defendant's first husband.

I.

The trial court classified the proceeds of a life insurance policy, which insured Defendant's first husband and was intended to provide familial support for her and the children from that prior marriage, as marital property belonging to the marital estate and distributed $120,000 from those proceeds to Plaintiff, Defendant's second husband. In affirming the trial court, the majority adopts what it terms a "mechanistic" approach to classification of these proceeds. In actuality, the majority simply applies the standard statutory analysis applicable to other assets acquired during the marriage using a traditional source of funds methodology.

The limited scenario presented by this case, however, may well cry out for application of the "analytic" method. Indeed, there are both practical and policy reasons for allowing a spouse to retain as her separate property insurance proceeds arising from the dissolution of a prior marriage intended to support her and the children from that prior marriage. This would be so notwithstanding the fact funds from the subsequent marriage contributed to the payment of the insurance premiums. *See Finkel v. Finkel*, 162 N.C. App. 344, 348, 590 S.E.2d 472, 475 (2004) (applying analytical approach to disability insurance benefits and noting the "monthly benefits do not lose their classification as separate property because the source of the premiums was marital"). Under our existing case law, had Defendant's first husband not died until after her separation from Plaintiff, the opposite result may have been reached and the insurance proceeds classified as Defendant's separate property; again, notwithstanding the fact marital funds contributed to the payment of the premiums. *See Foster v. Foster*, 90 N.C. App. 265, 267, 368 S.E.2d 26, 28 (1988).

It appears undisputed in this case the existence of the insurance policy was the result of arrangements Defendant made with her first husband to ensure, in the event of his death, she and the children from that marriage would be financially protected and have an independent source of support. It surely was not originally intended to provide a six-figure, lump-sum payment to Defendant's next husband. Moreover, it is evident there was a clear expectation and agreement between Plaintiff and Defendant that during their marriage their marital funds would be used to pay, in part, the premiums for this policy.

Here, though, the evidence also supports a determination the insurance proceeds—acquired during the marriage partially from the use of marital funds to pay the premiums—were also intended, in whole or part, to be contributed to the marital estate and applied to marital obligations. In the absence of evidence sufficient to trace out what share of the proceeds should be marital and separate, the presumption remains property acquired during the marriage is marital. Thus, in that regard, it was reasonable for the trial court to classify the entirety of the proceeds as marital property and, then, in the distribution phase take the nature of these insurance proceeds into account as a significant factor in its distribution. This the trial court did in awarding Defendant an 80/20 unequal distribution. On the facts of this case, this was not an abuse of discretion, and I concur in the result reached by the majority affirming the trial court's Equitable Distribution award.

II.

I do, however, disagree with the majority on the decision to affirm the denial of Alimony and attorneys' fees. The trial court concluded Defendant was not a dependent spouse because she was awarded the balance of the life insurance proceeds and, in the trial court's view, this provided her with a source of support such that she was not in need of maintenance or support from Plaintiff. In my view, this runs directly contrary to a central tenet of our Supreme Court's decision in *Williams v. Williams*. The ruling in *Williams v. Williams* remains the governing standard for determining whether a spouse is actually substantially dependent or substantially in need of maintenance and support. See 299 N.C. 174, 183, 261 S.E.2d 849, 856 (1980). *Williams* was decided under the pre-1995 alimony statute providing for "fault-based" alimony, and "on 1 October 1995, this fault-based approach was replaced by a need-based alimony statute." *Alvarez v. Alvarez*, 134 N.C. App. 321, 323, 517 S.E.2d 420, 422 (1999). Nevertheless, our Courts continue to look to *Williams* to guide the economic analysis for purposes of determining entitlement to alimony. *See*, *e.g.*, *Crocker v. Crocker*, 190 N.C. App. 165, 171, 660 S.E.2d 212, 216 (2008) (applying *Williams* to determine whether the trial court made findings supporting its conclusion of dependency).

In making a dependency determination, the relevant *Williams* factors include:

> (1) the accustomed standard of living of the parties prior to the separation, (2) the income and expenses of each of the parties at the time of the trial, (3) the value of the estates, if any, of both spouses at the time of the hearing, and (4) "the length of [the] marriage and the contribution each party has made to the financial status of the family over the years."

Hunt v. Hunt, 112 N.C. App. 722, 726-27, 436 S.E.2d 856, 859 (1993) (quoting *Williams*, 299 N.C. at 183-85, 261 S.E.2d at 856-57). "The conclusions made by the court as to whether a spouse is 'dependent' or 'supporting' must be based on findings of fact sufficiently specific to indicate that the court properly considered the factors set out in *Williams*." *Talent v. Talent*, 76 N.C. App. 545, 548, 334 S.E.2d 256, 259 (1985).

As it relates to the consideration of the parties' estates, the Supreme Court was clear:

> The financial worth or "estate" of both spouses must also be considered by the trial court in determining which

> spouse is the dependent spouse. We do not think, however, that usage of the word "estate" implies a legislative intent that a spouse seeking alimony who has an estate sufficient to maintain that spouse in the manner to which he or she is accustomed, through estate depletion, is disqualified as a dependent spouse. Such an interpretation would be incongruous with a statutory emphasis on "earnings," "earning capacity," and "accustomed standard of living." It would also be inconsistent with plain common sense. If the spouse seeking alimony is denied alimony because he or she has an estate which can be spent away to maintain his or her standard of living, that spouse may soon have no earnings or earning capacity and therefore no way to maintain any standard of living.
>
> We think, therefore, that the trial court consideration of the "estates" of the parties is intended primarily for the purpose of providing it with another guide in evaluating the earnings and earning capacity of the parties, and not for the purpose of determining capability of self-support through estate depletion. We think this is equally true in giving consideration to the estate of the alleged supporting spouse. Obviously, a determination that one is the supporting spouse because he or she can maintain the dependent spouse at the standard of living to which they were accustomed through estate depletion could soon lead to inability to provide for either party.

Williams, 299 N.C. at 183-84, 261 S.E.2d at 856 (emphasis omitted). The Court went on to hold the General Assembly "did not intend that one seeking alimony be disqualified as a dependent spouse because, through estate depletion, that spouse would be able to maintain his or her accustomed standard of living." *Id.* at 185, 261 S.E.2d at 857.

In this case, however, this is exactly what the trial court did: disqualify Defendant from alimony simply because, through estate depletion, she may be able to maintain her accustomed standard of living. The trial court quite plainly found:

> 17) Alimony: Husband is representing himself and the first two sentences of his closing argument was "how is she [Wife] dependent upon me if she has a $1,000,000.00" The Court agrees with Husband. Wife does not have all of the $1,000,000.00 but she has

> $777,851.00 from this distribution. Though Husband was earning money during the marriage, part of Wife's complaint is that Husband was not supporting her during marriage. Nevertheless, Wife got the life insurance proceeds and had them at her disposal of over a $1,000,000.00 while they were still married, kept them and had access and use of those proceeds in any investments she that she [sic] could have yielded from those proceeds after the date of separation. The Court finds that she is not a dependent spouse as of the date of trial, which is the date that it is determined and therefore the Court does not award alimony.

Based on this finding, the trial court concluded Defendant's Alimony claim should be denied.[1] This conclusion was error, and I would vacate the denial of Alimony and remand the matter to the trial court for reconsideration of its Alimony decision. I would therefore also vacate the denial of attorneys' fees related to Defendant's Alimony claim and remand that issue for further consideration.

Consequently, I would affirm the trial court's decision as to Equitable Distribution and vacate and remand the Alimony portion of the trial court's Order. Accordingly, I respectfully concur in the result in part and dissent in part.

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1. I do not, as the majority claims, ignore the context in which the trial court used the insurance proceeds. To the contrary, Finding of Fact 17—the only finding expressly addressing Alimony—speaks for itself and is perfectly clear in explaining exactly how the trial court used these proceeds in denying Alimony. The additional findings the majority uses to bolster its analysis are contained within the trial court's Equitable Distribution analysis under the heading: "The distributional factors applied by the Court[.]" *See* N.C. Gen. Stat. § 50-20(f) (2017) ("The court shall provide for an equitable distribution without regard to alimony . . . ."). In Equitable Distribution, after requiring Defendant to pay Plaintiff $120,000, the trial court distributed the balance of the insurance proceeds to Defendant. Based solely on this fact, and without any other consideration, the trial court denied Defendant alimony. This was error.

HART v. HART

[268 N.C. App. 172 (2019)]

MICHELE ANN HART, PLAINTIFF
v.
PAUL BRADLEY HART, DEFENDANT

No. COA18-914

Filed 5 November 2019

1. Child Custody and Support—child support order—from another state—Uniform Interstate Family Support Act—jurisdiction to enforce and modify

In a child support case originating in Washington, where a trial court in that state entered the initial support order and two more orders correcting the first, a North Carolina trial court had jurisdiction under the Uniform Interstate Family Support Act (UIFSA) to enforce and modify the father's child support obligation because both parents and their children resided in North Carolina when the father filed his motion to modify child support. Furthermore, where UIFSA requires an out-of-state order to be registered in North Carolina before a North Carolina court can modify it, the mother substantially complied with this requirement by registering the original support order and one of the corrected orders.

2. Child Custody and Support—child support—modification—substantial change in circumstances—new custodial arrangement

In a child support case originating in another state, where the father relocated to North Carolina shortly after the mother moved there with the parties' three children, a North Carolina trial court did not abuse its discretion in modifying the father's child support obligation where the evidence revealed a substantial change in circumstances affecting the children's welfare. Specifically, the amount of time the children spent with the father increased significantly once they all lived in the same state and after the parties changed their custodial arrangement to one of shared custody.

3. Child Custody and Support—child support amount—modification—calculation—deviation from guidelines—effective date

Where the trial court modified a father's child support obligation and granted him a credit for past support payments, the court did not abuse its discretion by deviating from the N.C. Child Support Guidelines when calculating the new amount of child support, because competent evidence showed that the parties' combined

monthly gross income exceeded the maximum amount to which the Guidelines' support schedule applied. Furthermore, the decision to make the modification effective from the date on which the father filed his motion to modify fell squarely within the trial court's discretion.

Appeal by plaintiff from order entered 3 April 2018 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 14 February 2019.

Moen Legal Counsel, by Lynna P. Moen, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Caroline T. Mitchell, for defendant-appellee.

ZACHARY, Judge.

Michele Ann Hart ("Plaintiff-Mother") appeals from an order modifying the child support obligation of Paul Bradley Hart ("Defendant-Father"). Plaintiff-Mother argues that the trial court (1) lacked jurisdiction to modify a child support order entered by a Washington court, (2) modified the order without evidence of a substantial change in circumstances, and (3) erred in determining the appropriate amount of Defendant-Father's child support obligation. Upon review, we affirm the trial court's order.

I. Background

Plaintiff-Mother and Defendant-Father, while citizens of Washington, married in September 1999, separated in May 2011, and divorced in May 2013. They have three minor children. Between 2011 and 2013, a Washington trial court entered two separate orders relating to custody and child support: a Parenting Plan Final Order ("2011 Custody Order"), and an Order of Child Support ("Support Order"). Because of an error in the Support Order, the Washington court entered a Corrected Order of Child Support ("Corrected Order") obligating Defendant-Father to pay Plaintiff-Mother $1,839.95 per month in child support.

In August 2013, Plaintiff-Mother and the children relocated to North Carolina. As a result, a second parenting plan order was entered by the Washington court the following year ("2014 Custody Order"). The 2014 Custody Order modified the custody arrangement to account for the fact that the parties now lived across the country from one another. At the same time, the trial court entered an order correcting a typographical

error in the Corrected Order concerning Defendant-Father's obligation to pay a portion of the children's uninsured medical expenses ("Correction of Scrivener's Error").

In December 2014, Defendant-Father moved to North Carolina. Plaintiff-Mother then filed a motion in Mecklenburg County District Court, requesting that the North Carolina court assume jurisdiction and modify Washington's 2014 Custody Order. The Washington court subsequently entered an order transferring jurisdiction over "all parenting-related issues in this case" to North Carolina.

On 2 June 2015, Plaintiff-Mother filed a Notice of Registration of Foreign Support Order seeking enforcement of Defendant-Father's child support obligation in North Carolina. Defendant-Father accepted service of the Notice of Registration of Foreign Support Order on 4 January 2016, and did not contest registration. Although Plaintiff-Mother's registration packet included the initial Support Order and the Correction of Scrivener's Error, she omitted the Corrected Order.

On 6 January 2016, the parties consented to a modification of the custodial arrangement. The North Carolina trial court entered a consent order reflecting the parties' agreement concerning custody of the children ("Child Custody Consent Order").

On 26 February 2016, Defendant-Father filed a Motion for Modification of Child Support, properly attaching all three parts of the controlling order: (1) the initial Support Order, (2) the Corrected Order, and (3) the Correction of Scrivener's Error. The trial court heard Defendant-Father's motion to modify on 11 October 2017. At the hearing, Plaintiff-Mother moved to dismiss Defendant-Father's motion for lack of subject-matter jurisdiction, which was denied in open court. When a second hearing was held on 30 November 2017 before the Honorable Jena P. Culler, Plaintiff-Mother once again moved to dismiss the case for lack of subject-matter jurisdiction. After hearing arguments from both parties, Judge Culler denied the motion.

At the conclusion of the hearing, the trial court found that "there ha[d] been several material and substantial changes in circumstances" since the Support Order's entry in May 2013. By order entered 3 April 2018, the trial court granted Defendant-Father's motion to modify his child support obligation. The trial court ordered Defendant-Father to pay $569.09 per month in child support, effective 26 February 2016, the date on which he filed his motion to modify. Ultimately, the trial court's modification entitled Defendant-Father to a $26,676.30 credit. Plaintiff-Mother timely appealed.

II. UIFSA

[1] Plaintiff-Mother first challenges the trial court's authority to modify Defendant-Father's child support obligation. Specifically, Plaintiff-Mother asserts that the trial court lacked subject-matter jurisdiction over the matter. We disagree.

The instant case is governed by the Uniform Interstate Family Support Act ("UIFSA"), codified in Chapter 52C of our General Statutes. *See generally* N.C. Gen. Stat. §§ 52C-1-100 to -9-902. "UIFSA governs the proceedings concerning the enforceability of any foreign support order that is registered in North Carolina after 1 January 1996." *Uhrig v. Madaras*, 174 N.C. App. 357, 359, 620 S.E.2d 730, 732 (2005) (citation omitted), *disc. review denied*, 360 N.C. 367, 630 S.E.2d 455 (2006).

UIFSA is a federally mandated uniform model act that was enacted "as a mechanism to reduce the multiple, conflicting child support orders existing in numerous states[.]" *New Hanover Cty. v. Kilbourne*, 157 N.C. App. 239, 243, 578 S.E.2d 610, 613-14 (2003). Designed to remedy flaws and inconsistencies that existed under previous interstate legislation, *see id.* at 241-43, 578 S.E.2d at 612-13, UIFSA allows for "only . . . one controlling support order at any given time." *Uhrig*, 174 N.C. App. at 360, 620 S.E.2d at 732. Under UIFSA's "one order" system, all states "are required to recognize and enforce the same obligation consistently." *Kilbourne*, 157 N.C. App. at 243, 578 S.E.2d at 614.

The concept of "continuing, exclusive jurisdiction" is crucial to determining whether North Carolina has jurisdiction to modify, or merely enforce, a child support order issued by another state. "Any [child support order] issued by a court of another state may be registered in North Carolina for enforcement" by following the procedures set forth under N.C. Gen. Stat. § 52C-6-602. *Twaddell v. Anderson*, 136 N.C. App. 56, 60, 523 S.E.2d 710, 714 (1999), *disc. review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000). A support order issued in another state is registered and enforceable in North Carolina upon filing. N.C. Gen. Stat. § 52C-6-603(a)-(b); *see also id.* § 52C-1-101(14) (" 'Register' means to file in a tribunal of this State a support order or judgment determining parentage of a child issued in another state or a foreign country.").

Registering a sister state's child support order for enforcement, however, does not automatically vest North Carolina courts with authority to modify the order. *See id.* § 52C-6-603(c) ("Except as otherwise provided . . . a tribunal of this State shall recognize and enforce, but may not modify, a registered . . . order if the issuing tribunal had jurisdiction."). Indeed, "[o]nce a foreign child support order has been registered

in North Carolina, it can be modified by a North Carolina court only if the issuing state has lost continuing, exclusive jurisdiction over the order." *Lombardi v. Lombardi*, 157 N.C. App. 540, 543, 579 S.E.2d 419, 420 (2003).

The issuing state loses continuing, exclusive jurisdiction "in two situations: (1) if neither the child nor any of the parties continue to reside in the state; or (2) if each of the parties consented to the assumption of jurisdiction by another state." *Uhrig*, 174 N.C. App. at 360, 620 S.E.2d at 732 (citation omitted). The foreign support order remains enforceable even after the issuing state has lost continuing, exclusive jurisdiction; however, a North Carolina court lacks authority to modify the order unless the requirements of N.C. Gen. Stat. §§ 52C-6-611 or 52C-6-613 are met. *See* N.C. Gen. Stat. § 52C-6-610. If no other state has continuing, exclusive jurisdiction over the order *and* all of the individual parties currently reside in North Carolina, "a tribunal of this State has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order." *Id.* § 52C-6-613(a).

"Whether the trial court complied with the registration procedures set out in UIFSA is a question of law reviewed *de novo* on appeal." *Crenshaw v. Williams*, 211 N.C. App. 136, 139-40, 710 S.E.2d 227, 230 (2011).

In the instant case, Plaintiff-Mother, Defendant-Father, and their three children were living in Washington when a court of that state entered the initial Support Order in May 2013. Thus, Washington retained continuing, exclusive jurisdiction to modify its support order until the parties moved or consented to another state's exercise of jurisdiction. Plaintiff-Mother and the children moved to North Carolina in August 2013; Defendant-Father followed soon thereafter, establishing residence in North Carolina in December 2014. Plaintiff-Mother registered the Support Order and the Correction of Scrivener's Error—but not the Corrected Order—in Mecklenburg County in June 2015. Defendant-Father filed his motion to modify his child support obligation on 26 February 2016. At that time, both parties and all of their children were North Carolina residents. No state possessed continuing, exclusive jurisdiction over the controlling order, nor did the parties consent to the exercise of jurisdiction by Washington or any other state. Therefore, pursuant to N.C. Gen. Stat. § 52C-6-613(a), the trial court had jurisdiction to enforce and modify the Washington support order.

Nevertheless, as she unsuccessfully argued at two separate hearings before the trial court, Plaintiff-Mother contends that the trial court lacked subject-matter jurisdiction to modify the Corrected Order,

because it was never registered in North Carolina. However, registration is a *procedural* requirement, not a *jurisdictional* one. *See* N.C. Gen. Stat. § 52C-6-601 cmt. (providing that "registration is a process, and the failure to register does not deprive an otherwise appropriate forum of subject matter jurisdiction"). And as this Court has recognized, a party is not required to strictly adhere to § 52C-6-602's procedural requirements in order to register a support order issued by another state; rather, "substantial compliance" is sufficient "to accomplish registration of the foreign order." *Twaddell*, 136 N.C. App. at 60, 523 S.E.2d at 714 (holding that "the trial court erred in finding that [the] plaintiff had not met the registration requirements of UIFSA" where, notwithstanding the plaintiff's omission of certain required documentation, the registration packet substantially complied with N.C. Gen. Stat. § 52C-6-602). Although this Court is not bound by case law from other jurisdictions, *see State v. J.C.*, 372 N.C. 203, 210, 827 S.E.2d 280, 285 (2019), we note that the *Twaddell* Court's interpretation of UIFSA's registration requirements is consistent with that reached by courts of other jurisdictions.[1]

In the case at bar, the controlling order is composed of three parts: (1) the initial Support Order, (2) the Corrected Order, and (3) the Correction of Scrivener's Error. Stated another way, there is one controlling order, which was corrected twice by the issuing court in Washington. When Plaintiff-Mother registered the order for enforcement in North Carolina, she included in her UIFSA registration packet the Support Order and the Correction of Scrivener's Error, but she failed to include the Corrected Order. Nevertheless, Plaintiff-Mother's inadvertent omission was not a fatal error in this case.

Plaintiff-Mother substantially complied with N.C. Gen. Stat. § 52C-6-602 by registering two of the three parts of the controlling order. As for the third portion of the controlling order, Plaintiff-Mother referred to the omitted Corrected Order in several filings before the trial court. Indeed, on the same day that Plaintiff-Mother registered the controlling order for enforcement in North Carolina, she also filed a motion *in the same court* seeking to have Defendant-Father held in contempt of court in North Carolina for his alleged failure to comply with specific terms of the Corrected Order that she failed to include in her UIFSA registration packet. Plaintiff-Mother also referred to the Corrected Order in her *second motion* to have Defendant-Father held

1. *See*, *e.g.*, *Kendall v. Kendall*, 340 S.W.3d 483, 499 (Tex. App. 2011); *In re Marriage of Owen*, 108 P.3d 824, 829 (Wash. Ct. App.), *disc. review denied*, 126 P.3d 1279 (Wash. 2005); *Lamb v. Lamb*, 707 N.W.2d 423, 435 (Neb. Ct. App. 2005).

in contempt of court in North Carolina based on the same grounds. The trial court's order denying both of Plaintiff-Mother's motions specifically references terms of the Corrected Order. Defendant-Father also attached copies of the initial Support Order and the two corrections to his motion to modify. Accordingly, neither Plaintiff-Mother nor Defendant-Father were prejudiced by Plaintiff-Mother's failure to strictly comply with all of the statutory registration procedures.

Finally, under the provisions of UIFSA, the trial court had jurisdiction to modify Defendant-Father's child support obligation. The official comment to § 52C-6-609, "Procedure to register child support order of another state for modification," provides, in pertinent part:

> If the tribunal has the requisite personal jurisdiction over the parties and may assume subject matter jurisdiction as provided in Sections 611 or 613, modification may be sought independently, in conjunction with registration and enforcement, or at a later date after the order has been registered and enforced if circumstances have changed.

N.C. Gen. Stat. § 52C-6-609 cmt. Despite her procedural error, Plaintiff-Mother registered the controlling support order in North Carolina. As explained above, Washington lost—and North Carolina gained—continuing, exclusive jurisdiction to modify that order, because all parties resided in North Carolina when Defendant-Father filed his motion to modify.

In sum, the controlling order is composed of three parts: (1) the initial Support Order, (2) the Corrected Order, and (3) the Correction of Scrivener's Error. That Plaintiff-Mother inadvertently omitted the Corrected Order from her UIFSA registration packet did not deprive our courts of subject-matter jurisdiction to modify Defendant-Father's child support obligation.

III. Modification of Child Support

[2] Pursuant to N.C. Gen. Stat. § 50-13.7(b), "when an order for support of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support which modifies or supersedes such order for support."

Plaintiff-Mother next argues that the trial court erroneously modified Defendant-Father's child support obligation absent any evidence of a substantial change in circumstances. We disagree.

A. Standard of Review

On appeal, "[c]hild support orders entered by a trial court are accorded substantial deference . . . and our review is limited to a determination of whether there was a clear abuse of discretion." *Ferguson v. Ferguson*, 238 N.C. App. 257, 260, 768 S.E.2d 30, 33 (2014). Under this standard of review, the trial court's order will be upheld unless its "actions were manifestly unsupported by reason." *Head v. Mosier*, 197 N.C. App. 328, 332, 677 S.E.2d 191, 195 (2009) (citation omitted).

B. Substantial Change in Circumstances

A child support order is modifiable at any time upon motion in the cause, *id.* at 333, 677 S.E.2d at 195, and is "subject to alteration upon a change of circumstances affecting the welfare of the child or children." *Bishop v. Bishop*, 245 N.C. 573, 576, 96 S.E.2d 721, 724 (1957). "The moving party has the burden of showing a substantial change of circumstances affecting the welfare of the child." *Ebron v. Ebron*, 40 N.C. App. 270, 271, 252 S.E.2d 235, 236 (1979).

Modifying a child support order is a two-step process. *Head*, 197 N.C. App. at 333, 677 S.E.2d at 195. "First, a court must determine whether there has been a substantial change in circumstances since the date the existing child support order was entered." *Id.* "Upon finding a substantial change in circumstances, the second step is for the court to enter a new child support order that modifies and supersedes the existing child support order." *Id.* at 334, 677 S.E.2d at 196.

A substantial change in circumstances may be shown in several ways, including evidence of

> a substantial increase or decrease in the child's needs . . . ; a substantial and involuntary decrease in the income of the non-custodial parent even though the child's needs are unchanged . . . ; a voluntary decrease in income of either supporting parent, absent bad faith, upon a showing of changed circumstances relating to child oriented expenses . . . ; and, for support orders that are at least three years old, proof of a disparity of fifteen (15) percent or more between the amount of support payable under the original order and the amount owed under North Carolina's Child Support Guidelines based upon the parties' current income and expenses.

Wiggs v. Wiggs, 128 N.C. App. 512, 515, 495 S.E.2d 401, 403 (1998), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d

898 (1998). Although multiple factors may contribute, this Court has held that a substantial change in circumstances can also arise from a single, dispositive factor. *See, e.g.*, *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (determining that a change in custody was sufficient to constitute a substantial change in circumstances).

C. The Trial Court's Findings of Fact

In the instant case, the record is replete with evidence supporting a determination that there had been a substantial change in circumstances since the entry of the previous order. In particular, there was a significant difference in the amount of time that the children were able to spend with Defendant-Father once they had all moved to North Carolina.

The trial court made the following findings of fact regarding the change in the parties' custodial arrangement:

> 54. Since the entry of the [initial] Support Order, the parties have modified the custodial schedule so that Defendant/Father is spending more time with the minor children.
>
> 55. Per the parties' Child Custody Consent Order, the parties share legal and physical custody of the minor children. Defendant/Father has parenting time with the minor children on alternating weeks from the time school recesses on Friday through the start of school on Monday morning. In addition, Defendant/Father has parenting time with the children every Tuesday from the time school recesses through the start of school on Wednesday morning.
>
> 56. Now, the minor children stay with Defendant/Father at his home in North Carolina as opposed to staying in a hotel with Defendant/Father when he traveled from Washington to North Carolina.
>
> 57. Now, Defendant/Father has six of the ten weeks of summer vacation with the minor children as opposed to only two weeks of vacation in the summer as previously provided in the Washington [Custody Orders].
>
> 58. . . . Defendant/Father now has significantly more time with the minor children per the Child Custody Consent Order.

Plaintiff-Mother contends that the trial court erred in finding that Defendant-Father has more parenting time with the children now than

he had at the time of the entry of the 2014 Custody Order. However, competent evidence supports the trial court's findings that, under the provisions of the parties' Child Custody Consent Order, Defendant-Father was spending substantially more time with the children than he was at the time that the 2014 Custody Order was entered by the Washington court.

While the trial court found "several material and substantial changes in circumstances," the significant change in the parties' custodial arrangement alone was sufficient to warrant modification of the existing support order. Accordingly, the trial court did not err in modifying Defendant-Father's child support obligation.

IV. Child Support Obligation

[3] Finally, Plaintiff-Mother argues that the trial court "abused its discretion in calculating child support off guideline from February 2016 through August 2017," in that the parties' combined monthly gross income did not exceed the $25,000 maximum monthly gross income to which the child support schedule of the Guidelines is applicable. Plaintiff-Mother is mistaken.

A. Standard of Review

As previously noted, "[i]n reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). However, it is well established that the trial court "must . . . make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Id.* We have reviewed myriad financial issues relating to child support under an abuse of discretion standard. *See, e.g.*, *Hinshaw v. Kuntz*, 234 N.C. App. 502, 505, 760 S.E.2d 296, 299 (2014) (reviewing the trial court's exclusion of parties' bonus income); *Ludlam v. Miller*, 225 N.C. App. 350, 355, 739 S.E.2d 555, 558 (2013) (reviewing the trial court's failure to consider non-recurring income); *Midgett v. Midgett*, 199 N.C. App. 202, 206, 680 S.E.2d 876, 879-80 (2009) (reviewing the trial court's calculation of father's gross income and thus his child support obligation).

B. Child Support Obligation

After determining that there has been a substantial change in circumstances warranting a modification of child support, the trial court must next calculate the appropriate amount of support and enter a new

order. *Head*, 197 N.C. App. at 334, 677 S.E.2d at 196. The "trial court has the discretion to make a modification of a child support order effective from the date a petition to modify is filed as to support obligations that accrue after such date." *Mackins v. Mackins*, 114 N.C. App. 538, 546-47, 442 S.E.2d 352, 357, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994).

"The court shall determine the amount of child support payments by applying the presumptive guidelines[.]" N.C. Gen. Stat. § 50-13.4(c) (2017). The Guidelines "apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent." *N.C. Child Support Guidelines*, Annotated Rules 51 (2019).

The gross income of the parents is used to calculate the presumptive child support obligation. *Fink v. Fink*, 120 N.C. App. 412, 424, 462 S.E.2d 844, 853 (1995), *disc. review denied*, 342 N.C. 654, 467 S.E.2d 710 (1996). "Income" is broadly defined under the Guidelines as

> a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation, rental of property, retirement or pensions, interest, trusts, annuities, capital gains, Social Security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action.

Guidelines, at 53.

A trial court will generally determine a parent's actual income at the time that the child support obligation is established. *Frey v. Best*, 189 N.C. App. 622, 631, 659 S.E.2d 60, 68 (2008). When a parent receives income "on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of [the] non-recurring income . . . equivalent to the percentage of [the] recurring income paid for child support." *Guidelines*, at 53.

Currently, the child support schedule provided with the Guidelines does not provide a support obligation when the parties' combined monthly gross income is greater than $30,000. *Id.* at 52. At the time that the judgment was entered in the instant case, however, the Guidelines

provided that the child support schedule was inapplicable if the parties' monthly gross income exceeded $25,000. *Guidelines*, at 52 (2018). Under such circumstances, the trial court must determine the appropriate amount of child support on a case-by-case basis. *Id.*

Here, the trial court found that Plaintiff-Mother's monthly gross income was $13,856.21, and that Defendant-Father's monthly gross income totaled $13,515.68; thus, the parties' combined monthly gross income exceeded the $25,000 maximum monthly gross income to which the child support schedule of the Guidelines applied.

The trial court made the following findings of fact relevant to its determination of the parties' monthly gross income, which Plaintiff-Mother challenges on appeal as not supported by competent evidence:

> 65. Per Plaintiff/Mother's [Financial Affidavit], Plaintiff/Mother's gross income is $9,563.48. This total includes Plaintiff/Mother's salary, ordinary dividends, pension income, negative rental income, and capital gains and losses.
>
> 66. Plaintiff/Mother's [Financial Affidavit] does not include her recent raise, annual bonus, stock income, Stay Fit award, or reasonable rental income as monthly gross income.
>
> 67. In September of 2017, Plaintiff/Mother received a pay raise. Plaintiff/Mother's new base bay is $9,580.32 per month.
>
> 68. n September of 2017, Plaintiff/Mother received an annual bonus in the amount of $18,700.00. This Court finds that Plaintiff/Mother receives additional bonus income in the amount of $1,558.00 each month.
>
> 69. In September of 2017, Plaintiff/Mother received annual stock income in the amount of $24,376.68. This Court finds that Plaintiff/Mother received additional stock income in the amount of $2,031.39 each month.
>
> 70. Plaintiff/Mother receives $800.00 per year for enrolling in the Microsoft Stay Fit Plan. This Court finds that Plaintiff/Mother receives additional income in the amount of $66.67 each month.
>
> . . . .

75. This Court finds that Plaintiff/Mother's total gross monthly income is $13,856.21.

. . . .

80. This Court finds that Defendant/Father's total gross monthly income is $13,515.68.

81. The parties' total gross annual income exceeds $300,000.00 so the North Carolina Child Support Guidelines are not applicable in this matter.

82. Plaintiff/Mother's income represents 51% of the parties' total gross annual income and Defendant/Father's income represents 49% of the parties' total gross annual income.

. . . .

98. Per the parties' respective income percentages, Plaintiff/Mother's prorated portion of the total expenses for the children each month is $4,326.73 and Defendant/Father's prorated portion is $4,220.38.

. . . .

101. This Court calculated child support by subtracting the amounts paid by each party toward the total expenses for the children each month in his or her household from the parties' respective prorated portions. A chart outlining this Court's child support calculation is attached hereto as Exhibit 2 and hereby incorporated by reference.

102. Considering the income and expenses of the parties and the reasonable needs and expenses of the minor children, Defendant/Father's child support obligation to Plaintiff/Mother should be $569.09 per month.

103. Defendant/Father's child support obligation should be modified effective February 26, 2016.

. . . .

105. As such, as of December 1, 2017, Defendant/Father has a child support credit in the amount of $26,676.30. A chart outlining this Court's child support credit calculation is attached hereto as Exhibit 3 and hereby incorporated by reference.

Plaintiff-Mother also challenges conclusions of law numbers 5, 7, 8, 9, and 10:

> 5. Defendant/Father's Motion to Modify should be granted.
>
> . . . .
>
> 7. The North Carolina Child Support Guidelines do not apply in this matter as the combined monthly gross income of the parties exceeds $25,000.00 per month.
>
> 8. Considering the income and expenses of the parties and the reasonable needs and expenses of the minor children, Defendant/Father's child support obligation to Plaintiff/Mother should be $569.09 per month.
>
> 9. The amount of child support is reasonable and entry of this Order is in the bests [sic] interests of the minor children.
>
> 10. Any finding of fact which would be an appropriate Conclusion of Law is incorporated herein by reference.

Finally, Plaintiff-Mother asserts that decretal paragraphs 1 and 2 are not supported by competent evidence, and constitute errors of law and an abuse of discretion:

> 1. Defendant/Father's Motion to Modify is granted.
>
> 2. Child Support Obligation: Defendant/Father's child support obligation to Plaintiff/Mother is $569.09 per month. Defendant/Father's modified child support obligation is effective February 26, 2016. Since March 1, 2016, Defendant/Father has paid child support to Plaintiff/Mother in the amount of $1,839.39 each month. As such, as of December 1, 2017, Defendant/Father has a child support credit in the amount of $26,676.30. Beginning December 1, 2017, Defendant/Father shall not pay a child support obligation to Plaintiff/Mother each month but shall subtract said amount owed each month from the child support credit until said credit is fully depleted. Upon depletion of the child support credit, Defendant/Father shall pay to Plaintiff/Mother child support in the amount of $569.09 per month on the first day of each month thereafter.

In challenging these portions of the trial court's order, Plaintiff-Mother contends that the trial court erred in determining Defendant-Father's

child support obligation based on the parties' current income, but making the modification effective on 26 February 2016, the date on which Defendant-Father filed his motion to modify. Plaintiff-Mother asserts that, in doing so, the trial court improperly "applied the decreased child support amount from February 2016 through October 2017" while assigning Plaintiff-Mother "three large income changes that occurred in September 2017." We disagree.

The method by which the trial court determines a party's child support obligation is manifest. As explained above, although a party's ability to pay is generally determined by the party's actual income at the time the existing order is modified, *Frey*, 189 N.C. App. at 631, 659 S.E.2d at 68, the decision of whether "to make a modification . . . effective from the date a petition to modify is filed" is within the trial court's discretion, *Mackins*, 114 N.C. App. at 547, 442 S.E.2d at 357.

Plaintiff-Mother's testimony revealed each source of income. However, this Court has held that a trial court cannot merely restate a witness's testimony as a finding of fact in its order. *See Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) ("Recitations of the testimony of each witness do not constitute findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." (quotation marks omitted)). Nonetheless, Plaintiff-Mother's testimony was verified by the paystubs that she submitted to the court as evidence. Her September 2017 paystubs plainly disclosed her pay raise, bonus, and stock award. These paystubs supported Plaintiff-Mother's testimony, and ultimately allowed the trial court to make sufficient findings to resolve the issue of Plaintiff-Mother's monthly gross income. *Cf. In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) ("The purported 'findings' in the order under discussion do not even come close to resolving the disputed factual contentions of the parties . . . .").

In that the trial court's findings of fact regarding the parties' monthly gross income are supported by the evidence at trial, the trial court did not abuse its discretion in its determination of the appropriate child support obligation.

V. Conclusion

We conclude that the trial court properly exercised jurisdiction to modify the controlling Washington child support order. Moreover, the trial court did not abuse its discretion in determining that there had been a substantial change in circumstances warranting modification of

the existing support order, or in determining the appropriate amount of child support in this matter. Therefore, we affirm the trial court's order.

AFFIRMED.

Judges BERGER and HAMPSON concur.

CHANDA Y. HINSON, PLAINTIFF
v.
MICHAEL ANTHONY HINSON, DEFENDANT

No. COA19-439

Filed 5 November 2019

1. Appeal and Error—preservation of issues—waiver—inconsistent legal position—child custody

In an appeal from an order modifying a child custody order, plaintiff-mother waived her argument that the trial court erred by concluding that a substantial change in circumstances affecting the welfare of the children had occurred, because she had moved the trial court to modify the custody order based on an alleged substantial change in circumstances affecting the welfare of the children. The mother was barred from asserting an inconsistent legal position on appeal to avoid the trial court's order.

2. Child Custody and Support—best interests of the child—resolution of the evidence—remand

A custody order was remanded for adjudication and resolution of the evidence where the order made many findings regarding issues such as the mother's move with the children to a new county, the work schedules of the parents, and the family and friends available to help where the mother and father lived—but failed to make any findings regarding the effect of these issues upon the children and why it was in the children's best interests for their father to be awarded primary physical custody.

Appeal by plaintiff from order entered 14 February 2019 by Judge T. Thai Vang in Stanly County District Court. Heard in the Court of Appeals 15 October 2019.

Adkins Law, PLLC, by C. Christopher Adkins, Sarah E. Bennett, and Kelsey J. Queen, for plaintiff-appellant.

Parker Bryan Family Law, by Gene Brentley Tanner and Kaitlin S. Kober, for defendant-appellee.

TYSON, Judge.

Chanda Hinson ("Plaintiff") appeals from an order modifying child custody ("custody order") entered on 14 February 2019, which granted Michael Hinson ("Defendant") joint legal and primary physical custody of their two minor children. We affirm in part and remand.

I. Background

Plaintiff and Defendant married on 19 January 2007 and separated on 1 June 2017. They are parents of two minor children: S.H., born in 2006, and T.H., born in 2012. Defendant has served as a firefighter with the Albermarle Fire Department in Stanly County for nineteen years. During their marriage, Plaintiff worked in a "traditional role" raising their children. Since their separation, Plaintiff works part-time, sixteen hours per week, providing in-home medical services.

On 14 February 2018, Plaintiff filed a verified complaint for custody, child support, equitable distribution, and attorney's fees. Plaintiff alleged she was a fit and proper person to have custody of the children, and their best interests would be served by custody with her.

On 27 February 2018, Defendant filed an answer and counterclaim for the same, as well as a motion for status quo order. Defendant alleged, in part:

> 3. The Plaintiff has stated that she intends to uproot the minor children from their home town and relocate to Lincoln County, North Carolina away from all family and friends and everything they have ever known.
>
> 4. The Plaintiff has shown inconsistency by changing jobs frequently.
>
> 5. The Defendant has been employed with the same company for over eighteen (18) years.
>
> . . .
>
> 9. The Defendant's parents have been actively involved in the care of the minor children.

Defendant requested the trial court to grant him joint custody if Plaintiff remained in Stanly County, but moved for an award of primary custody if she moved to Lincoln County.

On 7 March 2018, Plaintiff filed a reply to Defendant's answer and counterclaim. Plaintiff's reply admitted she has "considered relocating and that she let defendant know her thoughts." Plaintiff denied the rest of the allegations in paragraph 3, as well as those in paragraphs 4 and 9, of Defendant's counterclaim.

The parties agreed to joint legal and physical custody of the children and established a regular visitation schedule. The parties resolved all issues and the trial court entered a consent judgment on 29 May 2018.

Just over two months later on 10 August 2018, Plaintiff filed a motion to modify the terms of child custody she had agreed to in the consent judgment. Plaintiff alleged a substantial change in circumstances affecting the welfare of the children had occurred after the entry of the consent judgment on 29 May 2018:

> including but not limited to defendant's change in work schedule, the children's wishes, mental health issues, scheduling problems, changes in living arrangements, inappropriate communications directed to plaintiff and to the children, refusal to children [sic] to contact plaintiff, problems regarding eczema and such additional and further changes which may be alleged and proven at trial.

Plaintiff asked the court to modify the consent order and grant her the primary care and custody of the children.

On 20 November 2018, Defendant filed a motion to modify custody and also another motion for a status quo order. Defendant also alleged a substantial change of circumstances affecting the welfare of the children including but not limited to the following:

> a. The Plaintiff has missed a significant number of visitations with the minor children since the entry of the Consent Order filed May 29, 2018;
>
> b. The Plaintiff has refused reasonable weekend visitation with the Defendant when he was willing to assist with childcare to avoid taking the youngest child to a funeral service of a grandparent he does not even know;
>
> c. The Plaintiff has refused the Defendant Thanksgiving visitation with the minor children;

d. The Plaintiff continues to make derogatory references about the Defendant to the minor children;

e. The Plaintiff is coaching the minor children of things to say to their Defendant father in an attempt to alienate the children from their father;

f. The Plaintiff is attempting to drive a wedge between the minor children and the Defendant father;

g. The Plaintiff has denied telephone access with his minor children and oftentimes refuses to answer the Defendant's calls and fails to allow them to call back;

h. When the Defendant does talk over the telephone with his children, the Plaintiff hovers over them creating a stressful situation in which the children cannot freely communicate with their father;

i. The Plaintiff is refusing visitation with the children's paternal grandparents;

j. The Plaintiff intends to uproot the minor children and relocate an hour and a half away from their home, friends, school and family;

k. The Plaintiff is in a relationship with a married man who has been separated from his estranged wife for years;

l. The Plaintiff is without a job and has been unable to maintain steady employment since July, yet alleges she has a home to move into in Lincoln County.

On 31 December 2018 and while these motions were pending, Plaintiff left Stanly County and moved to Lincoln County. On 3 January and without notice to Defendant, Plaintiff enrolled the minor children in new schools in Lincoln County. Plaintiff asserted the children would benefit academically from the transfer, while Defendant disagreed with their move and the change.

After a trial on the cross-claims for modification of custody on 7 and 8 January 2019, the trial court entered the custody order on 14 February 2019. The trial court made thirty findings of fact, including:

11. The Court finds that the minor children have resided continuously in Stanly County, North Carolina, their place of birth, until December 31, 2018;

12. That the minor children have family, including paternal grandparents, and friends here in Stanly County, North Carolina;

13. That the Defendant has his parents and friends here as a support group to assist him with the minor children;

14. That the minor children have been enrolled in Central Elementary School and Albemarle Middle School where it is evident that they are performing exceptionally well until January, 2019;

. . .

16. The Plaintiff testified that [T.H.] has experienced separation anxiety, however neither the defendant nor the paternal grandparents have observed this behavior;

17. That the minor child, [T.H.], is involved in T-ball in Stanly County, North Carolina and the Defendant Father and paternal grandfather were actively involved as assistant coaches;

18. That the minor child, [S.H.], is a member of the cross country team at Albemarle Middle School;

19. That testimony shows that both minor children have a network of friends here in Stanly County, North Carolina;

20. That the paternal grandparents have had a long and continuous involvement in the lives of the minor children;

21. That both minor children are treated by local pediatricians;

22. That both biological parents were actively involved in doctor's visits;

23. That the Defendant Father has been employed with the Albemarle Fire Department for over nineteen (19) years;

24. That the paternal grandparents have been teachers and residents of Stanly County for a period of approximately forty-nine (49) years;

25. That unilaterally, the Plaintiff Mother withdrew the minor children from their schools and enrolled them elsewhere in Lincoln County, North Carolina, in January, 2019;

> 26. That the Plaintiff testified that she has no family residing in Stanly County, North Carolina;
>
> 27. That the Plaintiff has no connection to family in Lincoln County, North Carolina other than her sister, who did not appear before the Court.
>
> 28. That the [P]laintiff testified that she only works sixteen (16) hours per week providing inhome [sic] medical services;
>
> 29. That the [D]efendant works every third day a twenty-four hour shift;
>
> 30. That the [D]efendant has been diagnosed with some mental health problems including post traumatic stress disorder for which [he] has received counseling[.]

The trial court found and concluded a substantial change of circumstances affecting the welfare of the minor children had occurred and vested with primary physical custody with Defendant. Plaintiff timely filed and served a notice of appeal of the custody order.

II. Jurisdiction

An appeal of right lies with this Court from a child custody order entered in a district court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

III. Issues

Plaintiff argues the trial court abused its discretion by concluding, without adequate findings of fact: (1) there has been a substantial change of circumstances affecting the welfare of the minor children; and, (2) it is in the best interests of the minor children that Defendant be vested with primary physical custody.

IV. 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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations and internal quotation marks omitted).

"In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254 (citation omitted). "Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted).

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal. Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Routten v. Routten*, __ N.C. App. __, __, 822 S.E.2d 436, 441 (2018) (internal citation and quotation marks omitted), *disc. review denied*, 831 S.E.2d 77 (2019).

V. Analysis

A custody order "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party." N.C. Gen. Stat. § 50-13.7(a) (2017). In *Shipman*, our Supreme Court succinctly set forth the trial court's duties and obligations under the statute:

> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, 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. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Shipman, 357 N.C. at 474, 586 S.E.2d at 253.

A. Substantial Change in Circumstances

[1] On appeal, Plaintiff argues the trial court erred in its conclusion of law that a substantial change in circumstances affecting the welfare

of the children had occurred. Plaintiff's motion to modify custody asserted the opposite position before the trial court. She has waived this argument by asserting on appeal the opposite position to that she asserted in the trial court.

"It is well established that a party to a suit may not change [her] position with respect to a material matter during the course of litigation. Especially is this so where the change of front is sought to be made between the trial and the appellate courts." *Green v. Kelischek*, 234 N.C. App. 1, 6-7, 759 S.E.2d 106, 110 (2014) (alteration in original) (quoting *Leggett v. Se. People's Coll.*, 234 N.C. 595, 597, 68 S.E.2d 263, 266 (1951)).

In *Green*, the plaintiff "represented that her remarriage and proposed relocation did constitute a substantial change in circumstances before the trial court." *Id.* After the trial court's subsequent "best interests" determination was contrary to what she anticipated, Green asserted "an inconsistent legal position on appeal in order to avoid the modified custody plan set forth in the trial court's order. This she cannot do." *Id.* at 6, 759 S.E.2d at 110.

Here, Plaintiff moved to modify the consent order and alleged a substantial change in circumstances had occurred, which affected the welfare of the children, as is required by N.C. Gen. Stat. § 50-13.7(a). She cited "changes in living arrangements" as one substantial change among others to support her allegation. Plaintiff cannot now assert an inconsistent legal position on appeal to avoid the trial court's custody order. *Id.* at 6, 759 S.E.2d at 110.

Plaintiff's argument on appeal that the trial court erred by concluding a substantial change of circumstances occurred is wholly inconsistent with the position she asserted in the trial court. *See id.* The trial court did not err in concluding that a substantial change of circumstances affecting the welfare of the children had occurred. We proceed to the second step of the trial court's two-fold analysis.

B. Best Interests of the Children

[2] Plaintiff argues the trial court abused its discretion by concluding the best interests of the minor children are served by an award of joint legal and primary physical custody to Defendant and secondary physical custody to Plaintiff. Plaintiff challenges the adequacy of the findings of fact in the custody order.

"[B]efore a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite

is the requirement that the trial court make findings of fact regarding that connection." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255 (citation omitted). Where a substantial change of circumstances "involves a discrete set of circumstances such as a move on the part of a parent, . . . the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence *directly* linking the change to the welfare of the child." *Id.* at 478, 586 S.E.2d at 256 (citations omitted) (emphasis original).

A trial court's findings of fact in a child custody order must "resolve the primary disputes between the parties and . . . explain *why* awarding primary custody" is in the children's best interests. *Carpenter v. Carpenter*, 225 N.C. App. 269, 278, 737 S.E.2d 783, 790 (2013).

> 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.

Id. at 279, 737 S.E.2d at 790 (quoting *Coble v. Coble*, 300 N.C. 709, 714, 268 S.E.2d 185, 190 (1980)).

In *Carpenter*, the trial court made eighty findings of fact, but "many of the findings of fact [were] actually recitations of evidence which [did] not resolve the disputed issues." *Id.* at 273, 737 S.E.2d at 787. A primary disputed issue in *Carpenter* was one parent's excessive alcohol consumption. *Id.* at 274, 737 S.E.2d at 787. The court made numerous findings of fact which mentioned alcohol consumption, reciting the evidence presented in briefs and from testimony at trial, but "[n]one of these findings resolve the real issue, which . . . was whether plaintiff abuses alcohol to an extent that it may have an adverse effect" on his child. *Id.* at 276, 737 S.E.2d at 788. "The findings merely recognize the existen[ce] of a dispute and some evidence which may bear upon that dispute without resolving it. There are no findings that either party actually does abuse alcohol or that either party's drinking has adversely affected" the child. *Id.*

Based upon the trial court's findings of fact here, the primary issues supporting its conclusions of law were: the schools, doctors, and extracurricular activities the children attended; the disparate work schedules of the parties; and the relative support groups of family and friends each party had in their respective county. The trial court made thirty findings of fact, which touched on all of these issues, but resolved none of them. These findings are not self-executing.

The trial court found Plaintiff "unilaterally . . . withdrew the minor children from their schools and enrolled them elsewhere in Lincoln County, North Carolina, in January, 2019." The court also found "it is evident that they are performing exceptionally well until January, 2019" in their former schools. Yet the court did not make any finding of fact regarding the effects of either the withdrawal or new enrollment had on the children's education or well-being. Without adjudication and resolution of the findings of fact, "it cannot be determined on appeal whether the trial court correctly exercised its function." *Id.* at 279, 737 S.E.2d at 790 (quoting *Coble*, 300 N.C. at 714, 268 S.E.2d at 190).

The trial court found that Plaintiff "only works sixteen (16) hours per week" while Defendant "works every third day a twenty-four hour shift." Whether these findings are positive or negative for either party, we cannot say from just this recitation. *See id.* at 278, 737 S.E.2d at 789-90 ("Finding 72 states that '[the child] has returned from visitation with his father with muddy shoes and dirty clothes. We are unable to discern if this is a positive finding, as it may indicate [father] has been engaging in healthy outdoor activities with his son, or negative, as it may indicate [father] has failed to properly address the child's hygiene issues. Perhaps it is both.").

Here, the court may be indicating Plaintiff's lesser hourly work schedule is concerning compared to Defendant's as far as supporting the children financially, but it equally could indicate Defendant's regular day-length shifts are concerning compared to Plaintiff's greater availability to be present with the children. "Perhaps it is both." *Id.*

The custody order in this case merely recognizes the existence of disputes and identifies some evidence from both parties that may bear upon those disputes without resolving them. As in *Carpenter*, the findings of fact do not explain *why* it is in the best interests of the children for Defendant to be granted primary physical custody. *See id.* This lack of resolution mandates remand for additional findings of fact.

Because we remand on this issue, we need not reach Plaintiff's remaining arguments. However, the decree does not resolve all of

the disputed legal issues. Notably, Plaintiff asserts the decree does not resolve which school system the children should attend, or how to resolve that issue, "despite that issue being a, if not *the*, primary concern discussed at trial."

VI. Conclusion

By asserting inconsistent legal positions on the issue of whether a substantial change of circumstances affecting the welfare of the minor children had occurred before the trial court and this Court, Plaintiff waived that argument on appeal. That portion of the trial court's order is affirmed.

The trial court's conclusion for Defendant to be granted primary physical custody and Plaintiff to be granted secondary physical custody is remanded for adjudication and resolution of the evidence and for entry of findings of fact showing *why* the award in the custody order was in the children's best interests.

The trial court shall adjudicate and resolve conflicts in the evidence and make additional findings of fact to support the conclusions and legal issues in its decree. Whether to take additional evidence upon remand rests within the trial court's discretion. *It is so ordered.*

AFFIRMED IN PART AND REMANDED IN PART.

Judges BRYANT and BROOK concur.

NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, PLAINTIFF
v.
WEATHERSFIELD MANAGEMENT, LLC, F/K/A ACCUFORCE STAFFING SERVICES, LLC, F/K/A ACCUFORCE SMART SOLUTIONS, LLC, DEFENDANT

No. COA19-300

Filed 5 November 2019

1. Insurance—N.C. Insurance Guaranty Association—right to reimbursement—deductible amount advanced

The N.C. Insurance Guaranty Association (plaintiff) was entitled to reimbursement of the deductible amount it advanced on a workers' compensation claim after defendant's workers' compensation insurer became insolvent. Pursuant to N.C.G.S. § 58-48-35, which sets forth plaintiff's statutory authority, plaintiff had the "rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent." The Court of Appeals rejected defendant's argument that plaintiff had no claim under section 58-48-35 because the section refers to a "self-insured retention" and defendant's policy had a deductible.

2. Insurance—N.C. Insurance Guaranty Association—right to reimbursement—deductible amount advanced—high-net-worth employer

The Court of Appeals rejected defendant's argument that the N.C. Insurance Guaranty Association (plaintiff) was not entitled to reimbursement of the deductible amount it advanced on a workers' compensation claim because defendant was not a high-net-worth employer and thus not covered under plaintiff's statutory authority. Defendant's argument was premised on an inapplicable portion of the statute (N.C.G.S. § 58-48-50(a)) pertaining to the Association seeking reimbursement for entire claims.

3. Appeal and Error—abandonment of issues—no citation to authority

Defendant's argument that the N.C. Insurance Guaranty Association (plaintiff) was not entitled to reimbursement of the deductible amount it advanced on a workers' compensation claim (because plaintiff purportedly mishandled the claim) was dismissed where defendant cited to no statutory provision, insurance provision, or any other authority in support of its argument.

4. Appeal and Error—abandonment of issues—issues of material fact—failure to specify any issue

The Court of Appeals deemed an argument—that genuine issues of material fact remained and that the trial court erred by granting summary judgment for plaintiff—abandoned where defendant failed to specify any issue of fact that remained undecided.

Appeal by defendant from order entered 4 January 2019 by Judge G. Bryan Collins, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 October 2019.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake and Joseph W. Eason, for plaintiff-appellee.

Hunter, Smith & Davis, LLP, by Rachel Ralston Mancl, for defendant-appellant.

TYSON, Judge.

Weathersfield Management, LLC, f/k/a Accuforce Staffing Services, LLC, f/k/a Accuforce Smart Solutions, LLC ("Defendant") appeals an order granting summary judgment for the North Carolina Insurance Guaranty Association ("Plaintiff"). We affirm.

I. Background

Defendant is a regional worker staffing company with less than $50,000,000.00 in market value. Defendant experienced severe financial problems to the extent it was forced to file for bankruptcy protection under Chapter 13 of the U.S. Bankruptcy Code.

North Carolina employers, who employ above a threshold number of employees, are statutorily required to maintain workers' compensation insurance coverage. Defendant's bankruptcy filing made it difficult to obtain coverage to meet this statutory requirement. Dallas National quoted coverage for Defendant, which required a deductible of $800,000.00 per occurrence, but included a duty to defend the insured. Defendant was unable to find another insurance carrier and accepted the policy from Dallas National to meet North Carolina's workers' compensation insurance coverage requirement beginning 18 August 2009.

This policy also required Defendant to maintain a collateral deposit of $600,000.00. Defendant claims this collateral deposit has not been returned. At some point during Defendant's period of coverage, Dallas

National ceased conducting business as Dallas National and began using Freestone as its name.

In June 2012, Defendant's employee, Tina Huffman ("Ms. Huffman"), asserted a workplace injury and filed a workers' compensation claim. Freestone acknowledged in a Form 60 filing to the North Carolina Industrial Commission ("Commission"): (1) coverage under Defendant's policy; (2) that Ms. Huffman was an employee of Defendant; and, (3) Ms. Huffman was injured during the course and scope of her employment. The Commission determined Ms. Huffman was entitled to weekly disability benefits totaling $165.40 and Ms. Huffman's attorney was awarded $55.14 per week.

In 2014, Plaintiff's involvement with Defendant's policy was activated due to the insolvency of Freestone. Plaintiff retained counsel to defend Defendant during the pendency of Ms. Huffman's claim. Plaintiff pursued settling Ms. Huffman's claim and a determination from the Commission of whether she can return to work. Ms. Huffman's counsel maintains that she "is completely disabled and unable to return to work." As of 10 August 2018, Plaintiff has paid $134,002.93 in indemnity and expense payments on Ms. Huffman's claim.

On 28 September 2017 Plaintiff commenced this action for reimbursement under N.C. Gen. Stat. § 58-48-1 for payment of Ms. Huffman's claims asserted under coverage for Defendant's policy with Freestone. Following written discovery, Plaintiff moved for summary judgment. The trial court heard and granted Plaintiff's motion for summary judgment. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Defendant argues the trial court erred by granting summary judgment for Plaintiff under N.C. Gen. Stat. § 58-48-35 (2017) and asserts: (1) Defendant does not have a self-insured retention; (2) Defendant is not a high-net-worth employer or affiliate; (3) estoppel bars the claim; and, (4) genuine issues of material fact remain undecided.

IV. 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)).

V. Analysis

A. Self-Insured Retention

[1] Defendant argues Plaintiff has no claim under N.C. Gen. Stat. § 58-48-35 because Defendant's policy does not contain a self-insured retention. We disagree.

N.C. Gen. Stat. § 58-48-35, articulates Plaintiff's statutory authority:

> (a) The Association Shall:
>
> (1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination. This obligation includes only the amount of each covered claim that is in excess of fifty dollars ($50.00) and is less than three hundred thousand dollars ($300,000). However, the Association shall pay the full amount of a covered claim for benefits under a workers' compensation insurance coverage, and shall pay an amount not exceeding ten thousand dollars ($10,000) per policy for a covered claim for the return of unearned premium. The Association has no obligation to pay a claimant's covered claim, except a claimant's workers' compensation claim if:
>
> a. The insured had primary coverage at the time of the loss with a solvent insurer equal to or in excess of three hundred thousand dollars ($300,000) and is applicable to the claimant's loss; or
>
> b. The insured's coverage is written subject to *a self-insured retention* equal to or in excess of three hundred thousand dollars ($300,000).
>
> If the primary coverage *or the self-insured retention* is less than three hundred thousand dollars ($300,000), the Association's obligation to the claimant is reduced by the coverage and the retention. The Association shall pay

> the full amount of a covered claim for benefits under a workers' compensation insurance coverage to a claimant notwithstanding *any self-insured retention*, but the Association has the right to recover the amount of the *self-insured retention* from the employer.
>
> In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises. Notwithstanding any other provision of this Article, a covered claim shall not include any claim filed with the Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.
>
> (2) *Be deemed the insurer to the extent of the Association's obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer had not become insolvent.* However, the Association has the right but not the obligation to defend the insured who is not a resident of this State at the time of the insured event unless the property from which the claim arises is permanently located in this State in which instance the Association does not have the obligation to defend the matter in accordance with policy.

N.C. Gen. Stat. § 58-48-35 (emphasis supplied).

The highlighted provisions in the statute refer to a "self-insured retention." Defendants argue the statute is inapplicable to them because their policy had a deductible. N.C. Gen. Stat. § 58-48-20 (2017) does not define either "self-insured retention" or "deductible."

B. Rules of Statutory Interpretation

When interpreting the parties' arguments, we must first determine the meaning of the terms in N.C. Gen. Stat. § 58-48-35. In reviewing the definitions of self-insured retention and deductible we are guided by several well-established principles of statutory construction.

"The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citations omitted). "The best indicia of that intent are the [plain] language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

"When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself[.]" *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). Additionally, when dealing with insurance policies "[a]ny doubt as to coverage is to be resolved in favor of the insured." *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 378 (1986).

"Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (internal quotation marks, citations, and ellipses omitted). "Statutes *in pari materia* must be read in context with each other." *Cedar Creek Enters. v. Dep't of Motor Vehicles*, 290 N.C. 450, 454, 226 S.E.2d 336, 338 (1976).

Further, "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)).

C. Persuasive Authority

The use and application of the terms "self-insured retention" or "deductible" in our statutes is an issue of first impression. In reconciling the uses and application of "self-insured retention" or "deductible," it is helpful to review definitions in persuasive authorities and how other courts have addressed this issue. 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). Our review has revealed the following:

The United States District Court for the Central District of California reviewed an analogous issue in *Gen. Star. Nat'l Ins. Corp. v. World Oil Co.*, 973 F. Supp. 943, 948-49 (C.D. Cal. 1997). In *Gen. Star*, an oil company insured its company automobiles using a policy with a deductible. Additionally, the oil company purchased a second policy to cover the deductible on the first policy. *Id.* at 945. The federal district court found a deductible

> is a portion of an insured loss for which the insured is responsible. The deductible is generally a specific sum that the insured must pay before the insurer owes its duty to indemnify the insured for a loss. A deductible usually relates only to the damages sustained by the insured, not to defense costs.

Id. at 948 (citation omitted).

The federal district court further found a self-insured retention is "a specific amount of loss that is not covered by the policy but instead must be borne by the insured . . . . [The policy] may provide that the insurer shall have the right, but not the duty, to assume charge of the defense and settlement of any claim, including those below the [self-insured retention]." *Id.*

The courts in Wisconsin agree with the federal district court's holding. *See Burgraff v. Menard, Inc.*, 853 N.W.2d 574, 581 (Wis. Ct. App. 2014) ("When an insured has a deductible, the insurance company is typically required to provide a defense from dollar one, in contrast, the insured whose coverage is subject to a self-insured retention is usually obligated to retain its own defense counsel." (citations omitted)).

Also, when considering the plain meaning and text of a statute, it is appropriate to review dictionary definitions and meanings of undefined terms in the statute. A "self-insured retention" is defined:

> The amount of an otherwise-covered loss that is not covered by an insurance policy and that usu. must be paid before the insurer will pay benefits <the defendant had a $1 million CGL policy to cover the loss, but had to pay a self-insured retention of $100,000, which it had agreed to do so that the policy premium would be lower>. Abbr. SIR. Cf. Deductible, n.

Self-Insured Retention, Black's Law Dictionary (11 ed. 2019). A "deductible" is defined as "Under an insurance policy, the portion of the loss to be borne by the insured before the insurer becomes liable for payment. Cf. Self-Insured Retention." *Deductible*, Black's Law Dictionary (11 ed. 2019). The reasoning of these decisions and the differences in the definitions are instructive. A self-insured retention is clearly treated differently under the policy and in the law from a deductible.

D. N.C. Gen. Stat. § 58-48-35(a)(2)

However, these differences do not end the analysis on this issue. N.C. Gen. Stat. §§ 58-48-35(a)(1) and 58-48-35(a)(2) must be read

together. It would create an absurd result and violate § 58-48-35(a)(2) to strictly limit coverage of the statute to policies simply with a self-insured retention. First, a self-insured retention does not provide for the defense of the claim, unless otherwise provided for in the policy. A self-insured retention serves as a "first insurance" by the insured up to the dollar limit of the retained risk, when coverage available under the policy is then activated.

A deductible with a duty to defend, as in this policy and the facts before us, requires more involvement from an insurance carrier from the initiation of the claim. Plaintiff's involvement in the reduced insurer responsibilities of self-insured retention contravenes the purpose of the statute "to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." N.C. Gen. Stat. § 58-48-5 (2017). Additionally, § 58-48-35(a)(2) provides Plaintiff shall have "rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent."

A right of Dallas National and later Freestone under the policy was to seek reimbursement of the deductible amount from Defendant, if advanced, and be provided the safeguard of the collateral deposit in the event the financially struggling company faced further financial difficulties. Defendant's assignment of error is overruled.

E. High-Net-Worth Employer

[2] Defendant asserts the trial court improperly granted Plaintiff's summary judgment motion because Plaintiff is not a high-net-worth employer without derivative rights to reimbursement. We disagree.

Defendant's policy provides in its Benefits Deductible Endorsement:

> 4. We will pay the deductible amount for you, but you must reimburse us within 30 days after we send you notice that payment is due. If you fail to fully reimburse us, we may cancel the policy as provided in Part Six (Conditions), Section D. Cancelation, of the policy. We may keep the amount of unearned premium that will reimburse us for the payments we made. These rights are in addition to other rights we have to be reimbursed.

N.C. Gen. Stat. § 58-48-50(a) (2017) provides:

> Any person recovering under this Article shall be deemed to have assigned his rights under the policy or at law to the Association to the extent of his recovery from the Association. Every insured or claimant

> seeking the protection of this Article shall cooperate with the Association to the same extent as such person would have been required to cooperate with the insolvent insurer. The Association shall have no cause of action against the insured of the insolvent insurer for any sums it has paid out except such causes of action as the insolvent insurer would have had if such sums had been paid by the insolvent insurer. In the case of an insolvent insurer operating on a plan with assessment liability, payments of claims of the Association shall not operate to reduce the liability of insureds to the receiver, liquidator, or statutory successor for unpaid assessments.

Additionally, N.C. Gen. Stat. § 58-48-35(a)(2) provides Plaintiff: "[b]e deemed the insurer to the extent of the Association's obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer had not become insolvent.

Plaintiff's statutory grant of authority transfers all rights retained or assigned to the insolvent insurer under the Defendant's policy. The policy specifically retains and provides the insurer the right to seek indemnification for deductible payments it advanced and paid.

Defendant's assertion they are not covered under Plaintiff's statutory authority due to their net worth is misplaced. The section of § 58-48-50(a) containing the language of "net worth in excess of $50,000,000" pertains to Plaintiff's seeking reimbursement for the entire claim. *See N.C. Ins. Guar. Ass'n v. Bd. of Tr. of Guilford Tech. Cmty. Coll.*, 364 N.C. 102, 691 S.E.2d 694 (2010).

Plaintiff is not pursuing reimbursement for the entire claim in this matter, simply the deductible as defined in the insurance contract. This claim is allowed by statute and this Court's binding precedent. *Id.* Defendant's argument is overruled.

F. Handling of the Claim

[3] Defendant asserts the trial court improperly granted Plaintiff's summary judgment when Plaintiff had failed in its obligation to Defendant in the handing of this claim. We disagree.

Defendant argues Plaintiff's purportedly mishandled the claim, which bars their recovery. Nowhere in the statutes nor the insurance policy do we find a clause barring the insurer's or Plaintiff's recovery for reimbursement of the deductible for purported mismanagement of

a claim. Defendant does not cite any case or authority to relieve them from this contractual obligation. Defendant's argument is dismissed.

E. Material Facts

[4] Defendant asserts genuine issues of material fact remain and argues the trial court erred by granting summary judgment for Plaintiff. Defendant does not highlight or argue any issue of fact that remains undecided. Where a party "does not set forth any legal argument or citation to authority to support the contention, [it is] deemed abandoned." *State v. Evans*, 251 N.C. App. 610, 625, 725 S.E.2d 444, 45 (2017). This issue is abandoned and dismissed.

VI. Conclusion

Viewed in the light most favorable to Defendants and giving them the benefit of any disputed inferences, no genuine issues of material fact exist. Plaintiff had statutory authority to step into the shoes of the insolvent insurer and be subrogated to seek reimbursement for amounts advanced toward the stated deductible as provided and determined by Defendant's insurance policy and contract.

Plaintiff was entitled to summary judgment as a matter of law. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges BRYANT and BROOK concur.

STATE OF NORTH CAROLINA
v.
JAQUAIL DONAVEN ALSTON, DEFENDANT

No. COA18-1285

Filed 5 November 2019

Motor Vehicles—felony serious injury by motor vehicle—guilty plea—factual basis—sufficiency

Where defendant crashed his car into a tree while a woman and her baby rode as passengers, the prosecutor's statements to the trial court provided a sufficient factual basis for defendant's guilty plea to felony serious injury by vehicle. Specifically, where the prosecutor described how, after all three individuals were hospitalized, the infant needed to be flown to a different hospital for care, it was reasonably inferable that the infant sustained a serious injury. Additionally, where the prosecutor stated that defendant's bloodwork from the hospital came back positive for narcotics, it was reasonably inferable that defendant was driving under the influence during the crash.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 8 March 2018 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant.

DILLON, Judge.

Defendant Jaquail Donaven Alston appeals from a judgment convicting him of felony serious injury by vehicle ("FSIBV"). We affirm.

I. Background

In April 2017, a grand jury indicted Defendant for FSIBV, driving while impaired, and driving while license revoked. Eleven months later, in March 2018, Defendant pleaded guilty to the FSIBV charge and the other two charges were dropped, as part of a plea agreement.

Defendant petitioned our Court for a writ of *certiorari* to review whether the prosecutor's factual basis presented to the trial court was not sufficient. We grant *certiorari* to consider the merits of Defendant's appeal.

II. Analysis

Defendant alleges that the factual basis put forth by the prosecutor was insufficient to warrant an informed decision by the trial court. Our General Assembly has provided that "[t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea" but that "[t]his determination may be based upon . . . a statement of facts by the prosecutor[.]" N.C. Gen. Stat. § 15A-1022(c) (2018). *See State v. Atkins*, 349 N.C. 62, 95-97, 505 S.E.2d 97, 118-19 (1998) (concluding that the prosecutor's factual summary was sufficient to allow the trial court to accept a defendant's guilty plea).

Here, after the trial judge read the plea transcript to Defendant, the prosecutor gave the following factual summary:

> This matter occurred on [25 May 2016], Your Honor. It was investigated by the highway patrol. On that date, Your Honor, they received a call at 3 o'clock in the morning, Your Honor. The vehicle had a one car accident. It had veered off the road and struck a tree and then flipped over, Your Honor, on I-73.
>
> When they arrived there, there were three individuals, Your Honor, a male, female and small child, I believe at the time was an infant, five months or so. The EMTs, Your Honor, had taken the individuals to the hospital. At the hospital, Your Honor, Mr. Alston was acting erratically – unresponsive and acting erratically, so they drew the blood, Your Honor. The EMT noted to the hospital that he was the driver.
>
> When they actually questioned him, Your Honor, when he was responsive, he did say he was the driver. At the hospital, blood was drawn. He was then released. . . . His girlfriend was there with her baby, Your Honor. The baby was injured and flown to another hospital. His wife then said, "No, no, I was the driver." She gave a statement that she was distracted by her cell phone or so and that she was the driver.

> There was a little argument between the two. He told her, why are you lying in front of the trooper, etc. So the charges stayed with him, Your Honor. Like I said, the EMT noticed that he was the driver. He was the initial person that said he was the driver. So, that being said, the reason we bring that to your attention, Judge, is that we have limited contact with her, obviously, for those.
>
> Some of the stuff came back, no impact statement. We did finally track her down through Mr. Evans, as far as a phone number, just to clarify that she did not want to be here, and she said the child was doing fine now. So, just as far as that information. His blood was sent off to the lab, Your Honor. It came back positive for Alprazolam and Benzodiazepine. Those two narcotics were in his system, Judge. And that would be all, Judge.

The trial judge then asked defense counsel if there was anything more that he wanted to add. Defense counsel answered that he did not wish to change any of the information put forth by the prosecutor and that "[Defendant] does have a two-year old daughter, and one of the reasons he wanted to go ahead and try and go on probation is so he can get out, go back to work and start taking care of his child. . . . So we just ask Your Honor to accept the plea."

On appeal, Defendant claims that it was unclear from the prosecution's factual summary whether he was under the influence *while driving* and whether the infant sustained *serious* injury. He claims the prosecutor needed to provide more evidence to the trial judge to prove these elements of the charge. However, the prosecutor need not "find evidence from each, any, or all of the enumerated sources." *Atkins*, *supra*. These elements could reasonably be inferred. Specifically, it could be inferred from the prosecutor's description of drug components being found in Defendant's blood that Defendant was driving under the influence. And it could be inferred from the prosecutor's statement that the child victim had to be transferred to another hospital for care that the child sustained *serious* injury. Thus, the information given by the prosecutor for the case's factual basis was sufficient.

III. Conclusion

For the aforementioned reasons, we affirm the lower court's ruling that finds the factual basis to support the guilty plea.

AFFIRMED.

Judge BROOK concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

I vote to deny Defendant's petition for writ of certiorari in the exercise of discretion and precedents, and to grant the State's motion to dismiss his appeal. I respectfully dissent.

I. Petition for Writ

Defendant has "petitioned this Court for *certiorari*. A petition for the writ must show merit or that error was probably committed below. *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. *Womble v. Gin Company*, 194 N.C. 577, 579, 140 S.E. 230." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). *See also State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (reversing grant of certiorari by the Court of Appeals on defendant's challenge of sufficiency of factual basis of plea: "Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause").

Defendant entered a guilty plea pursuant to a plea arrangement with the State on one count of felony serious injury by vehicle. In exchange, *the State dismissed both the remaining charges* of driving while impaired and driving while license revoked. The trial court suspended the sentence and placed Defendant on supervised probation.

The majority's opinion details from the transcript the factual basis for his plea and Defendant's specifically addressing the trial court and declining to add to or change the State's factual summary for his plea. The trial court entered judgment in accordance with the terms of the plea arrangement.

Defendant received the full benefit of his plea bargain and failed to place the State or the trial court on any notice of any dissatisfaction or that he intended to seek further review on appeal after judgment on his plea was entered. Defendant's in-court admission to the factual basis to support his guilty plea, acceptance of its benefits, and his failure to provide or preserve any prior notice to the State and the trial court

precludes further review. For Defendant to now seek appellate review of his guilty plea, with no showing of either merit or any prejudicial error, damages the fairness and integrity of the plea bargaining process and violates long standing precedents. *See id.*

The State may offer fewer binding plea bargains, if a defendant circumvents the fairness requirement to inform the State of his intent to seek further review on appeal. The State can expressly preclude such collateral back door actions by requiring prior disclosure and waiver of appeal as an express condition of the plea arrangement.

II. Conclusion

Defendant's petition "must show merit or that error was probably committed below." *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. This standard mandates a writ to be "issued only for good and sufficient cause shown." *Id.* Absent Petitioner's "must" showing of "merit" or probable prejudicial "error," there exists no "good and sufficient cause shown to issue" the writ. *Id.* Defendant's petition asserts no basis to allow and is procedurally barred.

Defendant's petition for a wholly discretionary writ is properly denied and the State's motion to dismiss his purported appeal is properly allowed. *Ross*, 369 N.C. at 400, 794 S.E.2d at 293. Defendant received the full benefit of his plea bargain and did not disclose or preserve his intent to seek appellate review.

The majority's opinion provides no basis whatsoever to allow Defendant's petition after his guilty plea, dismissal of other charges, being given a suspended sentence and probation, particularly after his expressed agreement with the State's factual basis for his guilty plea. Allowing his petition under this facts is clearly precluded under binding precedents. *See id.* I vote to deny Defendant's petition for writ of certiorari and allow the State's motion to dismiss the appeal. I respectfully dissent.

STATE v. AMES

[268 N.C. App. 213 (2019)]

STATE OF NORTH CAROLINA
v.
KAMANI AMES, DEFENDANT

No. COA18-1035

Filed 5 November 2019

Sentencing—first-degree murder—juvenile offender—life without parole—improper analysis

Defendant's sentence of life imprisonment without the possibility of parole, imposed upon conviction for first-degree murder based on a crime committed when defendant was 17 years old, was vacated and the matter remanded for resentencing. The trial judge utilized an incorrect legal standard and improperly compared defendant to adult offenders before imposing the sentence. Although the trial court considered the mitigating factors found in N.C.G.S. § 15A-1340.19B, the court improperly balanced those factors against the evidence of the crime rather than applying the standard set forth in *Miller v. Alabama*, 567 U.S. 460 (2012), which required an examination of whether defendant was beyond rehabilitation so as to justify life without parole.

Judge DILLON dissenting.

Appeal by Defendant from judgment entered 19 January 2018 by Judge Jerry R. Tillett in Camden County Superior Court. Heard in the Court of Appeals 7 August 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant.

BROOK, Judge.

Kamani Ames ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of first-degree murder. On appeal, Defendant challenges his sentence of life without the possibility of parole. Defendant argues that the trial court applied the incorrect legal standard in sentencing him to the harshest punishment possible for a

crime he committed as a juvenile. We agree. We therefore vacate the trial court's judgment and remand the case for re-sentencing.

I. Factual and Procedural Background

A. Background Facts

On 27 September 2015, 18-year-old Nahcier Brunson shot and killed 17-year-old Unique Graham in Camden Causeway Park. The only witness was Defendant, then 17 years old.

Graham and Brunson and Defendant knew one another through Defendant's sister. Graham and Defendant's sister were dating at the time of the shooting. Their relationship had caused friction between Graham and Defendant; both parties had pressed criminal charges against each other that were subsequently dismissed. At the same time, Brunson was "dating [and] messing around" with Defendant's sister. Brunson and Defendant were new acquaintances, having only known each other for approximately two weeks at the time of the shooting.

B. The Murder, Investigation, and Trial

The evidence at trial tended to show that Defendant went to law enforcement the day after the shooting, 28 September 2015. He stated that he had discussed robbing a drug dealer with Brunson and Graham. However, while acknowledging that he was present when Brunson shot and killed Graham, he claimed he played no part in the shooting. Police then arrested Defendant for being an accessory after the fact. After his arrest, Defendant claimed he was not actually present at the shooting.

While interviewing Defendant, police executed a search warrant of his house. There they found a gun, which Defendant admitted was used in the murder. Police then placed Defendant under arrest for first-degree murder.

When confronted by police, Brunson initially claimed that he played no role in the killing. Within the next two days, however, he accepted full responsibility, indicating that he had acted alone in killing Graham. After his arrest, Brunson said the same in a letter to Defendant's trial lawyer and in an interview with a local news channel.[1]

At the trial, however, Brunson testified that Defendant had orchestrated the killing. More particularly, Brunson testified that on the evening of 27 September 2015 Defendant drove him to Camden Causeway

1. Brunson ultimately pleaded guilty to first-degree murder.

Park. Once at the park, Defendant and Brunson both walked down the wooden walkway. According to Brunson's trial testimony, Defendant then called Graham and asked him to participate in a robbery with them. Graham agreed. Defendant asked Brunson who should hold the gun on the way to pick up Graham; believing this to be a question about who would be armed during the robbery, Brunson volunteered to do so and put Defendant's gun in his waistband. After picking Graham up, the three youths returned to the walkway at Camden Causeway Park to smoke marijuana. After Brunson and Defendant finished smoking marijuana, Brunson testified that Defendant "fell back" as they walked down the walkway. Defendant then "indicated" for Brunson to shoot Graham by tapping Brunson and making his hand into the shape of a gun. Brunson testified that he looked at Defendant twice to see if "he was for real[,]" and then he shot and killed Graham.

At trial, the State also introduced "kites," or jail letters, between Defendant and Brunson written while both were incarcerated and awaiting trial. One found in Defendant's cell read in part:

> I [Defendant] was told that if he does tell the court people that I was honestly had nothing to do with the murder and that he [Brunson] kidnapped me, then that will help me out a lot and they just drop the charges against me . . . . If they do drop the charges against me, then I still got to fight to get the murder charges dropped, but what he would have to tell them is I had nothing to do with it and he made me drive him back[.]

This communication came after Brunson told police he alone was responsible for the murder and gave a news interview stating the same, but before his letter to Defendant's trial counsel accepting full responsibility.

A fellow inmate also testified that Defendant confessed to him that "he planned the murder."

Defendant was convicted of first-degree murder by a jury on 19 January 2018.

C. The Sentencing Hearing

In the same court session, the trial court conducted a brief sentencing hearing. Defense counsel called one witness, Defendant's mother. She testified that Defendant grew up in a household plagued by domestic violence and was exposed to violence visited upon her by both his father and stepfather. She further testified Defendant played football and ran track in high school while also maintaining good grades. Finally,

she testified that Defendant completed high school and earned his high school diploma while incarcerated awaiting trial.

Defense counsel argued that a sentence of life without parole was inappropriate based on this evidence. Defendant had no prior criminal record, was not the shooter, and there was a "strong likelihood that [Defendant would] benefit from rehabilitation and confinement." Counsel contended confinement had not "stop[ped] [Defendant] from moving on with parts of his life[,]" referencing his completion of his high school education while in jail.

The State asked for a sentence of life without the possibility of parole. The State argued Defendant "manipulated" the shooter, Brunson, and that Defendant had "manifest[ed] an effort to, in some respects, obstruct justice." Finally, the State contended Defendant had not "show[n] a second of remorse" for the period leading up to and during trial. The State presented no evidence at sentencing.

In an oral order, the trial court sentenced Defendant to life without the possibility of parole. The court's oral order was as follows:

> At this juncture, the Court has considered the arguments made. The Court's considered the factors of mitigation that are possible under Chapter 15A-1340.19B, together with those that have been argued by defense counsel and the State.
>
> The Court finds that the defendant did have no record at the time – no prior criminal record at the time of this offense. The Court finds that he was 17 at the time of the offense. The Court finds that the defendant has demonstrated that he did have an ability to appreciate the risk and consequences of his conduct in that he engaged at various times throughout the process and the process of investigation with schemes to cover his conduct or deter others from providing information that would be detrimental to him.
>
> In addition, the Court finds that there is no evidence of immaturity that would be countenanced under what the Court interprets the intentions of this statute, which has a narrow application to a person who is convicted of first degree murder who, at the time, had not attained the age of 18. Limited to that general class of persons, the Court

finds there is no evidence of immaturity that would not otherwise be applicable to all those within that class.

The Court finds that there is no evidence of mental illness or impairment. There's no evidence of any familial or peer pressure exerted upon the defendant relative to the commission of this offense.

The Court does find that the defendant had an intellectual capacity that was not impaired and may have been, in fact, above average in that the defendant had been transferred or made arrangements to be transferred to a different high school other than his original county, was participating in sports and was making As, Bs, and Cs.

The Court finds that there is no evidence before the Court at this juncture of the likelihood that the defendant would benefit from rehabilitation and confinement other than that of other class of persons who may be incarcerated or may be incarcerated for the offense of first degree murder.

The Court finds that the mitigating factors that have been found, that is of no record and the age, are outweighed by the other evidence in this case of the nature of the offense and the manner in which it was committed, specifically that of involving another person who the Court concludes was manipulated by the defendant; also taking advantage of a position of what may have been trust or confidence in that the victim was — a scheme was concocted to lure the victim to ride with the defendant under a ruse and under a scheme which ultimately resulted in his vulnerability and his death.

The Court concludes that life without parole is the appropriate sentence.

Prior to trial, the State had offered Defendant a plea deal that would have resulted in him serving 16 to 30 years in prison. He rejected this proposed plea deal.

II. Analysis

Defendant argues on appeal that the trial court sentenced him based on the incorrect legal standard in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. In assessing this argument, we review the governing federal and state jurisprudence on the

punishment of juvenile offenders. These cases compel the conclusion that the trial court applied the incorrect legal standard and also improperly compared the juvenile Defendant to adult offenders – errors the approach advocated in the dissent would perpetuate. Thus, we vacate the trial court's judgment and remand for re-sentencing consistent with this opinion.

A. Standard of Review

Findings of fact by a trial court are reviewed to determine if they are supported by competent evidence. *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008), *pet. for discretionary rev. allowed by* ___ N.C. ___, ___, 828 S.E.2d 21, 22 (2019). "The trial court's weighing of mitigating factors" pertaining to the sentencing of juveniles convicted of first-degree murder subject to punishments including life without the possibility of parole "is reviewed for an abuse of discretion." *State v. Sims*, ___ N.C. ___, ___, 818 S.E.2d 401, 406 (2018) (citation omitted). Questions and conclusions of law, however, are reviewable *de novo*. *Williams* at 632, 669 S.E.2d at 294. Under *de novo* review, we "consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal." *Id.* at 632-33, 669 S.E.2d at 294 (citation omitted).

B. United States Supreme Court Case Law on the Punishment of Juvenile Offenders

The jurisprudence pertaining to the punishment of juvenile defendants has undergone a sea change in the last generation. We briefly review the key cases central to this shift as well as their key lessons below.

In 2005, the United States Supreme Court held that the imposition of the death penalty on a juvenile offender violates the Eighth Amendment's ban on cruel and unusual punishments. *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed.2d 1 (2005). This path-marking decision held that "[t]hree general differences between juveniles under 18 and adults" counsel against finding a juvenile defendant "among the worst offender[s]" subject to the harshest penalties. *Id.* at 569, 125 S. Ct. at 1195. First, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 2668-69, 125 L. Ed.2d 290, 305 (1993)). Second, "juveniles have less control, or less experience with control, over their own environment." *Roper* at 569, 125 S. Ct. at 1195 ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate

themselves from a criminogenic setting[.]") (quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Third, science and common sense make plain that "the character of a juvenile is not as well formed as that of an adult." *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195. Their transitory personality traits mean that "a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*, 125 S. Ct. at 1195-96; *Thompson v. Oklahoma*, 487 U.S. 815, 837, 108 S. Ct. 2687, 2699, 101 L. Ed.2d 702, 719 (1988) (noting a "teenager's capacity for growth").

These differences, in turn, undermine the penological justifications for subjecting juveniles to the harshest punishments. "[T]he case for retribution is not as strong with a minor as with an adult" as their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196. Further, the remote "likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight" to harsh penalties undercuts their deterrent effect. *Id.* at 572, 125 S. Ct. at 1196 (quoting *Thompson*, 487 U.S. at 837, 108 S. Ct. at 2700).

Five years later, the United States Supreme Court held that a sentence of life without the possibility of parole for juvenile offenders in non-homicide cases violates the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 82, 130 S. Ct. 2011, 2034, 176 L. Ed.2d 825, 850 (2010). In reiterating that juveniles' "lessened culpability" make them "less deserving of the most severe punishments[,]" the Court again pointed to "developments in psychology and brain science" that "continue to show fundamental differences between juvenile and adult minds" in the "parts of the brain involved in behavior control." *Id.* at 68, 130 S. Ct. at 2026. The Court also noted that life without the possibility of parole as a penalty is the "second most severe penalty permitted by law[,]" sharing "some characteristics with death sentences that are shared by no other sentences." *Id.* at 69, 130 S. Ct. at 2027 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705, 115 L. Ed.2d 836, 869 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). This overlap includes the "denial of hope" rendering "good behavior and character improvement . . . immaterial[.]" *Graham*, 560 U.S. at 71, 130 S. Ct. at 2027 (internal marks and citation omitted). Bringing together these two threads, the Court noted, "[l]ife without parole is an especially harsh punishment for a juvenile[,]" as a "16-year-old and a 75-year-old" each sentenced thus "receive the same punishment in name only." *Graham*, 560 U.S. at 70, 130 S. Ct. at 2028.

And two years later, the United States Supreme Court held that "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" in homicide cases violates the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 479, 132 S. Ct. 2455, 2469, 183 L. Ed.2d 407, 424 (2012). It so held because such mandatory regimes preclude consideration of an offender's age and "family and home environment" as well as potential mitigating factors pertaining to the homicide, such as the fact that the offender "might have been . . . convicted of a lesser offense if not for incompetencies associated with youth – for example, his inability to deal with . . . prosecutors (including on a plea agreement)[,]" and, finally, "the possibility of rehabilitation[.]" *Id.* at 477-78, 132 S. Ct. at 2468.

Most recently, in *Montgomery v. Louisiana*, ___ U.S. ___, ____, 136 S. Ct. 718, 734, 193 L. Ed.2d 599, 620 (2016), the Supreme Court concluded that *Miller*'s prohibition on mandatory life without the possibility of parole for juveniles constituted a new substantive rule of constitutional law and, as such, applied retroactively. "Because *Miller* determined that sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption, it rendered life without parole an unconstitutional penalty for a class of defendants because of their status[,]" a hallmark of a substantive rule of constitutional law. *Id.* (internal marks and citation omitted).

* * * * * * * *

Four overarching points from this line of cases are worth highlighting.

First, each case builds on the foundation "that children are constitutionally different from adults for purposes of sentencing." *Id.* at ___, 136 S. Ct. at 733 (internal marks and citation omitted).

Second, the developments in United States Supreme Court case law demand a long and deep look at each juvenile defendant. *Roper* noted that the distinguishing characteristics of youth render suspect any conclusion that a juvenile's crime is "evidence of *irretrievably* depraved character." 543 U.S. at 570, 125 S. Ct. at 1195 (emphasis added). In that same vein, *Graham* spoke in terms of *incorrigibility*. *See* 560 U.S. at 72-73, 130 S. Ct. at 2029 (emphasis added); *Montgomery*, ___ U.S. at ____, 136 S. Ct. at 734 (speaking of "*permanent* incorrigibility") (emphasis added). *Miller* spoke of "*irreparable* corruption." 567 U.S. at 479-80, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197) (emphasis added). *Montgomery* indicated life without the possibility of parole was justified only where "rehabilitation is *impossible*[.]" ___ U.S. at ____, 136 S. Ct. at 733 (emphasis added). "Permanent means

forever. Irreparable means beyond improvement." *State v. Williams*, ___ N.C. App. ___, ___, 820 S.E.2d 521, 526 (2018) (quoting *Sims*, ___ N.C. App. at ___, 818 S.E.2d at 413 (Stroud, J., concurring) (internal quotations omitted)). And, of course, irretrievable means "cannot be retrieved[,]" VIII *The Oxford English Dictionary* 100 (2nd ed. 1989), incorrigible means "[i]ncapable of being corrected or amended[,]" *id.* at 825, and impossible means "[n]ot possible[,]" *id.* at 732. In other words, the focus is on whether "in 25 years, in 35 years, in 55 years—when the defendant may be in his seventies or eighties—he will likely still remain incorrigible or corrupt, just as he was as a teenager[.]" *Williams*, ___ N.C. App. at ___, 820 S.E.2d at 526 (quoting *Sims*, ___ N.C. at ___, 818 S.E.2d at 413 (Stroud, J., concurring)).

Third, none of these teachings "about children . . . is crime-specific." *Miller*, 567 U.S. at 473, 132 S. Ct. at 2465. Indeed, this line of cases dwells on the danger in focusing the sentencing inquiry on the nature of the offense. *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197 ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course[.]"); *Graham*, 560 U.S. at 59, 130 S. Ct. at 2021 (highlighting the "essential principle that, under the Eighth Amendment, the State must respect the human attributes [such as potential for rehabilitation] even of those who have committed serious crimes"); *Miller*, 567 U.S. at 472, 132 S. Ct. at 2465 ("[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."). This recognizes the obvious: "almost all of the cases" subjecting juveniles to the harshest penalties "arose from heinous and shocking crimes[.]" *State v. May*, 255 N.C. App. 119, 130, 804 S.E.2d 584, 591 (2017) (Stroud, J., concurring); *see Roper*, 543 U.S. at 600, 125 S. Ct. at 1213 (O'Connor, J., dissenting) ("Christopher Simmons' murder of Shirley Cook was premeditated, wanton, and cruel in the extreme."); *Roper*, 543 U.S. at 619, 125 S. Ct. at 1223 (Scalia, J., dissenting) (citing examples of "individuals under 18 . . . involve[d] [in] truly monstrous acts"); *Graham*, 560 U.S. at 112, 130 S. Ct. at 2051 (Thomas, J., dissenting) (recounting vicious stabbing and rape in arguing for retaining possibility of juvenile life without the possibility of parole for non-homicide offenses); *Miller*, 567 U.S. at 513, 132 S. Ct. at 2489 (Alito, J., dissenting) (noting "brutality and evident depravity" in case at issue); *Mongtomery*, ___ U.S. at ___, 136 S. Ct. at 744 (Scalia, J., dissenting) (underlining facts involved "17-year-old who murdered an innocent sheriff's deputy"). Making the facts of these awful crimes the lodestar in sentencing will result in "life

imprisonment without the possibility of parole [becoming] the rule and not the exception." *May*, 255 N.C. App. at 130, 804 S.E.2d at 591 (Stroud, J., concurring).

But a key teaching of these cases is that sentences of life without the possibility of parole for juvenile offenders "will be uncommon." *Miller*, 567 U.S. at 479, 132 S. Ct. at 2469; *see Montgomery*, ___ U.S. at ___, 136 S. Ct. at 736 (sentencing juvenile to life without the possibility of parole only appropriate in "exceptional circumstances"); *State v. James*, 371 N.C. 77, 93, 813 S.E.2d 195, 207 (2018) ("[T]he imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile [will] be a rare event."). This is the case in spite of the fact that differentiating "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption . . . is difficult even for expert psychologists[.]" *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197. Indeed, this reality "counsel[s] against irrevocably sentencing them to a lifetime in prison." *Miller*, 567 U.S. at 480, 132 S. Ct. at 2469.

C. Developments in North Carolina Law Since *Miller*

Our General Assembly responded to this sea change by replacing the statutory regime that had automatically sentenced juveniles tried and convicted as adults for homicide offenses to life without the possibility of parole, N.C. Gen. Stat. § 14-17 (2010), with one that requires trial courts to conduct hearings to determine whether juvenile defendants convicted of first-degree murder not based on felony murder "should be sentenced to life imprisonment without parole . . . or a lesser sentence of life imprisonment with parole[,]" N.C. Gen. Stat. § 15A-1340.19B(a)(2) (2017). The juvenile defendant may submit mitigating circumstances during this hearing, including the following:

> (1) Age at the time of the offense[;]
>
> (2) Immaturity[;]
>
> (3) Ability to appreciate the risks and consequences of the conduct[;]
>
> (4) Intellectual capacity[;]
>
> (5) Prior record[;]
>
> (6) Mental health[;]
>
> (7) Familial or peer pressure exerted upon the defendant[;]

(8) Likelihood that the defendant would benefit from rehabilitation in confinement[;] [and]

(9) Any other mitigating factor or circumstance.

N.C. Gen. Stat. § 15A-1340.19B(c) (2017).

In *James*, 371 N.C. at 99, 813 S.E.2d at 211, our Supreme Court held this new statutory regime constitutional. Central to its holding was a rejection of the notion that the new regime created a presumption in favor of life without the possibility of parole. *See id.* at 92-93, 813 S.E.2d at 207 ("[A] statutory sentencing scheme embodying a presumption in favor of a sentence of life imprisonment without the possibility of parole for a juvenile . . . would be, at an absolute minimum, in considerable tension with the General Assembly's expressed intent to . . . compl[y] with *Miller* and with the expressed intent of the United States Supreme Court that . . . the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile be a rare event."). Instead of applying such a presumption, trial courts conducting these sentencing hearings should consider how the facts of a particular controversy interact with both the statutorily enumerated mitigating factors and the "substantive standard enunciated in *Miller*." *Id.* at 89, 813 S.E.2d at 204 (citation omitted). And, given that "*Miller* and its progeny indicate[d] that life without parole sentences for juveniles should be exceedingly rare and reserved for specifically described individuals," *id.* at 96-97, 813 S.E.2d at 209, a trial court need not "adopt and credit such mitigating evidence" to impose a sentence of life with the possibility of parole, *id.* at 91, 813 S.E.2d at 206.

Most recently, our Court held it was necessary to find a juvenile irreparably corrupt before sentencing him or her to life without the possibility of parole. *Williams*, ___ N.C. App. at ___, 820 S.E.2d at 526. The trial court in *Williams* made "an explicit finding contrary" to concluding the defendant was irreparably corrupt. *Id.* Accordingly, we vacated the defendant's sentence of life without the possibility of parole and remanded the case for resentencing "to two consecutive terms of life imprisonment with the possibility of parole." *Id.*[2]

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2. The dissent questions the reasoning of *Williams* and, given that it has been stayed and will be reviewed by our Supreme Court, its precedential value. *State v. Ames*, *infra* at ___ (Dillon, J., dissenting). There is a strong argument that it remains binding precedent, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, *a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court*.")

III. Defendant's Sentencing Hearing

After the jury convicted Defendant of first-degree murder, the trial court conducted a brief hearing to consider whether to sentence him to life imprisonment with or without the possibility of parole. The trial court ultimately sentenced Defendant to life imprisonment without the possibility of parole.

As noted above, our Supreme Court has held that trial courts must comply with "the substantive standard enunciated in *Miller*" when deciding whether to sentence a juvenile to life without the possibility of parole. *James*, 371 N.C. at 89, 813 S.E.2d at 204. The lodestar of *Miller* is that life without the possibility of parole "should be reserved for the rare juvenile offender whose crime reflects irreparable corruption rather than being imposed upon the juvenile offender whose crime reflects unfortunate yet transient immaturity." *Id.* at 92, 813 S.E.2d at 206 (internal marks omitted). This focal point is informed by the fact that "children are constitutionally different from adults for the purposes of sentencing." *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 733. It is "misguided to equate the failings of a minor with those of an adult," in part, because "a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195-96.

Defendant argues that the trial court sentenced him based on the incorrect legal standard in violation of the Eighth Amendment. Specifically, Defendant asserts that the trial court's brief oral order not only fails to apply the standard articulated in *Miller* but also transgresses the teaching that juveniles are constitutionally different from adults. As the State conceded at oral argument – and is well settled in our case law – these are both questions of constitutional law and thus reviewed *de novo*. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (citation omitted). For the following reasons, we agree with Defendant.

A. Incorrect Legal Standard

The crux of the trial court's oral order sentencing Defendant to life without the possibility of parole is "that the mitigating factors that have been found, that is of no record and the age, are outweighed by the other evidence in this case of the offense and the manner in which it was committed[.]"

(emphasis added), and the dissent does not cite any authority that supports its assertion to the contrary. *State v. Ames*, *infra* at ___ (Dillon, J., dissenting). But, even *if Williams* were not binding, the trial court's deviation from *Roper*, *Graham*, *Miller*, *Montgomery*, and *James* is plain. *Infra* section III.

This approach finds no support in the case law. The consideration of whether the Defendant is the rare, "irreparabl[y] corrupt[]" youth is, at a minimum, opaque in the trial court's balancing test. *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197). The trial court did not examine whether the Defendant is "the *rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible* and life without parole is justified[,]" *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 733, and the dissent explicitly rejects this analysis, which is required. *Ames*, *infra* at ___ (criticizing the majority for "getting ahead of the United States Supreme Court" by quoting and considering in its analysis the above language from the United States Supreme Court) (Dillon, J., dissenting).[3] In place of the prescribed inquiry, the nature of the offense becomes the lodestar, despite the fact that the case law warns against such a focus repeatedly in the context of juvenile sentencing. *Supra* section II.B. Focusing the assessment in this fashion made Defendant's sentence far more likely. Were it to hold sway, this approach would make life imprisonment without the possibility of parole "the rule and not the exception[,]" *May*, 255 N.C. App. at 130, 804 S.E.2d at 591 (Stroud, J., concurring), a result flatly inconsistent with precedent. *James*, 371 N.C. at 95, 813 S.E.2d at 208 ("[S]entences of life imprisonment without the possibility of parole for juveniles convicted of first-degree murder should be the exception, rather than the rule[.]").

Nothing in the statutory sentencing regime runs contrary to this precedent, nor could it given its origin. *See id.* at 92, 813 S.E.2d at 206 ("[T]he legislation in which the relevant statutory provisions appear is captioned [a]n act to amend the state sentencing laws to comply with the . . . decision in *Miller v. Alabama*[.]") (internal marks omitted). While the regime permits a defendant to bring forward mitigating evidence, this is not obligatory. N.C. Gen. Stat. 15A-1340-19B(c) (2017) ("The defendant or the defendant's counsel *may* submit mitigating circumstances to the court[.]") (emphasis added). The statute "does not compel the conclusion that persuading the sentencing court to adopt and credit . . . mitigating evidence is necessary in order to preclude the imposition" of life without the possibility of parole, *James*, 371 N.C. at 91, 813 S.E.2d

3. The dissent's critique of our opinion's (and, by extension, the governing case law's) consideration of whether a juvenile is beyond rehabilitation merely resurrects an already rejected argument. *Compare Montgomery*, ___ U.S. ___, 136 S. Ct. at 744 (Scalia, J., dissenting) (criticizing the "'incorrigibility' *requirement* that the Court imposes today" as "impossible in practice" to apply) (emphasis added), *with Ames*, *infra* at ___ ("I do not believe that any judge has the ability to look into the soul of a juvenile and declare that it would be 'impossible' for that juvenile to ever be rehabilitated.").

at 206, a conclusion at odds with the trial court's balancing test and the dissent's endorsement thereof.

Simply put, nothing in the case law or our statutes supports the test the trial court employed and the dissent defends.

B. Improper Comparison of Defendant to Adult Offenders

The trial court also found "that there is no evidence before the Court at this juncture of the likelihood that Defendant would benefit from rehabilitation and confinement other than that of other class of persons who may be incarcerated or may be incarcerated for the offense of first degree murder." Though not a model of clarity, the trial court unmistakably compared Defendant to the entire universe of individuals incarcerated for first-degree murder. The State conceded as much at oral argument and its obvious implication: this universe includes adults. The dissent finds no flaw in this approach. *Ames*, *infra* at ___ (Dillon, J., dissenting) ("I believe it is totally appropriate for Judge Tillett to compare Defendant to adult murderers in determining whether he should treat Defendant's crime as one reflecting transient immaturity.").

But comparing Defendant and his capacity for rehabilitation to adult offenders transgresses the central tenet of the juvenile sentencing case law. *See Miller*, 567 U.S. at 481, 132 S. Ct. at 2470 ("[C]hildren are different[.]"); *Roper*, 543 U.S. at 570, 125 S. Ct. at 1195-96 ("[A] greater possibility exists that a minor's character deficiencies will be reformed.").

* * * * * * * *

While the dissent rightly notes that the trial court made reference to each of the statutorily enumerated mitigating factors in its brief oral order, *Ames*, *infra* at ___ (Dillon, J., dissenting), it then considered them through a lens bearing little to no relationship with "the substantive standard enunciated in *Miller*[,]" *James*, 371 N.C. at 89, 813 S.E.2d at 204. *Roper*, *Graham*, *Miller*, and *Montgomery* establish no mere boxes to check before a child is sentenced to a punishment the United States Supreme Court has analogized to death. Recent developments in the law demand a long and deep inquiry into whether a juvenile defendant is beyond rehabilitation before this harshest penalty is imposed, a demand the trial court did not meet and the dissent would elide.

IV. Remedy

Having determined that the trial court erred as a matter of law both in its apprehension and application of the correct legal standard and, more particularly, by comparing the Defendant juvenile to adult

offenders, we now turn to the appropriate remedy. Defendant urges us to enter a sentence of life with the possibility of parole, pointing to *Williams* in support of its position. We must decline to do so, however, as *Williams* is not on all fours with the current controversy and, as a general rule, sentencing is a task for the trial court. *See Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L. Ed. 1337, 1342 (1949) (underlining that trial court judge's "task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined.").

Whereas in *Williams* the trial court made a factual finding categorically at odds with a sentence of life without the possibility of parole, *see* ___ N.C. App. at ___, 820 S.E.2d at 526, the errors requiring reversal here pertain to the legal standard applied. Put another way, there is no factual finding in the trial court's order categorically at odds with a life without the possibility of parole sentence.[4]

To be clear: we do not mean to suggest that the trial court merely took the wrong path to the right destination. The trial court found two statutory mitigating factors, one of which, Defendant's age, is a "mitigating factor of great weight[.]" *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S. Ct. 869, 877, 71 L. Ed.2d 1, 12 (1982). Defense counsel argued that Defendant's intelligence and continued educational engagement while incarcerated was a mitigating factor, inasmuch as it showed he was not beyond rehabilitation; however, this evidence seems curiously to have counted, if anything, against Defendant during sentencing. In fact, the mitigation case put on by Defendant's counsel at sentencing, which included evidence of Defendant's youth, Defendant having been raised in a violent home environment, the fact that Defendant did not shoot Graham, his rejection of a far less punitive plea proposal, and his potential for rehabilitation, seemingly implicated every factor *Miller* identified as counseling *against* sentencing a juvenile to life without the

4. Defendant alleges that the trial court's finding that "that there is no evidence before the Court at this juncture of the likelihood that Defendant would benefit from rehabilitation" precludes a sentence of life without the possibility of parole. Defendant reads this as the trial court stating Defendant's prognosis for rehabilitation is uncertain, the finding that led our Court in *Williams* to directly enter a sentence of life with the possibility of parole. *Williams*, ___ N.C. App. at ___, 820 S.E.2d at 526. The State reads the same as merely connoting an (arguably dubious) absence of evidence on point. Both interpretations strike us as plausible, which counsels caution in fashioning a remedy. It is enough for us to simply reiterate that the Defendant need not persuade "the sentencing court to adopt and credit . . . mitigating evidence" for a sentence of life with the possibility of parole to be imposed, and the standard when assessing his prospects for rehabilitation is whether he is "irreparabl[y] corrupt[][.]" *James*, 371 N.C. at 91, 813 S.E.2d at 206.

possibility of parole. 567 U.S. at 477-78, 132 S. Ct. at 2468 (noting age, "family and home environment[,]" "the extent of [Defendant's] participation in the . . . homicide offense[,]" "inability to deal with . . . prosecutors (including on a plea agreement)[,]" and the "possibility of rehabilitation[,]" as factors worthy of consideration in sentencing).

V. Conclusion

For the foregoing reasons, we vacate the trial court's judgment and remand for re-sentencing consistent with this opinion.

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Judge Tillett is the sentencing judge in this case. He has the authority to choose whether to sentence Defendant, upon his conviction for first degree murder, to life without the possibility of parole ("LWOP") or some lesser sentence, so long as his sentence is not contrary to the Eighth Amendment or our General Statutes.

Here, I conclude that Judge Tillett's sentence of LWOP does not violate the Eighth Amendment, for the reasons explained in Section I, below.

Further, I conclude that Judge Tillett did not err in sentencing Defendant to LWOP in accordance with our General Statutes, for the reasons explained in Section II, below.

Accordingly, I conclude that Judge Tillett properly exercised his discretion as the sentencing judge in this case. Therefore, I respectfully dissent.

I. Judge Tillett's Order Does Not Violate the Eighth Amendment

LWOP is "the second most severe [punishment] known to the law[.]" *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991). But as a LWOP sentence is markedly different than a death sentence, *Furman v. Georgia*, 408 U.S. 238, 286 (1972), a LWOP sentence is constitutionally permissible for *adult* offenders even for many non-violent crimes, such as simply possessing a large amount of cocaine, *Harmelin*, 501 U.S. at 996, and may be imposed on adult offenders even without ever considering mitigating factors or the "particularized circumstances of the crime and of the criminal." *Id.* at 962.

However, where the defendant is a *juvenile* offender, the United States Supreme Court, as reiterated by our Supreme Court, has determined that the Eighth Amendment is more restrictive on the ability to impose a LWOP sentence. Specifically, a sentencing judge may impose a LWOP sentence on a juvenile offender only in homicide cases *and* only on " 'the rare juvenile offender *whose crime* reflects irreparable corruption,' rather than 'unfortunate yet transient immaturity.' " *State v. James*, 371 N.C. 77, 95, 813 S.E.2d 195, 208 (2018) (quoting *Miller v. Alabama*, 567 U.S. 460, 479-80 (2012)) (emphasis added).

Certainly, every homicide is horrific. But when committed by a juvenile, it is the duty of the sentencing judge to determine whether the defendant's horrific act was borne out of transient immaturity; for example, was prompted by peer pressure.

In the present case, I conclude that Judge Tillett properly considered Defendant's crime in essentially determining that it did not reflect transient immaturity but rather irreparable corruption. Specifically, Judge Tillett noted how Defendant was not influenced by peer or familial pressure, but rather was the ringleader, manipulating an unwitting accomplice to participate in the murder. Judge Tillett noted how Defendant concocted an elaborate scheme to lure his victim into a vulnerable situation and how, after the murder, Defendant orchestrated an elaborate cover-up of the crime. Judge Tillett found that Defendant was intelligent, that he showed no signs of "immaturity," "mental illness or impairment," and that Defendant was able "to appreciate the risk and consequences of his" actions.

The majority, however, suggests that the proper test under the Eighth Amendment goes further than merely determining whether *the crime* reflects irreparable corruption. Specifically, the majority suggests that a LWOP sentence may not be imposed unless the sentencing judge is able to determine that the juvenile *himself* is irreparably incorrigible, that is, the judge is able to determine that it is "impossible" for the juvenile to ever be rehabilitated.

In a case cited by the majority, another panel of our Court last year, in a case currently at our Supreme Court, made this same error, getting ahead of the United States Supreme Court. *State v. Williams*, ___ N.C. App. ___, ___, 820 S.E.2d 521, 526 (2018). Specifically, the *Williams* panel held that a LWOP sentence may not be imposed on a juvenile offender unless the sentencing judge makes a "threshold determination" that the defendant, himself, is "irreparably corrupt[.]" *Id.* We are not bound by *Williams* at this point, as our Supreme Court granted the State's motion

to stay that opinion, based on the effect that the opinion could have on other cases. *State v. Williams*, 371 N.C. 572, 818 S.E.2d 639 (2018); *see also State v. Williams*, ___ N.C. App. ___, ___, 828 S.E.2d 21, 22 (2019) (allowing the State's petition "for Writ of Supersedeas of the judgment of the Court of Appeals").

While the United States Supreme Court has made a lot of statements suggesting that a LWOP sentence should be extremely rare and should be for the worst of juvenile offenders, that Court has *held* that a LWOP sentence for a juvenile offender is constitutionally permissible if the sentencing judge merely determines that "the crime" itself was one which "reflects" irreparable corruption. *Miller*, 567 U.S. at 479-80. In *Montgomery*, the most recent seminal case on this issue, that Court clearly stated that "*Miller*'s substantive holding [was] that life without parole is an excessive sentence for children *whose crimes* reflect transient immaturity," *Montgomery v. Louisiana*, ___ U.S. ___, ___, 136 S. Ct. 718, 735 (2016) (emphasis added), and that the Court was now requiring that a sentencing judge considering a LWOP sentence must conduct a hearing to determine whether the juvenile offender's *crime* reflected transient immaturity, *id.*

Requiring that a sentencing judge must be convinced that the defendant *himself* is incapable of rehabilitation, as suggested by the majority and by our panel in *Williams*, would effectively eliminate LWOP sentences in all cases involving juvenile offenders. I do not believe any sentencing judge, more or less any human being, can ever say that a juvenile offender is beyond moral redemption. I do not believe that any judge has the ability to look into the soul of a juvenile and declare that it would be "impossible" for that juvenile to ever be rehabilitated. Indeed, the Fourth Circuit Court of Appeals has recognized this reality in a case decided just last year, a case that is headed to the United States Supreme Court this term. *See Mathena v. Malvo*, ___ U.S. ___, 139 S. Ct. 1317, 2019 U.S. LEXIS 1905 (2019) (granting *certiorari*). That case involves Lee Boyd Malvo, one of the D.C. snipers who was a juvenile at the time of his 2002 killing spree, and who received a sentence of LWOP prior to *Miller* and *Montgomery* being decided. The Fourth Circuit Court affirmed an order granting Mr. Malvo a *Miller* hearing to determine if *his crime* indeed reflected irreparable corruption rather than transient immaturity. *Malvo v. Mathena*, 893 F.3d 265, 277 (4th Cir. 2018). The Fourth Circuit concluded its opinion by recognizing that no judge, though, could predict how Mr. Malvo *himself* will turn out, stating that "who knows but God how [Mr. Malvo] will bear the future." *Id.* In any event, it may be that in reconsidering the issue, the Supreme Court will again reinterpret the Eighth Amendment by determining that all LWOP

sentences for juvenile offenders are unconstitutional. Who knows? But it is not for us to apply a new test which would essentially make that decision for that Court.

I recognize that our General Assembly has provided that a sentencing judge is to consider the "[l]ikelihood that the defendant would benefit from rehabilitation in confinement." N.C. Gen. Stat. § 15A-1340.19B(c)(8) (2018). While this is an important factor, it is only one of a number of statutory mitigating factors to be considered and weighed by the sentencing judge. It is not an absolute requirement under the statute, much less the Eighth Amendment as interpreted by the United States Supreme Court, that the sentencing judge must absolutely determine that a juvenile offender could never benefit from rehabilitation as a prerequisite of imposing a LWOP sentence. The statute only requires that the sentencing judge consider any evidence that a juvenile offender might benefit when considering the appropriate sentence.

II. Judge Tillett Made Sufficient Findings Under Section 15A-1340.19B

Our General Assembly allows a juvenile offender convicted of first degree murder, not involving felony murder, to introduce evidence concerning eight specific mitigating factors and "any other mitigating factor" when deciding whether to impose a LWOP sentence. N.C. Gen. Stat. § 15A-1340.19B(c). In a holding affirmed by our Supreme Court, our Court held that a sentencing judge *must* make findings as to each of the enumerated factors. *State v. James*, 247 N.C. App. 350, 364-66, 786 S.E.2d 73, 82-84 (2016), *affirmed in part and modified in part*, *State v. James*, 371 N.C. 77, 813 S.E.2d 195 (2018).

In the present case, Judge Tillett properly considered each of the statutory factors listed in Section 15A-1340.19B. He determined that two were applicable, but that the others were inapplicable. Specifically, Judge Tillett found that there was no evidence that Defendant was immature. Judge Tillett found that Defendant had the ability to appreciate the risks and consequences of his conduct; that he had a strong, above-average intellectual capacity that was not impaired; that he had no mental health issues; that his crime was not influenced by any familial or peer pressure; and that there was no evidence that Defendant would benefit from rehabilitation any more than anyone else convicted of first degree murder. Judge Tillett did find that Defendant's age and the lack of a prior record were mitigating factors.

Judge Tillett, as the sentencing judge, considered the two mitigating factors that he found and how they interplayed with his determination regarding the crime itself, and concluded that a sentence of LWOP was

appropriate in this particular case. It may be that other judges would have given Defendant a lesser sentence. But our job is simply to determine if Judge Tillett exceeded his authority or failed to apply the law correctly. I conclude that he did not.

The majority takes issue with Judge Tillett's finding concerning the statutory mitigating factor regarding whether there is a "[l]ikelihood that the defendant would benefit from rehabilitation[.]" N.C. Gen. Stat. § 15A-1340.19B(c)(8). Specifically, the majority takes issue that Judge Tillett improperly compared Defendant with adult murderers, rather than other juvenile murderers. I disagree.

I believe it is totally appropriate for Judge Tillett to compare Defendant to adult murderers in determining whether he should treat Defendant's crime as one reflecting transient immaturity. But assuming Judge Tillett was required to compare Defendant's likelihood of rehabilitation to other *juvenile* murderers, his findings essentially do this anyway. That is, it is a given that a juvenile murderer is presumed to have a greater likelihood of rehabilitation than an adult murderer. But in finding that the likelihood of Defendant's rehabilitation *was equal to* the likelihood of an adult murderer, it logically follows that Judge Tillett was necessarily determining that Defendant's likelihood at rehabilitation *was less than* that of a juvenile murderer.

The majority also takes issue that Judge Tillett did not consider the statutory mitigating factors "through the lens" of the "substantive standard enunciated in *Miller*," as required by our Supreme Court in *James*, 371 N.C. at 83, 89, 813 S.E.2d at 201, 204. But, again, this "substantive standard enunciated in *Miller*" is to determine whether "[*the*] *crime*[] reflect[s] transient immaturity." *See Montgomery*, 136 S. Ct. at 735 (describing "*Miller*'s substantive holding [to be] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity"). And Judge Tillett did just that. He viewed the two mitigating factors that he found present, i.e., Defendant's age and lack of prior record, through the lens of the crime that Defendant committed. Judge Tillett did not consider the factors through the lens of the brutality of the crime, as all homicides are brutal. Rather, he appropriately considered them through the lens of how Defendant's crime *did not reflect* transient immaturity.

For these reasons, I would uphold Judge Tillett's sentencing of Defendant to LWOP.

STATE v. COBURN

[268 N.C. App. 233 (2019)]

STATE OF NORTH CAROLINA
v.
GREGORY SCOTT COBURN, DEFENDANT

No. COA18-1231

Filed 5 November 2019

1. Criminal Law—charge conference—N.C.G.S. § 15A-1231—not recorded in full—material prejudice

The Court of Appeals rejected defendant's argument that the trial court's failure to record the entire charge conference as required by N.C.G.S. § 15A-1231 constituted material prejudice. After the trial court and attorneys discussed the jury instructions off the record during a break, the court summarized the discussions on the record and twice gave defendant an opportunity to address whether an instruction on defense of habitation should be given, but defendant declined.

2. Criminal Law—jury instruction—defense of habitation—not requested—invited error

In a prosecution for assault with a deadly weapon inflicting serious injury, defendant was not entitled to plain error review of the trial court's failure to give an instruction on defense of habitation. Where defendant failed to request such an instruction despite being given multiple opportunities to do so, or to object to the instructions as given, any error was invited.

Appeal by defendant from judgment entered on or about 15 December 2017 by Judge William W. Bland in Superior Court, Wayne County. Heard in the Court of Appeals 20 August 2019.

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

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

STROUD, Judge.

Defendant appeals a judgment convicting him of assault with a deadly weapon inflicting serious injury. On appeal defendant argues the trial court should have instructed the jury on defense of habitation based upon North Carolina General Statute § 14-51.2. Because defendant

invited any error in the trial court's instructions as to self-defense and defense of habitation, defendant has waived review of this issue, including plain error review. We thus conclude there was no error in defendant's trial .

I. Background

The State's evidence showed that Mr. William Howard Lancaster, Jr. had owned the home where he also resided for 32 years. Mr. Lancaster was an acquaintance of defendant and allowed defendant to move into the home at a time when defendant was struggling to find a stable living arrangement. Defendant occasionally paid Mr. Lancaster for the accommodations. Mr. Lancaster did not consider himself to be renting the room but rather "helping [defendant] out" until he was able to get a job and move. Defendant lived with Mr. Lancaster for approximately four months, and in February of 2016, Mr. Lancaster asked defendant to leave. Shortly thereafter, Mr. Lancaster went to the home with Tony Anderson. Mr. Anderson and defendant got into an argument and a physical altercation ensued. Mr. Lancaster testified he saw defendant hit Mr. Anderson with a crowbar and a bat and spray fire at Mr. Anderson using an aerosol can and a lighter. Mr. Lancaster tried to break up the fight, and defendant stabbed him in the leg with a knife from his back pocket.

Defendant also testified in his own defense. Defendant said he was renting a room from Mr. Lancaster. One Friday Mr. Lancaster came home and told defendant if he messed with one of the women who was visiting the home he would "cut [his] guts out." Defendant left the house on Saturday morning and did not return until Sunday. Defendant was packing up when Mr. Lancaster and his son[1] threatened defendant; defendant called 911. The police came and when they left, Mr. Lancaster, Mr. Anderson, and Mr. Lancaster's son went into defendant's room, "cornered me in the back of my bedroom and was jumping at me" and threatened defendant. Defendant called 911 again because he "needed help," and he "was scared they were going to, you know, really hurt me, jump on me." Defendant claimed he was defending himself when he pulled out the knife.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and attempted voluntary manslaughter. The trial court dismissed some of the charges against defendant and submitted only assault with a deadly weapon inflicting serious injury to the jury, and the jury found defendant guilty. The trial court entered

1. The record does not include the age of Mr. Lancaster's son, but it appears he was an adult. Mr. Lancaster's son left the scene "before the Sheriff got there" so the extent of his participation in the incident is not clear.

judgment and sentenced defendant to a minimum of 29 months and a maximum of 44 months imprisonment. Defendant appeals.

II. Preservation of Issue on Appeal

Defendant's only issue on appeal is whether the trial court erred in failing to instruct the jury on defense of habitation. The State contends defendant failed to preserve this issue for appeal because he did not request an instruction regarding defense of habitation. Defense of habitation was discussed from the beginning of the trial, based upon a pretrial motion, until the end, during the charge conference. Defendant filed several motions prior to trial; one alleged he was immune from prosecution based upon defense of habitation under North Carolina General Statutes §§ 14-51.2 and 15A-954. The trial court denied defendant's pretrial motion to dismiss based upon "immunity" from prosecution and defendant has not challenged this ruling appeal. After all of the evidence was presented, defendant made several more motions, particularly regarding self-defense and the alleged defender's reasonable belief of the need to use force. Defendant did argue for defense of habitation. The trial court then stated,

> I'm going to talk with each of the lawyers as we do this, so we kind of have an idea what's coming, and then get it firmly on the record. . . . Let's officially be in recess until a quarter to 2:00, and but let me speak to you all in chambers.

Upon return to the courtroom the trial court stated, "I appreciate the assistance and professional attitude of counsel as we worked through lunch addressing some of these issues." The trial court listed the introductory pattern jury instructions it intended to give and then addressed the jury instructions regarding self-defense and stated,

> Now, on the substantive charge, particularly as to the self-defense, the same issues, which were challenging in 14-51.2 and 14-51.3 made this, ah . . . charge challenging; however, we're proceeding with assault with a deadly weapon inflicting serious injury.
>
> And then, including the defense of self-defense. When you go to the self-defense instruction, 308.45, in the pattern jury instruction, which, of course, is not the law, but is a dedicated attempt to properly instruct on the law, that instruction, 308.45, has a note well where it says if the assault occurred in the Defendant's home, place of residence, or place of motor vehicle, use North

> Carolina Pattern Jury Instruction 308.8, defense of habitation. And we looked at that, the Court looked, and all of us looked together at that defense of habitation. It . . . under the facts as -- or the evidence as it's developed, and in this case, I mean I really think all of us agreed, but I'll speak only for the Court. That under the evidence as we've heard, 308.45, that self-defense instruction fit best and was appropriate even under the law in the facts or the evidence as it's come up here[.]

The trial court then asked, "Anybody wish to be heard on these instructions?" The State's attorney did not and defendant's attorney stated:

> Judge, the only exception the Defendant would note is in the self-defense instruction 308.45, it provides that if the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness, we believe that to be an inaccurate statement under the law, under 14-51.3, and if you would note our exception to that portion for the record, Judge.

Defendant did not request an instruction on defense of habitation under North Carolina General Statute § 14-52.2.

The trial court later brought up defense of habitation again, stating,

> Also, the, ah . . . but there was certainly timely filed a notice of self-defense by the Defendant, there was no specific request for the defense of habitation, or abode or whatever it's called. But, ah . . . and there was some discussion whether that had to be mandatory, because it's in a house that, ah -- stated the reasons that we're proceeding here which seemed applicable to the evidence in this case.

The trial court again noted self-defense as the appropriate instruction and asked if defendant's attorney would like to say anything further to which he responded, "No, sir."

The trial court then instructed the jury as to self-defense and not as to defense of habitation, and once the jury had left the courtroom asked counsel, "Are there any additions or corrections to the instructions as they were read?" Defendant's counsel renewed the earlier request regarding the wording of the "reasonable belief" portion of the self-defense instruction. At 4:59 p.m., the trial court brought the jury back into the courtroom and had them recess for the evening; again, the trial court asked if defendant's counsel had anything further, and he did not.

The following day, the jury reached its verdict, and at no point during the charge conference or the conversations until the close of the trial did defendant's attorney mention giving a jury instruction on the defense of habitation. Yet on appeal, defendant raises only one issue – that the trial court erred in failing to give a defense of habitation instruction.

[1] Defendant contends this issue regarding the instruction on defense of habitation is preserved because the charge conference was not recorded in its entirety in contravention of North Carolina General Statute § 15A-1231. North Carolina General Statute § 15A-1231 provides:

> (b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.
>
> (c) After the arguments are completed, the judge must instruct the jury in accordance with G.S. 15A-1232.
>
> (d) All instructions given and tendered instructions which have been refused become a part of the record. Failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13).

N.C. Gen. Stat. § 15A-1231 (2017).

Defendant contends that the trial court and counsel discussed the jury instructions during the lunch break and the entire conference was therefore not recorded. Defendant essentially argues that if *all* of a charge conference is not recorded, the defendant can raise *any* issue regarding the instructions on appeal because the statute requires the conference to be recorded and if it is not, there is no way of knowing all of the issues raised before the trial court. We agree that North Carolina General Statute § 15A-1231 provides that the entire charge conference should be recorded, and that is the better practice, but where the entire charge

conference is not recorded, defendant must show he was "materially prejudiced" based upon the trial court's failure to comply: "The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." *Id.*

In these circumstances, even though a portion of the conference was not recorded, defendant cannot show material prejudice from the failure to record the entire conference. *See id.* Before the trial court spoke with counsel off the record during the break, he clarified he wanted to ensure that when they returned all of the issues would be "firmly on the record." The trial court summarized on the record the discussions with counsel regarding the jury instructions during lunch; defendant had no objections or additions to the trial court's summary regarding the defense of habitation. In addition, on the record, the trial court *twice* mentioned the possibility of giving an instruction on defense of habitation and invited counsel to address this issue. But defendant instead focused on the self-defense instruction, specifically on the portion regarding reasonable belief, but did not mention or request defense of habitation, despite the extensive discussion of defense of habitation prior to the charge conference. Further, even after the instructions were given, defendant failed to raise any objection regarding the defense of habitation. Although some discussion regarding jury instructions was not recorded, the possibility of providing a jury instruction regarding defense of habitation was discussed at length on the record. Despite direct questions by the trial court, defendant did not request the instruction. We agree with the State that defendant has not shown material prejudice from failure to record the entire charge conference. *See id.*

[2] Defendant next contends that even if his argument regarding instruction on defense of habitation was not properly preserved, the trial court plainly erred in failing to instruct the jury on defense of habitation.

> Because our courts operate using the adversarial model, we treat preserved and unpreserved error differently. . . . Unpreserved error in criminal cases . . . is reviewed only for plain error.
>
> . . . .
>
> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's

> finding that the defendant was guilty. 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, 512-18, 723 S.E.2d 326, 330-34 (2012) (citations and quotation marks omitted).

But plain error review is not available where the defendant has invited the error he seeks to raise on appeal:

> It is well established that a defendant who causes or joins in causing the trial court to commit error is not in a position to repudiate his action and assign it as ground for a new trial. Under the doctrine of invited error, a party cannot complain of a charge given at his request, or which is in substance the same as one asked by him. Moreover, a defendant who invites error waives his right to all appellate review concerning the invited error, including plain error review.

State v. Jones, 213 N.C. App. 59, 67, 711 S.E.2d 791, 796 (2011) (citations, quotations, ellipses, and brackets omitted).

As discussed above, the theory of defense of habitation under North Carolina General Statute § 14-52.2 was addressed several times during the trial. Although a portion of the charge conference was not recorded, defendant cannot show material prejudice as to the instructions as to self-defense and specifically defense of habitation because this issue was discussed on the record. The trial court specifically asked about giving this instruction twice, and defendant did not request it, nor did defendant request any addition to the instructions after they were given. Because of the extensive discussion regarding defense of habitation, defendant's failure to request an instruction on defense of habitation, and defendant's failure to object to the instructions as given, if there was any error in failing to provide the instruction, this error was invited and is not subject to plain error review. *See id.* This argument is overruled.

III. Conclusion

For the foregoing reasons, we conclude there was no error in defendant's trial.

NO ERROR.

Chief Judge McGEE and Judge MURPHY concur.

STATE OF NORTH CAROLINA
v.
RYAN KIRK FULLER, DEFENDANT

No. COA19-243

Filed 5 November 2019

Sexual Offenses—sex offender registration—secret peeping—danger to the community

The trial court did not err by ordering defendant to register as a sex offender for thirty years (pursuant to N.C.G.S. § 14-202(l)) where defendant was convicted of felony secret peeping and the trial court concluded that he was a danger to the community, which is defined as one who poses a risk of engaging in sex offenses following release from incarceration. The trial court's conclusion was supported by its findings and by the evidence that defendant violated a position of trust by installing a hard-to-detect device to record the victim in her bedroom and bathroom, he made the recordings over a long period of time, he secretly invaded the victim's bedroom and bathroom multiple times to move his camera around, he stored his recordings, and he would easily be able to repeat his crime.

Judge TYSON concurring in separate opinion.

Judge BROOK dissenting.

Appeal by Defendant from order entered 23 October 2018 by the Honorable A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for the Defendant.

DILLON, Judge.

Defendant Ryan Kirk Fuller pleaded guilty to one count of felony secret peeping. During sentencing, the trial court determined that Defendant was a "danger to the community" and, accordingly, ordered that he register as a sex offender for thirty (30) years pursuant to N.C.

Gen. Stat. § 14-202(l). Defendant appeals from this portion of the order. We affirm.

I. Factual and Procedural Background

The victim, Mrs. Smith[1], and her husband lived with their teenage son in their home in Apex. Defendant, a long-time friend of the Smiths, lived in the home as well.

On 17 August 2018, Mr. Smith walked into his living room and observed a video of his wife undressing in their bedroom playing on the television. Mr. Smith was confused as to how the image was appearing on his television. Mr. Smith then saw Defendant in the living room watching the video and immediately contacted the police.

Defendant soon admitted to the following: He was responsible for the video and other recordings of Mrs. Smith made while she was either in her bedroom or bathroom. He had developed romantic feelings for Mrs. Smith, leading him to purchase and install a phone charger with a secret camera to record her when she was in her bathroom and bedroom. The camera activated via a motion sensor and had the capability, not only to record and store, but also to cast a live feed. He had been recording Mrs. Smith for more than two months when Mr. Smith caught him. And he had sorted and downloaded approximately fifty (50) images of Mrs. Smith from his recordings onto his personal devices.

Defendant was indicted on three counts of secret peeping, pursuant to N.C. Gen. Stat. § 14-202. Defendant pleaded guilty to one count in exchange for dismissal of the two other counts. The trial court accepted his plea and sentenced Defendant to a suspended prison term.

The trial court then heard arguments on whether to require Defendant to register as a sex offender, as registration is not mandatory for those convicted under Section 14-202, but rather is appropriate only if the trial court makes certain findings. After hearing arguments from counsel, the trial court ordered Defendant to register as a sex offender. Defendant timely appealed.

II. Analysis

Defendant argues that the trial court erred in requiring him to register as a sex offender. We disagree.

When a person is convicted for secretly peeping pursuant to Section 14-202(d) of our General Statutes, registration as a sex offender is not

1. Pseudonyms are used to protect the victims' identity.

automatically required. N.C. Gen. Stat. § 14-202 (2018). Rather, the General Assembly directs that "the sentencing court shall consider [(1)] whether the person is a danger to the community and [(2)] whether requiring the person to register as a sex offender pursuant to Article 27A of this Chapter would further the purposes of that Article as stated in G.S. 14-208.5." N.C. Gen. Stat. § 14-202(l).

In his appeal, Defendant argues that the trial court should not have ordered registration as there was no evidence that he was "a danger to the community."[2]

Our General Assembly has not defined "danger to the community," but it could be argued that a normal reading of the phrase would include someone who is willing and capable to violate a position of trust to install sophisticated, hard-to-detect devices to record his victim in intimate settings, as Defendant did in this case.

There is limited, controlling jurisprudence on who constitutes a "danger to the community" under Section 14-202(l). In support of his argument, Defendant relies primarily on two cases; namely, the one published opinion from our Court where this issue was squarely addressed, *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011), and an unpublished case decided by our Court seven years later, *State v. Guerrette*, 818 S.E.2d 648, 2018 N.C. App. LEXIS 967 (N.C. Ct. App. Oct. 2, 2018). Neither party has cited to any other North Carolina opinion, nor has our research uncovered any, where the issue before our Court or our Supreme Court was whether the trial court erred in ordering registration for a defendant convicted pursuant to Section 14-202. In any event, as *Pell* is a published decision, we are bound by the holdings therein. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

In *Pell*, our Court defined one who is a "danger to the community" as a defendant who "pose[s] a risk of engaging in sex offenses following release from incarceration or commitment." *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191.

Pell then suggested that whether one is a "danger to the community" is a mixed question of fact and law, *Id.* at 380, 712 S.E.2d at 192, and that our review on appeal is as follows:

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2. Defendant makes no clear argument as to the second required finding, that requiring him to register would not serve the purposes set forth in N.C. Gen. Stat. § 14-208.5. *See* N.C. Gen. Stat. § 14-202(l). We, though, conclude that requiring Defendant to register *would* serve those statutory purposes.

> Whether a trial court finds that a defendant poses a risk of engaging in sex offenses following release from incarceration [and is, therefore, a "danger to the community"] will be based upon a review of the surrounding factual circumstances. Accordingly, [our] Court will review the trial court's findings *to ensure that they are supported by competent evidence, and we review the conclusions of law to ensure that they reflect a correct application of law to the facts*.

Id. at 380-81, 712 S.E.2d at 192 (emphasis added).[3]

Here, the trial court determined that Defendant posed a risk of committing sexual offenses – and therefore was a danger to the community – based on its findings that (1) Defendant made the recordings "over a long period of time[;]" (2) Defendant used a sophisticated method of recording Mrs. Smith by use of a hidden camera; (3) Defendant invaded Mrs. Smith's private spaces on multiple occasions to move his camera back and forth between Mrs. Smith's bedroom and her bathroom when she was not present; (4) Defendant stored his recordings to allow him to view them at any time; and (5) Defendant would have no difficulty in repeating his crime as the recording devices were easily obtainable and inexpensive.

We conclude that these findings are supported by competent evidence. After he was caught in the act, Defendant essentially admitted to these findings and has not challenged any of them on appeal.

We further conclude that these findings and the uncontradicted evidence before the trial court support the determination that Defendant posed a risk of sexual offenses in the future to warrant imposition of the registration requirement.[4] Indeed, the evidence shows that Defendant is

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3. We note that in another published opinion, our Court suggested in *dicta* that our standard of review is for an "abuse of discretion." *State v. Mastor*, 243 N.C. App. 476, 482, 777 S.E.2d 516, 520 (2015). Indeed, since we must consider the "danger to the community" determination, in part, as a question of fact, it could be argued that we are to afford the trial court some discretion in making that determination. That is, if the determination is not a pure question of law, then it is possible that in a close case, one judge could determine certain findings support a "danger to the community" determination and another judge could determine that these same findings do not support a "danger to the community" determination.

In any case, we are bound by the standard of review as set forth in *Pell*, and we apply that standard in this case.

4. We note that the standard used by our Court in *Pell*, that registration should only be for those who "pose a risk of engaging in sex offenses [in the future]," was not clear on

capable of taking advantage of long-time, close friends who trusted him to live in their home with them and their teenage son. They show that he is willing and able to devise and execute a scheme using sophisticated means to commit his crime in a way that would likely be undetected by his victim. They show that he is willing and able to put forth effort over a period of time to further his crime, in that he repeatedly invaded the personal space of his victim to re-position his camera. They show that he is willing and able to commit his crime in a manner which could cause greater harm to his victim that that suffered by typical victims of this crime: where the harm for most victims of peeping is the knowledge that they have been spied upon, here Defendant made permanent recordings which could be viewed numerous times by anyone in the future. They show that he could commit the crime again in the future with ease. And they show a lack of real remorse in that he only confessed when he was caught red-handed by his victim's husband.

Defendant argues that *Pell* compels a reversal since the trial court largely relied on the facts of his crime to determine whether he posed a risk of reoffending. We do not read *Pell* so narrowly. Specifically, in *Pell*, the State's evidence showed that the defendant was only a low to moderate risk and was moving in the right direction and that his psychiatric issues, which were a cause of his criminal behavior, were in remission. *Id.* at 381, 712 S.E.2d at 192-93. The State in that case, though, had relied on victim impact statements, which "all tended to address the manner in which [the d]efendant committed his past offenses and the effect his actions had on each of [the victims'] lives." *Id.* at 382, 712 S.E.2d at 193. The *Pell* Court rejected the State's argument that these statements were sufficient, holding that the State's evidence "offered very little in the way of predictive statements concerning [the d]efendant's likelihood of recidivism." *Id.*

But, in so holding, the Court did *not* categorically reject the notion that a trial court could rely largely on the manner in which a defendant goes about committing his crime in determining that the defendant is a

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how much of a risk the trial court must determine a defendant to be in order to impose the registration requirement. *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191. Clearly, the trial court need not determine that the risk of recidivism is an absolute certainty. But the trial court must do more than rely on a determination that there is always a *slight* risk with every defendant to recidivate. We conclude that the trial court's findings must demonstrate that the level of risk is such that there is a reasonable likelihood that the defendant in question will recidivate. *See id.* at 382, 712 S.E.2d at 193 (stating that the State's evidence was insufficient to warrant the defendant's registration as a sex offender because the evidence "offered very little . . . concerning [the d]efendant's *likelihood* of recidivism") (emphasis added).

"danger to the community." Rather, the *Pell* Court held that "the victim impact statements [describing the manner in which the defendant had committed his crimes] *in this case* are insufficient to support the trial court's finding that [d]efendant represented 'a danger to the community.' " *Id.* (emphasis added).

Here, Defendant's manner of committing his crime was much more sophisticated and stealthier than that used by the defendant in *Pell*. That is, Defendant committed his crime in a way that was almost undetectable. Also, the findings here show that Defendant is willing to take advantage of even his close friends who had placed a great deal of trust in him. And, unlike *Pell*, there is no indication here that a cause of Defendant's behavior was in remission or that he was moving in the right direction. Indeed, Defendant chose his victim merely because he had a crush on her; and there is no indication that he will not develop a crush on a wife or girlfriend of a close friend in the future and, thereby, be a danger to that member of the community.

III. Conclusion

We conclude that the trial court's findings are supported by the evidence and that these findings support the trial court's imposition of the sex offender registration requirement in this case.

AFFIRMED.

Judge TYSON concurs, writing separately.

Judge BROOK dissents.

TYSON, Judge, concurring.

The majority's opinion correctly affirms the trial court's order for Defendant to register as a sex offender for thirty years, with a provision for Defendant, if he is not a recidivist, to petition after ten years to be removed from the registry. I vote to affirm the trial court's order. I write separately to assert and show the trial court's ruling is also properly affirmed under a less demanding abuse of discretion standard of review. *State v. Mastor*, 243 N.C. App. 476, 482, 777 S.E.2d 516, 520 (2015).

I. Background

Defendant agreed in his plea bargain agreement that "sex offender registration shall be determined by the court." The trial court included and read that provision aloud in its plea colloquy with Defendant, which

Defendant affirmed on the record and in open court as being a part of his full plea agreement.

The trial court made several findings of fact after hearing the parties' arguments on sex offender registration:

> In this particular case it seems that there were recordings made over a long period of time. The fact that he only used one device as opposed to two and to move it place to place is to me more concerning than if he had had two devices, because he had to make – each time he had to move the device, he had to do an intentional act. You know, the statement that this occurred because he was having feelings for the victim, the – and the setup was apparently much more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone. By having this secret device, moving – moving the secret device from room to room, the manner in which it was stored, and the fact of the – as you said, anybody could get anything on the internet, so it would make it easy for him to buy similar devices off the internet once he's – just make it easier for him to buy these devices off the internet, Court finds that he would be a danger to the community and the purpose of the Registry Act would be served by requiring him to register for a period of 30 years. If after 10 years he has a clean record, certainly can petition to get off.

II. Standard of Review

The majority's opinion asserts "this Court will review the trial court's findings to ensure that they are supported by competent evidence, and we review the conclusions of law to ensure that they reflect a correct application of law to the facts." *State v. Pell*, 211 N.C. App. 376, 381, 712 S.E.2d 189, 192 (2011) (citation omitted). While this standard of review requires a higher threshold for the State than an abuse of discretion, the trial court's ruling is also properly sustained and affirmed under an abuse of discretion standard of review.

Based upon Defendant's express agreement in his plea bargain that "sex offender registration shall be determined by the court," the trial court's ruling is properly reviewed for abuse of discretion. The defendant's plea agreement in *Pell* did not leave the issue of sex offender registration within the trial court's discretion. *Id.* at 376, 712 S.E.2d at 190. Here, Defendant acknowledged in his plea agreement, and again in open

court, for the trial court to exercise its discretion to determine whether to order and the extent of Defendant's sex offender registration.

> It is well established that *where matters are left to the discretion of the trial court*, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. *A ruling committed to a trial court's discretion is to be accorded great deference* and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

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

A proper review of the trial court's findings and registration order is for abuse of that discretion. *Id.* The ruling of the trial court is presumed to be correct. *Hogsed v. Pearlman*, 213 N.C. 240, 243, 195 S.E. 789, 791 (1938). Defendant carries the burden to show prejudicial error on appeal. N.C. Gen. Stat. § 15A-1443(a) (2017). Defendant acknowledged in his plea agreement his sex offender registration "shall be determined by" and within the discretion of the trial court. Defendant received the full benefit of his plea bargain, had multiple other charges dismissed, and avoided an active prison term and potential consecutive sentences.

III. Analysis

As noted in the majority's opinion, the statute provides and the parties agree Defendant pled guilty to an offense, which qualifies him as eligible to be registered as a sex offender. N.C. Gen. Stat. § 14-202(l) (2017). For a defendant to be required to register, a trial court must first determine: "(1) the defendant is a 'danger to the community;' and (2) the defendant's registration would further the purpose" of the Registry Act. *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191. The majority's opinion correctly notes Defendant fails to challenge or address this second factor, which the trial court properly found in this case. Defendant's argument rests solely upon the trial court's finding Defendant is a "danger to the community" under *Pell*'s less deferential standard of review.

Under *Pell*, " 'danger to the community' refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration or commitment." *Id.* The evidence brought forward by the State in *Pell*, which "tended to address the manner in which Defendant committed his past offenses . . . . offered very little in the way of predictive

statements concerning Defendant's likelihood of recidivism." *Id.* at 382, 712 S.E.2d at 193. Expert testimony in *Pell* consisted of "that Defendant represented a low to moderate risk of re-offending," "letters submitted by Defendant's psychiatrist and counselor," and "statements made by several of Defendant's victims." *Id.* at 381-82, 712 S.E.2d at 193.

Defendant argues the State has not brought forward evidence establishing the requisite likelihood of his recidivism. Even under *Pell*'s requirement for the State to show likelihood of recidivism with evidence beyond the manner of commission of the offense, Defendant cannot show the trial court abused its discretion, which he specifically agreed for the trial court to exercise in his plea bargain.

Because Defendant "only used one device as opposed to two," the trial court found "each time he had to move the device [between the victim's bedroom and bathroom], he had to do an intentional act." The court further found the Defendant had used a "secret device." While the number and surreptitious and concealed nature of devices used, or the multiple acts of moving the device between the victim's bedroom and bathroom, may arguably be manner-of-commission evidence, the trial court's finding of Defendant's intentionality is not and supports the trial court's ruling.

Defendant's claim his secret and repetitive acts "occurred because he was having feelings for the victim," also suggests Defendant's motive for his acts, which is separate and distinct from his manner of committing the crimes. Defendant grossly violated his relationship and position of trust and confidence as a close friend and guest in the Smiths' home to gain access to their most private and personal areas, where individuals rightfully expect the highest levels of privacy to disrobe, bathe, and engage in intimate bodily functions.

His multiple violations occurred over several months. Defendant sorted and stored over fifty images of the victim in both moving and still media, to allow him to review his "favorites" repeatedly and potentially share them with others.

Defendant's egregious violations of the victim's trust to gain access, his repeated invasions of the Smiths' most intimate private living areas over many months, his sorting and storing the images, his intent, motive, and future access to the internet support the conclusion Defendant is a likely future recidivist and a danger to the community.

The trial court's "danger to the community" conclusion requires the court to look at the evidence and factually determine likelihood of

recidivism as a question of fact. As a result, and as noted in the majority's opinion, the "danger to the community" determination is not entirely a question of law. As a question of fact, it is possible that one judge could review the evidence to support a finding that the defendant is a likely future recidivist and a danger to the community, whereas the same or another judge making these same findings about a different defendant could find a second defendant is not a danger to the community. *See Mastor*, 243 N.C. App. at 482, 777 S.E.2d at 520. Both conclusions are clearly within the trial judge's permitted range of discretion. The trial court clearly reviewed the undisputed evidence and articulated a reasoned decision within its discretion based upon the facts here.

The trial court also exercised its discretion of lenity and ruled, "[i]f after 10 years he has a clean record, [he] certainly can petition to get off" the registry. If Defendant is not a recidivist, as he claims, after ten years he can petition to be removed from the registry. Defendant has failed to carry his burden on appeal that the trial court's agreed-upon discretionary ruling for Defendant to register as a sex offender is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. *White*, 312 N.C. at 777, 324 S.E.2d at 833.

The trial court's findings and conclusions also meet the more strict *Pell* standard of review asserted in the majority's opinion. The trial court's ruling comes before us with the presumption of being correct. Defendant cannot carry his burden to show any error or that any error was prejudicial to his agreed-upon plea agreement. Defendant's appeal is wholly frivolous.

IV. Conclusion

The trial court's finding Defendant was a danger to the community is not manifestly unsupported by reason and its ruling for Defendant to register as a sex offender is not shown to be an abuse of discretion. The trial court also properly found and concluded "the purpose of the Registry Act would be served by requiring him to register." These findings fully comply with the requirements of the statute and are supported by competent evidence. The trial court's conclusions are supported by unchallenged findings of fact.

The majority's opinion uses a competent evidence standard of review from *Pell* to affirm the trial court's order. Given the terms of Defendant's plea bargain, the trial court's order is also properly affirmed under the less demanding abuse of discretion standard. I concur with the majority's opinion and vote to affirm the trial court's order.

BROOK, Judge, dissenting.

I respectfully dissent. The governing statutory regime and our binding precedent require reversal of the trial court's order.

The Statutory Regime and Our Case Law

Our General Assembly has outlined a variety of offenses in N.C. Gen. Stat. § 14-208.6(4)(a) that constitute "reportable offenses" requiring sex offender registration upon conviction. A conviction for secret peeping under N.C. Gen. Stat. § 14-202(d) is not so designated. Instead of automatic registration, a trial court can order an individual so convicted to register as a sex offender upon finding "that the person is a danger to the community." N.C. Gen. Stat. § 14-202(l) (2017).[1] In assessing the trial court's imposition of sex offender registration, this Court reviews the trial court's findings to ensure that they are supported by competent evidence and reviews the conclusions of law to ensure they reflect a correct application of law to the facts. *State v. Pell*, 211 N.C. App. 376, 380-81, 712 S.E.2d 189, 192 (2011) (citing *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009)).

Our Court's decision in *Pell* provides a roadmap for how we assess whether a trial court rightly concluded an offender is a danger to the community such that sex offender registration is warranted. "The phrase 'danger to the community' is not defined" by the statute. *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191. *Pell* reasoned an offender is a "danger to the community" if he "pose[s] a risk of engaging in sex offenses following release from incarceration." *Id.* at 379, 712 S.E.2d at 191. Accordingly, our Court did not focus on "the manner in which Defendant committed his past offenses" as such evidence "offered very little in the way of predictive statements concerning Defendant's likelihood of recidivism." *Id.* at 381-82, 712 S.E.2d at 192-93. We instead looked forward, focusing on risk assessment evidence showing that the defendant posed a low to moderate risk of re-offending and testimony from the defendant's psychiatrist and counselor assessing his major depression, alcohol abuse, and paraphilia to be in remission. *Id.* at 381, 712 S.E.2d at 193. Based on the evidence heard by the trial court, we held that the State had not shown the defendant "represented a danger to the community" and reversed the trial court's imposition of registration. *Id.* at 382, 712 S.E.2d at 193.

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1. The provision in question also requires a finding that registration would further the purposes of the registration program. *Id.* Defendant's argument focuses on the "danger to the community" finding; thus, my analysis is similarly tailored.

Following *Pell*'s guidance, this Court reversed an imposition of sex offender registration in *State v. Guerrette*, ___ N.C. App. ___, 818 S.E.2d 648, 2018 WL 4702230 (2018) (unpublished). On 4 July 2016, the defendant entered a women's restroom at Carolina Beach and used his cell phone to film six women for about eight minutes. *Id.* The defendant pleaded guilty to two counts of secret peeping using a photographic device, two counts of creating a photographic image while secretly peeping, and two counts of knowingly possessing a photographic image created through secretly peeping, and attaining the status of habitual felon. *Id.* at *2.

The trial court imposed a registration requirement, and this Court reversed. *Id.* at *10. To show the defendant was a danger to the community, the State argued that the defendant's 20 prior felony convictions, mental health issues, and current convictions supported the requisite "affirmative finding" that the defendant was a danger to the community. *Id.* at *2-3. We rejected each of these arguments in turn.

First, the "defendant's non-violent, non-sexual prior convictions do not indicate an increased risk he would commit another sexual offense." *Id.* at *7.

Second, the "[d]efendant's mental health issues *may* show he is a danger to the community *if* the State is able to show that those issues led [the] [d]efendant to have an increased risk of engaging in sex offenses after incarceration." *Id.* at *8 (emphasis in original). The State had offered no evidence connecting the defendant's diagnoses of schizophrenia, schizoaffective disorder, bipolar tied to social anxiety disorder, panic disorder, and post-traumatic stress disorder to an increased risk of committing sex offenses. *Id.*

Finally, as noted above, a conviction under N.C. Gen. Stat. §§ 14-202(d) does not constitute a "reportable offense" requiring registration. "[R]ather[,] an additional showing is required that a defendant is a danger to the community." *Id.* at *9. Our Court reasoned "[i]f the General Assembly had intended that a conviction for peeping – in and of itself – would show that a defendant was a danger to the community, it would have included such offense in N.C.G.S. § 14-208.6(4)(a)[,]" amongst offenses requiring registration. *Id.*

Assessing the Facts of the Current Controversy

It bears repeating that on appeal, this Court "reviews the conclusions of law to ensure they reflect *a correct application of law* to the facts." *Pell*, 211 N.C. App. at 380-81, 712 S.E.2d at 192 (emphasis added). To an even greater extent than *Pell* or *Guerrette*, the trial court here

focused its "danger to the community" analysis on how the crimes were committed. In rendering its order, the trial court first noted the window in which the recordings were made – from June through mid-August 2018. It reasoned that Defendant's use of one device was more troubling than if he had used multiple devices as "each time he . . . move[d] the device" between the bathroom and bedroom "he had to do an intentional act." The trial court then observed the setup was "more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone." Finally, the court stated, "anybody could get anything on the [I]nternet" and presumably it would be "easy for [Defendant] to buy similar devices off the [I]nternet."

These facts "address the manner in which Defendant committed his past offenses[,]" but "offer very little in the way of predictive [evidence] concerning Defendant's likelihood of recidivism." *Pell*, 211 N.C. App. at 382, 712 S.E.2d at 193. The fact that Defendant moved the camera in question, the sophistication of the technology employed, and its easy availability—none of this aids in answering the critical question of whether Defendant is likely to re-offend. *See id.* at 381, 712 S.E.2d at 192. In a similar vein, the trial court focused on the window in which filming occurred—three months—in imposing registration. Again, the connection of this fact to the likelihood of future recidivism is tenuous at best.[2] And simply convicting Defendant of the offense of secret peeping, of course, does not prove the requisite danger to the community. *See Guerrette*, at *9.

The evidence of Defendant's likelihood of recidivism, the lodestar of the requisite danger to the community analysis, borders on non-existent here. While a risk assessment tool may have provided some insight into Defendant's likelihood to re-offend, *see Guerrette*, at *6 ("[T]he absence of a risk assessment or expert testimony fails to support that Defendant poses a risk of committing sex offenses upon release from incarceration."), the trial court here refused Defendant's request for a Static 99 assessment. And the scant record evidence that is arguably pertinent tends to point in the opposite direction: for example, Defendant has no

2. A review of the record in *Pell* shows the grand jury returned 16 bills of indictment against the defendant for secretly peeping on his employees and neighbor for nearly 16 years. R. at 46, *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011) (COA10-415). The defendant pleaded guilty to eight counts of secret peeping spanning *four years*. R. at 52, *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011) (COA10-415). Despite this, this Court held the record evidence did not support the imposition of sex offender registration given the defendant's evidence showed he was not likely to recidivate and thus was not a "danger to the community." *See Pell*, 211 N.C. App. at 381-82, 712 S.E.2d at 192-93.

prior convictions, no history of mental health or substance abuse issues, and cooperated with law enforcement.

The majority and concurring opinions recognize the trial court's cardinal misstep and then promptly repeat it. Both opinions nod toward *Pell*'s admonition that the manner of the offense "offer[s] very little in the way of predictive statements concerning the likelihood of recidivism." *Supra* at ___; *supra* at ___ (Tyson, J., concurring) (noting "*Pell*'s requirement for the State [to] show likelihood of recidivism with evidence beyond the manner of commission of offense"). And both then flout this governing precedent by focusing their inquiry on the nature of the offense at hand. *Supra* at ___; *supra* at ___ (Tyson, J., concurring). Even efforts at distinction are merely return trips to forbidden ground. *Supra* at ___ ("Here, Defendant's manner of committing his crime was much more sophisticated and stealthier than in *Pell*.").

More than failing to abide by the statutory regime and case law, the majority inverts the approach of the controlling authority. Where both call for evidence that a defendant is a danger to the community beyond the simple fact of conviction, the majority repeatedly points to the absence of evidence (even when Defendant sought to fill the vacuum). For example, while noting the defendant in *Pell* "was only a low to moderate risk" for recidivism according to test results, the majority fails to mention that the trial court rejected Defendant's request for such testing in this case. *Supra* at ___. Relatedly, the majority closes by noting "there is no indication that [Defendant] will not develop a crush on a wife or girlfriend of a close friend in the future." *Supra* at ___. One can abhor Defendant's criminal betrayal while also concluding that such reasoning stands our precedent's inquiry into "predictive [evidence] concerning Defendant's likelihood of recidivism" on its head. *Pell*, 211 N.C. App. at 382, 712 S.E.2d at 193.

Conclusion

In many ways, this case is quite distinct from *Pell* and *Guerette*. The State could point to four years of offenses in *Pell*; the offenses at issue here span less than three months. The State in *Guerette* highlighted defendant's criminal record and history of mental health challenges; there is no similar backstory here. But these cases are similar in the most salient aspect: the State has not brought forward evidence establishing the requisite likelihood of future offense. In the absence of such a showing, I would reverse the trial court's order requiring Defendant to register as a sex offender and remand for resentencing.

With respect, I dissent.

STATE OF NORTH CAROLINA
v.
VAN BUREN KILLETTE, SR.

No. COA18-26-2

Filed 5 November 2019

Appeal and Error—preservation of issues—denial of motion to suppress—no notice before guilty plea—waiver—no certiorari

Where defendant pleaded guilty to two counts of manufacturing methamphetamine pursuant to a plea deal, defendant waived his right to appeal the denial of his motion to suppress because he failed to give notice to the State and to the trial court before pleading guilty that he intended to appeal the suppression ruling. The Court of Appeals declined to issue a writ of certiorari under Appellate Rule 21 because defendant's waiver was not a "failure to take timely action." Further, where defendant cited a case allowing certiorari under similar circumstances, the Court of Appeals disregarded it because it contradicted earlier, binding precedent.

Judge INMAN concurring with separate opinion.

Appeal by defendant from judgment entered 6 July 2017 by Judge Thomas H. Lock in Johnston County Superior Court. Originally heard in the Court of Appeals 20 September 2018, with opinion issued 2 October 2018. The defendant's petition for discretionary review pursuant to N.C. Gen. Stat. § 7A-31 was allowed by the Supreme Court of North Carolina on 19 August 2019 for the limited purpose of remanding to this Court for reconsideration.

Attorney General Joshua H. Stein, by Assistant Attorney General Nancy Dunn Hardison, for the State.

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

TYSON, Judge.

I. Factual Background

The facts giving rise to this appeal are set forth in detail in this Court's prior opinion. *State v. Killette*, ___ N.C. ___, 818 S.E.2d 646, 2018

WL 4701970 (2018) (unpublished). Defense counsel filed a motion to suppress the items seized during the September 2014 search. The hearing on this motion was held 3 May 2017. At the conclusion of the hearing, the parties consented to the court ruling out of session. The court signed a written order denying Defendant's motion to suppress on 6 July 2017, which was filed 7 July 2017.

Defense counsel also filed a motion to suppress the items seized from a June 2015 search. The hearing on this motion was held 18 May 2017. At the conclusion of this hearing, the trial court orally denied the motion to suppress and entered a written order memorializing its ruling filed on 7 June 2017.

On 6 July 2017, Defendant entered an *Alford* plea pursuant to a plea arrangement with the State to the two counts of manufacturing methamphetamine, alleged in 14 CRS 55188 and 15 CRS 53276. In exchange for the plea, the State dismissed the remaining charges. The trial court consolidated the offenses into one judgment, sentenced Defendant to a term of 120 to 156 months of imprisonment in accordance with the terms of the plea arrangement. Defendant filed a handwritten notice of appeal on 10 July 2017.

Defendant's *pro se* notice of appeal was filed appealing "the decision made in reference to the file number 14 CRS 055188 and 15 CRS 053276." The notice is addressed "To The Clerk of Superior Court" and does not reflect an appeal to this Court nor show that the notice was served on the State. Nonetheless, appellate entries were completed and appellate counsel was appointed. Defendant's appellate counsel filed a petition for writ of certiorari to allow Defendant to seek review to this Court.

II. Intent to Appeal Denial of Motion to Suppress Evidence

A. Direct Appeal

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress the evidence obtained from the probation officer's search in September 2014. We dismiss Defendant's attempted direct appeal for his failure to preserve this issue and to provide notice to the State and trial court when he entered his guilty plea.

The Supreme Court of North Carolina has held "when a defendant intends to appeal from the denial of a suppression motion pursuant to [N.C. Gen. Stat. § 15A-979(b)], he must give notice of his intention to the prosecutor and to the court *before* plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute."

State v. Tew, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990) (citation omitted) (emphasis supplied).

This Court has repeatedly held that when a defendant pleads guilty without first notifying the State of the intent to appeal a suppression ruling, the defendant "has not failed to take timely action," and thus "this Court is without authority to grant a writ of certiorari." *State v. Pimental*, 153 N.C. App. 69, 77, 568 S.E.2d 867, 872, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). Rather, as in other cases involving a guilty plea, the right to appeal was lost because the defendant pleaded guilty, thereby waiving the right to appeal, and not because he failed "to take timely action." *Id.* at 75-77, 568 S.E.2d at 871-72. Under Appellate Rule 21, a petition for a writ of certiorari may be allowed in this context only if the defendant's right to prosecute the appeal "has been lost by failure to take timely action." N.C. R. App. P. 21(a).

B. Defendant's Petition for Writ of Certiorari

Defendant has "petitioned this Court for *certiorari*. A petition for the writ must show merit or that error was probably committed below. *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown. *Womble v. Gin Company*, 194 N.C. 577, 579, 140 S.E. 230." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). *See also State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (reversing grant of certiorari by the Court of Appeals on defendant's challenge of sufficiency of factual basis of a guilty plea: "Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause").

In his petition for writ of certiorari, Defendant asserts the applicability of *State v. Davis*, 237 N.C. App. 22, 763 S.E.2d 585, (2014). The opinion in *Davis*, with no analysis and without citing or addressing prior binding authority in *Tew* or *Pimental*, cited a case with no precedential value and allowed a discretionary writ of certiorari in a similar circumstance. *Id.* at 27, 763 S.E.2d at 589 (citing *State v. Franklin*, 224 N.C. App. 337, 736 S.E.2d 218, *aff'd per curiam by equally divided court*, 367 N.C. 183, 752 S.E.2d 143 (2013)).

Our Supreme Court has addressed this Court's responsibility when faced with two arguably inconsistent opinions from separate panels: we must follow the earlier opinion. *State v. Jones*, 358 N.C. 473, 487, 598 S.E.2d 125, 133-34 (2004) (citing *In re Civil Penalty*, 324 N.C. 373, 385, 379 S.E.2d 30, 37 (1989)). In *Jones*, our Supreme Court held that, when faced with two or more inconsistent panel opinions on an issue,

this Court must follow the earliest opinion, because one panel of this Court cannot overrule another. *Id.* The Supreme Court explained that although "a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court." *Id.* Under well-settled precedents, we disregard *Davis* and follow *Tew*, *Pimental*, and *State v. Harris* as the earlier, binding precedents. *See Jones*, 358 N.C. at 487, 598 S.E.2d at 133-34.

In our view, *Tew*, *Pimental*, and *Harris* correctly apply the law. *State v. Harris*, 243 N.C. App. 137, 141, 776 S.E.2d 554, 556 (2015). In previous cases, our Supreme Court and this Court have stressed the importance of a defendant's prior notice of intent to appeal as a way to alert the State, during the plea bargaining process, that the defendant may seek to appeal the denial of the motion to suppress. *Tew*, 326 N.C. at 735, 392 S.E.2d at 605.

> Once a defendant strikes the most advantageous bargain possible with the prosecution, that bargain is incontestable by the [S]tate once judgment is final. If the defendant may first strike the plea bargain, "lock in" the State upon final judgment, and then appeal a previously denied suppression motion, [the defendant] gets a second bite at the apple, a bite usually meant to be foreclosed by the plea bargain itself.

State v. McBride, 120 N.C. App. 623, 626, 463 S.E.2d 403, 405 (1995).

Here, the wisdom of this reasoning is plainly evident. Defendant entered an *Alford* plea pursuant to a plea arrangement with the State on the two counts of manufacturing methamphetamine, 14 CRS 55188 and 15 CRS 53276, on 6 July 2017. In exchange, *the State dismissed the remaining charges*. The trial court consolidated the offenses into one judgment, again in accordance with the terms of the plea arrangement.

Defendant knew his motions to suppress were denied. He received the full benefit of his bargain and failed to place the State or the trial court on any notice he intended to reserve the right to appeal. Defendant's failure to provide the required notice to the State and the trial court damages the integrity of the plea bargaining process. If defendants can so easily circumvent the fairness requirement that the State be informed of a defendant's intent to appeal prior to concluding the plea agreement, the State may offer fewer plea bargains.

Even if *Tew*, *Pimental* and *Harris* were not binding on the issues here—and they are—within any jurisdictional discretion to allow the petition, we would follow and apply their reasoning. After reviewing the parties arguments, we apply binding precedents, and deny Defendant's petition for a writ of certiorari on this ground.

Unless *Tew*, *Pimental*, and *Harris* holdings are overturned by our Supreme Court, this Court is bound to follow them in all future cases, even if one panel of our Court failed to follow and to apply prior binding precedents, and purportedly relied upon a fractured case with no precedential value. *See Davis*, 237 N.C. App. at 27, 763 S.E.2d at 589; *see also In re Civil Penalty*, 324 N.C. at 385, 379 S.E.2d at 37.

Other than recognizing this Court's appellate *jurisdiction to exercise our discretion* on a petition for writ of certiorari, nothing else in the holdings of either *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015) or *State v. Ledbetter*, __ N.C. __, 814 S.E.2d 39 (2018) bears on the issues before us in this appeal. The fact this Court possesses the jurisdictional power to allow in our discretion, does not compel us to do so under Defendant's burden to show prejudicial reversible error and the clearly unmeritorious facts before us.

Applying *Ross*, *Tew*, *Pimental* and *Harris*, *supra*, Defendant's petition shows no basis to grant his requested discretionary writ. We deny the petition for a writ of certiorari to review the unpreserved and waived suppression rulings. Defendant's petition does not assert his "failure to take timely action."

We dismiss Defendant's purported appeal and deny Defendant's petition for writ of certiorari. *It is so ordered.*

DISMISSED.

Judge BERGER concurs.

Judge INMAN concurs with separate opinion.

INMAN, Judge, concurring.

I concur in the majority's decision to deny Defendant's petition for certiorari review upon reconsideration in light of the North Carolina Supreme Court's decisions in *State v. Ledbetter*, ___ N.C. ___, 814 S.E.2d 39 (2018), and *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015). I write separately, however, because I respectfully disagree with the majority's

holding that prior decisions of the Supreme Court and this Court, relied upon by our earlier opinion in this case and in today's opinion, are binding on our exercise of discretion in this case.

The majority, relying on *State v. Tew*, 326 N.C. 732, 392 S.E.2d 603 (1990), and *State v. Pimental*, 153 N.C. App. 69, 568 S.E.2d 867 (2002), writes that "[u]nder Appellate Rule 21, a petition for a writ of certiorari may be allowed in this context only if the defendant's right to prosecute the appeal 'has been lost by failure to take timely action.' " Following *Ledbetter*, our exercise of discretion is not so limited, and we are required to exercise our discretion independent of Appellate Rule 21. *Ledbetter* held: "Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari *or have any bearing upon the decision as to whether a writ of certiorari should be issued*." ___ N.C. at ___, 814 S.E.2d at 43 (emphasis added). Nor do I agree with the majority's conclusion that *Pimental* and *State v. Harris*, 243 N.C. App. 137, 77 S.E.2d 554 (2015), are "binding . . . within any jurisdictional discretion to allow the petition" after *Ledbetter* and *Stubbs*.

Tew held that if a defendant fails to give notice of his intention to appeal a denial of a motion to suppress before plea negotiations are finalized, he waives his statutory right of appeal pursuant to N.C. Gen. Stat. § 15A-979(b) (2017). 326 N.C. at 735, 392 S.E.2d at 605. Neither this holding, nor the statute it interpreted, addresses a defendant's right to petition for a writ of certiorari, or limit our exercise of discretion provided by N.C. Gen. Stat. § 15A-1444(e) (2017). *See Ledbetter*, ___ N.C. at ___, 814 S.E.2d at 43 ("Absent specific statutory language limiting the Court of Appeals' jurisdiction, the court maintains its jurisdiction and discretionary authority to issue the prerogative writs, including certiorari.").

In *Pimental*, this Court held that a defendant who failed to give notice of his intention to appeal from a motion to suppress prior to accepting a plea bargain was not entitled to a writ of certiorari because that circumstance did not fall within the three enumerated situations outlined in Rule 21(a)(1); as a result, we held "this Court does not have the authority to issue a writ of certiorari." 153 N.C. App. at 77, 568 S.E.2d at 872. Our decision in *Harris* expressly relied on this language in denying a defendant's petition for certiorari as outside our "authority" in similar circumstances. 243 N.C. App. at 138, 776 S.E.2d at 555 (quoting *Pimental*, 153 N.C. App. at 77, 568 S.E.2d at 872). However, as stated above, our Supreme Court has since held that Rule 21 does not limit, determine, or otherwise modify this Court's "jurisdiction and discretionary authority" to issue writs of certiorari. *Ledbetter*, ___ N.C. at ___, 814 S.E.2d at 43; *cf. State v. Thomsen*, 369 N.C. 22, 27, 789 S.E.2d

639, 643 (2016) ("[D]efendant argues that the Court of Appeals was not authorized by Rule 21 . . . to issue the writ of certiorari . . . . But, as we explained in *Stubbs*, if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." (citing *Stubbs*, 368 N.C. at 43-44, 770 S.E.2d at 76)).

In sum, while I agree that the analysis in the prior decisions cited by the majority may be instructive to the exercise of our discretion when reviewing a petition for certiorari review of an appeal following a guilty plea—and that Defendant's petition for writ of certiorari should be denied in our discretion—I disagree with the conclusion that these prior decisions foreclose a full exercise of our authority and discretion in reviewing Defendant's petition in this case.

STATE OF NORTH CAROLINA
v.
DARWIN JOSUE PERALTA

No. COA18-374

Filed 5 November 2019

1. Evidence—expert testimony—sexual abuse of a child—rule against vouching for victim's credibility—plain error analysis

At a trial for statutory rape and other sexual offenses against a child, the admission of a nurse practitioner's testimony—about the process of diagnosing sexual abuse in children, statistics of sexually abused children with normal medical exams, and her findings from the victim's own medical examination—was not plain error because she did not give an expert opinion on whether sexual abuse actually occurred, and therefore did not impermissibly vouch for the victim's credibility. In fact, the nurse practitioner never stated a conclusive diagnosis of the victim. Moreover, the testimony did not prejudice defendant where he invited any alleged error by eliciting the testimony on cross-examination, and where the State presented other overwhelming evidence of his guilt.

2. Evidence—relevance—character testimony—victim's credibility—speculative—sexual abuse of child

At a trial for statutory rape and other sexual offenses against a child, where the victim testified in graphic detail about defendant sexually abusing her, the trial court properly excluded testimony

from two defense witnesses alleging the victim "might" have learned how to describe certain sex acts because she often heard her mother talk about sex. The testimony constituted impermissible character evidence as to the victim's credibility because it was too speculative and not within the witnesses' personal knowledge.

3. Evidence—expert testimony—sexual abuse of a child—statistics of normal medical exams—limiting instruction—plain error analysis

At a trial for statutory rape and other sexual offenses against a child, where a nurse practitioner properly testified about statistics of sexually abused children with normal medical exams and about her findings from the victim's own evaluation—which included normal medical exam results and the victim's statements describing her sexual abuse by defendant—the trial court did not commit plain error by declining to instruct the jury to consider the statistics-related testimony for corroborative purposes only. Even if the trial court had erred, the unchallenged evidence of defendant's guilt was so significant that defendant could not show any probability that the jury would have reached a different result absent the error.

Appeal by defendant from judgments entered 4 October 2017 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 13 March 2019.

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

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

BRYANT, Judge.

Where an expert witness did not impermissibly vouch for the credibility of another witness, the trial court did not err in admitting the expert witness testimony. Where defendant sought to admit impermissible character evidence, the trial court did not err in denying the testimony. Where the admission of witness testimony was proper, the trial court did not err in its instructions to the jury regarding that witness testimony.

On 3 October 2016, a Durham County Grand Jury indicted defendant Darwin Josue Peralta on one count of statutory rape of a child by adult offender and three counts of statutory sexual offense of a child by

adult offender. A second indictment was issued charging defendant with three counts of indecent liberties with a child. Defendant pled not guilty, and his case was tried before the Honorable Henry W. Hight, Jr., Judge presiding, on 26 September 2017. Defendant was found guilty by a jury on all seven counts.

In August 2016, while her mother, Nancy, was out of town, five-year-old Delia[1] stayed overnight at a babysitter's house where defendant resided. On the day before Nancy returned, Delia called Nancy and asked her to tell defendant not to "lock her up in the room anymore." Thereafter, Delia told Nancy that defendant had been "touching her in her privates[,]" "put his private organ inside [of] her[,]" and said, "give me your milk." Nancy took Delia to the emergency room at Duke Medical Center, and the staff referred them to the Duke Child Abuse and Neglect Medical Evaluation Clinic ("CANMEC").

During trial, the State proffered testimony from several witnesses including seven-year-old Delia, Delia's brother, Ryan[2], Scott Snider, and Dr. Beth Herold.

Delia testified before the jury on her birthday and had just turned seven years old that day. Delia described, in significant detail, the numerous acts of sexual abuse by defendant: that defendant touched her private area ("her pee-pee" and "her poo poo") many times with his hands and his private part; that defendant "spit in his hand" and touched his private part; and that defendant touched her in all the rooms in the house. In particular, Delia described defendant bringing her to his bedroom, taking off her clothes along with his clothes, and touching her while they were both naked in bed. She stated this occurred sometimes while they were playing hide-n-seek with other children in the house. Delia further testified that she hid in the bathroom because defendant would touch her.

Ryan, Delia's ten-year-old brother, testified at trial that Delia would sometimes ask him to stand at the door while she used the bathroom. He stated that one day while playing hide-n-seek, he saw defendant and Delia laying on the bed under the covers. Delia's clothes were on the floor, and Delia was lying on her back while defendant was looking in her direction and touching her private part. Ryan testified to also observing the following behavior of defendant towards Delia: that defendant

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1. Pseudonyms were used to protect the identities of the juveniles and for ease of reading.

2. *See supra* note 1.

"told [Delia] to go with [him] and then he [would] give her candy;" that defendant kept candy in a blue bowl under his bed; and that defendant would only play with Delia in the room during hide-n-seek and "never went [to] find [the other children]." Ryan further testified that he asked Delia about lying down with defendant and that she told him defendant touched her private parts. Ryan urged her to tell their parents, but she was scared. Finally, she told them what defendant had been doing to her.

The State presented Snider and Dr. Herold to testify about Delia's medical evaluation. Defendant objected to their testimony—specifically to the use of Delia's out-of-court statements in regard to their respective evaluations. The trial court overruled defendant's objections and permitted Snider and Dr. Herold to testify.

Snider, a licensed clinical social worker at CANMEC, saw Delia on or about 8 September 2016 as a part of her evaluation to determine a medical diagnosis or treatment. Snider video recorded his diagnostic interview with Delia, gathered detailed statements from Delia describing the sexual contact with defendant, and prepared a report. At trial, Snider testified to his interview with Delia: "She described alleged sexual contact by a man named Darwin. She described that 'he [would] put his finger in my cosita,' which was based upon determinations of questioning her, was her genital area. And his finger [was] in her cosita, her back. And that he had droul [sic] on his part, and put his part in her mouth and in her cosita, and in her back. And her back, meaning her buttocks." Snider also testified that he asked Delia "where she would be when these things would happen. And she sa[id], 'in the room. In the bathroom. In the living room. His room.' " Specifically, Delia told him about "a particular isolated incident in the bedroom: When she came in and she says he put her on top of him in the bedroom, and he had no clothes on[.]" Snider's videotaped interview with Delia was played for the jury during his testimony.

Dr. Herold, a nurse practitioner at CANMEC, testified about the physical examination she performed on Delia, which was based on Delia's statements provided by Snider, and the CANMEC team evaluation.

Although called as a witness for defendant, Detective Jesus Sandoval, who investigated the case, testified about his interview with Delia, in which she told him about the sexual acts performed by defendant: "She told me about the kids playing a game, and that [defendant] called her into [another] room. . . . She said, 'he was touching me.' And I said, 'How did he touch you?' And that is when she stated that he pulled her pants down and 'put his fingers in [her][.]' . . . . And I said, 'Where did

he put his fingers?' She said, 'Right here,' and she pointed down to her genitals. And she was on video, but she gestured down her genital area." Detective Sandoval further testified: "[B]asically she said that he carried her to the room. She said, 'No' so he picked her up and carried her there. . . . And I asked her, 'Did that happen a lot or just one time?' And she said, 'A lot of times.' "

After being found guilty on all counts, defendant was sentenced to 300 to 420 months for statutory rape of a child, 300 to 420 months for three counts of statutory sex offense with a child by an adult, and 16 to 29 months for three counts of indecent liberties with a child. All sentences were to run consecutive to each other. Defendant was ordered to register as a sex offender upon his release from prison and enroll in satellite-based monitoring for the remainder of his life. Defendant appeals.

On appeal, defendant argues the trial court erred by: I) allowing the State to introduce improper testimony from Dr. Herold, II) excluding statements from rebuttal witnesses to be used during his defense, and III) issuing instructions to the jury regarding certain testimony and evidence presented by the State.

I

[1] Defendant first argues the trial court erroneously admitted opinion testimony. On this record, defendant does not directly challenge the testimony of the child victim, Delia, or Scott Snider. Instead, defendant argues that Dr. Herold's testimony was inadmissible because her expert opinion attested to the truthfulness of Delia's statements. Having not objected to the disputed testimony at trial, defendant now urges that Dr. Herold's statements detailing the process of diagnosing Delia constituted plain error. After careful consideration, 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).

Our courts have

> set out the limits and restrictions on expert testimony in child sexual abuse cases. In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. [A]n expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Wallace, 179 N.C. App. 710, 714, 635 S.E.2d 455, 459 (2006) (internal citations and quotation marks omitted).

In the instant case, defendant directs this Court's attention to *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993), and *State v. Bates*, 140 N.C. App. 743, 538 S.E.2d 597 (2000),[3] in challenging Dr. Herold's testimony as "she implied that Delia was sexually abused." Notwithstanding the notion that an inference was made by Dr. Herold, defendant conceded during oral argument before this Court that Dr. Herold did not explicitly testify to Delia's diagnosis or state that Delia was sexually abused. Nevertheless, we note that in the instant case, unlike the testimony from the experts in *Trent*, *Parker*, and *Bates*, Dr. Herold did not reveal a conclusive diagnosis that Delia was sexually abused.

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3. In *State v. Trent*, our Supreme Court held that the expert gave a "limited basis" for his diagnosis—presumably relying *exclusively* on the child's statements of sexual abuse—where he "repeatedly testified that his diagnosis was based upon the results of the pelvic exam, [which showed the child's hymen was not intact], and the history given to him by the victim. He cited no other basis for his diagnosis." 320 N.C. 610, 614, 359 S.E.2d 463, 465–66 (1987). The expert's testimony was ruled to be inadmissible.

Similarly, in *State v. Parker*, this Court held the expert's testimony to be inadmissible where he testified that the child "had been sexually abused over a long period of time" and his opinion was based "*only* on his interview with [the child] in which [the child] related a history of sexual abuse and the fact that [the child's] hymenal ring was not intact." 111 N.C. App. 359, 366, 432 S.E.2d 705, 709–10 (1993) (emphasis added).

In *State v. Bates*, the expert opined that the child was sexually abused after he completed the child's examination, which showed no physical evidence of abuse, and admitted that his diagnosis was "based *entirely* on statements made by the child[.]" 140 N.C. App. 743, 748, 538 S.E.2d 597, 601 (2000) (emphasis added). This Court ruled the testimony was inadmissible.

On direct examination, Dr. Herold testified about the "comprehensive" procedures for conducting a medical evaluation on children to make a medical diagnosis:

> [DR. HEROLD]: I work as a part of a team at [Duke's] CANMEC. We see children when we evaluate children. We see them -- typically one medical provider and one social worker will see the child. And then once a week we do what is called Peer-Review, and we case-review a hundred percent of our cases. And on that team there are two Board Certified Child Abuse Pediatricians, and two Social Workers, and one fellow, and we Peer-Review every case.
>
> . . . .
>
> [THE STATE]: And when [Delia] came to your clinic, what if any actions did you take?
>
> [DR. HEROLD]: We do complete medical evaluations. And that include[s] speaking to a caretaker, whoever brings the child; and we will speak to the caretaker and get a complete medical history. . . . And we also [complete] a social history, which [involves] speaking to the patient and finding out who lives in the home. We do -- I get an evaluation that include[s] risk factors, so I [can] do a full parent interview. . . .
>
> [T]he social worker will then be getting a medical history from the child at the same time. And after . . . our social worker is done getting a medical history from the child, and I know how I need to treat the child, I will then do a medical exam on the child, and do any necessary labs or test, or anything that have been determined are necessary through the obtaining of medical history that the social worker will have done.
>
> [THE STATE]: And did you do that in this case?
>
> [DR. HERORD]: Yes, ma'am.

Dr. Herold detailed the examination process of a pre-pubescent child and her findings from Delia's examination—in which she revealed that Delia had a "normal genital exam"—and testified that the absence of physical evidence was not uncommon after 72 hours of initial contact for a majority of cases involving children who had been sexually abused.

On cross-examination, Dr. Herold was expressly asked by defense counsel the following questions:

> [DEFENSE COUNSEL]: And now on September 8, 2016, [Delia] is in your clinic, correct?
>
> [DR. HEROLD]: Yes.
>
> [DEFENSE COUNSEL]: And it is your understanding that she has been raped, correct?
>
> [DR. HEROLD]: I have never -- I had never heard that word.
>
> [DEFENSE COUNSEL]: It is your understanding that [Delia] who is not able to give consent has been penetrated, correct?
>
> [DR. HEROLD]: It was my understanding that the child had been digitally penetrated and anally penetrated by an adult and we consider that sexual abuse.
>
> . . . .
>
> [DEFENSE COUNSEL]: On the 8th of September, 2016, you were not able to make any medical determination that [Delia] had been penetrated, were you?
>
> [DR. HEROLD]: Yes, I was.
>
> [DEFENSE COUNSEL]: And how were you able to make a medical determination of that?
>
> [DR. HEROLD]: The medical evaluation, when we're evaluating child sexual abuse, 90 to 95 percent of children do not have medical findings. The medical diagnosis is based on the entire evaluation which consist[s] of statements that the child says, as well as history from the patient, as well as the medical exam itself.
>
> [DEFENSE COUNSEL]: And notwithstanding what the child said, what the mother said, and in your capacity as a Nurse Practitioner, and during your medical examination, you were not able to make a determination based off of that alone that [Delia] was penetrated; were you?
>
> [DR. HEROLD]: Based upon the medical exam alone [we] cannot make a diagnosis of penetration.

On redirect, Dr. Herold clarified that a conclusive finding for child sexual abuse can be medically diagnosed in four situations: the child is pregnant, the child has gonorrhea, the child has chlamydia, or the child has HIV. Dr. Herold further testified to the significant parts of Delia's team evaluation:

> [DR. HEROLD]: The statements that [Delia] provided and she provided clear statement[s] describing sexual abuse. She described the alleged perpetrator putting saliva, or she called it droul [sic] on his hand. She described details of him placing his finger inside of her genital, in her anus, and in her vagina. She described clear statements of these events occurring.
>
> At five years of age[,] this child was able to tell us what had happened, and give details that were details that were clear and concise details which led us to have the medical findings that we did.

Following redirect, defense counsel expressly asked if the team evaluation relied solely on Delia's statements, in which Dr. Herold testified as such:

> [DEFENSE COUNSEL]: So what she said matters much more than any physical evidence that you did or did not find; correct?
>
> [DR. HEROLD]: We did a medical exam well after three days from when this child last had alleged contact with the alleged perpetrator. Therefore, I would not expect to find any findings on her medical exam. The most important part of a child's evaluation, if it has been greater than 72 hours, is the statement that the child provides.
>
> . . . .
>
> [DEFENSE COUNSEL]: But you did find [that] sexual abuse happened, correct?
>
> [DR. HEROLD]: We found that the child gave clear and concise statement[s] regarding child sexual abuse.
>
> [DEFENSE COUNSEL]: So your testimony today is based [on] the statements that [Delia] made, correct?
>
> [DR. HEROLD]: It is based off a complete medical evaluation, not only her statements.

Considering Dr. Herold's testimony in its entirety, and as admitted by defense counsel, Dr. Herold did not make a conclusive medical diagnosis. Although defendant raises the holdings in *Trent*, *Parker*, and *Bates*, where the admission of the expert's medical diagnosis, which rested exclusively on the victim's statements, was precluded in these cases, Dr. Herold's testimony was inapposite in the present case.

Dr. Herold carefully explained the results of Delia's examination, the statistics of sexually abused children with normal medical exams, and the collective process of the team evaluation—reviewing all the information that was obtained involving Delia. Her "testimony was relevant not only to help the jury understand the results of her examination, but also to demonstrate that a lack of physical evidence of sexual abuse does not preclude sexual abuse when there is a passing of time between the alleged incidents and the physical examination." *State v. Chavez*, 241 N.C. App. 562, 569, 773 S.E.2d 108, 114 (2015).

Moreover, we reject defendant's contention that he was prejudiced by Dr. Herold's testimony that Delia gave "clear and concise" details about sexual abuse as the record reveals that, if there was any error, defendant invited the error. Throughout Dr. Herold's direct testimony, she repeatedly stated that Delia's statements about sexual abuse were "allegations." However, on cross-examination, defendant deliberately elicited testimony from Dr. Herold regarding whether she had made a medical diagnosis that Delia had been sexually abused and what data she collected to connect defendant to the alleged penetration. Therefore, defendant is precluded from asserting prejudice from Dr. Herold's statements when he invited the error for which he now seeks relief from on appeal. *See* N.C. Gen. Stat. § 15A-1443(c) (2017) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.").

Notwithstanding defendant's invited error, defendant has not demonstrated that the jury would have reached a different result in light of all the other unchallenged evidence presented at trial. This includes strong testimony from Delia at trial and during videotaped interviews; from Ryan, who testified, *inter alia*, to seeing defendant and Delia in bed together; from Snider; and from Detective Sandoval. Thus, we conclude the trial court did not err by admitting Dr. Herold's testimony.

II

[2] Defendant next argues the trial court erred by not allowing the testimony of two defense witnesses who allegedly asked Delia's mother to stop talking about sex in front of children. We disagree.

"The admissibility of evidence is governed by a threshold inquiry into its relevance." *State v. Griffin*, 136 N.C. App. 531, 550, 525 S.E.2d 793, 806 (2000). "Evidence is relevant if it has 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." *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citing N.C.G.S. § 8C-1, Rule 401 ([2017])). "The trial court may exclude evidence that is irrelevant, non-probative, *speculative*, *not within a witness' personal knowledge*, and calling for legal conclusions from a lay witness." *State v. Pallas*, 144 N.C. App. 277, 283, 548 S.E.2d 773, 779 (2001) (emphasis added).

> Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn, 162 N.C. App. at 266, 591 S.E.2d at 17 (internal citations and quotation marks omitted). When it can be shown that a witness has personal knowledge of a witness's character for truthfulness or untruthfulness, that opinion testimony can be admitted as evidence of credibility. *State v. Hernendez*, 184 N.C. App. 344, 349, 646 S.E.2d 579, 583 (2007).

In the instant case, defendant sought to introduce testimony of witnesses that he proffered as relevant to prove a "central part of his theory of defense [ ] that [Delia] heard these type[s] of statements and these type[s] of sexual statements from [her mother] when she was around her boyfriends or talking about her boyfriends[.]" However, it is clear that defendant's attempt to introduce the testimony was premised on "undermining the truthfulness of [Delia's] statements;" in other words, to "raise doubts about the origin of [Delia's] ability to graphically describe certain sex acts."

Although premised as an attempt to impeach the mother's credibility, defendant's proposed testimony was, in reality, an attempt to put forth impermissible character testimony as to Delia's credibility. Neither witness could offer an opinion as to Delia's credibility. All they could offer

was speculation that comments made by Delia's mother "might" serve as the basis of Delia's explicit statements of sexual abuse, not whether Delia personally experienced the abuse. Defendant was unable to demonstrate that the proposed witnesses had sufficient personal knowledge to form an opinion about Delia's credibility.

Thus, because the proffered testimony was too speculative and not within the witnesses' personal knowledge, the trial court did not err in excluding the testimony.

III

[3] Finally, defendant argues the trial court erred by failing to properly issue limiting instructions to the jury as to Dr. Herold's testimony regarding the statistics of sexually abused children with normal exams and Delia's out-of-court statements about sexual abuse that she made to Snider. We disagree.

Defendant did not request a limiting instruction as to Dr. Herold's testimony at trial but on appeal, requests that we review his argument for plain error, and we do so. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial."); *see also id.* ("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." (citation and quotation marks omitted)).

Here, as we have already considered defendant's arguments regarding Dr. Herold as a witness and found no error in allowing her testimony, we reject defendant's argument that trial court was "obligated to issue a limiting instruction informing jurors [that] they could only consider the 'profile' testimony for corroborative purposes[.]" Dr. Herold properly testified as to her findings from Delia's examination, her history of dealing with child sexual abuse cases, and the process to complete a medical evaluation––which included the statements provided by Delia. Further, the evidence––the explicit testimony by Delia of defendant's acts of sexual abuse, the testimony of her brother Ryan, Delia's consistent statements to Snider and Detective Sandoval, and the video of Delia's statements––when viewed collectively by the jury, was significant and sufficient evidence for the jury to find defendant guilty. Even assuming the trial court erred in not giving limiting instruction as to Dr. Herold's testimony, there is no probability that the jury would have reached a different result under the circumstances.

Accordingly, for the reasons stated herein, we hold defendant received a fair trial, free from any prejudicial error.

NO ERROR.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
CLARENCE WENDELL ROBERTS, DEFENDANT

No. COA18-1194

Filed 5 November 2019

1. Evidence—hearsay—recorded phone calls—while defendant was in jail—lack of prejudice

In a murder trial, defendant failed to show the admission of phone calls—recorded between himself and other people while he was in jail—was prejudicial in light of the overwhelming evidence that he was the perpetrator of a drive-by shooting that resulted in one death.

2. Constitutional Law—Confrontation Clause—recorded phone calls—while defendant was in jail—testimonial

In a murder trial, the admission of recorded phone calls between defendant and other people while he was in jail did not violate defendant's right to confront witnesses because the phone calls were not testimonial. The participants' likely knowledge that the conversations would be monitored and recorded did not automatically mean their statements were intended to bear witness against defendant.

3. Evidence—relevance—character evidence—recorded interviews with defendant—plain error analysis

In a murder trial, the admission of video interviews between defendant and law enforcement, which included discussion of prior charges that had been dismissed, did not rise to the level of plain error given the overwhelming evidence that defendant was the perpetrator of a drive-by shooting that resulted in one death.

4. Sentencing—second-degree murder—B1 offense—ambiguity

The Court of Appeals rejected defendant's argument that he should have been sentenced to a B2 offense under a theory of

depraved-heart malice rather than a B1 offense. Although defendant argued that the jury's verdict was ambiguous as to which theory of second-degree murder it used to convict him, the evidence supported only theories punishable as B1 felonies and defendant did not present any argument nor request a jury instruction regarding depraved-heart malice.

5. Sentencing—prior record level—misdemeanor classification —stipulation

At sentencing in a murder trial, the trial court properly calculated defendant's prior record level based on defendant's stipulation to a Class 1 misdemeanor for a prior conviction of disorderly conduct. Although the disorderly statute (N.C.G.S. § 14-288.4) listed multiple potential misdemeanor classifications of that offense, the stipulation was sufficient to establish that the facts underlying the conviction justified that classification absent clear record evidence of an error or mistake.

Appeal by Defendant from judgment entered 5 May 2017 by Judge James Webb in Robeson County Superior Court. Heard in the Court of Appeals 6 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant.

COLLINS, Judge.

Defendant Clarence Wendell Roberts appeals from judgment entered upon jury verdicts of guilty of second-degree murder and assault with a deadly weapon. Defendant argues that the trial court committed certain evidentiary and sentencing errors. We find no prejudicial error.

I. Procedural History

On 9 September 2013, Defendant was indicted for first-degree murder, three counts of attempted first-degree murder, and three counts of assault with a deadly weapon with intent to kill. A trial commenced on 10 April 2017. At the close of the State's evidence, the trial court granted Defendant's motion to dismiss some of the charges. On 5 May 2017, the jury found Defendant guilty of second-degree murder and assault with a deadly weapon. The trial court consolidated the offenses and entered

judgment upon the jury's verdicts, sentencing Defendant to 300 to 372 months' imprisonment. Defendant gave oral notice of appeal in open court.

II. Factual Background

On the evening of 14 June 2013, approximately twelve people, including John Allen, Michael Burgess, and Joshua Council, were playing basketball at a park in the Hayeswood Hut area of Lumberton. During their breaks, they talked and had drinks beside their cars parked in the grassy area between the basketball court and Peachtree Street. Allen and Burgess were affiliated with the E-Ricket Hunter Bloods street gang. Allen's sister, her three-year-old daughter, and one of the sister's friends were hanging out by the cars, watching them play basketball. At about 9:00 or 9:30 p.m., a shooting occurred, and Council was killed.

Allen testified that while he, his sister, and Council were standing beside Council's Chevrolet Blazer, a white Ford Taurus with its windows rolled down came "kinda fast" down Peachtree Street. The driver, who was the only person in the car, yelled "all y'all mother***ers want to kill me." The car drove past them, slowed down, and spun backward before stopping beside the Blazer. Allen thought the driver was drunk. A black male with a "bald head or either a real close haircut" got out of the car. Then, Allen saw the driver shooting and heard a total of five gunshots coming from "where the car was[,]" but he did not see the gun that was being fired. Allen and others ran away from the basketball area. The white Taurus then drove away.

Burgess testified that when he and his friends were taking a break in the grassy area beside the court, a white car partially covered in black primer drove by, backed up, and "whipped" in front of them. Burgess could see that the driver was a black male with tattoos on his face and gold teeth, and he was the only person in the car. After the driver yelled "y'all gonna kill me," someone shot at the car. Burgess heard more shots coming from the white car and started running.

Sheena Britt lived right around the corner from Hayeswood Hut. On the night of the shooting, Britt was walking with a friend through an intersection near the park. She saw a white four-door car drive past her toward the basketball court. The driver, a black male with gold teeth, was hanging out of the window and yelling "ain't nobody going to mess with me." Britt thought he had been drinking. Just after the car turned down Peachtree Street, Britt heard gunshots. She later identified Defendant in a photo lineup at the police station, but she could not identify him in court.

Whitney Carter lived at the corner of Peachtree Street and Eleventh Street. Carter was sitting in her car in her driveway between 9:00 and 10:00 p.m. on the night of the shooting when she saw a white car drive by, intermittently "throwing on its brakes." Carter observed that the driver was the only person in the car. She saw the car stop briefly at the intersection while the driver talked to two pedestrians. The car then "sped down the dirt road." While still sitting in her car in her driveway about five minutes later, Carter heard gunshots. She waited a few minutes, then got out of her car and walked to the edge of Peachtree Street. When Carter looked down Peachtree Street, she saw the white car parked beside the basketball court. Then the car drove away toward Elizabethtown Road, and people were running.

Ronnie Roberson's house faced the Hayeswood Hut basketball court. On the night of the shooting, Roberson watched black-and-white surveillance video of the basketball court, captured by an infrared camera mounted on the side of his house. He observed people talking around the basketball court. He also watched as a dark car came down the road, backed up near the court slowly, and sat with its engine running. Then shots were fired. Roberson did not see any other cars in the area. He called 911 twice—first to report the loud noise coming from the basketball court, and then to report the gunshots.

Kimberly Lowery, the mother of Defendant's son, testified that Defendant showed up sometime after 9:30 p.m. at her home on Elizabethtown Road, visibly drunk and driving a white Ford Taurus. Two other witnesses who knew Defendant testified that Defendant visited them in Lumberton that night on or after 10:00 p.m., driving a white car.

Chris McGirt, who lived near Hayeswood Hut, was on his way home from work around 11:20 p.m. when he noticed a white Ford Taurus "driving strangely" down his street. When McGirt parked in his driveway, the white car pulled up beside him in the driveway. A black male, about 5'9" to 6' tall and 160 to 170 pounds with gold teeth, got out of the white car. After asking McGirt a few questions, the man got back in the car, started the engine, and backed out of the driveway while yelling that he was a "gangster." McGirt thought the driver was impaired. After the man drove away, McGirt called the police to report the suspicious activity. Two days later, when McGirt visited the police station to make a statement, he identified Defendant in a photo lineup.

After midnight, Trooper Steven Hunt of the North Carolina Highway Patrol found a white Ford Taurus in a ditch beside the highway. The engine was running, the taillights were on, and Defendant was asleep

inside, leaning against the steering wheel. When Defendant woke up and tried to put the car in drive, the officer pulled him out of the car, noticing that he was impaired. Hunt arrested Defendant for driving while impaired.

III. Issues

On appeal, Defendant argues that (1) the trial court erred and violated his right to confrontation by admitting recordings of his phone calls from jail, (2) the trial court plainly erred by admitting videos of his interviews with investigators, (3) the sentence imposed was not authorized by the jury's verdict, and (4) the trial court erred in calculating Defendant's prior record level.

IV. Discussion

A. Recorded Phone Calls

Defendant argues that the trial court erred by admitting recordings of three phone calls Defendant made from the Robeson County Jail. Defendant specifically contends that (1) the recordings of the phone calls contained inadmissible hearsay, and (2) by allowing the jury to hear the phone calls, the trial court violated Defendant's right to confront witnesses against him.

[1] Defendant first argues that the recorded phone calls were erroneously admitted because they contained inadmissible hearsay.

This Court conducts de novo review of the admission of evidence over a hearsay objection. *State v. Johnson*, 209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011). An erroneous admission of hearsay necessitates a new trial only if the defendant shows that there is a reasonable possibility that without the error the jury would have reached a different result. N.C. Gen. Stat. § 15A-1443(a) (2018); *State v. Wilkerson*, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (internal quotation marks and citation omitted).

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2018). "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (2018). However, a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence for a purpose other than to prove the truth of the matter asserted is admissible. *Livermon v. Bridgett*, 77 N.C. App. 533, 540, 335 S.E.2d 753, 757 (1985).

During one of the calls, Roberts repeatedly expressed bewilderment about being accused of murder. In another call, a woman urged Defendant to request a "lie detector test," to which Defendant replied, "They ain't do none of that." One of the women also told Roberts he should have "come back home." Referring to another person, the woman said, "She say, her baby daddy say, whenever you got around, he and them other dudes were trying to tell you to go home, but you wouldn't leave."

The State argues that these statements were admissible because (1) they were not hearsay, as they were introduced only to prove the existence of the statements and to show Defendant's state of mind under evidentiary Rule 803(3), rather than to prove the truth of the matters asserted, and (2) they were excepted from hearsay under evidentiary Rule 801(d), as an admission of a party opponent.

We need not determine whether the trial court erred because, even assuming *arguendo* that the evidence was erroneously admitted, Defendant fails to show that the error was prejudicial. *See* N.C. Gen. Stat. § 15A-1443(a). The State presented the following evidence:

Britt saw a white four-door car drive past her toward the Hayeswood Hut area basketball court. The driver, a black male with gold teeth, was hanging out of the window and yelling "ain't nobody going to mess with me." Britt thought he had been drinking. Just after the car turned down Peachtree Street, Britt heard gunshots. She later identified Defendant as the driver in a photo lineup.

Allen was standing beside Council's Chevrolet Blazer next to the basketball court when a white Ford Taurus came down Peachtree Street. The driver, a black male who appeared drunk and was the only person in the car, yelled "all y'all mother***ers want to kill me." The car drove past Allen, slowed down, and spun backward before stopping beside the Blazer. Allen then saw the driver shooting and heard a total of five gunshots coming from where the car was.

Burgess was standing next to the basketball court when a white car whipped in front of him. The driver, a black male with tattoos on his face and gold teeth, was the only person in the car. After the driver yelled "y'all gonna kill me," someone shot at the car. Burgess heard more shots coming from the white car.

Carter was sitting in her car in her driveway at the corner of Peachtree Street between 9:00 and 10:00 p.m. when she saw a white car drive by. The driver was the only person in the car. The car stopped briefly at the intersection and then sped down Peachtree Street. Carter

heard gunshots and she walked to the edge of Peachtree Street. She saw the white car parked beside the basketball court. Then the car drove away toward Elizabethtown Road, and people were running.

Defendant showed up visibly drunk at Lowery's house on Elizabethtown Road in a white Ford Taurus sometime after 9:30 p.m.

McGirt saw a white Ford Taurus driving strangely down his street near Hayeswood Hut around 11:20 p.m. The car pulled into McGirt's driveway and the driver, a black male with gold teeth, got out. McGirt thought the driver was impaired. After asking McGirt a few questions, the driver got back in the car and drove away while yelling that he was a "gangster." Two days later, McGirt identified Defendant as the driver in a photo lineup.

After midnight, Trooper Hunt found Defendant asleep in the driver's seat of a white Ford Taurus in a ditch beside the highway. Defendant was intoxicated and was arrested for driving while impaired.

Given this overwhelming evidence of guilt, we conclude that there is no reasonable possibility that had the jury not heard the phone calls, it would have reached a different result. *See State v. Clevinger*, 249 N.C. App. 383, 391, 791 S.E.2d 248, 254 (2016) (holding error harmless in light of other evidence against defendant, including witness identification in photo lineup). We therefore find no prejudicial error.

[2] Defendant also argues that by admitting the recordings, the trial court violated his right to confront witnesses against him. Defendant specifically argues that the women's statements in the recorded phone calls were testimonial because the Robeson County Jail telephone system provided automated warnings at the beginning of and during each phone call, indicating that the calls would be recorded and were subject to monitoring.

This Court conducts de novo review of an alleged violation of a constitutional right. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

A criminal defendant has a right to confront witnesses against him. U.S. Const. amend. VI; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (applied the Sixth Amendment to states through Fourteenth Amendment); N.C. Const. art. I, Section 23. This right is violated when a "'testimonial' statement from an unavailable witness is admitted against a defendant who did not have a prior opportunity to cross-examine the declarant." *State v. Garner*, 252 N.C. App. 393, 400, 798 S.E.2d 755, 760 (2017) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)).

While the United States Supreme Court has deferred "any effort to spell out a comprehensive definition of 'testimonial,'" *Crawford*, 541 U.S. at 68, it has specifically limited the reach of the Confrontation Clause to those statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. "As a result of the fact that '[t]estimony . . . is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact[,]'" testimonial statements typically include: (1) statements made to police officers during custodial interrogation; (2) ex parte in-court testimony or its functional equivalent, such as affidavits, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; and (3) extrajudicial statements contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions. *State v. Miller*, 371 N.C. 273, 281-82, 814 S.E.2d 93, 98-99 (2018) (quoting *Crawford*, 541 U.S. at 51) (other citations omitted).

In conducting this inquiry into the circumstances surrounding a statement, a declarant's knowledge that he is being recorded is not dispositive. Even if parties to a jailhouse phone call with a defendant were aware that the jail was recording their conversation, their understanding that a statement could potentially serve as evidence in a criminal trial does not necessarily denote "testimonial" intent. *See Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding that statements made during 911 emergency phone call were nontestimonial when uttered only "to enable police assistance to meet an ongoing emergency"); *United States v. Jones*, 716 F.3d 851, 856 (4th Cir. 2013) (holding that statements made during recorded jailhouse phone calls were nontestimonial because declarants did not demonstrate anywhere in the conversations an intent to "bear witness" against defendant).

We agree with the Fourth Circuit's reasoning in *Jones* that a prison, similar to 911 emergency services, "has a significant institutional reason for recording phone calls outside of procuring forensic evidence—i.e., policing its own facility by monitoring prisoners' contact with individuals outside the prison." *Jones*, 716 F.3d at 856. "To adopt the rule Defendant proposes would require us to conclude that all parties to a jailhouse phone call categorically intend to bear witness against the person their statements may ultimately incriminate." *Id.* Moreover, nowhere in the conversations between Defendant and the women do the women demonstrate an intent to "bear witness" against Defendant. There is no evidence that their conversation consisted of anything but "casual

remark[s] to an acquaintance." *Crawford*, 541 U.S. at 51. Because we are satisfied that the statements made by the women in the jailhouse telephone calls were not testimonial, their admission did not violate the Confrontation Clause.

B. Interviews with Police

[3] Defendant next argues that the trial court erred by admitting into evidence video interviews in which Defendant and investigators discussed prior assault and rape charges against Defendant that had been dismissed. Defendant specifically contends that this evidence was irrelevant and was inadmissible character evidence.

Defendant acknowledges his failure to object to the admission of this evidence, but specifically argues plain error on appeal. *See* N.C. R. App. P. 10(a)(4). The plain error rule should be "applied cautiously and only in the exceptional cases where, after reviewing the entire record, it can be said the claimed error . . . resulted in a miscarriage of justice or in the denial . . . of a fair trial." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal quotation marks and citation omitted). An appellate court should only find plain error if the court is convinced that absent the error the jury probably would have reached a different result. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

A trial court's rulings on relevancy are given great deference on appeal. *Dunn v. Custer*, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004). We review de novo a trial court's legal conclusion that evidence is or is not within the Rule 404(b) exception to the exclusion of character evidence. *State v. Beckelheimer*, 366 N.C. 127, 130, 726 S.E.2d 156, 158-59 (2012).

"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 (2018). Irrelevant evidence is inadmissible. N.C. Gen. Stat. 8C-1, Rule 402 (2018).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. 8C-1, Rule 404(a) (2018). Evidence of prior bad acts "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C. Gen. Stat. 8C-1, Rule 404(b) (2018). "Rule 404(b) evidence is admissible to prove identity when the defendant is not definitely identified as the perpetrator of the

alleged crime." *State v. Gray*, 210 N.C. App. 493, 508, 709 S.E.2d 477, 488 (2011) (citation omitted).

Defendant stated in one of the interviews that being a suspect of the Hayeswood Hut murder was similar to his previous situation, when he was charged with rape in 2002. Defendant described to investigators that, at that time, other people said he was "running around drinking"—just as some were doing in this case. The State argues that this evidence was admissible to "show opportunity, intent, preparation, plan, knowledge, absence of mistake, entrapment or accident, and most importantly in this case, identity."

However, we need not determine whether the evidence was admissible because, even assuming error *arguendo*, Defendant has failed to show that the admission of the evidence resulted in a miscarriage of justice or denied Defendant a fair trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378. In light of the overwhelming evidence of Defendant's guilt, including his identity as the shooter, as recited above in section IV.A., we do not conclude that absent admission of the evidence, the jury probably would have reached a different result. *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. Accordingly, we discern no plain error.

C. Sentencing

[4] Defendant next argues that the sentence imposed by the trial court was not supported by the jury's verdict. Defendant specifically contends that the general verdict of guilty of second-degree murder was ambiguous for sentencing purposes, and because there was evidence in this case of depraved-heart malice, the trial court erred by imposing a sentence for a class B1 offense. Defendant urges this Court to remand the case for resentencing as a B2 offense.

"We review *de novo* whether a sentence imposed was authorized by a jury's verdict." *State v. Mosley*, 806 S.E.2d 365, 367 (N.C. Ct. App. 2017) (internal quotation marks and citations omitted).

Second-degree murder is the unlawful killing of another human being with malice but without premeditation or deliberation. *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000) (internal citation omitted).

> Malice is an essential element of second-degree murder. North Carolina recognizes at least three malice theories: (1) express hatred, ill-will or spite; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on

> mischief; or (3) a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

Mosley, 806 S.E.2d at 367 (internal quotation marks and citations omitted). The second enumerated malice theory is known as depraved-heart malice. *Id.* While second-degree murder is generally punished as Class B1 felony, when the malice necessary to prove second degree murder is depraved-heart malice,[1] a second-degree murder is punished as a Class B2 felony. N.C. Gen. Stat. § 14-17(b)(1) (2017).

In *State v. Lail*, this Court held that the trial court did not err by sentencing defendant as a B1 felon upon a general verdict of guilty of second-degree murder where there was no evidence presented that would support a finding of depraved-heart malice or an instruction on that theory. 251 N.C. App. 463, 476, 795 S.E.2d, 401, 411 (2017). Moreover, the defendant did not rebut the State's malice theory, advance a depraved-heart malice theory argument, or request a jury instruction on depraved-heart malice. *Id.* at 475, 795 S.E.2d at 410. "Although the jury was not instructed to answer under what malice theory it convicted defendant of second-degree murder, it [wa]s readily apparent from the evidence presented and instructions given that the jury, by their verdict, found defendant guilty of B1 second-degree murder." *Id. See also Mosley*, 806 S.E.2d at 368-69 (holding that a general verdict of guilty of second-degree murder *was* ambiguous and thus should be construed in favor of defendant as consistent with § 14-17(b)(1) because there was *not only* evidence supporting Class B1 malice *but also* evidence from which the jury could have found Class B2 depraved-heart malice).

The present case is analogous to *Lail*. The State's theory was that Defendant intended to kill people at the basketball court, and the State's evidence supported only malice theories punishable as B1 felonies. The jury was only instructed on malice theories punishable as B1 felonies; Defendant did not object to the jury instructions and did not request an instruction on depraved-heart malice. Moreover, Defendant did not advance a depraved-heart malice theory argument or present evidence that would be consistent with a depraved-heart malice theory. *See Lail*, 251 N.C. App. at 475, 795 S.E.2d at 410. "Although the jury was not instructed to answer under what malice theory it convicted defendant of second-degree murder, it [wa]s readily apparent from the evidence presented and instructions given that the jury, by their verdict, found defendant guilty

1. N.C. Gen. Stat. § 14-17(b)(2) describes a second circumstance wherein a second-degree murder is punished as a B2 felony; that provision is inapplicable to this case.

of B1 second-degree murder." *Id.* Accordingly, the sentence imposed for a B1 offense was properly supported by the jury's verdict.

D. Prior Record Level

[5] Defendant argues that his stipulation on the prior record level worksheet was insufficient to support the trial court's legal conclusion that Defendant was a prior record level IV offender with ten felony sentencing points. Defendant urges this Court to remand the case to the trial court for sentencing as a Level III offender.

We review a trial court's determination of an offender's prior record level, which is a conclusion of law, de novo on appeal—even when the parties have stipulated to prior convictions on a record level worksheet. *State v. Massey*, 195 N.C. App. 423, 429, 672 S.E.2d 696, 699 (2009).

Stipulation by the parties is sufficient to prove the existence of a prior conviction for sentencing purposes. N.C. Gen. Stat. § 15A-1340.14(f)(1) (2018). When a defendant stipulates to a conviction on a prior record level worksheet, "he is stipulating that the facts underlying his conviction justify that classification." *State v. Arrington*, 371 N.C. 518, 522, 819 S.E.2d 329, 332 (2018) (holding that, while "second-degree murder has two potential classifications, B1 and B2, depending on the facts," when defendant stipulated to the conviction as a B1 offense, he "properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification").

Moreover, the trial court has "no duty to pursue further inquiry or make [the] defendant recount the facts during the hearing." *State v. Salter*, 826 S.E.2d 803, 809 (N.C. Ct. App. 2019) (internal quotation marks and citation omitted). However, if there is clear record evidence "conclusively showing a defendant's stipulation is to an incorrect classification" due to error or mistake, then "a reviewing court should defer to the record evidence rather than a defendant's stipulation." *State v. Green*, 831 S.E.2d 611, 617 (N.C. Ct. App. 2019) (holding that the trial court erred by assigning points according to defendant's stipulation to *felony* classification, when a certified copy of the judgment showing conviction of *misdemeanor* had been presented to the trial court).

In this case, Defendant stipulated on the prior record level worksheet to the following prior conviction: "M-PUBLIC DISTURBANCE . . . Class 1." Defendant argues that because "public disturbance" is a statutorily defined term under N.C. Gen. Stat. § 14-288.1(8) that applies to more than one misdemeanor classification under the "disorderly conduct" statute, N.C. Gen. Stat. § 14-288.4, the stipulation was too general

to support the trial court's conclusion that the prior offense was a Class 1 misdemeanor.[2] While there are multiple potential misdemeanor classifications of disorderly conduct, *see* N.C. Gen. Stat. § 14-288.4(c) (2017), Defendant stipulated to a Class 1 misdemeanor on his prior record level worksheet. In so doing, Defendant stipulated that the facts underlying his conviction justified that classification. *See Arrington*, 371 N.C. at 522, 819 S.E.2d at 332. The trial court had "no duty to pursue further inquiry or make defendant recount the facts during the hearing[,]" *Salter*, 826 S.E.2d at 803, and there is no record evidence suggesting that Defendant stipulated to an incorrect classification due to error or mistake, *see Green*, 831 S.E.2d at 617.

Accordingly, Defendant's stipulation on the prior record level worksheet was sufficient to support the trial court's calculation of sentencing points based on this prior conviction.

V. Conclusion

For the reasons explained above, we conclude that the trial court did not commit prejudicial error by admitting recordings of Defendant's phone calls with others from jail and did not commit plain error by admitting videos of his interviews with investigators. We also conclude that the trial court imposed a sentence that was authorized by the jury's verdict and properly calculated Defendant's prior record level.

NO PREJUDICIAL ERROR.

Chief Judge McGEE and Judge BERGER concur.

2. Defendant also argues that the stipulation to public disturbance was identified with a 2005 file number, even though it listed a conviction date of 1996, and thus the stipulation was "incoherent," rendering it "impossible for the information on the prior record level worksheet . . . to be accurate." We find no merit in this argument.

STATE OF NORTH CAROLINA
v.
WILLIAM CHRISTOPHER RUSHING

No. COA18-1100

Filed 5 November 2019

1. Indictment and Information—assault inflicting serious bodily injury—sufficiency—recitation of statutory terms

An indictment for assault inflicting serious bodily injury was facially valid where it included a recitation of the statutory language for the offense charged.

2. Assault—inflicting serious bodily injury—protracted impairment of bodily part function—two weeks—sufficiency of evidence

The State presented substantial evidence from which the jury could reasonably conclude that the victim of an assault suffered from a protracted loss or impairment of the function of a bodily member or organ—so as to qualify as a "serious bodily injury" pursuant to N.C.G.S. § 14-32.4(a) (assault inflicting serious bodily injury)—where her left orbital (eye socket) was fractured during the assault, leading to total blindness in that eye for one week and impaired vision for another week, during which time she could not drive or return to work.

3. Appeal and Error—preservation of issues—jury instruction—misdemeanor assault—not requested

In a prosecution for assault inflicting serious bodily injury, defendant failed to preserve for appellate review the issue of whether the jury should have been instructed on the misdemeanor offense of assault inflicting serious injury where defendant did not object to the instructions as given or request the misdemeanor instruction, and he did not ask for plain error review on appeal.

Judge ZACHARY concurring in part and dissenting in part.

Appeal by defendant from judgments entered 17 August 2016 by Judge Walter H. Godwin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.

Paul F. Herzog for defendant-appellant.

ARROWOOD, Judge.

William Christopher Rushing ("defendant") appeals from judgments entered against him for assault inflicting serious bodily injury, assault on a female, and habitual misdemeanor assault. For the reasons that follow, we find no error.

I. Background

In May 2016, a Pitt County grand jury indicted defendant for assault inflicting serious bodily injury, assault on a female, assault on a child under twelve years of age, and habitual misdemeanor assault.[1] The case came on for trial on 16 and 17 August 2016 in Pitt County Superior Court before the Honorable Walter H. Godwin.

The evidence of the State tended to show that defendant and Ms. Keyosha Leachman ("Ms. Leachman") had an eleven-year-old child, of whom defendant had physical custody on weekends. On Sunday, 6 March 2016, defendant and Ms. Leachman got into a heated argument as Ms. Leachman was attempting to pick up their child from defendant's mother's home. As the argument escalated, defendant pushed Ms. Leachman.

Having been assaulted by defendant in the past, Ms. Leachman drew a pocket knife and stabbed defendant in the chest. In the ensuing brawl, defendant threw Ms. Leachman's head into the concrete, disarmed her, punched her again, threw her into the concrete driveway, and dragged her across the driveway. Ms. Leachman—still attempting to fight back—was able to get to her feet. Wanting Ms. Leachman to "stay down," defendant punched her one last time, flinging her onto the hood of her car. Defendant finally relented after a neighbor threw herself over Ms. Leachman.

Ms. Leachman testified that she was immediately taken to the hospital after defendant assaulted her. At the hospital, she was told by physicians that she had sustained two concussions. In addition to scrapes and bruises on her scalp, she also received six stitches on her hand and one stitch on her leg.

Among these other injuries, defendant's assault of Ms. Leachman inflicted significant damage to her left eye. In an effort to reduce the

1. Defendant pleaded guilty to the habitual misdemeanor assault charge prior to trial.

pain in her eye, the lights in her hospital room were turned off. Detective Sonya Verdin from the Greenville Police Department testified that Ms. Leachman "was in very obvious pain" when they spoke to one another at the hospital. Ms. Leachman stayed at the hospital for three hours.

It was determined that the orbital (socket) of her left eye had been fractured during the assault. She was given several sutures near her eye. Due to her fractured eye socket and swelling around her eye, Ms. Leachman was rendered temporarily blind in her left eye. This complete blindness continued for one week. As a result, Ms. Leachman was not permitted to drive for one week. Ms. Leachman's overall facial swelling took five days to subside with the aid of medication. Her black eye lasted for a week and a half. Her vision in her left eye was not fully restored for two weeks, and she could not return to work until after her vision was restored. Ms. Leachman further testified regarding her orbital fracture in the present tense: "I actually have an orbital fracture, . . . what your eye sits on, the socket part is broken."

At the close of the State's evidence, defendant moved to dismiss all charges against him. The trial court granted the motion to dismiss for the charge of assault on a child under twelve years of age, but denied the motion as to the rest of the charges. Defendant renewed his motion to dismiss the charges at the close of all the evidence, which the trial court denied. On 17 August 2016, defendant was found guilty of assault inflicting serious bodily injury and assault on a female. Defendant failed to properly give notice of appeal; however, we granted defendant's petition for *writ of certiorari* to review defendant's case.

II. Discussion

On appeal, defendant raises several arguments: (1) the indictment fails to allege the crime of assault inflicting serious bodily injury; (2) the State failed to present substantial evidence that defendant's assault inflicted serious bodily injury upon the victim; and (3) defendant should be resentenced for the class A1 misdemeanor of assault inflicting serious injury. We address each contention in turn.

A. Sufficiency of the Indictment

[1] In the case *sub judice*, the indictment alleged that defendant "unlawfully, willfully and feloniously did assault [Ms.] Leachman and inflict serious bodily injury, several lacerations to the face resulting in stitches and a hematoma to the back of the head." Defendant argues that this language merely describes the *misdemeanor* crime of assault inflicting serious injury. We disagree. The indictment alleged the offense of assault

inflicting serious bodily injury by reciting the words of the statute itself: "[A]ny person who assaults another person and inflicts *serious bodily injury* is guilty of a Class F felony." N.C. Gen. Stat. § 14-32.4(a) (2017) (emphasis added); *see also State v. James*, 321 N.C. 676, 680-81, 365 S.E.2d 579, 582 (1988) ("The general rule is that an indictment for a statutory offense is facially sufficient if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words.").

The additional descriptions of Ms. Leachman's injuries in the indictment are irrelevant to its validity, and may be disregarded as incidental to the salient statutory language. *See State v. Pelham*, 164 N.C. App. 70, 79, 595 S.E.2d 197, 203 ("Allegations beyond the essential elements of the offense are irrelevant and may be treated as surplusage and disregarded . . . ."), *appeal dismissed*, *disc. rev. denied*, 359 N.C. 195, 608 S.E.2d 63 (2004). Therefore, in accordance with our policy that "[q]uashing indictments is not favored[,]" *State v. Flowers*, 109 N.C. 841, 844, 13 S.E. 718, 719 (1891) (citation omitted), we hold that the indictment in this case was facially valid.

B. Motion to Dismiss

[2] Defendant argues that the trial court erred in denying both motions to dismiss because the State failed to present substantial evidence that defendant's assault on Ms. Leachman resulted in her "serious bodily injury." We disagree.

1. Standard of Review

A trial court should deny a criminal defendant's motion to dismiss if there is substantial evidence of (1) each essential element of the offense charged, and (2) the defendant being the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citation omitted). Evidence is considered "substantial" if it is relevant and a reasonable mind might accept such evidence as "adequate to support a conclusion." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925 (citation omitted), *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980). On appeal, the trial court's denial of a motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

2. "Serious Bodily Injury"

Defendant was charged with committing assault inflicting serious bodily injury in violation of N.C. Gen. Stat. § 14-32.4, which requires the State to establish two elements: "(1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Williams*,

150 N.C. App. 497, 501, 563 S.E.2d 616, 619 (2002) (citations omitted) [hereinafter *Williams I*].[2] Everyone concedes that an assault was perpetrated by defendant against Ms. Leachman. The issue is whether the State has presented sufficient evidence to support a determination that Ms. Leachman suffered serious bodily injury.

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

N.C. Gen. Stat. § 14-32.4(a).

In this case, the trial court instructed the jury only on a portion of the statute: that, in order to convict, they must find a serious bodily injury that "creates or causes a permanent or protracted loss/impairment of the function of any bodily member or organ." Thus, we are limited to this instruction in determining whether there is sufficient evidence to allow a jury to find this element of the offense. *See State v. Rouse*, 198 N.C. App. 378, 382, 679 S.E.2d 520, 524 (2009) ("It is well settled that a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury." (internal quotation marks omitted)). Whether a serious bodily injury can be found "depends upon the facts of each case and is generally for the jury to decide under appropriate instructions." *Williams I* at 502, 563 S.E.2d at 619 (citation omitted).

3. "Protracted Impairment"

None of the injuries that Ms. Leachman suffered were permanent in nature. Thus, we must determine whether her injuries resulted in a protracted loss or impairment of the function of any bodily member or organ. In doing so, we focus our inquiry on the injury Ms. Leachman suffered to her left eye. The eye is clearly a bodily member or organ, and damage to vision is an "impairment" of the eye's function. *See State v. Kremski*, 222 N.C. App. 318, 729 S.E.2d 732, 2012 WL 3192720, at *5 (2012) (unpublished) (holding fractures around eye causing potentially permanent forty percent loss in vision qualified as permanent or protracted loss or impairment of function of a bodily member or organ).

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2. There are two cases by the name *State v. Williams* we use in our analysis. For ease of reading, they will respectively be labeled *Williams I* and *Williams II*.

Accordingly, the issue here turns on whether the term "protracted impairment" encompasses an eye injury that results in complete blindness for a week and impaired vision for two weeks. Webster's Dictionary defines "protracted" as "prolong[ed] in time or space: continue[d.]" *Protract*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/protract (last visited Sept. 25, 2019). We have previously declined a defendant's offer to define "protracted" to mean "not for a short period of time, but for a long period of time, just short of a permanent condition." *State v. Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *5 (2016) (unpublished). Injuries which cause impairments to the loss or function of a body part may, in certain circumstances, qualify as "protracted" even where they are healed within the month of the assault. *Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4-5 (where victim's broken jaw had to be wired shut for four weeks, evidence was sufficient to support jury finding of "protracted loss or impairment of the function of any bodily member or organ").

Here, the jury heard ample testimony from which it could conclude that Ms. Leachman's loss of vision was sufficiently "continued" and "extended in time" after the assault to qualify as a "protracted" impairment of the function of her left eye. Ms. Leachman testified that the fracture to her eye socket and associated swelling rendered her left eye completely blind for a week and caused damage to her vision that was not fully restored for two full weeks after the assault. She could not drive during the first week and was unable to return to work until her vision was completely restored. Furthermore, she testified about her fractured eye socket in the present tense at trial. Therefore, the evidence viewed in a light most favorable to the State is sufficient to submit to the jury the issue of whether Ms. Leachman suffered a "protracted loss or impairment of the function of a bodily member or organ."

The cases relied upon by defendant and the dissent do not compel a different result. Defendant has cited a litany of cases, claiming they stand for the proposition that the injuries therein did not rise to the level of "serious bodily injury." *See State v. Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (2000); *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001); *State v. Alexander*, 337 N.C. 182, 446 S.E.2d 83 (1994); *State v. Streeter*, 146 N.C. App. 594, 553 S.E.2d 240, *cert. denied*, 356 N.C. 312, 571 S.E.2d 211 (2001), *cert. denied*, 537 U.S. 1217, 154 L. Ed. 2d 1071 (2003); *State v. Washington*, 142 N.C. App. 657, 544 S.E.2d 249, *appeal dismissed, disc. rev. denied*, 353 N.C. 532, 550 S.E.2d 165 (2001). This reliance is misplaced. In each of these cases, the evidence of injury was held *sufficient* to withstand a motion to dismiss on some variant of assault

with a deadly weapon inflicting *serious injury*. The deciding court did not have occasion to rule upon, or even speculate, whether the evidence of injury supported a finding of serious bodily injury.

Additionally, the dissent cites several cases in which more damaging injuries with longer lasting effects have been found sufficient to support a finding of serious bodily injury. *See State v. Jamison*, 234 N.C. App. 231, 758 S.E.2d 666 (2014); *Williams I*, 150 N.C. App. 497, 563 S.E.2d 616 (2002); *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009) [hereinafter *Williams II*]. While previous cases that turn on the particular facts of that case can be instructive, they are not controlling. In fact, we have previously discouraged the practice of using the injuries in our precedent cases as measuring posts for determining whether or not the evidence before us is sufficient to support a finding of serious bodily injury. *Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4 (unpublished) ("[O]ur inquiry [ ] must focus not on whether the victim's injuries were more or less serious than the injuries suffered in [another case], but instead on whether the record contains substantial evidence that [the victim] suffered an 'injury that create[d] or cause[d] permanent or protracted loss or impairment of the function of any bodily member or organ.' ").

Moreover, *Williams I* was decided upon jury instructions different from the case at bar. *Williams I* at 503, 563 S.E.2d at 620 (jury instructed on serious bodily injury as "an injury that creates or causes a permanent or protracted condition that causes extreme pain"). Though the victim's injury in *Williams I* was arguably more serious than Ms. Leachman's injury in the instant case, this Court addressed neither impairment of the function of any of the victim's body parts nor whether any such impairment was sufficiently "protracted." *Williams I* is thus inapposite for comparison to the evidence now before us.

The jury instruction in *Jamison* was substantially similar to that of the instant case. *Jamison* at 235, 758 S.E.2d at 669. While their effects lasted longer, many of the victim's injuries and resulting complications are similar to those of Ms. Leachman. *Id.* at 235-36, 758 S.E.2d at 670 (holding, among other evidence, testimony of injuries such as "broken bones in her face . . . and an eye so beat up and swollen that she [ ] could not see properly out of it" sufficient for a finding of serious bodily injury).

The dissent has pointed to no cases in which an injury comparable to that of Ms. Leachman was held insufficient to support a finding of protracted impairment to the function of a bodily member or organ. The dissent correctly notes that the focus of our inquiry is whether the injury

to Ms. Leachman's eye was temporally "protracted." The dissent then endeavors to distinguish *Smalls* based upon the greater degree of medical treatment required to heal the victim's injury. Distinguishing *Smalls* on this ground is irrelevant to the issue now before us. In *Smalls*, evidence of an impairment lasting four weeks was held sufficient to submit the charge of assault inflicting serious bodily injury to the jury. 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4-5. We can find no meaningful distinction between an impairment lasting two weeks and one lasting four weeks that would compel us to remove from the jury an issue which is "generally for the jury to decide under appropriate instructions." *Williams I* at 502, 563 S.E.2d at 619 (citation omitted).

We do not hold that the injury to Ms. Leachman's eye was a serious bodily injury as a matter of law. Viewing the evidence offered at trial in a light most favorable to the State, there was substantial evidence sufficient for a reasonable juror to find that defendant's assault of Ms. Leachman caused her to suffer an injury resulting in a protracted loss or impairment of the function of a bodily member or organ. Considering Ms. Leachman's testimony on the nature and duration of her left eye injury and her resulting loss of vision, which included complete blindness in her left eye for a week and diminished vision for two weeks, a reasonable juror could have found that defendant's assault inflicted an injury upon Ms. Leachman that resulted in a protracted impairment of the function of her left eye. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury.

C. Jury Instruction for Lesser Included Offenses

[3] In his final assignment of error, defendant maintains that he should be resentenced for the class A1 misdemeanor of assault inflicting serious injury. At the close of evidence, the trial court inquired into "whether assault inflicting serious injury . . . is a lesser[-]included offense of assault inflicting serious bodily injury." Both the State and counsel for defendant agreed that simple assault was the only lesser-included offense of assault inflicting serious bodily injury. The jury was subsequently instructed on the offense of felonious assault inflicting serious bodily injury, as well as the offense of simple assault.

Defendant never objected to the instructions, nor did he request that an instruction on the offense of assault inflicting serious injury be submitted to the jury. Absent such preservation of the issue, we are not required to review this assignment of error. *See* N.C.R. App. P. 10(a)(2) (2019) ("A party may not make any portion of the jury charge or

omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection . . . ."). In criminal cases, this Court may review unpreserved issues on appeal under a plain error standard. N.C.R. App. P. 10(a)(4). Nevertheless, we have also held that a criminal defendant's failure to argue plain error on appeal waives appellate review. *See State v. Call*, 349 N.C. 382, 416, 508 S.E.2d 496, 517 (1998). Nowhere in defendant's brief is there any mention of plain error review. We therefore dismiss this assignment of error.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judge DIETZ concurs.

Judge ZACHARY concurs in part and dissents in part, with separate opinion.

ZACHARY, Judge, concurring in part, dissenting in part.

I concur with the majority's analysis in parts II(A) and II(C), regarding the sufficiency of the indictment and the trial court's failure to instruct the jury on the lesser-included offense. However, I depart from my colleagues with respect to part II(B), regarding the denial of Defendant's motion to dismiss the charge of assault inflicting serious bodily injury.

In its instructions to the jury, the trial court narrowly defined a "serious bodily injury" as one that "creates or causes a permanent or protracted loss/impairment of the function of any bodily member or organ." As the majority correctly notes, it is undisputed that none of the victim's injuries were permanent in nature; thus, the remaining question is whether her injuries resulted in a protracted loss or impairment of the function of any bodily member or organ. Because I do not agree that the victim's injuries, from which she fully recovered in two weeks, constitute a "serious bodily injury" under the "protracted loss or impairment" theory of culpability, I respectfully dissent.[1]

1. To clarify, my analysis is confined to this limited definition of "serious bodily injury." My analysis does not apply to cases in which the jury is instructed on alternative or multiple definitions of "serious bodily injury."

I.

Neither this Court nor our Supreme Court has conclusively determined when an injury is to be considered "protracted." It is evident, however, that where the jury instructions narrowly define a "serious bodily injury" as one that "creates or causes a permanent or protracted loss/impairment of the function of any bodily member or organ," the typical inquiry in accordance with the entire statutory definition is not appropriate. *See* N.C. Gen. Stat. § 14-32.4(a) (2017) (" 'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization."). In evaluating the serious bodily injury in such cases, we must disregard the circumstances underlying the assault, the types of injuries sustained, and the intent of the attacker. Instead, an inquiry into the existence of a "protracted" injury is more objectively grounded in the temporal persistence of the injury. Put differently, the nature of the offense hinges on the length of the victim's period of recovery from the injury.

In its analysis, the majority first consults a dictionary to establish that an injury from which it takes two weeks to recover may constitute a protracted loss or impairment of the function of any bodily member or organ, determining that the word "protract[ed]" means "prolong[ed] in time or space: continue[d]." Majority Op. at 8 (citing *Protract*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/protract (last visited Oct. 15, 2019)). While ordinarily dictionaries are valuable tools for appellate courts, in this context, the definition of the word "protracted" is not useful; it is redundant and nebulous. Under this broad definition, any injury that impairs any bodily organ and "continue[s]" for any amount of time would meet the temporal threshold to qualify as a serious bodily injury. Thus, the definition of "protract" is unhelpful in determining when a victim's injury is one that creates or causes a protracted loss or impairment of the function of any bodily member or organ.

The majority maintains that "we have previously discouraged the practice of using the injuries in our precedent cases as measuring posts for determining whether or not the evidence before us is sufficient to support a finding of serious bodily injury." Majority Op. at 10 (citing *State v. Smalls*, 245 N.C. App. 132, 781 S.E.2d 718, 2016 WL 223812, at *4 (2016) (unpublished)). The *Smalls* Court stated that "our inquiry . . . must focus not on whether the victim's injuries were more or less serious than the

injuries suffered in [another case], but instead on whether the record contains substantial evidence that [the victim] suffered an 'injury that create[d] or cause[d] permanent or protracted loss or impairment of the function of any bodily member or organ.' " *Smalls*, 2016 WL 223812, at *4. I agree.

This does not, however, preclude our reference to published cases and other binding authorities for guidance in future decisions. Indeed, lacking a statutory definition on which to base our analysis, we *must* seek direction from cases in which a similar jury instruction was given, and review the injuries and recovery times of those victims. This adherence to precedent protects both the rights of the accused and the role of the judiciary. *See Hill v. Atl. & N.C. R.R. Co.*, 143 N.C. 539, 573, 55 S.E. 854, 866 (1906) ("The doctrine of *stare decisis*, commonly called the doctrine of precedents, has been firmly established in the law . . . . The precedent thus made should serve as a rule for future guidance in deciding analogous cases . . . .").

The majority also cites *Smalls* in support of its conclusion on this issue. *Smalls*, 2016 WL 223812, at *5. In *Smalls*, the victim suffered injuries that required him to have his jaw wired shut for four weeks as a result of the defendant's assault. *Id.* The jury instructions in *Smalls* were nearly identical to those in the case at bar, and the defendant was found guilty of assault inflicting serious bodily injury. *Id.* at *2, *5. On appeal, the defendant argued that "the State failed to present sufficient evidence that [the victim's] injury caused him to suffer any permanent or protracted loss or impairment of the function of any bodily member or organ." *Id.* at *3. This Court held that the trial court properly denied the defendant's motion to dismiss, and upheld his conviction. *Id.* at *4-5.

In determining that the evidence was sufficient to withstand the defendant's motion to dismiss, our Court considered the extended nature of the victim's loss, including the length of his recovery. The victim required emergency surgery, during which physicians repaired two breaks in the victim's jaw by "applying bars across [his] teeth and wiring the bars to the teeth and then wiring the upper teeth to the lower teeth and then making two separate incisions near [the] jaw fractures to expose the bone and attach two titanium plates with screws." *Id.* at *2 (internal quotation marks omitted). The victim was "unable to speak, eat, or open his mouth" during the four-week period while his jaw was wired shut, and he "lost 15 pounds, which was more than 10% of his body weight." *Id.* at *1-2. Moreover, the victim's doctor testified that the injury "could result in issues with malocclusion or jaw pain *later in life*." *Id.* at *2 (emphasis added) (internal quotation marks omitted). It is therefore

clear that the *Smalls* victim's injuries resulted in a continued impairment of multiple bodily organs, and required a much lengthier recovery than did those of the victim in the present case.

As compared to other published cases involving similar jury instructions, here, the victim's period of loss and recovery was notably shorter. The assault that the victim endured left her blind in her left eye for one week, and she suffered diminished vision for an additional week thereafter. Swelling from her eye injury subsided five days after the incident. In contrast, the victims in similar cases in which the injuries were determined to be protracted had much longer recoveries. *See*, *e.g.*, *State v. Williams*, 201 N.C. App. 161, 169-70, 689 S.E.2d 412, 416 (2009) [*Williams II*] (beating left the victim unable to have sex for seven months); *State v. Williams*, 150 N.C. App. 497, 503, 563 S.E.2d 616, 620 (2002) [*Williams I*] (observing that the assault resulted in the victim's broken jaw that was wired shut for two months, and recurring back spasms that persisted up to trial and required multiple return visits to the hospital after the initial beating).

Furthermore, unlike other cases, here, the State offered no medical testimony regarding any "protracted loss or impairment of the function of any bodily member or organ" suffered by the victim as a result of the injuries she sustained in the assault. Medical testimony involving the extent and persistence of a victim's injuries is often noted by this Court in reviewing these cases. *See*, *e.g.*, *State v. Williams*, 255 N.C. App. 168, 180, 804 S.E.2d 570, 578 (2017) *[Williams III*]; *Williams I*, 150 N.C. App. at 503, 563 S.E.2d at 620; *Smalls*, 2016 WL 223812 at *2.

The majority also observes that at trial, the victim testified that her orbital socket was still fractured. However, her statement, "I actually have an orbital fracture," does not clearly indicate that her eye *impairment* had lingered to the time of trial. She did not testify that her vision was impaired after the two-week period of recovery, nor did the State question her regarding the lasting impairment.

There is no meaningful allusion to any injuries lingering beyond the two-week period that it took for the victim's eye to heal. *See State v. Jamison*, 234 N.C. App. 231, 235-36, 758 S.E.2d 666, 670 (2014) (concluding that the victim's "*ongoing trouble* with her hand and eye" at the time of trial, one year later, was dispositive (emphasis added)). Most of the victim's testimony was related to the attack itself, or her two-week recovery period. Thus, the facts of this case, as they relate to the jury instructions on "serious bodily injury," warranted dismissal of the charge of assault inflicting serious bodily injury because the

evidence was insufficient to establish that the victim suffered an injury that caused a "protracted loss or impairment of the function of any bodily member or organ."

II.

I reach my conclusion in spite of the brutal beating that the victim endured. While her injuries may constitute a serious bodily injury under the full statutory definition, given the temporally grounded instructions submitted to the jury in this case on the charge of assault inflicting serious bodily injury, the trial court erred in denying Defendant's motion to dismiss.

I do not purport to establish the minimum length of recovery time necessary to demonstrate a protracted loss or impairment of the function of any bodily member or organ, but in light of the unique facts and circumstances of this case, I conclude that the victim's two-week recovery is insufficient. Accordingly, I respectfully dissent from this portion of the majority's opinion.

STATE OF NORTH CAROLINA
v.
TIQUAN K. SUMMERS, DEFENDANT

No. COA19-162

Filed 5 November 2019

Probation and Parole—probation revocation—deferred prosecution agreement—appeal—jurisdiction

The trial court lacked jurisdiction over, and therefore properly dismissed, defendant's appeal from the district court's order revoking his probation where the probation was pursuant to a deferred prosecution agreement. The probation revocation here did not activate a sentence or impose special probation (N.C.G.S. § 15A-1347(a))—rather, it allowed the State to prosecute defendant for the charged crime of embezzlement—so defendant had no appeal of right until after being adjudged guilty of the charged crime.

Appeal by Defendant from order entered 6 August 2018 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

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

DILLON, Judge.

Defendant Tiquan K. Summers appeals from an order dismissing his case from Mecklenburg County Superior Court on the basis of lack of jurisdiction.

I. Background

On 21 November 2016, officers arrested Defendant for embezzlement of $1,284.00 from his employer.

In April 2017, Defendant and the prosecutor entered into a deferred prosecution agreement in district court whereby Defendant signed a document stipulating to the facts as presented by the prosecutor. Pursuant to that agreement, the district court judge placed Defendant on probation for a period of 24 months.

Eight months later, in December 2017, Defendant's probation officer filed a report alleging that Defendant had violated the conditions of his probation. On 27 April 2018, following a hearing on the matter, the district court entered an order revoking Defendant's probation, the effect of which allowed the State to pursue prosecution. However, though the State had not yet restarted its prosecution of Defendant, he immediately filed a notice of appeal to superior court from that order.

After a hearing on the matter, the superior court dismissed the appeal, ruling that the superior court did not have jurisdiction. Defendant seeks review with our Court.[1] After careful review, we affirm.

II. Analysis

Where a defendant has been charged with a low level felony or a misdemeanor, the defendant and prosecutor can agree that prosecution be deferred and the defendant be placed on probation. *See* N.C. Gen.

1. It is the State's position that Defendant's appeal is from an interlocutory order. Indeed, there is no final judgment entered against Defendant, as he has yet to be prosecuted. We note that Defendant has filed a petition seeking a writ of *certiorari*. To the extent Defendant does not have an appeal of right, we grant *certiorari* to reach the merits of Defendant's arguments.

Stat. § 15A-1341(a1) (2017). Typically, under a deferred prosecution, the defendant signs an agreement admitting to the facts of the crime alleged; however, he is not actually entering a plea of guilty. *See State v. Ross*, 173 N.C. App. 569, 573, 620 S.E.2d 33, 37 (2005). If the defendant fails to comply with the terms of the agreement, the prosecutor is free to reinstate charges. *See State v. Courtney*, ___ N.C. ___, ___, 831 S.E.2d 260, 270 (2019) ("A prosecutor may reinstate charges . . . if a defendant fails to comply with the terms of a deferred prosecution agreement."). Where the charges are so reinstated, the defendant is free, though, to plead "not guilty," notwithstanding that he has previously admitted to the facts of the crime. *Ross*, *supra*. But where a defendant chooses to plead "not guilty," the State may be able to use the defendant's admissions in the agreement as evidence in the trial. N.C. Gen. Stat. § 8C-1, Rule 801(d) (2017) (out-of-court statement of a party opponent is generally admissible).

Here, the district court revoked Defendant's probation, determining that Defendant had violated the terms of the deferred prosecution agreement. Unlike most probation revocations, this revocation did not result in the activation of any sentence, as Defendant had not yet even been prosecuted. Notwithstanding, Defendant appealed the district court's order to superior court.

We conclude that the General Assembly has not provided an appeal of right where probation has been revoked in a deferred prosecution context. Specifically, the General Assembly has provided that "when a district court judge, as a result of a finding of a violation of probation, *activates a sentence or imposes special probation*, the defendant may appeal to the superior court for a *de novo* hearing." N.C. Gen. Stat. §15A-1347(a) (2018). But in the deferred prosecution context, no sentence is activated nor any special probation conditions imposed when probation is revoked. Rather, the effect of a revocation in this context is merely that the State is now free to prosecute: there is not yet any final judgment. *See State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004) ("Defendant's sentence was neither activated nor was it modified to 'special probation' . . . Defendant therefore *has no right to appeal*."). A defendant has no right to appeal the revocation until after he is adjudged guilty. Therefore, we conclude that the superior court did not err in dismissing Defendant's appeal to that court from the district court's order revoking probation.

We note, though, that the superior court does have the authority to issue writs of *certiorari* under Rule 19 of the General Rules of Practice for the Superior and District Courts, and that our Court has held that the

superior court's authority to issue such writs is "analogous to the Court of Appeals' power to issue a writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c)." *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 833 (1993). It may be that had Defendant petitioned the superior court for *certiorari*, that court in its discretion would have granted the petition and reviewed whether the district court acted properly in revoking his probation, in the interest of judicial economy. But there is nothing in the record indicating that Defendant ever petitioned the superior court for a writ of *certiorari*.

III. Conclusion

No sentence was activated nor was special probation invoked; thus, Defendant has no right of appeal to superior court. We, therefore, affirm the superior court's ruling dismissing Defendant's appeal to that court from the district court's order revoking probation.

AFFIRMED.

Judges STROUD and YOUNG concur.

STATE OF NORTH CAROLINA
v.
DALLAS JAY WORLEY

No. COA18-1162

Filed 5 November 2019

1. Appeal and Error—satellite-based monitoring order—failure to file notice of appeal—no manifest injustice

Defendant was not entitled to review of an order imposing lifetime satellite-based monitoring (SBM) where he failed to file a notice of appeal from the order and did not preserve for review a constitutional argument—that imposition of SBM subjected him to an unreasonable Fourth Amendment search—by raising the issue in the trial court. Where defendant failed to demonstrate manifest injustice, the Court of Appeals declined to issue a writ of certiorari or to invoke Appellate Rule 2.

2. Evidence—expert witness—credibility vouching—sex offense with child—plain error analysis

In a prosecution for statutory sexual offense, the admission of testimony from two expert witnesses did not amount to plain error where certain statements—including that the child victim "disclose[d]" her allegations and that she related her story consistently and "gave excellent detail"—did not constitute impermissible vouching of the victim's credibility. A statement that children generally do not make up stories about sexual abuse was permissible because it reflected characteristics of abused children learned through professional experience. Finally, although one expert's subjective belief of the victim's truthfulness—expressed through the statements that she believed the victim and that the victim needed extra support "because of the sexual abuse that she experienced"—did constitute improper vouching, a different verdict was not probable in light of medical evidence and the victim's extensive testimony.

Appeal by defendant from judgment entered 23 March 2018 by Judge Karen Eady-Williams in Cleveland County Superior Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Damie Adegbuyi Sesay, for the State.

Mark Montgomery for defendant-appellant.

ZACHARY, Judge.

Defendant Dallas Jay Worley appeals from a judgment entered upon a jury's verdicts finding him guilty of two counts of statutory sex offense with a child by an adult, and one count of first-degree kidnapping. Defendant argues the trial court (1) erred by ordering him to submit to lifetime satellite-based monitoring upon his release from prison; and (2) committed plain error by permitting two expert witnesses to vouch for the child's credibility. Upon review, we hold that Defendant received a fair trial, free from prejudicial error.

Background

The evidence presented at trial established that Defendant repeatedly sexually assaulted his seven-year-old niece, "Jane."[1] On multiple occasions, Defendant subjected Jane to anal penetration and oral sex. Although Defendant threatened to kill her if she ever revealed what he

1. We employ a pseudonym to protect the identity of the minor child.

was doing, Jane eventually informed her mother; she was then taken to the emergency room for examination. On 14 March 2016, Defendant was indicted for two counts of statutory sex offense with a child by an adult, and one count of first-degree kidnapping.

Defendant's case came on for trial before the Honorable Karen Eady-Williams on 19 March 2018 in Cleveland County Superior Court. The State tendered two witnesses as medical experts: Dr. Daniel Troha and Dr. Nancy Hendrix. Dr. Troha examined Jane and testified that he observed that "there was a lot of redness around the labia and in the area surrounding that and the anus," but he could not specifically identify the cause of the redness. Dr. Hendrix, who examined Jane after she had been discharged from the hospital, found that (1) there was "a little bit of redness" around her vaginal area and anus, (2) there was swelling around her anus, and (3) "the actual anus [was] opened a little bit, about 3 millimeters."

On 23 March 2018, the jury returned verdicts finding Defendant guilty of all charges. The trial court sentenced Defendant to an active term of 300 to 420 months in the custody of the North Carolina Division of Adult Correction, and ordered that he submit to satellite-based monitoring for the remainder of his life upon his release from prison. Defendant gave oral notice of appeal in open court.

Discussion

I. Satellite-Based Monitoring Order

[1] Defendant first argues that the trial court erred by ordering him to submit to lifetime satellite-based monitoring upon his release from prison, absent evidence that lifetime satellite-based monitoring was a reasonable Fourth Amendment search. Procedurally, however, Defendant's failure to comply with our Appellate Rules renders this Court unable to review this claim.

First, Defendant neglected to file written notice of appeal from the satellite-based monitoring order. A satellite-based monitoring proceeding is a civil action. *State v. Dye*, ___ N.C. App. ___, ___, 802 S.E.2d 737, 741 (2017). "Any party . . . in a civil action . . . may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties." N.C.R. App. P. 3(a). Accordingly, failure to comply with Rule 3 leaves this Court without jurisdiction to hear the satellite-based monitoring order. *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *appeal dismissed and cert. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990).

In addition, Defendant did not argue before the trial court that satellite-based monitoring constituted an unreasonable Fourth Amendment search. *See* N.C.R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make."). "[C]onstitutional arguments not brought forth at the lower court level will be dismissed on appeal pursuant to Rule 10(a)(1)." *In re Davis*, ___ N.C. App. ___, ___, 808 S.E.2d 369, 374 (2017).

Having failed to follow these Rules, on 21 January 2019, Defendant filed a petition for writ of certiorari requesting that this Court reach the merits of his constitutional challenge to the satellite-based monitoring order. Defendant "essentially asks this Court to take *two* extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear his appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *State v. DeJesus*, ___ N.C. App. ___, ___, 827 S.E.2d 744, 753 (quotation marks omitted), *disc. review denied*, ___ N.C. ___, 830 S.E.2d 837 (2019).[2]

We decline to take these extraordinary steps. Defendant fails to identify any evidence of manifest injustice warranting the invocation of Rule 2. Therefore, in our discretion, we deny Defendant's petition and dismiss his appeal of the satellite-based monitoring order.

II. Expert Vouching

[2] Defendant argues that "the trial court committed plain error in allowing two of the State's experts to vouch for" Jane's credibility. Specifically, Defendant takes issue with the testimony of Dr. Nancy Hendrix and Ms. Michelle Sullivan. We address each of Defendant's arguments in turn.

A. Standard of Review

In criminal cases, unpreserved issues "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). Because Defendant failed to object to either of the experts' testimony vouching for Jane's credibility, Defendant is only entitled to plain error review, and may prevail only by showing "that a fundamental error

2. "To prevent manifest injustice to a party . . . either court of the appellate division may . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative[.]" N.C.R. App. P. 2.

occurred at trial." *State v. Oliphant*, 228 N.C. App. 692, 696, 747 S.E.2d 117, 121 (2013), *disc. review denied*, 367 N.C. 289, 753 S.E.2d 677 (2014). "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.* (emphasis added) (quotation marks omitted); *see State v. Lawrence*, 365 N.C. 506, 507, 723 S.E.2d 326, 327 (2012) ("[T]he rule provides that a criminal defendant is entitled to a new trial if the defendant demonstrates that the jury probably would have returned a different verdict had the error not occurred."). Moreover, "the plain error rule may not be applied on a cumulative basis, but rather a defendant must show that each individual error rises to the level of plain error." *State v. Dean*, 196 N.C. App. 180, 194, 674 S.E.2d 453, 463, *disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009).

B. Impermissible Vouching

It is well settled that an expert witness's "opinion that . . . children were sexually abused [is] clearly admissible," but an "opinion that . . . children were sexually abused by [a] defendant [is] not admissible." *State v. Figured*, 116 N.C. App. 1, 9, 446 S.E.2d 838, 843 (1994), *disc. review denied*, 339 N.C. 617, 454 S.E.2d 261 (1995). Our courts do not permit an expert witness to vouch for the credibility of the victim of the alleged crime in a child sexual abuse case, *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988), in that an expert is in "no better position than the jury to assess credibility." *In re T.R.B.*, 157 N.C. App. 609, 617, 582 S.E.2d 279, 285 (2003), *appeal dismissed and disc. review improvidently allowed*, 358 N.C. 370-71, 595 S.E.2d 146 (2004). Consequently, our Supreme Court has found reversible error where an expert testified "that the 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.

In cases involving the alleged sexual abuse of a child,

> the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility. However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (citations omitted).

C. Dr. Hendrix's Expert Testimony

Dr. Hendrix had practiced as a pediatrician for 24 years, and the State tendered her as an expert in the fields of pediatric medicine and child sexual abuse. When asked during direct examination whether "children tend to make up stories about sexual abuse," Dr. Hendrix answered in the negative. Dr. Hendrix then explained that Jane "gave excellent detail" regarding Defendant's illicit actions, and noted on cross-examination that "her story was very consistent." Although Defendant failed to object during these portions of Dr. Hendrix's testimony at trial, he now asserts that these statements constituted impermissible vouching, and that the trial court's admission of this testimony rose to the level of plain error. Defendant has failed to show any plain error.

Our Supreme Court has explained that "an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children." *Id.* at 267, 559 S.E.2d at 789. Likewise, an expert may testify to "whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* Although an expert may not speak to whether sexual abuse has occurred "in the absence of physical evidence," an expert may testify that the child exhibits characteristics consistent with those exhibited by abused children. *State v. Grover*, 142 N.C. App. 411, 419, 543 S.E.2d 179, 184, *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). The unique nature of these offenses "make[s] [experts] better qualified than the jury to form an opinion as to the characteristics of abused children." *Id.*

Dr. Hendrix's expert opinion that "children do not tend to make up stories about sexual abuse" was therefore admissible under our case law. This general statement of opinion did not vouch for Jane's credibility, but instead merely described the profile of a sexually abused child. *See Stancil*, 355 N.C. at 267, 559 S.E.2d at 789; *State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987) (finding no error where the expert-opinion testimony was based on knowledge unrelated to the victim's credibility).

Moreover, we find no error with Dr. Hendrix's testimony regarding the "consistent" nature and "excellent detail" of Jane's reports. While it would be improper for an expert witness, based on an interview with the child, to opine that the child had been sexually abused, *Grover*, 142 N.C. App. at 414, 543 S.E.2d at 181, statements regarding *the child's consistency in recounting the alleged abuse* are nevertheless admissible. *See, e.g.*, *State v. Stancil*, 146 N.C. App. 234, 241, 552 S.E.2d 212, 215-16 (2001) (finding no error where the expert testified that the child

was consistent in relating facts during each interview), *aff'd*, 355 N.C. 266, 559 S.E.2d 788 (2002).

In the instant case, Dr. Hendrix testified that her office has worked with 25 to 30 children per year since 1998, and that she personally works with approximately seven or eight of those children each year. Dr. Hendrix's experience in treating sexually abused children supports her statements that Jane provided "consistent" accounts and "excellent detail" in their conversations.

D. Use of the Word "Disclose"

Defendant also asserts that it was error for Dr. Hendrix and Ms. Sullivan to use the word "disclose" when describing what Jane told each of them in private. In support of this argument, Defendant cites *State v. Jamison*, ___ N.C. App. ___, 821 S.E.2d 665, 2018 WL6318321 (2018) (unpublished), *disc. review denied*, ___ N.C. ___, 826 S.E.2d 701 (2019).

In *Jamison*, the defendant argued that the repeated use of the words "disclose" and "disclosure" by the prosecutor and State's expert at trial enhanced the victim's credibility, and amounted to impermissible vouching. *Jamison*, 2018 WL6318321 at *4. This Court addressed the meaning of the word "disclosure" by consulting and citing a preeminent legal dictionary, as is standard practice. *Id.* (concluding that the word "disclosure" is defined as "[t]he act or process of making known something that was previously unknown; a revelation of facts" (quoting *Disclosure*, *Black's Law Dictionary* (9th ed. 2009))).[3] The Court in *Jamison* determined that the frequent use of the terms "disclose" and "disclosure" suggested that "there was something factual to divulge, and [was] itself a comment on the declarant's credibility and the consequent reliability of what [was] being revealed." *Id.*

However, a panel of this Court recently published an opinion addressing a nearly identical argument to the one considered in our Court's decision in *Jamison*, and reiterated in the instant case by Defendant. *State v. Betts*, No. COA18-963, ___ N.C. App. ___, ___ S.E.2d ___ (filed Sept. 3, 2019). There, the defendant asserted that it was plain error to admit testimony from the State's experts where the term "disclose" was repeatedly used to summarize the minor victim's statements. *Id.* slip op. at 10. Citing *Jamison*, the defendant in *Betts* argued that the use of the word

3. This definition of "disclosure" is also "consistent with the meanings contained in other standard dictionaries of the English language." *State v. Betts*, No. COA18-963, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (filed Sept. 3, 2019) (Tyson, J., concurring in part and dissenting in part) (citing multiple prominent, non-legal dictionaries).

"disclose" amounted to vouching for the minor victim's credibility. *Id.* slip op. at 11.

The *Betts* panel "decline[d] to follow [the *Jamison*] panel's reasoning." *Id.* slip op. at 13. Instead, it held that "[t]here is nothing about [the] use of the term 'disclose', [sic] standing alone, that conveys believability or credibility." *Id.* Thus, repeated use of the word "disclose" or its variants does not constitute impermissible vouching for a declarant's credibility.

In light of *Betts*, we must conclude that the repeated use of the word "disclose" or its variants at trial of this matter was not plain error. Defendant's argument is overruled.

Assuming, *arguendo*, that the admission of portions of Dr. Hendrix's and Ms. Sullivan's testimony without objection was error, and in light of the physical and other substantial testimony admitted, and for the reasons stated below, any asserted error does not rise to the level of plain error warranting a new trial. *See State v. Sprouse*, 217 N.C. App. 230, 242, 719 S.E.2d 234, 243 (2011) (holding that there was no prejudice where "absent the [impermissible vouching] testimony, the . . . case involved more evidence of guilt against the defendant than simply the testimony of the child victim and the corroborating witnesses"), *disc. review denied*, 365 N.C. 552, 722 S.E.2d 787 (2012).

E. Ms. Sullivan's Expert Testimony

Defendant further contends that the trial court erred in the admission of Ms. Sullivan's testimony concerning statements that "assured the jury that [Jane's] claim of abuse was true." We agree.

"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[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017). An expert witness is permitted to testify as to matters within the area of her expertise. *Mills v. New River Wood Corp.*, 77 N.C. App. 576, 578, 335 S.E.2d 759, 761 (1985). It follows, then, that an expert may not offer an opinion regarding issues that are beyond the scope of the witness's field of expertise. *See, e.g.*, *State v. O'Hanlan*, 153 N.C. App. 546, 557-58, 570 S.E.2d 751, 759 (2002), *cert. denied*, 358 N.C. 158, 593 S.E.2d 397 (2004) (concluding that a medical expert should not have been allowed to testify as to definitions of terms such as "rape" and "kidnap").

The State tendered Ms. Sullivan as an expert in marriage and family counseling. She testified that she received a Master's degree in marriage

and family therapy, and that she primarily treats children. Nevertheless, Defendant challenges Ms. Sullivan's general statements regarding "trauma[-]focused" therapy as impermissible vouching for Jane's credibility. We disagree.

In accordance with her area of expertise, it was permissible for Ms. Sullivan to testify that trauma-focused therapy would be recommended "because of a specific event that happened to the child." Likewise, Ms. Sullivan could properly comment as to how children like Jane are generally encouraged during a therapy session "to tell the whole story of what happened" to them.

Defendant also mistakenly asserts that Ms. Sullivan impermissibly vouched for Jane's credibility by testifying:

> In a therapeutic setting I'm not trying to investigate. I'm not—I'm there to sit with them with the feelings. We really *work on how this certain incident that happened* is going to impact her feelings and her thoughts in the long run. Not—I'm not trying to write a police report.

(Emphasis added).

Our review of the record indicates that the phrase "this certain incident that happened" was not improper in context. This testimony was prompted by the State's question: "Do you ask specific questions about sexual acts?" The crux of the question related to Ms. Sullivan's general practice and procedures when interviewing children. Neither the question nor Ms. Sullivan's answer directly concerned Jane or the substance of her interview.

However, Ms. Sullivan also opined that Jane "really needs that extra support for trauma-focused [therapy] because of the sexual abuse that she experienced." This statement is demonstrably different from the aforementioned general descriptions of trauma-focused therapy. Unlike those statements, here, Ms. Sullivan's testimony improperly conveyed to the jury her opinion of Jane's veracity. Put differently, Ms. Sullivan's *subjective* beliefs concerning Jane's veracity were conveyed to the jury. *See State v. Horton*, 200 N.C. App. 74, 78, 682 S.E.2d 754, 757-58 (2009) (holding that it was inadmissible for the expert to testify that "[i]n all of my training and experience, when children provide those types of specific details it enhances their credibility"). The same is true for Ms. Sullivan's testimony: "I believe [Jane]." Thus, Ms. Sullivan's direct commentary on Jane's credibility was erroneously admitted.

In sum, the trial court erroneously admitted: (1) Ms. Sullivan's statement that trauma-focused therapy would be appropriate "because of the sexual abuse [Jane] experienced"; and (2) Ms. Sullivan's statement "I believe [Jane]." This, however, does not end our analysis.

F. Plain Error

Notwithstanding the presumed error and impermissible testimony, Defendant's convictions will be sustained absent a showing that the trial court's admission of this testimony amounted to plain error, meaning "that the jury *probably* would have returned a different verdict had the error not occurred." *Lawrence*, 365 N.C. at 507, 723 S.E.2d at 327 (emphasis added). Defendant contends that the case "rested entirely on [Jane's] statements," and that her "credibility was suspect" because "she had a history of lying." In addition, Defendant asserts that "there was no diagnostic physical evidence of abuse." After careful review of the record, we conclude that it is not probable that the jury would have returned a different verdict had portions of Ms. Sullivan's testimony been excluded.

At the outset of the State's presentation of evidence, nine-year-old Jane testified at length to her experiences as the victim of Defendant's repeated assaults. Jane stated that Defendant made her drink alcohol, and she described how, on multiple occasions, Defendant "shoved his penis up [her] butt and it started bleeding and [she] started crying." Jane also testified in graphic detail about a particular incident when Defendant woke her up around midnight and assaulted her while her mother and brother slept in the next room. The jury listened to Jane describe the pain she suffered, as well as Defendant's threat to her: "If you tell anybody, I will kill you." In total, Jane testified on direct examination for an hour and a half, and was cross-examined for an hour and fifteen minutes. It is evident, therefore, that the jurors could reach their own conclusions regarding Jane's credibility based on her extensive testimony.

Moreover, Jane's testimony was not only corroborated by other witnesses, but also by medical evidence. *See Sprouse*, 217 N.C. App. at 242, 719 S.E.2d at 243. Dr. Troha, an emergency physician at the Cleveland Regional Medical Center in Shelby, North Carolina, testified concerning his examination of Jane after she first came forward with the accusation. In his interview with Jane, her description of Defendant's acts was consistent with her previous statements to others: namely, that he would "put his penis in [her] butt," which would subsequently cause her to bleed and experience pain when having bowel movements. After he interviewed Jane, Dr. Troha conducted an external examination which revealed that "there was a lot of redness around the labia and in the

area surrounding that and the anus." Dr. Troha testified that "a repetitive friction" would cause redness and irritation of the anus. This testimony was corroborated by Dr. Hendrix's physical examination of Jane 5 days after Dr. Troha met with her. Dr. Hendrix noted that either constipation or "penetrating trauma" could cause similar symptoms, but both doctors were able to rule out constipation based on Jane's medical history.

Dr. Christopher Cerjan also testified to his review of Jane's medical examinations. Dr. Cerjan meticulously explained that Jane had an "anal opening . . . approximately 3 millimeters," as well as the presence of swollen genitals. He further testified about the experience of "forced rectal penetration" and the resultant pain that a child would endure. Three other witnesses also corroborated Jane's testimony, using language similar—if not identical—to that used by Jane.

Although Defendant testified and denied any wrongdoing, given the substantial evidence against Defendant, we cannot conclude that the trial court's admission of Ms. Sullivan's impermissible vouching testimony—absent any objection from Defendant—had "a probable impact on the jury's finding that [Defendant] was guilty." *Oliphant*, 228 N.C. App. at 696, 747 S.E.2d at 120. In that reversal under a plain error review is only warranted in "exceptional case[s]," *id.* at 697, 747 S.E.2d at 121, we hold that the admission of the erroneous evidence here does not rise to the level of plain error warranting a new trial.

III.

Finally, Defendant argues in the alternative that his lawyer's failure to "adequately object to the vouching" constituted ineffective assistance of counsel.

To succeed on a claim of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense." *State v. Edgar*, 242 N.C. App. 624, 631, 777 S.E.2d 766, 770 (2015) (quotation marks omitted). However, here, we have already "determine[d] . . . that there is no reasonable probability that[,] in the absence of counsel's alleged errors[,] the result of the proceeding would have been different." *State v. Turner*, 237 N.C. App. 388, 396, 765 S.E.2d 77, 84 (2014) (citation and brackets omitted), *disc. review denied*, 368 N.C. 245, 768 S.E.2d 563 (2015). Accordingly, we need not address this claim.

Conclusion

Defendant failed to: (1) preserve his Fourth Amendment challenge, and (2) timely appeal the satellite-based monitoring order. We dismiss

that portion of Defendant's appeal, and deny the petition for writ of certiorari.

Although the trial court improperly admitted certain expert testimony to which Defendant did not object, and which presumably constituted impermissible vouching, the admission did not rise to the level of plain error in light of the other overwhelming evidence supporting Defendant's guilt. The jury was presented with ample evidence of Defendant's guilt notwithstanding the trial court's error. Accordingly, we also dismiss Defendant's ineffective assistance of counsel claim.

DISMISSED IN PART; NO PREJUDICIAL ERROR IN PART.

Judges BRYANT and TYSON concur.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDER OF THE SAMI II INC. BEAR STEARNS ARM TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-12, PLAINTIFF

v.

ESTATE OF JOHN G. WOOD, III A/K/A JOHN G. WOOD, JR., ANNETTE F. WOOD, EDWARD W. WOOD, AND MARY G. WOOD, DEFENDANTS

No. COA18-1259

Filed 5 November 2019

1. Appeal and Error—order on summary judgment—de novo review—other issues irrelevant

In an appeal from an order granting summary judgment in an action to quiet title, since the Court of Appeals reviewed the order de novo, issues raised by defendant challenging the trial court's findings of fact and conclusions of law were dismissed as irrelevant. Findings and conclusions are not required for the resolution of a motion for summary judgment and are disregarded on appeal.

2. Estates—action to quiet title—N.C.G.S. § 41-10—standing—real party in interest

Plaintiff bank was not required to show that it was the holder of a promissory note executed at the same time as a deed of trust in order to establish it had standing to bring an action to quiet title under N.C.G.S. § 41-10. Plaintiff's complaint, supported by documentation, sufficiently pled standing by alleging the bank was the real party in interest under the deed of trust.

3. Equity—action to quiet title—equitable subrogation—applicability—purchase transaction

In an action to quiet title in which plaintiff bank sought relief under the doctrine of equitable subrogation, the trial court did not err as a matter of law in applying the doctrine to the transaction at issue in this case, which involved a lender providing money to the purchaser of the property in order to extinguish debt owed by the seller of the property, since the doctrine's application is not limited to refinancing transactions but may also be applied to purchase transactions.

4. Laches—action to quiet title—delay of eight years—prejudice—genuine issue of material fact

In an action to quiet title, the trial court erred in granting summary judgment to plaintiff bank because there existed genuine issues of material fact as to whether plaintiff's delay of over eight years before bringing the action prejudiced defendant property owner to the extent that her defense of laches could bar plaintiff's suit.

Judge MURPHY dissenting.

Appeal by Defendant Mary Wood from orders entered 1 May 2018 and 6 June 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 9 May 2019.

Manning Fulton & Skinner P.A., by Robert S. Shields, Jr., for Plaintiff-Appellee.

Law Office of Susan M. Keelin, PLLC, by Susan M. Keelin, for Defendant-Appellant.

COLLINS, Judge.

Mary Wood ("Defendant") appeals from (1) an order granting U.S. Bank National Association, as Trustee for the Holder of the SAMI II Inc. Bear Stearns Arm Trust, Mortgage Pass-Through Certificates, Series 2005-12's ("Plaintiff") and denying Defendant's motions for summary judgment made pursuant to North Carolina Rule of Civil Procedure 56, and (2) an order granting in part and denying in part Defendant's motion for amended findings of fact and an amended order made pursuant to North Carolina Rule of Civil Procedure 52. Defendant contends that the trial court erred by granting Plaintiff summary judgment, and by making various findings of fact and conclusions of law that were unsupported by

the evidence and erroneous. We dismiss in part and reverse and remand in part.

I. Background

In April 2005, John Wood agreed to purchase real property in Wilmington from Barbara Buchanan for $878,000. In connection with the contemplated transaction, Alpha Mortgage Corporation ("Alpha") agreed to loan John Wood $650,000. According to the closing attorney, Alpha conditioned the loan upon (1) the loan being used to pay off an existing lien on the property allegedly held by one of Buchanan's creditors[1] and (2) the execution of a deed of trust on the property that would give Alpha a first-lien security interest therein. In his opinion on title, the closing attorney averred that he represented to Alpha that those conditions would be met, and that Alpha would have a first-lien security interest in the entire property.

Closing took place on 17 June 2005. On that date: (1) according to the closing attorney, Alpha made the $650,000 loan to John Wood, and the loan proceeds were applied to pay off the existing lien on the property; (2) John Wood executed a promissory note to Alpha for $650,000 (the "Note"); (3) Buchanan recorded a General Warranty Deed in the New Hanover County Register of Deeds that transferred ownership of the property to John Wood, Annette Wood, Edward Wood, and Defendant; and (4) John Wood and Annette Wood executed a Deed of Trust giving Alpha a security interest in the property, but Edward Wood and Defendant did not.

According to the closing attorney, the Deed of Trust should have been executed by all four subsequent owners of the property, but was executed only by John and Annette Wood due to an error on the attorney's part. As a result, Edward Wood and Defendant took their one-half combined interest in the property unencumbered by any security interest. In December 2008, the Note went into default, and Plaintiff instituted foreclosure proceedings on the property. The foreclosure proceedings were dismissed as inactive in July 2012.

John Wood died in December 2015, and Edward Wood quitclaimed his interest in the property to Defendant in 2016 following their divorce, leaving Annette Wood and Defendant each holding a one-half undivided interest in the property.

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1. No documentary evidence regarding any prior lien on the property is reflected in the record.

On 14 February 2017, Plaintiff filed a verified complaint in New Hanover County Superior Court seeking, *inter alia*, a declaratory judgment quieting title to the property pursuant to N.C. Gen. Stat. §§ 1-254 and 41-10. Plaintiff filed an amended complaint on 24 April 2017.

On 5 June 2017, Defendant filed an answer in which she generally and specifically denied the allegations of the amended complaint, raised a number of affirmative defenses (including the affirmative defense of laches), made a number of counterclaims, and moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). On 27 July 2017, Plaintiff replied to Defendant's motion to dismiss and moved to dismiss Defendant's counterclaims pursuant to Rule 12(b)(6). On 19 March 2018, Plaintiff moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56. Defendant then moved for summary judgment pursuant to Rule 56 on 13 April 2018, and on 16 April 2018 moved for sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 37.

On 1 May 2018, the trial court entered an order (1) granting Plaintiff summary judgment on its claim to quiet title to the property under a theory of equitable subrogation, (2) granting Defendant summary judgment as to Plaintiff's other claims, and (3) granting Plaintiff summary judgment as to Defendant's counterclaims. On 10 May 2018, the trial court entered an order which denied Defendant's motion for sanctions but compelled Plaintiff to provide all documents responsive to Defendant's request for production within 30 days.

On 14 May 2018, Defendant filed a motion for amended and additional findings of fact and for an amended order pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(b), essentially asking the trial court to reverse itself and grant summary judgment for Defendant on Plaintiff's claim to quiet title, and asking the court to amend its findings of fact and conclusions of law in the 1 May 2018 order.

On 6 June 2018, the trial court entered an order on Defendant's Rule 52 motion, noting that "[i]n the interest of clarity" it would make certain additional findings of fact and conclusions of law, but otherwise denied Defendant's motion, reiterating its ultimate conclusion that it discerned no genuine issues of material fact as to the various claims before it and that the litigants were accordingly entitled to summary judgment as set forth in the 1 May 2018 order.

Defendant timely appealed both the 1 May 2018 and 6 June 2018 orders.

II. Discussion

a. Appellate Jurisdiction

[1] As a threshold matter, Defendant's appeal of the 6 June 2018 order and all but one of Defendant's issues presented ask this Court to conduct irrelevant analysis.

Defendant's Rule 52 motion was a request for the trial court to amend its findings of fact and conclusions of law in its 1 May 2018 order granting and denying the parties' competing motions for summary judgment. Likewise, in its second, third, and fourth issues presented, Defendant posits as issues for our review the questions of whether the trial court made erroneous findings of fact and conclusions of law in its two orders. But since this Court reviews 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), we are to disregard all but the trial court's ultimate decision to grant or deny summary judgment for purposes of our review. *See Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 278, 536 S.E.2d 349, 354 (2000) ("A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal." (citation omitted)); *State v. Price*, 233 N.C. App. 386, 394, 757 S.E.2d 309, 315 (2014) ("Immaterial findings of fact are to be disregarded." (quotation marks and citation omitted)).

Thus, Defendant's appeal of the 6 June 2018 order and its second, third, and fourth issues presented all ask this Court to weigh irrelevant matters, and are accordingly dismissed. However, Defendant properly appealed whether Plaintiff was entitled to summary judgment on its claim to quiet title, which the trial court granted based upon the doctrine of equitable subrogation, and we will analyze that issue.

b. 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). "[T]he 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 Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985), and the evidence is viewed "in a light most favorable to the nonmoving party." *Hamby v. Profile Prods., LLC*, 197

N.C. App. 99, 105, 676 S.E.2d 594, 599 (2009) (quotation marks and citation omitted). We review an order granting or denying summary judgment *de novo*. *Variety Wholesalers*, 365 N.C. at 523, 723 S.E.2d at 747.

c. Standing

[2] To establish standing to bring an action to quiet title under N.C. Gen. Stat. § 41-10, a plaintiff must show that the "plaintiff [] own[s] the land in controversy, or ha[s] some estate or interest in it[,]" and that "the defendant [] assert[s] some claim to such land adverse to the plaintiff's title, estate or interest." *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952).

Defendant argues at length that Plaintiff's failure to provide a materially-complete copy of the Note[2] showing that Plaintiff is the holder of the Note dooms its claim to standing. But Defendant cites to no authority standing for the proposition that a plaintiff's failure to show that it was the holder of a promissory note executed along with a deed of trust in a real-estate transaction is fatal to the plaintiff's standing to sue to quiet title to the property allegedly covered by the deed of trust, particularly where the plaintiff establishes it is the real party in interest under the deed of trust.

Plaintiff attached the Deed of Trust executed by John and Annette Wood to its verified and amended complaints,[3] which shows Alpha's

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2. At the hearing on the parties' competing motions for summary judgment, Plaintiff provided the trial court with a document that Plaintiff represents is a "complete copy of the note[,]" which appears to reflect certain endorsements that are not reflected on the copy of the Note attached to the verified complaint.

We agree with Defendant that the copy of the Note attached to the verified complaint does not show any endorsement by Alpha to any other party, and is therefore insufficient standing alone to show that another party was the holder of the Note. We also grant Defendant's 27 March 2019 motion to strike the purported "complete copy of the note" because it is an unverified document that is not properly considered in ruling on a motion for summary judgment. N.C. Gen. Stat. § 1A-1, Rule 56(e) ("Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith"); *First Citizens Bank & Trust Co. v. Northwestern Ins. Co.*, 44 N.C. App. 414, 420, 261 S.E.2d 242, 246 (1980) (holding that the trial court erred by considering unsworn documents on a motion for summary judgment); *cf. Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc.*, 120 N.C. App. 866, 869, 463 S.E.2d 787, 789-90 (1995) (citing Rule 56(e) in noting that a document offered by a party for purposes of summary judgment "is admissible if properly authenticated" but holding that "[i]n this case [the document offered] was not properly authenticated and thus properly excluded by the trial court."), *rev'd on other grounds*, 344 N.C. 713 (1996).

3. The fact that the original verified complaint was superseded by the amended complaint does not render the attachments thereto unverified, and we treat the verified

security interest in the half of the property owned by John and Annette Wood that Plaintiff alleges should have covered the entire property. Plaintiff also alleged that (1) Alpha assigned the Deed of Trust to Plaintiff in 2012, citing to the entry in the New Hanover County Register of Deeds that reflects the assignment to Plaintiff of the Deed of Trust "together with the note(s) and obligation therein described[,]"[4] and (2) Defendant has claimed that it owns half of the property free and clear of Plaintiff's asserted lien.

We accordingly conclude that Plaintiff sufficiently pled standing to sue to quiet title to the property.

d. Equitable Subrogation

[3] Plaintiff argued at the hearing on the parties' competing motions for summary judgment that it seeks to quiet title to the property under a theory of equitable subrogation.

The doctrine of equitable subrogation is described as follows:

> [A]s a general rule one who furnishes money for the purpose of paying off an encumbrance on real or personal property, at the instance either of the owner of the property or of the holder of the encumbrance, either upon the express understanding or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, will be subrogated to the rights of the prior lienholder as against the holder of an intervening lien, of which the lender was excusably ignorant. . . . In order to invoke the equitable remedy of subrogation it is necessary both that the money should have been advanced for the purpose of discharging the prior encumbrance, and that it should actually have been so applied.

Peek v. Wachovia Bank & Trust Co., 242 N.C. 1, 15-16, 86 S.E.2d 745, 755-56 (1955) (internal quotation marks and citations omitted).

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complaint as an affidavit such that the documents attached thereto may be considered for purposes of ruling on a motion for summary judgment. *See Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

4. *See* Restatement (Third) of Property: Mortgages § 5.4(b) (1997) ("Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.").

The amended complaint alleges that (1) "[a]n express condition of the $650,000 loan made by the Plaintiff to the Defendants to enable them to purchase the property, [was that] the Defendants agreed that the Plaintiff would be granted a deed of trust for the entire property securing their loan[,]" (2) "[t]he proceeds from [Alpha]'s loan to John Wood and Annette Wood were to be used for the purchase of the Property" as described in Plaintiff's Exhibit D, and (3) "[t]he proceeds . . . were used to pay off and release a first mortgage on the property to First Horizons in the amount [of] $515,732.80." Plaintiff's Exhibit D, a U.S. Department of Housing and Urban Development Settlement Statement executed by John Wood and Barbara Buchanan, reflects that $515,732.80 was applied at closing for "[p]ayoff of first mortgage loan[:] First Horizons[,]" which is corroborated by the closing attorney's affidavit that he used the funds to pay off the purported prior mortgage. Defendant denied all of these allegations in her answer.

The trial court ruled that Plaintiff established that there exist no genuine issues of material fact and that Plaintiff is entitled to quiet title to the property via the doctrine of equitable subrogation as a matter of law. In her brief on appeal, Defendant argues that the doctrine of equitable subrogation is unavailable to Plaintiff because Alpha, Plaintiff's predecessor-in-interest, did not furnish money to extinguish any debt owed by John Wood, the borrower, but rather to extinguish the debt owed by Buchanan, the owner of the real property Alpha's money was used to purchase. In essence, Defendant argues that equitable subrogation cannot apply unless the lender is providing money to a borrower to extinguish a prior debt owed by that borrower, e.g., in a refinancing transaction.

Neither of the parties cite to any controlling authority expressly holding that equitable subrogation is or is not available to a lender who has furnished money to the purchaser of real property on the condition that (1) the money be used to extinguish debt owed by the seller of the property so that (2) the lender gains a first-position lien over the property, and we are aware of no such authority. We are persuaded, however, that equitable subrogation can apply in such a context.

Equitable subrogation is a creature of equity whose "basis is the doing of complete, essential, and perfect justice between all the parties *without regard to form*, and its object is the prevention of injustice." *Journal Publ'g Co. v. Barber*, 165 N.C. 478, 487-88, 81 S.E. 694, 698 (1914) (emphasis added). While distinguishable in that it concerned a refinancing transaction, our decision in *Bank of N.Y. Mellon* instructs that where a lender furnishes money on the condition that it be used to give the lender a first-position lien over a parcel of real property but

an attorney's error causes the defendant to receive title to a fraction of the parcel unencumbered by the lender's lien, the defendant may be subjected to the anticipated lien via equitable subrogation. *Bank of N.Y. Mellon v. Withers*, 240 N.C. App. 300, 303, 771 S.E.2d 762, 765 (2015). And while not controlling, we agree with many of our sister states, as well as with federal courts applying North Carolina law, that have held that equitable subrogation is not limited to the context of refinancings and can apply in the context of purchase transactions such as the transaction here at issue. *See*, *e.g.*, *Gibson v. Neu*, 867 N.E.2d 188, 200 (Ind. Ct. App. 2007) ("we must disagree that equitable subrogation applies only in refinance situations"); *Sourcecorp*, *Inc. v. Norcutt*, 258 P.3d 281, 288 (Ariz. Ct. App. 2011) ("equitable subrogation should not be precluded on the basis that the party seeking subrogation is a purchaser of property who has paid the existing encumbrance in connection with the purchase"); *In re Project Homestead*, *Inc.*, 374 B.R. 193, 208 (Bankr. M.D.N.C. 2007) ("The Trustee also argues that equitable subrogation is not available in these proceedings because the borrowed funds were not used to pay an obligation of the borrowers (i.e., the Purchasers), but instead were used to pay obligations of the Debtor. Neither *Peek* nor the other North Carolina decisions involving equitable subrogation support such a limitation. . . . Although not strictly a refinancing, this is precisely the type of situation that, under the broad equitable principles recognized in the North Carolina cases, the remedy of equitable subrogation may be invoked by the new lender in order to claim the rights formerly held by the old lender under the old lender's deed of trust.").

We therefore hold that the doctrine of equitable subrogation can apply in the context of a purchase transaction, and conclude that the trial court did not commit an error of law by denying Defendant summary judgment. Our holding should not be construed as a ruling that Plaintiff has established that it is entitled to be equitably subrogated in this case. As explained below, we conclude that summary judgment was improperly granted by the trial court. At trial, Plaintiff must convince the factfinder that it falls within the ambit of *Peek* and other decisions setting forth what a plaintiff must prove in order to avail itself of the doctrine of equitable subrogation.

e. Laches

[4] Defendant raised the affirmative defense of laches in her answer and counterclaims, and argues on appeal that a genuine issue of material fact regarding whether Plaintiff's delay in bringing suit constitutes laches renders erroneous the trial court's grant of summary judgment to Plaintiff.

"The doctrine of laches is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton v. Royal Bank of Can.*, 211 N.C. App. 78, 88-89, 712 S.E.2d 221, 230 (2011) (internal quotation marks and citation omitted). A party seeking to invoke the affirmative defense of laches must show: (1) a delay of time resulting in some change in the condition of the property or in the relations of the parties; (2) the delay was unreasonable and worked to the disadvantage, injury, or prejudice of the party seeking to invoke the doctrine of laches; and (3) the party against whom laches is sought to be invoked knew of the existence of the grounds for the claim sought to be barred. *See MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209-10, 558 S.E.2d 197, 198 (2001). The mere passage of time is insufficient to constitute laches, and the delay necessary to constitute laches depends upon the facts and circumstances of each case. *Id.*

Defendant argues that summary judgment was inappropriate because she has asserted that Plaintiff's delay in bringing this action is unreasonable and has prejudiced her both financially and in her ability to make her defense. Specifically, Defendant argues that Plaintiff's delay has (1) prevented her from selling her share of the property, to which she allegedly made certain improvements during the period of delay, and (2) made unavailable testimony from John Wood (who is deceased) and closing attorney Price (who does not recall the transaction) that she might use to defend against Plaintiff's claim. While conceding that it knowingly delayed bringing the action for more than eight years, Plaintiff argues that Defendant's allegations of prejudice are insufficient to prevent summary judgment because (1) the property has allegedly increased in value during the period of the delay, (2) the alleged improvements cost little, and (3) Defendant lived on the property rent-free during the period of the delay.

We are unpersuaded by Plaintiff's arguments, and agree with Defendant that there exist genuine issues of material fact as to whether Defendant suffered prejudice because of Plaintiff's delay in bringing suit. The factfinder must accordingly decide at trial whether such prejudice, if proven, allows Defendant to invoke the doctrine of laches to bar Plaintiff's cause of action. *See Cieszko v. Clark*, 92 N.C. App. 290, 298, 374 S.E.2d 456, 461 (1988) (holding that where "issues of fact remain as to whether plaintiffs' delay in bringing this action was unreasonable and whether defendants were prejudiced by the delay[,]" summary judgment was improper).

"Summary judgment provides a drastic remedy and should be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Given the drastic nature of the judgment here appealed from, we conclude that the trial court erred by granting Plaintiff summary judgment, and remand to the trial court to require Plaintiff to prove that it is entitled to quiet title to the real property, and to give Defendant the opportunity to prove otherwise, at trial.

III. Conclusion

Because (1) Defendant's second, third, and fourth issues presented and her appeal from the trial court's 6 June 2018 order on her Rule 52 motion concern the trial court's findings of fact and conclusions of law underpinning its ultimate decision to grant Plaintiff summary judgment on its claim to quiet title to the property and (2) we disregard all but the trial court's ultimate decision on an appeal from an order granting a motion for summary judgment, we dismiss those aspects of Defendant's appeal. But because Plaintiff has not shown that there exist no genuine issues of material fact regarding its claim to quiet title via the doctrine of equitable subrogation, we conclude that the trial court erred by granting Plaintiff's motion for summary judgment on that claim in its 1 May 2018 order, and we reverse that ruling and remand to the trial court for further proceedings consistent with this opinion.

DISMISSED IN PART AND REVERSED AND REMANDED IN PART.

Judge DIETZ concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

I respectfully dissent from the Majority as it is not within our authority to expand the doctrine of equitable subrogation into the context of purchase transactions like that at issue in this case.

The Majority correctly notes that there is no controlling authority to support its decision that equitable subrogation is available in the context of the underlying agreement in this case. As there is no precedent

affirmatively allowing us to apply the equitable subrogation doctrine in favor of Plaintiff, doing so would allow lenders to rely upon equitable subrogation in a way in which they previously could not. However, as our State's intermediate appellate court, "this Court is not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature[.]" *Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 126, 723 S.E.2d 352, 358 (2012). "This Court is an error-correcting court, not a law-making court." *Id.* at 127, 723 S.E.2d at 358.

Like the Majority, I would conclude the trial court erred in granting summary judgement in Plaintiff's favor. However, I would reverse the trial court's order and hold that Defendant is entitled to summary judgment in her favor. The Majority's opinion is an expansion of our State's common law and I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 NOVEMBER 2019)

AM. FIRST FED., INC. v. ROCK HILL AFR. METHODIST EPISCOPAL ZION CHURCH No. 18-1225	Cabarrus (16CVS3057)	Affirmed
ANDY-OXY CO., INC. v. HARRIS No. 19-10	Buncombe (18CVS3120)	Reversed and Remanded
BEANE v. DUCKSTEIN No. 19-206	Surry (17CVD919)	Affirmed
BENTLEY v. REVLON No. 18-1009	N.C. Industrial Commission (609188)	Reversed and Remanded.
CORNELIUS v. CORNELIUS No. 18-979	Mecklenburg (11CVD11454)	Affirmed in part, Vacated in part and Remanded
IN RE A.L.M. No. 18-1248	New Hanover (16JT212-14)	Affirmed
IN RE A.O.T. No. 19-168	Onslow (18JA124)	Vacated and Remanded
IN RE B.L.R. No. 19-70	Gaston (18JT124) (18JT125)	Affirmed
IN RE B.M.B. No. 18-1241	Surry (17JT75)	Affirmed
IN RE C.W. No. 18-1236	Guilford (16JA147) (16JA204)	Affirmed
IN RE E.L. No. 19-332	Mecklenburg (18SPC7684)	Affirmed
IN RE J.C.R. No. 19-89	Davidson (16JA127)	Affirmed
IN RE J.S.K. No. 19-105	Cabarrus (15JT4) (15JT5)	Affirmed

IN RE K.E.B. No. 19-349	Alleghany (18JB19)	AFFIRMED IN PART, VACATED AND REMANDED IN PART.
IN RE K.Z. No. 19-8	Iredell (14JT85) (14JT86)	Affirmed
IN RE M.V. No. 19-119	Mecklenburg (17JT325)	Affirmed
IN RE N.E.P. No. 19-366	Mecklenburg (18SPC10013)	Dismissed
IN RE T.J.S. No. 19-4	Alexander (17JT16)	Affirmed
IN RE T.M. No. 19-222	Sampson (18JA43,18JA44, 18JA45)	Affirmed in part; Reversed and Remanded in part.
IN RE V.S.O. No. 19-87	Yadkin (17JA51)	Affirmed
LYTLE v. N.C. DEP'T OF PUB. SAFETY No. 19-73	N.C. Industrial Commission (TA-26234)	Reversed and Remanded
MACIAS v. BSI ASSOCS., INC. No. 19-299	N.C. Industrial Commission (16-742209)	Affirmed in Part, Vacated in Part
RAGLAND v. N.C. DEP'T OF PUB. INSTRUCTION No. 19-235	Vance (18CVS478)	Affirmed in Part, Dismissed in Part
RAMIREZ v. PARKER No. 18-1192	Alamance (18CVD500094)	Vacated
SEA WATCH AT KURE BEACH HOMEOWNERS' ASS'N, INC. v. FIORENTINO No. 19-64	New Hanover (17CVS2128)	Affirmed
STATE v. BOYKINS No. 18-949	New Hanover (15CRS4145) (15CRS4147) (15CRS51301) (17CRS791-792)	No Error

STATE v. FOOTMAN No. 19-132	Guilford (16CRS79989-90) (16CRS81751-52)	No Error
STATE v. FRANK No. 19-373	Cleveland (16CRS53528) (17CRS844)	No Error
STATE v. HAITH No. 18-1169	Guilford (17CRS24530) (17CRS76326-27) (17CRS76329)	No Error
STATE v. HOOKS No. 19-398	Pitt (16CRS58475-76)	VACATED IN PART AND REMANDED FOR RESENTENCING
STATE v. JENKINS No. 19-210	Nash (17CRS1782) (17CRS53012)	NO PREJUDICIAL ERROR
STATE v. JEREZ No. 18-897	Alamance (15CRS55932-35)	No Error
STATE v. LEWIS No. 17-888-2	Hoke (14CRS51735-37) (15CRS557)	Vacated and Remanded
STATE v. LEWIS No. 17-1051-2	Johnston (14CRS55560) (14CRS55877)	Vacated and Remanded
STATE v. McKOY No. 19-337	Bladen (15CRS50392)	New Trial
STATE v. McRAE No. 19-114	Person (16CRS52310-11)	No Error
STATE v. MOORE No. 19-247	Mecklenburg (16CRS243664) (16CRS32663)	Affirmed
STATE v. MURRAY No. 19-328	Anson (17CRS50292)	Affirm in Part, Dismissed in Part
STATE v. PHILLIPS No. 19-231	Macon (16CRS51206) (17CRS34)	NO ERROR IN PART; VACATED AND REMANDED IN PART.

STATE v. RICHARDSON No. 19-232	Johnston (17CRS1856) (17CRS52734-35)	No error in part, vacated in part and remanded.
STATE v. SNEED No. 18-1061	Mecklenburg (17CRS222943-44) (17CRS25631)	NO ERROR, NO PLAIN ERROR.
STATE v. SOUTHERN No. 18-1173	Forsyth (15CRS2759) (15CRS50369)	No Error
STATE v. WALTON No. 18-1280	Mecklenburg (17CRS202116)	No Error
STATE v. WILLIAMS No. 19-359	Caswell (14CRS50657-58) (14CRS50661-62) (15CRS16)	No Error
STATE v. WYCHE No. 19-201	Lenoir (15CRS50852) (15CRS50879)	No Error

DAVIS & TAFT ARCHITECTURE, P.A. v. DDR-SHADOWLINE, LLC

[268 N.C. App. 327 (2019)]

DAVIS & TAFT ARCHITECTURE, P.A., PLAINTIFF
v.
DDR-SHADOWLINE, LLC, DEEDS REALTY SERVICES, LLC, AND
SHADOWLINE PARTNERS, LLC, DEFENDANTS

No. COA19-35

Filed 19 November 2019

1. Liens—on real property—improvement—architecture planning and design

The trial court properly dismissed an architecture firm's lien claims arising from planning and design work in accordance with an agreement for the purchase and sale of real property because the architecture firm's work did not directly impact the real property and thus did not constitute an improvement pursuant to N.C.G.S. § 44-8.

2. Contracts—third-party beneficiaries—intent of the parties—specific inclusion in contract by name

The trial court properly granted summary judgment for an architecture firm on its claim for breach of contract arising from planning and design work performed in accordance with a contract for the purchase and sale of real property, because the architecture firm was an intended third-party beneficiary of the contract, as evidenced by the firm's specific inclusion by name within the "Third Party Payments" section of the contract. Furthermore, the clear intent for the firm to be a third-party beneficiary was evidenced by the firm's performance of architectural services, the purpose of the contract (development of a student housing complex, which required architectural plans), and the firm's direct dealings with the parties to the contract.

Appeal by defendant Shadowline Partners, LLC from judgment entered 12 July 2018 by Judge J. Thomas Davis in Watauga County Superior Court. Cross-appeal by plaintiff from order entered 11 December 2017 by Judge R. Gregory Horne in Watauga County Superior Court. Heard in the Court of Appeals 22 May 2019.

Eggers, Eggers, Eggers & Eggers, by Stacy C. Eggers, IV, and Kimberly M. Eggers, for plaintiff-appellee/cross-appellant.

Forrest Firm, P.C., by Patrick S. Lineberry, and Clement Law Office, by D. Dale Howard, for defendant-appellant/cross-appellee Shadowline Partners, LLC.

ZACHARY, Judge.

This case arises out of a contract dispute between Shadowline Partners, LLC and Deeds Realty Services, LLC. Shadowline Partners, LLC appeals from a summary judgment order finding it liable for breach of contract and in quantum meruit. Davis & Taft Architecture, P.A., a third-party beneficiary to the contract, cross-appeals from an order dismissing its claim for enforcement of a claim of lien. After review, we affirm both orders.

Background

Shadowline Partners, LLC ("Shadowline") owned and intended to sell real property that was to be developed into a student-housing complex. Two companies expressed an interest in the property: Deeds Realty Services, LLC ("Deeds Realty") and DDR-Shadowline, LLC ("DDR"). On 1 August 2016, before Shadowline entered into any agreement to sell its property, DDR contracted with Brent Davis Architecture, Inc. to perform architectural work on the planned student-housing complex. The contract was subsequently assigned to Davis & Taft Architecture, P.A. ("Davis & Taft"). At the end of the month, Davis & Taft submitted a fee proposal and payment schedule to DDR. Phases I and II of the proposal, respectively, encompassed the housing complex's "schematic design" and "design development." The first payment for Phase I was made by DDR on 31 August 2016.

On 30 September 2016, Shadowline entered into an Agreement for Purchase and Sale of Real Property ("the Agreement") with Deeds Realty. Davis & Taft agreed to perform architectural work pursuant to the Agreement between Shadowline and Deeds Realty, which explicitly named Davis & Taft under the section titled "Third Party Payments":

> Davis & Taft Architecture. TWO HUNDRED THIRTY THOUSAND AND NO/100 DOLLARS ($230,000.00) shall be payable to Davis & Taft Architecture ("Davis & Taft") by [Shadowline] on a payment schedule to be established by Davis & Taft. As of the date of execution of this Agreement, an invoice from Davis & Taft in the amount of $74,500.00 has been received by [Shadowline] and shall be paid by [Shadowline] within five (5) business days of execution of this Agreement and is included in the above-stated $230,000.00 obligation of [Shadowline]. [Shadowline] will expect another invoice for the remaining balance from Davis & Taft and shall pay said invoice (up to its obligation

> stated herein) received from Davis & Taft as and when due pursuant to said invoices. [Shadowline] agrees to pay the remaining balance owed into the [trust account of a Law Office] within five (5) business days of execution of this Agreement and authorizes [the Law Office] to pay future Davis & Taft invoice(s) up to the balance held in Trust. In the event of early termination of this Agreement for any reason, [Shadowline] shall be entitled to all plans, specifications, and any and all work product produced by Davis & Taft. [Deeds Realty] shall pay Davis & Taft all amounts owed in excess of [Shadowline's] obligation stated herein.

After the Agreement was signed, Deeds Realty assigned its interest in the contract to DDR. Because DDR failed to close on the property, Shadowline terminated the Agreement on 7 December 2016. At the time of termination, Shadowline still owed Davis & Taft $80,000 pursuant to the terms of the Agreement. Davis & Taft filed an $80,000 claim of lien against Shadowline, the property's owner.

On 7 June 2017, Davis & Taft filed a complaint in Watauga County Superior Court against DDR, Shadowline, and Deeds Realty alleging claims: (1) for breach of contract, (2) in quantum meruit, and (3) for enforcement of the claim of lien. On 5 October 2017, Shadowline filed a motion to dismiss all claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 11 December 2017, the motion was heard before the Honorable R. Gregory Horne, who dismissed Davis & Taft's claim for enforcement of the claim of lien and discharged the lien.

On 25 June 2018, Davis & Taft moved for summary judgment on its remaining claims. The motion came on for hearing before the Honorable J. Thomas Davis, who (1) granted Davis & Taft's motion for summary judgment in its entirety, and (2) dismissed all claims against Deeds Realty. Shadowline timely filed notice of appeal from the summary judgment order. Davis & Taft filed notice of cross-appeal from the order dismissing and discharging its claim of lien.[1]

Discussion

A. Claim of Lien

[1] Davis & Taft argues that the trial court erred in dismissing its claim for enforcement of the claim of lien and by discharging the lien. We disagree.

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1. Davis & Taft did not timely file its notice of appeal from the order dismissing the claim of lien; however, on 17 May 2019, this Court allowed its petition for writ of certiorari. N.C.R. App. P. 21(a)(1).

A motion to dismiss "tests the legal sufficiency of the complaint." *Parker v. Town of Erwin*, 243 N.C. App. 84, 110, 776 S.E.2d 710, 729 (2015). Such a motion requires that the trial court decide, as a matter of law, whether the pleadings "state a claim upon which relief can be granted." N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2017). "Dismissal is proper (1) when the complaint on its face reveals that no law supports [the] plaintiff's claim; (2) when the complaint reveals on its face that some fact essential to [the] plaintiff's claim is missing; and (3) when some fact disclosed in the complaint defeats the plaintiff's claim." *Signature Dev., L.L.C. v. Sandler Commercial at Union, L.L.C.*, 207 N.C. App. 576, 582, 701 S.E.2d 300, 305 (2010) (quotation marks omitted), *disc. review denied*, 365 N.C. 211, 710 S.E.2d 33 (2011). On appeal, this Court reviews a trial court's ruling on a 12(b)(6) motion *de novo*. *Id.* at 582, 701 S.E.2d at 306.

The North Carolina General Assembly has enacted legislation to protect the interests of contractors, laborers, and materialmen:

> Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, *with the owner of real property for the making of an improvement thereon* shall . . . have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract.

N.C. Gen. Stat. § 44A-8 (2017) (emphasis added); *see also O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) ("The materialman's lien statute is remedial in that it seeks to protect the interests of those who supply labor and materials that improve the value of the owner's property.").

The instant dispute concerns the meaning of the word "owner" under N.C. Gen. Stat. § 44-8, and whether Shadowline meets that definition. Shadowline argues that Davis & Taft did not contract with an "owner" of property "according to the straightforward language" of N.C. Gen. Stat. § 44A-8. We agree.

Chapter 44A defines "owner" as "[a] person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made." N.C. Gen. Stat. § 44A-7(6) (2017). An "improvement" is defined as "[a]ll or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling,

or landscaping, including trees and shrubbery, driveways, and private roadways, on real property." *Id.* § 44A-7(4). Further, "improve" means:

> To build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes, and rental of equipment directly utilized on the real property in making the improvement.

Id. § 44A-7(3). These definitions are indicative of the legislature's intent in enacting § 44A-8. *See In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003).

In its complaint, Davis & Taft alleged that it "first furnished work, material, labor, and services to the property on October 19, 2016, and last furnished work, material, labor, and services to the property on February 28, 2017." However, Davis & Taft stated that the labor furnished consisted of "[a]rchitectural design and schematic plans in accordance with the agreement for purchase and sale of real property." There is no evidence of the performance of any work directly affecting the real property during that time, a "fact essential to [Davis & Taft's] claim." *Signature Dev., L.L.C.*, 207 N.C. App. at 582, 701 S.E.2d at 305. Without work *directly impacting* the real property, the real property in question has not been "improved" as defined by N.C. Gen. Stat. § 44A-8. *See S.E. Steel Erectors, Inc. v. Inco, Inc.*, 108 N.C. App. 429, 434, 424 S.E.2d 433, 437 (1993) ("It is apparent that 'labor' and 'improve' contemplate *actual work* done by the person claiming a lien, whether that person be a manual laborer, supervisor, or skilled professional, *which directly impacted on the real property in question*." (emphasis added)).

In short, Shadowline does not qualify as an "owner" because no improvement was made to its real property, and Davis & Taft therefore did not have a contract with any owner pursuant to § 44A-8. Accordingly, the trial court correctly dismissed Davis & Taft's claim for enforcement of the claim of lien.

B. Third-Party Beneficiary

[2] Shadowline next argues that the trial court erred in granting summary judgment in Davis & Taft's favor on its claim for breach of contract because Davis & Taft was not an intended third-party beneficiary of the contract. We disagree.

Summary judgment is appropriate 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. Gen. Stat. § 1A-1, Rule 56(c) (2017). The standard of review for summary judgment is *de novo*. *Shroyer v. Cty. of Mecklenburg*, 154 N.C. App. 163, 167, 571 S.E.2d 849, 851 (2002).

A party is a direct beneficiary of a contract "if the contracting parties intended to confer a legally enforceable benefit on that person." *Hospira Inc. v. AlphaGary Corp.*, 194 N.C. App. 695, 703, 671 S.E.2d 7, 13, *disc. review denied*, 363 N.C. 581, 682 S.E.2d 210 (2009). By contrast, in order to establish a claim based on the third-party beneficiary doctrine, a complainant must show: "(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit." *Hoots v. Pryor*, 106 N.C. App. 397, 408, 417 S.E.2d 269, 276 (citation omitted), *disc. review denied*, 332 N.C. 345, 421 S.E.2d 148 (1992). Moreover, "[i]t is not enough that the contract . . . benefits the [third party], if, when the contract was made, the contracting parties did not intend it to benefit the [third party] directly." *Hospira*, 194 N.C. App. at 703, 671 S.E.2d at 13 (quotation marks omitted); *see also Snyder v. Freeman*, 300 N.C. 204, 220, 266 S.E.2d 593, 604 (1980) ("[T]he determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract.").

In the case at bar, the record reveals that Davis & Taft was an intended third-party beneficiary of the Agreement. DDR and Shadowline named Davis & Taft in the section of the Agreement titled "Third Party Payments," and provided that $230,000 "shall be payable to Davis & Taft by [Shadowline] on a payment schedule to be established by Davis & Taft." The Agreement also provided that "[Shadowline] will expect another invoice for the remaining balance from Davis & Taft and shall pay said invoice . . . received from Davis & Taft."

Davis & Taft's specific inclusion, by name, within the "Third Party Payments" section of the Agreement provides strong evidence that it was an intended third-party beneficiary to the contract between Shadowline

and DDR. *See Vogel v. Supply Co.*, 277 N.C. 119, 126-27, 177 S.E.2d 273, 278 (1970); 17B C.J.S. *Contracts* § 848 (2011) ("A third-party beneficiary *who is clearly designated as such* is seldom left without a remedy . . . ." (emphasis added)). Additionally, this intent was effectuated by Davis & Taft's performance of architectural services. Shadowline intended to sell—and DDR intended to purchase—the real property in question for the purpose of developing and building a student-housing complex, which required architectural plans and designs. Shadowline's obligation to pay for the architectural plans drawn by Davis & Taft thereby furthered the contract's purpose.

Davis & Taft's direct dealings with the parties to the Agreement are also of consequence. "[A]ctive and direct dealings" with one of the parties to a contract may confer third-party beneficiary status upon a plaintiff. *Hospira*, 194 N.C. App. at 703, 671 S.E.2d at 13. Here, before DDR and Shadowline executed the Agreement, Davis & Taft agreed to provide architectural services and sent DDR a payment schedule outlining the payment obligations under the Agreement. Even if Davis & Taft were not expressly named in the Agreement, Davis & Taft's involvement with the contracting parties evidences its status as a third-party beneficiary. *See Chem. Realty Corp. v. Home Fed. Sav. & Loan*, 84 N.C. App. 27, 33, 351 S.E.2d 786, 790 (1987).

In sum, the facts of this case compel the conclusion that the parties to the Agreement intended to benefit Davis & Taft. *See Hospira*, 194 N.C. App. at 703, 671 S.E.2d at 13 (noting that courts "must consider the surrounding circumstances as well as the language of the contract" when determining whether the parties intended to benefit a third party). Therefore, no issues of material fact exist, and the trial court properly granted summary judgment in favor of Davis & Taft as to its claim for breach of contract.[2]

Conclusion

Upon review, we conclude that (1) Judge Horne properly dismissed Davis & Taft's claim of lien, and (2) Judge Davis correctly determined that there were no genuine issues of material fact and entered summary

2. Because we conclude that Davis & Taft was a third-party beneficiary and that a contract did exist between the parties, we need not address any appeal relating to Davis & Taft's claim in quantum meruit. *See Ron Medlin Constr. v. Harris*, 364 N.C. 577, 580, 704 S.E.2d 486, 489 (2010) ("Quantum meruit is not an appropriate remedy when there is an actual agreement between the parties because an express contract precludes an implied contract with reference to the same matter." (internal citation and quotation marks omitted)).

judgment in favor of Davis & Taft. Accordingly, we affirm both of the trial court's orders.

AFFIRMED.

Judges BRYANT and MURPHY concur.

BETTY LOU DeMARCO, Plaintiff
v.
CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS HEALTHCARE SYSTEM, CAROLINAS PHYSICIANS NETWORK, INC. d/b/a CABARRUS FAMILY MEDICINE, P.A., and CABARRUS FAMILY MEDICINE-HARRISBURG, CAROLINAS MEDICAL CENTER-NORTHEAST d/b/a NORTHEAST WOMEN'S HEALTH & OBSTETRICS, Defendants

No. COA19-350

Filed 19 November 2019

1. Negligence—elements—failure to delete erroneous entry in medical records—sufficiency of pleading

In a lawsuit against a healthcare system and a hospital, where a doctor mistakenly entered a gonorrhea diagnosis into plaintiff's medical records, wrote "cancelled" and "entered in error" next to the entry, and sent the entry to the U.S. Department of Labor as part of plaintiff's medical evaluation for disability benefits, the trial court improperly dismissed plaintiff's negligence claim pursuant to Civil Procedure Rule 12(b)(6). Plaintiff's complaint (by notifying defendants that plaintiff intended to base the standard of care on HIPAA and defendants' own privacy policy) adequately pled defendants' duty to delete the erroneous entry, and that the breach of this duty proximately caused her to suffer reputational harm, loss of consortium, and severe economic, physical, and emotional distress.

2. Emotional Distress—negligent infliction of severe emotional distress—failure to delete erroneous entry in medical records—sufficiency of pleading

In a lawsuit against a healthcare system and a hospital, where a doctor mistakenly entered a gonorrhea diagnosis into plaintiff's medical records, wrote "cancelled" and "entered in error" next to the entry instead of deleting it, and sent the entry to the U.S. Department of Labor as part of plaintiff's medical evaluation for disability

benefits, the trial court improperly dismissed plaintiff's claim of negligent infliction of emotional distress pursuant to Civil Procedure Rule 12(b)(6), because plaintiff's complaint sufficiently alleged that she suffered severe mental and emotional anguish, depression, hair loss, and paranoia due to her advanced age (seventy-six), the sordid nature of the erroneous entry, and her fear of defendants continuing to share the entry with the Department of Labor.

3. Libel and Slander—defamation—false statement—failure to delete erroneous entry in medical records—sufficiency of pleading

In a lawsuit against a healthcare system and a hospital, where a doctor mistakenly entered a gonorrhea diagnosis into plaintiff's medical records, wrote "cancelled" and "entered in error" next to the entry instead of deleting it, and sent the entry to the U.S. Department of Labor as part of plaintiff's medical evaluation for disability benefits, the trial court properly dismissed plaintiff's defamation claim pursuant to Civil Procedure Rule 12(b)(6). Because the annotations next to the entry clarified the doctor's mistake—and because statements that acknowledge their own falsity are true—plaintiff failed to plead that defendants communicated a false statement.

Appeal by plaintiff from order entered 7 January 2019 by Judge Adam M. Conrad in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2019.

Stubbs & Perdue, P.A., by Matthew W. Buckmiller and Joseph Z. Frost, for plaintiff.

Alston & Bird, LLP, by Brian D. Boone, Michael R. Hoernlein, and Rebecca L. Gauthier, for defendants.

ARROWOOD, Judge.

Betty Lou Demarco ("plaintiff") appeals from order granting motion of Charlotte-Mecklenburg Hospital Authority, Carolinas Physicians Network, Inc., and Carolinas Medical Center-Northeast ("defendants") to dismiss plaintiff's claims with prejudice pursuant to N.C.R. Civ. P. 12(b)(6) (2019). For the following reasons, we affirm in part, reverse in part, and remand.

I. Background

This case arises from an error in plaintiff's medical records. Plaintiff's complaint alleges that she is a 76-year-old woman who receives disability compensation from the U.S. Department of Labor's Office of Worker's Compensation Programs ("OWCP"). Under OWCP policy, plaintiff is required to undergo annual medical evaluations which are sent by plaintiff's doctors to OWCP. In preparation for an upcoming medical evaluation, plaintiff requested a copy of her medical record from her previous annual evaluation from Dr. Katherine Foster ("Dr. Foster"), an employee of defendants. One document in plaintiff's medical record, titled "Problem List," catalogues instances in which her attending physicians have recorded her various ailments over time, along with information concerning when the problem was last updated and whether or not it is ongoing or resolved.

Upon receipt of her medical record, plaintiff discovered erroneous entries in the Problem List. The Problem List contained two entries ("the erroneous entries") created in 2011 by Dr. Linda Bresnahan ("Dr. Bresnahan"), an employee of defendants Charlotte-Mecklenburg Hospital Authority and Carolinas Medical Center-Northeast. The erroneous entries indicated that plaintiff had been diagnosed with "gonococcal infection (acute) of lower genitourinary tract" and "gonorrhea" in 2011, which were "resolved" in January of 2016. Plaintiff has neither been diagnosed with nor treated for any sexually transmitted disease in her lifetime.

Plaintiff contacted Dr. Bresnahan to address the erroneous entries, and Dr. Bresnahan admitted that they had been "added to [her] chart erroneously in Dec[.] 2011[,]" "found no reason" why they were entered, and had no explanation for how the erroneous entries had been added to her medical record. To address this mistake, Dr. Bresnahan amended the Problem List for the erroneous entries by adding language reflecting that the diagnoses had been "canceled" and "entered in error" (hereinafter "the annotated entries").

Thereafter, plaintiff repeatedly insisted that this solution was insufficient and, per defendants' privacy policy and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 ("HIPAA") regulations, requested an amendment of her medical record to completely erase the annotated entries from her medical record. Defendants deemed their response sufficient to address the problem and took no further action to change the Problem List in plaintiff's medical record.[1] In January of 2018, Dr. Foster conducted

1. Plaintiff notes that defendants did erase the annotated entries entirely after the filing of her complaint in the instant case.

plaintiff's annual medical evaluation for submission to OWCP. Dr. Foster sent OWCP the medical evaluation along with the rest of plaintiff's medical record, including the annotated entries.

Defendants' refusal to comply with plaintiff's request to completely erase the annotated entries from her medical record led plaintiff to file her complaint in the instant case, asserting claims of negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and defamation. Defendants responded by moving to dismiss the complaint with prejudice for failure to state a claim upon which relief could be granted, pursuant to N.C.R. Civ. P. 12(b)(6). A hearing on this motion was held at the 6 November 2018 civil session of Mecklenburg County Superior Court. The trial court entered an order granting defendants' motion, and this appeal followed.

II. Discussion

Plaintiff argues that the trial court erred in dismissing her claims of negligence, negligent infliction of emotional distress, and defamation pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted.[2] We address each argument in turn.

A. Standard of Review

"We review appeals from dismissals under Rule 12(b)(6) de novo." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citations omitted).

> Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint fail[s] to state a claim upon which relief can be granted. [T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted. When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper.

Id. at 448, 781 S.E.2d at 7-8 (internal quotation marks and citations omitted).

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2. Plaintiff has abandoned a fourth assignment of error on appeal regarding the trial court's dismissal of her claim for intentional infliction of emotional distress. *See* N.C.R. App. P. 28(a) (2019) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

B. Negligence

[1] Plaintiff first argues that dismissal of her negligence claim was improper because her complaint adequately pleaded a legally viable claim against defendants. We agree.

> Under the common law, a person who has sustained injuries due to the negligent conduct of another may recover against the tortfeasor provided that the negligent behavior was the proximate cause of the injuries suffered. The elements of common law negligence . . . [are] as follows:
>
> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks[;]
> 2. A failure on his part to conform to the standard required[;]
> 3. A reasonabl[y] close causal connection between the conduct and the resulting injury[; and]
> 4. Actual loss or damage resulting to the interests of another[.]

Hutchens v. Hankins, 63 N.C. App. 1, 12-13, 303 S.E.2d 584, 591-92 (1983) (emphasis, alterations, and internal citations omitted). We address whether plaintiff has sufficiently pleaded each element of negligence in turn.

1. Duty

First, plaintiff's complaint asserts that defendants owed a duty to her as their patient "to exercise reasonable care, skill, and diligence to ensure that the protected health information contained in Plaintiff's medical records was accurate and correct, and did not contain any erroneous diagnoses or treatments" and to "prevent . . . dissemination of false, inaccurate, offensive, and derogatory protected health information relating to Plaintiff to third parties[.]" Plaintiff's complaint contends this duty is based upon both common law principles and HIPAA.

It is well established that hospitals and doctors in their employ owe their patients a duty to exercise the degree of care that a reasonable person would in similar circumstances to prevent an unreasonable risk of harm to their patients. *Blanton v. Moses H. Cone Mem'l Hosp., Inc.*, 319 N.C. 372, 375, 354 S.E.2d 455, 457-58 (1987) (citing *Rabon v. Rowan*

Mem'l Hosp., Inc., 269 N.C. 1, 152 S.E.2d 485 (1967) (general duty of care); *Hoke v. Glenn*, 167 N.C. 594, 83 S.E. 807 (1914) (duty of reasonable care in selecting agents); *Payne v. Garvey*, 264 N.C. 593, 142 S.E.2d 159 (1965) (duty of reasonable care in maintaining equipment)). We have not had occasion to consider whether or not this general duty of reasonable care extends to corrections of erroneously entered medical records. Plaintiff also argues that HIPAA and defendants' own privacy policy impose upon them a duty to take reasonable measures in response to her request to correct erroneous entries in her medical records.

Although the existence of such a duty is an issue of first impression for this Court, we have previously held that HIPAA, its implementing regulations, and hospital privacy policies may be used to plead a specific standard of care sufficient to overcome dismissal under Rule 12(b)(6). *See Acosta v. Byrum*, 180 N.C. App. 562, 638 S.E.2d 246 (2006). In *Acosta*, a patient sued her treating hospital for negligence because one of its doctors provided his access code for the patient's medical records to an unauthorized party, who then viewed the records and shared information therein. *Id.* at 565, 638 S.E.2d at 249. The patient's complaint alleged that the defendant hospital owed her a duty to conform to a standard of care established by HIPAA and its own privacy policy, which it breached when its doctor gave his password to an unauthorized individual. *Id.* The complaint did not mention any specific provisions of HIPAA or the hospital's privacy policy which established this standard of care. *Id.* at 568, 638 S.E.2d at 250-51. We held that the patient was "not required in her complaint to cite the exact rule or regulation. *See* N.C. Gen. Stat. § 1A-1, Rule 8. She only must provide [defendants] notice of how she plan[ned] to establish the duty that was negligently breached." *Acosta*, 180 N.C. App. at 568, 638 S.E.2d at 251. The patient's complaint sufficiently pleaded the element of duty for the purposes of Rule 12(b)(6) because it provided the hospital notice that she intended to use HIPAA and the hospital's own policy to establish the duty and standard of care. *Id.*

In *Acosta*, it was much more evident that the defendant's conduct violated several explicit prohibitions in HIPAA. However, we find the aforementioned principle in *Acosta* applicable here. Plaintiff's complaint likewise does not cite any specific provisions of HIPAA or defendants' privacy policy which establish their duty to respond reasonably to her request to remove the annotated entries from her medical record. As in *Acosta*, we hold that plaintiff's complaint sufficiently pleads defendants' duty to adhere to a particular standard of care because it notifies defendants that she plans to use HIPAA and defendants' own privacy policy

to establish their duty to act reasonably in response to her request to remove an erroneously entered diagnosis from her medical records.[3]

2. Breach

Accordingly, we also hold that plaintiff's complaint adequately pleads breach of duty. The complaint asserts that defendants failed to meet the alleged standard of care by, among other things, adding annotations to the erroneous entries rather than erasing them entirely. *See Acosta*, 180 N.C. App. at 568, 638 S.E.2d at 251 (implicitly addressing breach in discussion of standard of care).

Defendants argue that they did not breach their duty to plaintiff as a matter of law, citing *Thornburg v. Long*, 178 N.C. 589, 101 S.E. 99 (1919). In *Thornburg*, our Supreme Court held that a doctor does not breach his common law duty of care when he makes "an honest mistake or error of judgment in making a diagnosis . . ., where there is ground for reasonable doubt as to the practice to be pursued." *Id.* at 591, 101 S.E.2d at 100. The Supreme Court held that the defendant doctor was not liable for misdiagnosing the patient plaintiff with syphilis, where the defendant had sent the plaintiff's blood sample to a laboratory for testing and returned a false indication of the disease's presence. *Id.* at 590, 101 S.E.2d at 99-100.

We find *Thornburg* distinguishable from the instant case. As plaintiff notes, "*Thornburg* was a case involving an *actual diagnosis* that turned out to be false. . . . [Here,] the False Entry appears to have been the product of negligent recordkeeping, not the negligence of a particular doctor in reaching the wrong conclusion about a patient's actual signs and symptoms." We decline to extend the rationale of *Thornburg* beyond diagnosis to cover negligence in the preparation and maintenance of a patient's medical records.

Furthermore, contrary to defendant's assertion at oral argument, such medical records do not belong to the doctor or the hospital

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3. At oral argument, counsel for defendants suggested that HIPAA preempts tort claims arising from the creation and sharing of medical records. We need not address this argument because defendants did not raise it at trial. *See* N.C.R. App. P. 10(a)(1) (2019) (requiring parties to raise arguments and objections before trial court and obtain rulings thereon in order to preserve for appellate review); *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) ("[W]here 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.") (internal quotation marks and citations omitted).

who created them. Healthcare providers are mere custodians of their patients' medical records. Indeed, the regulatory scheme implementing HIPAA makes clear that ultimate control over a medical record lies with the patient, abridged only by enumerated exceptions. *See*, *e.g.*, N.C. Gen. Stat. § 8-53 (2017) (subject to enumerated exceptions, "medical records shall be furnished only on the authorization of the patient"); N.C. Gen. Stat. § 90-414.11 (2017) (recognizing patient's rights to request restriction of use and disclosure of medical records, access, inspect, and copy records, and request amendment of medical records); 45 C.F.R. § 164.524(a)(1) (2019) (subject to enumerated exceptions, "an individual has a right of access to inspect and obtain a copy of" her medical records); 45 C.F.R. § 164.502(a) (2019) (subject to enumerated exceptions, healthcare providers "may not use or disclose" patient's medical records); *see also Lowd v. Reynolds*, 205 N.C. App. 208, 212-15, 695 S.E.2d 479, 482-84 (2010) (stating that patient holds physician-patient privilege, which covers medical records; deeming plaintiff's medical records within his "possession, custody, or control" for discovery purposes under N.C.R. Civ. P. 34 (2019)); *State v. Smith*, 248 N.C. App. 804, 808, 789 S.E.2d 873, 877 (2016) (implicitly holding defendant-patient had standing to challenge admissibility of his medical records in criminal case).

3. Causation

> The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. Questions of proximate cause and foreseeability are questions of fact to be decided by the jury. Thus, since proximate cause is a factual question, not a legal one, it is typically not appropriate to discuss in a motion to dismiss.

Acosta, 180 N.C. App. at 568-69, 638 S.E.2d at 251 (alteration, internal citations, and quotation marks omitted). Here, the complaint alleges that the harm plaintiff suffered was a "direct and proximate result of Defendants' negligence" and was "reasonably foreseeable to Defendant[s.]" Because the complaint adequately recites the element of causation, an issue of fact for the jury to decide, plaintiff has made a sufficient pleading of causation under Rule 12(b)(6).

4. Damages

An allegation of damages is sufficient under Rule 12(b)(6) "so long as it provide[s] the defendant notice of the nature and basis of plaintiff['s] claim so as to enable him to answer and prepare for trial." *Acosta*, 180

N.C. App. at 570, 638 S.E.2d at 252 (internal quotation marks omitted) (citing *McAllister v. Ha*, 347 N.C. 638, 646, 496 S.E.2d 577, 583) (1998)). Here, plaintiff's complaint claims that defendants' breach of duty caused her reputational harm, marital strife and loss of consortium, and "severe and crippling economical [sic], physical, and emotional distress, . . . pain and suffering, [and] lost opportunities[.]" This allegation is specific enough to allow defendants to prepare a defense as to each of the listed grounds of harm. Thus, plaintiff has adequately pleaded damages.

Plaintiff's complaint adequately pleads all four elements of negligence, stating a claim upon which relief could theoretically be granted to her if proven. While we express no opinion as to whether plaintiff can survive a motion for summary judgment or prevail on the merits at trial, she has alleged sufficient facts to survive a pre-answer motion to dismiss under Rule 12(b)(6). Therefore, the trial court erred in granting defendants' motion to dismiss her claim of negligence pursuant to Rule 12(b)(6). We reverse the portion of the trial court's order dismissing plaintiff's negligence claim and remand for further proceedings on this matter.

C. Negligent Infliction of Emotional Distress

[2] Second, plaintiff argues that the trial court erred in dismissing her claim for negligent infliction of emotional distress. Plaintiff's complaint alleges that defendants' negligence inflicted severe emotional distress upon her. Because plaintiff has pleaded a viable claim for negligence arising from the same facts, we need only consider whether her complaint adequately pleads damages in the form of "severe emotional distress."

"To state a claim for negligent infliction of emotional distress under North Carolina law, the plaintiff need only 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.' " *Sorrels v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 321-22 (1993) (alteration omitted) (quoting *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). As discussed *supra* section B.3, the issue of proximate causation and foreseeability of harm is inappropriate for consideration on a motion to dismiss per Rule 12(b)(6). Thus, plaintiff's complaint will pass muster under Rule 12(b)(6) if it sufficiently pleads severe emotional distress as damages.

"[T]o establish severe emotional distress . . ., the plaintiff must show an emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and

diagnosed by professionals trained to do so." *Sorrels*, 334 N.C. at 672, 435 S.E.2d at 322 (internal quotation marks and citation omitted). An allegation of severe emotional distress is sufficient to overcome dismissal under Rule 12(b)(6) so long as it provides the defendant with "notice of the nature and basis of plaintiff['s] claim so as to enable him to answer and prepare for trial." *Acosta*, 180 N.C. App. at 570, 638 S.E.2d at 252 (internal quotation marks and citation omitted). We have found an allegation of severe emotional distress sufficient where the plaintiff's claim that the defendant's negligence caused "severe emotional distress, humiliation, and mental anguish[,]" when considered with the plaintiff's other factual allegations, provided the defendant adequate notice with which to prepare a defense. *Id.*

In the instant case, plaintiff's claim for negligent infliction of emotional distress alleges that defendants' negligence has caused plaintiff to suffer "severe and grievous mental and emotional suffering, fright, anguish, shock, nervousness, and anxiety" in light of her advanced age and the sordid nature of the erroneously recorded affliction. Additionally, the factual allegations of the complaint specify that the notion that defendants will continue to share the annotated entries in its communications with OWCP has caused her to "develop[ ] depression, stress, anxiety, unbridled fear, and emotional distress" which have manifested in other maladies such as loss of hair, sleeplessness, extreme exhaustion, decreased energy levels, and paranoia. Because these allegations are sufficient to provide defendants with enough notice to prepare their defense as to severe emotional distress, the trial court erred in dismissing plaintiff's claim for negligent infliction of emotional distress. We reverse the portion of the trial court's order granting defendants' motion to dismiss and remand for further proceedings on this claim for relief.

D. Defamation

[3] Third, plaintiff contends that the trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss her defamation claim. We disagree.

"In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Craven v. Cope*, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008) (internal quotation marks and citation omitted). "If a statement cannot reasonably be interpreted as stating actual facts about an individual, it cannot be the subject of a defamation suit." *Id.* at 817, 656 S.E.2d at 732 (citation omitted). "In determining whether a statement can be reasonably interpreted as stating actual facts about an individual, courts look to the circumstances in which the statement is made." *Id.* (citation

omitted). The truth of an allegedly defamatory statement is a complete defense to an action for defamation. *Long v. Vertical Techs., Inc.*, 113 N.C. App. 598, 602-603, 439 S.E.2d 797, 801 (1994) (citation omitted).

In the instant case, plaintiff's complaint alleges that defendants defamed her by sending her medical records including the annotated entries to OWCP. Plaintiff contends that the initial language of diagnosis accompanied by the annotation that the diagnosis was "entered in error" "suggest[s] that Plaintiff[ ] once presented to Defendant[s] with *signs or symptoms* of a pelvic/vaginal inflammatory ailment, was diagnosed with gonorrhea, and was later determined to have some other ailment other than gonorrhea." We disagree.

The excerpt of plaintiff's medical record before us on appeal consists entirely of a Problem List in which her attending physicians have recorded her various ailments over time, along with information concerning when the problem was last updated and whether it is ongoing or resolved. The Problem List does not support plaintiff's contention because no other entries suggest that plaintiff once had some other ailment presenting symptoms similar to those of gonorrhea. Moreover, the five year span between the initial entry of diagnosis and subsequent correction does not suggest that plaintiff was subsequently diagnosed and treated for some other ailment based upon the same symptoms.

The annotated entries, viewed in the context of the Problem List in its entirety, are reasonably interpreted to state that Dr. Bresnahan entered records of diagnoses for "gonococcal infection (acute) of lower genitourinary tract" and "gonorrhea" in 2011, that were last updated in 2016 to reflect that these entries were "cancelled" because they were "entered in error." A statement which acknowledges its own falsity is true, and thus immune from liability for defamation. Because plaintiff has failed to plead that defendants communicated a false statement, we affirm the trial court's order dismissing plaintiff's defamation claim pursuant to Rule 12(b)(6).

III. Conclusion

For the foregoing reasons, we affirm that portion of the trial court's order dismissing plaintiff's defamation claim, reverse those portions dismissing plaintiff's claims for negligence and negligent infliction of emotional distress, and remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges COLLINS and HAMPSON concur.

EQUITY TR. CO. v. S&R GRANDVIEW, LLC

[268 N.C. App. 345 (2019)]

EQUITY TRUST COMPANY CUSTODIAN FOR BENEFIT OF GORDON FRIEZE IRA TRADITIONAL ACCOUNT NUMBER 113190 AND ROTH ACCOUNT NUMBER 113192, AND GORDON P. FRIEZE, JR., PLAINTIFFS

v.

S&R GRANDVIEW, LLC, DEFENDANT

No. COA18-1264

Filed 19 November 2019

1. Civil Procedure—two-dismissal rule—same transaction or occurrence—confession of judgment

In a case involving a series of business transactions and lawsuits, where plaintiffs had voluntarily dismissed a prior action for breach of contract (the first dismissal) and then dismissed an action instituted by a confession of judgment (the second dismissal), plaintiffs' next complaint violated the two-dismissal rule (Civil Procedure Rule 41(a)(1)) and the trial court did not err by granting summary judgment for defendant. The actions were based upon the same transaction or occurrence—an alleged breach of a real estate contract. The Court of Appeals rejected plaintiffs' argument that the confession of judgment was not an action under Rule 41, because the parties and the trial court treated it as an action.

2. Estoppel—unclean hands—circumvention of corporate bylaws

In a case involving a series of business transactions and lawsuits, defendants were not estopped from asserting the two-dismissal rule (Civil Procedure Rule 41(a)(1)) where plaintiffs acted with unclean hands. Among other things, plaintiffs deliberately attempted to circumvent defendant's bylaws by not obtaining the required approval for a real estate listing or for filing a legal action.

3. Civil Procedure—default judgment—set aside—appearance—by implication

The trial court did not err by setting aside a default judgment against defendant LLC, where defendant made an appearance pursuant to Civil Procedure Rule 55(b)(1) when the attorney of a managing member of defendant requested and accepted an informal extension of time from plaintiffs and also engaged in discussions with plaintiffs' counsel regarding the case.

Appeal by Plaintiffs from Orders entered 18 July 2014 by Judge W. Allen Cobb, Jr. and 4 May 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 22 May 2019.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr. and Jennifer L. Carpenter, for plaintiffs-appellants.

Hodges Coxe & Potter, LLP, by C. Wes Hodges, II, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Equity Trust Company Custodian for Benefit of Gordon Frieze IRA Traditional Account Number 113190 and Roth Account Number 113192 (Equity Trust) and Gordon P. Frieze, Jr. (Frieze) (collectively, Plaintiffs) appeal from an Order granting summary judgment in favor of S&R Grandview, LLC (Defendant) and from Orders setting aside entry of default and default judgment against Defendant. This appeal arises out of a series of business transactions, questionable practices, internal and external business disputes, and multiple lawsuits involving the parties and others dating back to 2005. The result is a rather extensive and convoluted history of the case with all parties injecting accusations and innuendos into their arguments. Relevant, however, to this appeal, the Record tends to show the following:

Defendant is a North Carolina limited liability company (LLC) formed in 2005, whose sole purpose is to invest, own, hold, develop, and/or sell real estate—specifically, a residential subdivision in Pender County known as Eagle's Watch. According to Defendant's Bylaws, Defendant is a manager-managed LLC, and at the time of its organization, Defendant's two managers were Donald J. Rhine (Rhine) and Steven Silverman (Silverman). Defendant's Bylaws dictated any action taken on behalf of Defendant required both managers' approval. From its inception, Frieze and Maxine Ganer (Ganer) have been members of Defendant. Defendant's Bylaws also provided in the event Silverman ceased to act as manager, Ganer would serve as a manager in his place. In order to develop Eagle's Watch in 2005, Defendant first obtained a loan from Gramercy Warehouse Funding II LLC (Gramercy), and on or about 17 November 2006, Defendant secured a second loan of $11,000,000.00 from Cooperative Bank (Cooperative Bank Loan), which was in turn used to pay off the Gramercy loan. The Cooperative Bank Loan was personally guaranteed by, among others, Frieze, Ganer, Rhine, and Silverman.

On 22 November 2006, Defendant sold Lot 33R in Eagle's Watch for approximately $306,000.00 to Robert Russell Haywood, Carla Jean

Haywood, Robert Whitty Haywood, and Deborah Harris Haywood (collectively, the Haywoods), who financed a portion of the purchase price via a loan from SunTrust Mortgage, Inc. (SunTrust) in the amount of $289,750.00. Plaintiffs' Complaint in this action (2014 Complaint) alleged the Haywoods subsequently became unwilling or unable to make payments on the loan to Suntrust. Thus, Plaintiffs alleged in early March 2008, to avoid allowing the Haywoods' Lot to go into foreclosure and to prevent any potential negative impact on the development, Defendant and the Frieze Enterprises, Inc. Defined Benefit Plan & Trust (Frieze Trust) entered into an agreement to purchase and resell Lot 33R (Lot 33R Agreement). The Lot 33R Agreement provided:

> Lot 33R was originally sold to [the Haywoods] at a critical time in the development stage. This sale[1] was influenced by [Defendant's] need to close with the Haywoods in order to assist in the loan to [Defendant] by Cooperative Bank. The Haywoods were unable to sustain their monthly payments and were extremely close to forfeiting their ownership back to [SunTrust]. Because [Defendant] did not want this blemish on the subdivision and felt it would blemish the banking relationship with Cooperative Bank, it was agreed upon with [sic] [Defendant] and [the Frieze Trust] would purchase and resell Lot 33R in Eagle's Watch. The terms of purchase and resell are as follows:
>
> 1. [The Frieze Trust] will purchase Lot 33R at the exact cost of the lot to the Haywoods or $305,675.
>
> 2. [The Frieze Trust] will list for sale in MLS and through the sales office at Eagle's Watch at a price agreed upon by Gordon Frieze, Don Rhine and Steve Silverman.
>
> 3. [Defendant] shall reimburse [the Frieze Trust] for the difference between the purchase price of this Lot [33R], $305,675, and the net sales price.
>
> 4. [The Frieze Trust] shall be reimbursed at an interest rate of 7% APR on the amount of the purchase price until lot is sold.

1. In his deposition, Frieze indicated that this referenced sale was the sale of Lot 33R from the Haywoods to the Frieze Trust.

> 5. Any loss and all interest due shall be paid to [the Frieze Trust] at closing on resale of lot.

The Lot 33R Agreement was purportedly signed by Frieze on behalf of the Frieze Trust, Rhine, and Silverman, although the Agreement contains no date of signature.[2] On 11 March 2008, Defendant obtained a second loan from Cooperative Bank for $500,000.00. In his deposition, Frieze acknowledged he drafted the Lot 33R Agreement and claimed it was necessary because Defendant had not yet obtained the second Cooperative Bank Loan and a foreclosure on the Haywoods' Lot 33R could jeopardize Defendant's relationship with Cooperative Bank and ability to obtain this second loan. On 12 March 2008, the Haywoods sold Lot 33R to the Frieze Trust[3] for $315,000.00, instead of the $305,675.00 price listed in the Lot 33R Agreement.

In December of 2009, Silverman passed away, and under Defendant's Bylaws, Ganer became the other manager of Defendant and served in this role until July of 2014. According to Ganer, Silverman never mentioned the Lot 33R Agreement, and copies of this Agreement were not located in his business files after his death. Ganer claimed she first learned of the Lot 33R Agreement on 19 May 2010 when Frieze sent her an email informing her of the Agreement and providing her with a copy. In her affidavit, Ganer asserted:

> On numerous occasions during 2010, [Frieze] attempted to get me, as manager of [Defendant], to agree on a listing price for Lot 33R, as required by the [Lot 33R Agreement]. Due to my uncertainties regarding the legality and authenticity of the purported agreement, and the state of the real estate market at the time, I never agreed upon a price for Lot 33R.

On 20 December 2010, the Frieze Trust assigned its interest in the Lot 33R Agreement to Equity Trust. Although Defendant's managers never agreed on a list price in accordance with the Lot 33R Agreement, on 13 December 2010, Equity Trust listed Lot 33R for $79,900.00, and on 12 January 2011, Equity Trust and Pleasure Holdings, LLC[4] entered into

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2. The Record before us also contains two separate signature pages to the Lot 33R Agreement: one bearing the signatures of Frieze, Rhine, and Silverman; the other bearing plainly different signatures of Frieze and Rhine and unsigned by Silverman.

3. The Record is silent on when the Frieze Trust subsequently transferred its interest in Lot 33R to Equity Trust.

4. According to Frieze's deposition, Pleasure Holdings, LLC is owned by Bud Blanton, who Frieze has "had a relationship with for a long time in the real estate business[.]"

a contract to sell and purchase Lot 33R for $78,000.00. According to their contract, Equity Trust agreed to seller finance $74,100.00 of the purchase price and to indemnify Pleasure Holdings, LLC against any claims or losses arising from any dispute between Frieze and Defendant. On 7 February 2011, a deed transferring Lot 33R to Pleasure Holdings, LLC was recorded. On 15 February 2011, Frieze emailed Rhine and Ganer requesting payment of $301,299.86 under the Lot 33R Agreement.

On 16 May 2011, at the request of his attorney, Frieze sent Ganer an email containing two documents related to the Lot 33R Agreement. The first document was a draft confession of judgment requesting Defendant "confess[] judgment in favor of Plaintiff in the sum of $302,171.07," the amount due under the Lot 33R Agreement. Notably, this draft confession of judgment contained a signature block for both Ganer and Rhine as the two managing members of Defendant. The second document was a draft complaint alleging Defendant breached the Lot 33R Agreement. According to her affidavit, Ganer informed Frieze and Rhine that she would not sign the confession of judgment.

The following day, 17 May 2011, Frieze signed a verification of the complaint (2011 Complaint). The same day, Rhine, purportedly on behalf of Defendant, signed a revised version of the confession of judgment (Confession of Judgment), which listed only Rhine as the managing member. On 19 May 2011, Plaintiffs filed the 2011 Complaint in New Hanover County (First Action). According to Plaintiffs, however, because they now had the Confession of Judgment signed by Rhine, Plaintiffs took a voluntary dismissal without prejudice, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure, of the First Action on 23 May 2011 (First Voluntary Dismissal). The next day, on 24 May 2011, Plaintiffs filed the Confession of Judgment, signed only by Rhine, in Pender County (Pender County Case) where Defendant's property was located. Attached to this filing was a civil action cover sheet listing the type of pleading as a "confession of judgment" and specifying the claim for relief was based on "contract."

On 22 June 2011, Ganer filed a Motion to Intervene and Motion for Relief from Judgment Pursuant to Rule 60 (2011 Motion for Relief) in the Pender County Case. In her Motion to Intervene, Ganer alleged the filing of the Confession of Judgment was contrary to Defendant's Bylaws—which required both managers' consent to bind Defendant—and therefore invalid and sought to intervene on behalf of Defendant in the Pender County Case. Ganer's 2011 Motion for Relief requested the trial court set aside the Confession of Judgment for the same reasons.

On 5 October 2011, the trial court entered an Order (Intervention Order) granting Ganer's Motion to Intervene, designating her as an "Intervenor Defendant to this action," and changing the "caption of this action" to reflect that Ganer was an Intervenor-Defendant. The Intervention Order also ordered that Ganer's 2011 Motion for Relief "shall constitute the initial pleading of the Intervenor Defendant[.]" The same day, the trial court entered an Order granting Ganer's 2011 Motion for Relief, setting aside the Confession of Judgment, and providing Defendant thirty days to answer Plaintiffs' Complaint in the First Action. On 16 November 2011, even though Plaintiffs had already taken a voluntary dismissal of the First Action, Defendant filed its Answer to Plaintiffs' Complaint in the First Action.

While these first two cases between the parties were going on, Defendant was involved in a separate dispute with First Bank, the successor in interest to Cooperative Bank, over the two Cooperative Bank Loans, which had matured and become due in June of 2010. Sometime in February of 2011, First Bank filed a civil action against Defendant and the personal guarantors of the Cooperative Bank Loans (First Bank Suit), seeking recovery for Defendant's default. On 5 December 2011, First Bank, Defendant, and the individual guarantors participated in court-ordered mediation, and as a result, the parties executed a Settlement Agreement and Release (First Bank Settlement) in March of 2012. Pursuant to the First Bank Settlement, the individual guarantors, which included both Frieze and Ganer, were relieved of a significant portion of their liability under the Cooperative Bank Loans, and the First Bank Suit was dismissed. In addition, the First Bank Settlement required Frieze to dismiss the Pender County Case without prejudice. On 24 July 2012, Plaintiffs filed a voluntary dismissal without prejudice, again pursuant to Rule 41(a), of the Pender County Case (Second Voluntary Dismissal).

Also during this same time period, Ganer and Rhine were involved in several disputes over who had the authority to act on behalf of Defendant. In early 2012, Rhine filed a lawsuit against Ganer (Rhine-Ganer Action), contending he was the only authorized manager of Defendant. On 29 February 2012, the trial court in the Rhine-Ganer Action entered a Temporary Restraining Order restraining Rhine from taking unilateral action on behalf of Defendant and from "refusing or failing to provide . . . Ganer or any member of Defendant . . . with information related to any and all legal proceedings pending against Defendant[.]" In defiance of this Order, Rhine would go on to file two more actions, including a foreclosure appeal and federal bankruptcy case, on behalf of Defendant, both of which were dismissed on the basis Rhine lacked authority to act alone on Defendant's behalf.

On 2 January 2014, Plaintiffs filed the 2014 Complaint alleging Defendant breached the Lot 33R Agreement. Because Rhine was listed as Defendant's registered agent with the Secretary of State, Plaintiffs mailed, by certified mail, the Summons and 2014 Complaint to Defendant's registered address, which was a P.O. Box owned by Rhine, and to Rhine's personal residence, which were received by Rhine on 3 and 13 January 2014, respectively.

On 5 February 2014, Matt Buckmiller (Buckmiller), counsel for Rhine individually, sent Plaintiffs' counsel an email regarding the present case, stating: "Give me a call when you get a chance about this lawsuit. I'd like to get an informal extension of time for 30 days so that we can figure out what lawyer is representing [Defendant], if any." The same day, Plaintiffs' counsel responded to Buckmiller, asking if an "informal extension until [3 March 2014 would] work[.]" Buckmiller accepted Plaintiffs' counsel's informal extension by email the following day, and in this email, Buckmiller copied Joseph Gram (Gram), counsel for Ganer individually, on this email exchange. Five minutes after receiving this email, Gram sent Plaintiffs' counsel the following email: "I represent [Ganer] in the various [Defendant] related matters. I just saw the email chain between you and [Buckmiller] regarding [Plaintiffs'] lawsuit against [Defendant]. This is the first I have heard of the suit and would appreciate it if you would provide me with a courtesy copy." Thereafter, Plaintiffs' counsel provided Gram with a copy of the 2014 Complaint.

On 4 March 2014, in the present case, Plaintiffs filed a Motion for Entry of Default stating Defendant was served with the 2014 Complaint and "has failed to answer, otherwise respond or plead in a timely manner[.]" The same day, Plaintiffs filed a Motion for Default Judgment. Both Motions were served on Rhine as the registered agent of Defendant. On 7 March 2014, the clerk of court for New Hanover County Superior Court entered an Entry of Default and a Judgment (Default Judgment) in the amount of $368,113.36 against Defendant, with both documents again being served on Rhine only.

Also, during February and March 2014, Plaintiffs' counsel, Buckmiller, Trawick Stubbs (Stubbs)—another attorney for Rhine—Gram, and Gary Shipman (Shipman)—an attorney who had previously handled matters for Defendant—conferred about arranging a meeting to discuss various matters relating to Defendant—such as the Rhine-Ganer Action, the present case, and another dispute with First Bank—and agreed to meet on 26 March 2014. On 19 March 2014, Gram emailed Plaintiffs' counsel to inquire into the status of the present case, and the

following day, Plaintiffs' counsel informed Gram that "[w]e obtained an entry of default and default judgment against [Defendant]."

Thereafter, Plaintiffs began executing on the Default Judgment and had it transcribed to Pender County, where Defendant owned real property—specifically, forty acres of unencumbered land (40 Acres). On 29 April 2014, Plaintiffs filed a Motion "to fix procedural details of the execution sale of real property" owned by Defendant in Pender County, which was, again, only served on Rhine. On 8 May 2014, at an execution sale on the 40 Acres, Plaintiffs submitted the only bid, credit bidding the amount of the Default Judgment. On 19 May 2014, a third party apparently unrelated to the parties placed an upset bid on the 40 Acres. Another upset bid was submitted by a different business entity represented by Shipman on 29 May 2014. Although the Record is not clear, this sale was apparently not consummated.[5]

During this same time frame, Ganer and Rhine mediated the Rhine-Ganer Action, resulting in a Mediated Settlement Agreement entered on 16 May 2014 (Rhine-Ganer Settlement Agreement). The Rhine-Ganer Settlement Agreement provided Defendant's members would appoint new managers for Defendant and that "Rhine agrees that Rebecca Rhine[, Rhine's wife,] and [Frieze] will not be the new managers." The Agreement also provided: "During the period of transition to the new managers, [Rhine] will not act unilaterally and must cooperate with [Ganer] consistent with the terms of the Temporary Restraining Order entered in this case." Further, the Agreement stated: "Rhine agrees that [Shipman] is authorized to represent [Defendant] . . . to address [Frieze's] claim and lawsuit against [Defendant] and prevent [Defendant] from losing its rights, title and interest to the 40 [A]cres."

On 28 May 2014, Defendant, through Shipman, filed a Motion for Relief from Judgment and to Set Aside Entry of Default (2014 Motion for Relief) arguing, *inter alia*, that Buckmiller's and Gram's communications with Plaintiffs' counsel in February and March 2014 constituted an "appearance" by Defendant, thereby prohibiting the Entry of Default, and that the Default Judgment itself was "void" because of Rule 41(a)'s "two-dismissal rule." By Orders entered on 18 July 2014, the trial court granted Defendant's 2014 Motion for Relief and set aside the Entry of Default (Order Setting Aside Entry of Default) and Default Judgment (Order Setting Aside Default Judgment). Thereafter, on 31 July 2014, Defendant filed its Answer to Plaintiffs' 2014 Complaint.

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5. The Record appears to indicate the prior upset bidder challenged the subsequent upset bid and sought an order requiring the property be put up for resale.

After extensive discovery, on 22 November 2017, Defendant filed a Motion for Summary Judgment arguing, *inter alia*, that Plaintiffs' 2014 Complaint violated the two-dismissal rule. The trial court entered an Order granting Defendant's Motion (Summary Judgment Order) on 4 May 2018. The Summary Judgment Order concluded Plaintiffs' First Action and Pender County Case constituted "actions" for purposes of Rule 41(a) and thus Plaintiffs' two Voluntary Dismissals of these actions, which "[arose] out of the same transaction or occurrence and the same core operative facts[,]" triggered Rule 41(a)'s two-dismissal rule. Therefore, the trial court concluded the present action was barred. Plaintiffs timely filed Notice of Appeal from the trial court's Orders Setting Aside Entry of Default and Default Judgment and Summary Judgment Order.[6]

Issues

The dispositive issues are (I) whether the trial court erred in applying the two-dismissal rule and granting summary judgment in favor of Defendant and (II) whether the trial court erred in setting aside the Entry of Default and Default Judgment.

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) (citation and quotation marks omitted). "A trial court's decision to grant or deny a motion to set aside an entry of default and default judgment is discretionary. Absent an abuse of that discretion, this Court will not reverse the trial court's ruling." *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 621, 610 S.E.2d 469, 470 (2005) (citations omitted).

Analysis

I. Two-Dismissal Rule

[1] Plaintiffs argue the trial court erred in applying the two-dismissal rule for several reasons. First, Plaintiffs claim the Confession of Judgment is not an "action" for purposes of Rule 41 and thus the two-dismissal rule is inapplicable. Second, assuming Rule 41 applies, Plaintiffs argue its 2011 Complaint and the Confession of Judgment

6. Defendant also filed timely Notice of Appeal from certain orders of the trial court; however, because our disposition renders Defendant's appeal moot, we do not reach Defendant's cross appeal.

are not based upon the same transaction or occurrence. Plaintiffs also assert the Confession of Judgment was not "unilaterally dismissed by Plaintiff." Lastly, Plaintiffs contend Defendant should be estopped from asserting the two-dismissal rule.

Rule 41 of the North Carolina Rules of Civil Procedure provides:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that *a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim.*

N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2017) (emphasis added). This provision of Rule 41(a)(1) is commonly referred to as the two-dismissal rule. Our Court has stated:

> [I]n enacting the two dismissal provision of Rule 41(a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts.

Richardson v. McCracken Enterprises, 126 N.C. App. 506, 509, 485 S.E.2d 844, 846 (1997), *aff'd per curiam*, 347 N.C. 660, 496 S.E.2d 380 (1998). "The 'two dismissal' rule has two elements: (1) the plaintiff must have filed two notices to dismiss under Rule 41(a)(1) and (2) the second action must have been based on or included the same claim as the first action." *Dunton v. Ayscue*, 203 N.C. App. 356, 358, 690 S.E.2d 752, 753 (2010) (citation omitted). To analyze this second element, we look to whether the second action was based upon the same transaction or occurrence as the first action. *Richardson*, 126 N.C. App. at 509, 485 S.E.2d at 846.

> Our determination of whether claims are based upon the same transaction or occurrence require[s] us to assess (1) whether the issues of fact and law raised by the claim[s] . . . are largely the same; (2) whether substantially

> the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims.

Gentry v. N.C. Dep't of Health & Human Servs., 242 N.C. App. 424, 427, 775 S.E.2d 878, 880 (2015) (alterations in original) (citation and quotation marks omitted).

Here, the parties agree the First Action, the filing of a civil complaint for breach of contract, constituted an "action" for purposes of the two-dismissal rule. *See* N.C. Gen. Stat. § 1-2 (2017) ("An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement . . . of a right[.]"). Rather, Plaintiffs assert the Pender County Case is not an "action" under Rule 41 because it was instituted by the Confession of Judgment not a complaint. However, the Pender County Case viewed in its entirety falls within Rule 41's definition of an action.

Specifically, after Plaintiffs filed their Confession of Judgment in Pender County, Ganer filed her Motion to Intervene requesting to intervene on behalf of Defendant in the Pender County Case. *See* N.C. Gen. Stat. § 1A-1, Rule 24(a)-(b) (2017) (allowing "anyone . . . to intervene in an action" to protect their interests in the subject matter of the dispute). Ganer's 2011 Motion for Relief sought to have the Confession of Judgment set aside and for "Defendant [to] be permitted to file answer to the Complaint filed on behalf of Plaintiff[.]" The trial court entered its Intervention Order granting Ganer's Motion to Intervene, designating her as an "Intervenor Defendant to this action," and changing the "caption of this action" to reflect that she was an Intervenor-Defendant. The Intervention Order also ordered Ganer's 2011 Motion for Relief "shall constitute the initial pleading of the Intervenor Defendant[.]" The same day, the trial court entered its Order granting Ganer's 2011 Motion for Relief, setting aside the Confession of Judgment, and providing Defendant thirty days to answer Plaintiffs' Complaint. Thereafter, Defendant filed its Answer to Plaintiffs' Complaint in the First Action. Plaintiffs, themselves, then voluntarily dismissed this action when they filed their Second Voluntary Dismissal on 24 July 2012. On these facts, after the trial court's Intervention Order and Order granting Ganer's 2011 Motion for Relief, the Pender County Case constituted an "action" for purposes of Rule 41.

Plaintiffs next contend the Confession of Judgment is not based upon the same transaction or occurrence as the First Action. Specifically, Plaintiffs assert the Confession of Judgment and the First Action are not based upon the same transaction or occurrence because the First Action

involved a claim for breach of contract, whereas Plaintiffs claim the Confession of Judgment simply sought entry of a monetary judgment against Defendant. However, as our Court has made clear, the focus of whether claims are based on the same transaction or occurrence is on "(1) whether the issues of fact and law raised by the claim[s] . . . are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims." *Gentry*, 242 N.C. App. at 427, 775 S.E.2d at 880 (alterations in original) (citation and quotation marks omitted).

Here, the First Action was for breach of contract against Defendant based on the Lot 33R Agreement, and the Pender County Case was for entry of a judgment against Defendant based on the Lot 33R Agreement. The present case, again, raises a claim against Defendant for monies owed arising under the Lot 33R Agreement. In the First Action, the "issues of fact and law" included whether the Lot 33R Agreement was valid and whether Defendant breached the Agreement. The Pender County Case dealt with the exact same issues of fact and law once Ganer was permitted to intervene. Further, both the First Action and Pender County Case would require identical evidence for either party to prevail, and a clear "logical relationship exists between" the two—namely, both sought the same relief: recovery of the exact debt Plaintiffs allegedly were due under the Lot 33R Agreement. *Id.* (citation and quotation marks omitted). Therefore, the First Action and Pender County Case plainly "are based upon the same transaction or occurrence[.]" *Id.* (citation omitted). The present action seeks the same relief[7] and would thus be barred by the two prior Voluntary Dismissals.

Further, attacking the first prong of the two-dismissal rule, Plaintiffs also argue the Confession of Judgment was not "unilaterally dismissed by Plaintiff," claiming Defendant "stipulated" to the Second Voluntary Dismissal in the First Bank Settlement. However, "[t]he crucial element in a notice of dismissal is the intention of the party actually to dismiss the case." *Robinson v. General Mills Restaurant*, 110 N.C. App. 633, 636, 430 S.E.2d 696, 698 (1993) (citation omitted). Here, the Second Voluntary Dismissal plainly and unequivocally states: "Please take notice that Plaintiff hereby voluntarily dismisses this action

7. This is what distinguishes this case from *Lifestore Bank v. Mingo Tribal Preservation Trust*, 235 N.C. App. 573, 763 S.E.2d 6 (2014), relied on heavily by Plaintiffs. There, while the first two actions dismissed were foreclosures by power of sale before the clerk, the third action sought different relief: judicial foreclosure and a money judgment. *See In re Foreclosure of Herndon*, 245 N.C. App. 83, 90, 781 S.E.2d 524, 528 (2016) (citation omitted).

pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, without prejudice." Plaintiffs' Second Voluntary Dismissal evinces an "intention of the party actually to dismiss the case." *Id.* (citation omitted). Therefore, Plaintiffs (1) "filed two notices to dismiss under Rule 41(a)(1)[,]" and (2) as discussed above, the Pender County Case was "based on . . . the same claim" as the First Action, thereby satisfying both elements of the two-dismissal rule. *Dunton*, 203 N.C. App. at 358, 690 S.E.2d at 753 (citation omitted).

[2] In a similar vein, Plaintiffs argue Defendant should be estopped from asserting the two-dismissal rule because Plaintiffs relied on Defendant's Confession of Judgment in obtaining a dismissal of the First Action and because Defendant benefited under the First Bank Settlement, which required Plaintiffs to dismiss the Pender County Case. We disagree.

"Equitable estoppel arises when one party, by his acts, representations, or silence when he should speak, intentionally, or through culpable negligence, induces a person to believe certain facts exist, and that person reasonably relies on and acts on those beliefs to his detriment." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007) (citation omitted). Our Supreme Court has stated: "One who seeks equity must do equity. The fundamental maxim, [h]e who comes into equity must come with clean hands, is a well-established foundation principle upon which the equity powers of the courts of North Carolina rest." *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998) (citations and quotation marks omitted).

Here, the Record establishes Plaintiffs are not entitled to equitable relief on the basis of their own unclean hands. For instance, Frieze conceded he never obtained Ganer's consent for the listing and purchase price of Lot 33R in contravention of the Lot 33R Agreement. Frieze also sold Lot 33R at a reduced price to Pleasure Holdings, LLC, a company owned by his friend and business associate, who he agreed to indemnify if Defendant contested this purchase. With regard to the Confession of Judgment itself, on 16 May 2011, three days before filing the First Action, Frieze sent Ganer the draft confession of judgment containing a signature block for Ganer as one of the managers of Defendant; however, on 24 May 2011, Frieze filed the Confession of Judgment signed only by Rhine. The filing of the Confession of Judgment represented a deliberate attempt by Frieze to circumvent Defendant's Bylaws by not obtaining Ganer's approval. Thereafter, Ganer filed her Motion to Intervene and 2011 Motion for Relief and was allowed to intervene in the Pender County Case and to set aside the Confession of Judgment.

Further, in filing the present case, Plaintiffs' actions illustrate a continuing pattern of a lack of clean hands. Although multiple court orders prohibited Rhine from acting unilaterally on Defendant's behalf, a fact Frieze was surely well aware of as a member of Defendant, Plaintiffs repeatedly served all court documents in this case solely on Rhine. Although Plaintiffs technically complied with Rule 4's service requirements, Plaintiffs' actions in this respect—when coupled with the fact that Plaintiffs' counsel, without notice, sought and obtained the Entry of Default and Default Judgment[8] while in discussions with Gram, Buckmiller, and Shipman over, *inter alia*, how to proceed in the present case—cut against exercising equitable remedies. *See id.* Therefore, the trial court did not err in applying the two-dismissal rule and granting summary judgment for Defendant. Accordingly, we affirm the trial court's Summary Judgment Order.

II. Entry of Default and Default Judgment

[3] Plaintiffs further contend the trial court erred by setting aside the Entry of Default and Default Judgment. Under Rule 55(b)(1) of our Rules of Civil Procedure, the clerk of superior court may enter a default judgment against a defendant only if the defendant has never made an appearance in the action. *N.C.N.B. v. McKee*, 63 N.C. App. 58, 60, 303 S.E.2d 842, 844 (1983) (citation omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 55(b)(1) (2017). "Generally, an appearance requires some presentation or submission to the court." *Cabe v. Worley*, 140 N.C. App. 250, 253, 536 S.E.2d 328, 330 (2000) (citation and quotation marks omitted). Nevertheless, "a defendant does not have to respond directly to a complaint in order for his actions to constitute an appearance." *Roland v. Motor Lines*, 32 N.C. App. 288, 289, 231 S.E.2d 685, 687 (1977) (citation omitted). Rather, "an appearance may arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Id.* (citations omitted); *see Coastal Fed. Credit Union v. Falls*, 217 N.C. App. 100, 103-07, 718 S.E.2d 192, 194-96 (2011) (concluding the defendants' negotiations with the plaintiff's law firm regarding a payment plan could qualify as an "appearance," thereby entitling the defendants to notice of the default judgment hearing); *Webb v. James*, 46 N.C. App. 551, 557, 265 S.E.2d 642, 646 (1980) (holding "when [a] defendant negotiated a continuance of the action . . . , that he made an appearance"). In *Lexis-Nexis v. Travishan Corp.*, our Court recognized when an agent of a defendant corporation negotiates with the opposing party, the agent can "make an implied

8. Even initiating an execution sale, at which Plaintiffs attempted to purchase the 40 Acres.

appearance on behalf of [the] corporation[.]" 155 N.C. App. 205, 208, 573 S.E.2d 547, 549 (2002). This is so because "[a] corporation can only act through its agents." *Id.* (alteration in original) (citation and quotation marks omitted).

Here, when the clerk entered its Entry of Default and Default Judgment, Defendant had appeared within the meaning of Rule 55. Prior to filing its Motions for Entry of Default and Default Judgment, Buckmiller, counsel for Rhine individually, sent Plaintiffs' counsel an email regarding the 2014 Complaint, stating: "Give me a call when you get a chance about this lawsuit. I'd like to get an informal extension of time for 30 days so that we can figure out what lawyer is representing [Defendant], if any." Thereafter, Plaintiffs' counsel offered Buckmiller an "informal extension until [3 March 2014,]" which Buckmiller accepted. As Rhine was one of the managers of Defendant at this time, and its registered agent, Rhine's acceptance of Plaintiffs' offering of an informal extension of time constituted "an implied appearance on behalf of [Defendant.]" *Id.* In addition, after being granted an informal extension of time, Frieze's counsel continued having discussions with Buckmiller, Gram, and Shipman about arranging a meeting to discuss the various matters relating to Defendant, including the present case, which such discussions further suggest Defendant had made an appearance. *See Falls*, 217 N.C. App. at 103-07, 718 S.E.2d at 194-96. Therefore, because Defendant had appeared in this action, the clerk's Entry of Default and Default Judgment were "void." *McKee*, 63 N.C. App. at 61, 303 S.E.2d at 844 (citation omitted). Thus, under Rule 60(b), the trial court did not abuse its discretion in setting aside the Entry of Default and Default Judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2017) (allowing a trial court to set aside a default judgment where "[t]he judgment is void").

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Orders Setting Aside Entry of Default and Default Judgment and Summary Judgment Order.

AFFIRMED.

Judges STROUD and BROOK concur.

IN RE S.G.

[268 N.C. App. 360 (2019)]

IN THE MATTER OF S.G., A.G., AND F.C.

No. COA18-1147

Filed 19 November 2019

1. Child Abuse, Dependency, and Neglect—abuse—serious physical injury—non-accidental means—sufficiency of evidence

The trial court properly adjudicated a child abused based on the child suffering a bruise to his face that had a distinct pattern to it and that was visible for at least four days. The injury qualified as a "serious physical injury" pursuant to N.C.G.S. § 7B-101(1) and the court's conclusion that it occurred "by other than accidental means" was supported by the evidence, including testimony from two medical professionals.

2. Child Abuse, Dependency, and Neglect—neglect—risk of future harm—abuse of another child in household

The trial court properly adjudicated two children as neglected after adjudicating a third sibling as abused—where its findings that the parents refused to acknowledge responsibility for the abuse and that the mother opted to stay with the father (the alleged perpetrator of the abuse) rather than care for the children supported a determination that the children were at risk of future harm if they remained in their parents' care.

3. Child Abuse, Dependency, and Neglect—dispositional order—services ordered—relation to reason for removal—discretion of trial court

The trial court did not abuse its discretion by ordering respondent parents to undergo mental health and substance abuse assessments and random drug screens where their children were removed from the home based on the physical abuse of one child, since those services had the potential to resolve possible underlying causes of the abuse that occurred. Likewise, the court's requirement that respondents obtain safe and stable housing, even though housing was not an issue in the adjudication phase, was a proper exercise of its authority pursuant to N.C.G.S. § 7B-904(d1)(3), particularly where respondents attempted to conceal their living arrangements from the social services agency and had moved multiple times.

4. Child Abuse, Dependency, and Neglect—dispositional order—visitation schedule—abuse of discretion

After adjudicating three children neglected and one of them abused, the trial court's determination that it was in the children's best interests to have visits with their parents only once a month was not an abuse of discretion, but the matter was remanded for the court to establish the minimum duration of the visits as required by N.C.G.S. § 7B-905.1(c). The court's directive that contact between respondent-father and the oldest child, who was not his biological child, be in accordance with recommendations by the child's therapist was not an improper delegation of authority because the court was not required to award any visitation between them.

Appeal by Respondents from order entered 28 June 2018 by Judge Ali B. Paksoy and order entered 27 July 2018 by Judge Jeannette R. Reeves in District Court, Lincoln County. Heard in the Court of Appeals 3 October 2019.

Lauren Vaughan for Petitioner-Appellee Lincoln County Department of Social Services.

J. Thomas Diepenbrock for Respondent-Appellant Father.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellant Mother.

Parker Poe Adams & Bernstein LLP, by Michael J. Crook and Joshua J. Morales, for Guardian ad Litem.

McGEE, Chief Judge.

Respondents appeal from an order adjudicating the minor child F.C. to be an abused, neglected, and dependent juvenile and the minor children S.G. and A.G. to be neglected and dependent juveniles. Respondents also appeal from a disposition and permanency planning order requiring them to engage in services and establishing visitation. We affirm the adjudication order, affirm in part and vacate in part the disposition/permanency planning order, and remand for entry of an appropriate visitation order.

I. Background

Respondent-Mother is the mother of all three children. She is in a relationship with Respondent-Father, who is the father of S.G. and A.G. F.C.'s father is deceased. On 18 July 2017, the Lincoln County Department

of Social Services ("DSS") received a report alleging that three-year-old F.C. was seen with a black eye that resulted from Respondent-Father pushing him down and hitting him. A social worker went to Respondents' home to investigate, but Respondents appeared to be intentionally evading the social worker, until the social worker called law enforcement, and Respondents finally opened their door. Respondents both denied to the social worker that Respondent-Father hit F.C., instead claiming that F.C. had been running through the house with the dog when he tripped and hit his head on a coffee table. The social worker informed Respondent-Father that he would have to leave the residence while the matter was being investigated. The social worker stayed at the home until Respondent-Father left.

The next day, another social worker informed Respondent-Mother that Respondent-Father could not have contact with F.C. until F.C. was given a forensic interview. F.C. was seen by Dr. Melissa Will ("Dr. Will"), who found "a red patterned bruise covering [F.C.'s right] forehead (pattern of rectangle with 3 vertic[al] lines within it), also unpatterned bruise lateral to this; also bruise of his upper eyelid[.]" It was Dr. Will's opinion that the unusual pattern of the bruise was inconsistent with Respondent-Mother's explanation that F.C. hit his head on a coffee table.

DSS decided that Respondent-Father could not have any contact with the children. "Respondent-Mother was asked to take all three children and keep [] Respondent-Father away from them. [] Respondent-Mother wanted to be with [Respondent-Father] and preferred that [Respondent-Father] come home and the three children go somewhere else. [] Respondent-Mother would not agree to keep the children away from [Respondent-Father]." The children were placed with a paternal relative, who later became unable to care for them.

On 24 July 2017, DSS filed petitions alleging that F.C. was an abused, neglected, and dependent juvenile; and alleging that S.G. and A.G. were neglected and dependent juveniles. DSS obtained nonsecure custody of the children the same day. The trial court held an adjudicatory hearing on 20 February and 15 April 2018, after which the trial court entered a 28 June 2018 order adjudicating F.C. to be abused and all three children to be neglected and dependent.

The trial court conducted a disposition and permanency planning hearing on 17 July 2018. The trial court's 27 July 2018 order established a visitation plan of "one visit each month" with Respondents' respective children. Contact between Respondent-Father and F.C. was to be based on the recommendations of F.C.'s therapist. The trial court also ordered

Respondents to submit to substance abuse and mental health assessments and follow all recommendations, participate in parenting classes and demonstrate skills learned during visits, obtain and maintain safe and stable housing, and submit to random drug screens. Respondents appeal.

II. Adjudication

Respondent-Father argues that the trial court erred by adjudicating F.C. as an abused juvenile.[1] Both Respondents argue that the trial court erroneously adjudicated S.G. and A.G. as neglected juveniles. We address each argument in turn.

A. *Standard of Review*

When reviewing an adjudication of abuse, neglect, or dependency, this Court determines whether the trial court's findings of fact are supported by clear and convincing evidence and whether the trial court's legal conclusions are supported by its findings of fact. *See In re C.M. & M.H.M.*, 198 N.C. App. 53, 59, 678 S.E.2d 794, 798 (2009). Findings of fact which are "supported by clear and convincing competent evidence are deemed conclusive [on appeal], even where some evidence supports contrary findings." *Id.* (quotation marks and citation omitted). The trial court's conclusions of law are reviewed *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citation omitted).

B. *Abuse*

[1] The trial court concluded that F.C. was abused under N.C.G.S. § 7B-101(1)(a) and (b) (2017). These subsections define an abused juvenile, in relevant part, as one whose parent:

> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]

Id.

Respondent-Father first contends that neither the evidence nor the trial court's findings support its conclusion that F.C. suffered a "serious physical injury." He argues that F.C. did not suffer the type of "significant

1. Respondent-Mother does not challenge the trial court's abuse adjudication. Neither Respondent challenges the court's adjudication of F.C. as neglected or its adjudication of all three children as dependent.

physical injuries" that provided support for the abuse adjudications upheld by this Court in cases such as *In re Hayden*, 96 N.C. App. 77, 83, 384 S.E.2d 558, 562 (1989) (child "suffered multiple burns over a wide portion of her body") and *In re T.H.T.*, 185 N.C. App. 337, 345-46, 648 S.E.2d 519, 525 (2007) (child suffered skull fracture), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008).

However, the cases cited by Respondent-Father did not establish a *minimum threshold* for a serious injury. As this Court has explained, "the nature of an injury is dependent upon the facts of each case[.]" *In re L.T.R. & J.M.R.*, 181 N.C. App. 376, 383, 639 S.E.2d 122, 126 (2007). Using this standard, we previously upheld an abuse adjudication when a three-year-old child suffered "a dark, six-inch bruise, which lasted well over one week, on his right thigh." *Id.* at 382, 639 S.E.2d at 126.

In this case, the trial court made a number of findings about three-year-old F.C.'s injury. He "had a significant bruise on his forehead, above his eye" when a DSS social worker observed him on the night of 18 July 2017. Then, during a medical examination the following day, F.C. was found to have "bruising on his right forehead with an unusual pattern[.] It was a red patterned bruise covering his right forehead, the pattern of a rectangle with three vertical lines within it. There was also a patterned bruise lateral to this, in addition to a bruise on his upper eyelid." A 21 July 2017 examination "revealed bruising to the right eyelid and on [F.C.'s] forehead was a knot, raised, with a very distinct patterned bruise." Finally, the trial court found that "[t]he bruise was visible at least four days after the incident." These findings were sufficient to support the trial court's conclusion that F.C. suffered a serious injury.

Respondent-Father next contends that neither the evidence nor the trial court's findings support the conclusion that F.C.'s injury or risk of injury occurred through non-accidental means. He argues that "cases involving an adjudication of physical abuse typically include medical opinions . . . that the injuries were inflicted by non-accidental means" and that such opinions were absent here.

Respondent-Father cites three cases to support his contention: *In re L.Z.A.*, 249 N.C. App. 628, 792 S.E.2d 160 (2016); *C.M.*, 198 N.C. App. 53, 678 S.E.2d 794; and *T.H.T.*, 185 N.C. App. 337, 648 S.E.2d 519. While he is correct that each of these cases, in upholding abuse adjudications, noted there was medical testimony that the child suffered a non-accidental injury, these cases do not hold that similar medical testimony is a requirement. In this case, no medical expert explicitly testified that F.C.'s injuries occurred through non-accidental means, but there was ample

medical evidence from which the trial court could determine that F.C.'s injuries were not caused by accident. Dr. Will testified that Respondent-Mother's claim that F.C.'s injury resulted from falling and hitting his head on the coffee table was inconsistent with the nature of the injuries. Moreover, a forensic nurse examiner testified that F.C.'s bruising was "definitely consistent with having been hit with a belt buckle[,]" rather than consistent with F.C.'s head hitting a wall, a table, or the floor. When presented photographs of the table during the adjudication hearing, the nurse testified, "I don't see anything on that table that would intimate to me that that pattern would have shown up from being hit."

Based on the unobjected-to testimony of the two medical professionals above, the trial court found that F.C.'s bruise "was consistent with having been hit with a belt buckle" and "was not consistent with the child's head hitting a table, a wall, or the floor." This finding, coupled with the findings about the severity of F.C.'s injury, fully supported the trial court's determination that "Respondents have inflicted or allowed to be inflicted on [F.C.] a serious physical injury by other than accidental means." Thus, the trial court appropriately adjudicated F.C. as an abused juvenile. Respondent-Father's arguments are overruled.

C. *Neglect*

[2] The Juvenile Code defines a neglected juvenile, in relevant part, as one

> Who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare[.] In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15) (2017).[2] "Since the statutory definition of a neglected child includes living with a person who neglected [or abused] other children[,]" "the trial judge has discretion in determining the weight to be given" to evidence of another child's abuse or neglect in determining whether a child is neglected. *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (quotation marks and citation omitted).

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2. This definition has been amended, in a manner not relevant to this case, by legislation that became effective after the entry of the trial court's order. *See* 2018 N.C. Sess. 68 § 8.1(b).

"In order to adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment *or a substantial risk of such impairment*." *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (emphasis added) (citation omitted). Respondents contend that there was no evidence that S.G. or A.G. suffered any impairment or substantial risk of impairment, and that their neglect adjudication was based solely on the fact they lived with F.C.

However, in addition to the findings relevant to its conclusion that F.C. was an abused juvenile, the trial court made additional findings of fact supporting its determination that S.G. and A.G. were neglected juveniles:

> 27. After the CAC interview with the minor child, [F.C.], which was on July 20, 2017, [DSS] determined that [] Respondent[-]Father could not be around the children. [] Respondent[-]Mother was asked to take all three children and keep [] Respondent[-]Father away from them. [] Respondent[-]Mother wanted to be with [Respondent-Father] and preferred that [Respondent-]Father come home and the three children go somewhere else. [] Respondent[-]Mother would not agree to keep the children away from [Respondent-]Father.
>
> . . . .
>
> 40. After the CAC interview on July 20, 2017, [] Respondent[-]Mother did not believe what the child reported. []Respondent[-]Mother believed [] Respondent[-]Father's story over the child's and wanted [] Respondent[-]Father back in the home. [] Respondent[-]Mother did not believe she could protect the children from [] Respondent[-]Father. There were no other placement options found and [] Respondent[-]Mother would rather have the children leave and [] Respondent[-]Father come home.
>
> . . . .
>
> 44. Respondent[s] have continued to deny any responsibility for the injuries to [F.C.].
>
> 45. That the failure to acknowledge responsibility, . . . [Respondent-Mother's] inability to protect the children, [Respondents'] avoidance of DSS workers, and the other facts of this case lead to the conclusion that there is a risk of future harm to the children.

> 46. That the juveniles, [S.G.] and [A.G.], have lived in a home where another juvenile, their older brother [F.C.], had been subjected to abuse and neglect by adults who regularly live in the home.

Based on these findings, the trial court concluded that the children "have not received proper care, supervision or discipline from [Respondents] and they have lived in an environment injurious to [their] welfare."

The trial court's findings above were supported by competent evidence[3] and show that, contrary to Respondents' arguments, the trial court's conclusion that S.G. and A.G. were neglected juveniles was not supported solely by its finding that they lived in a home where F.C. was abused and neglected. Rather, the trial court also considered that Respondent-Father had not been allowed to have contact with the children and, therefore, could not provide care and that Respondent-Mother chose to be with Respondent-Father rather than to provide housing, care, and love to the children. Furthermore, even after medical professionals provided unobjected-to opinion testimony that F.C.'s injuries could not have occurred in the way Respondents described, Respondents still refused to take any responsibility for F.C.'s injuries. After the incident where F.C. was abused, Respondent-Mother would not care for the children if it meant she could not be with Respondent-Father. Considered together, these factors support the trial court's determination that there was a risk of future harm to the children if they remained in Respondents' care. Accordingly, the trial court did not err by concluding S.G. and A.G. were neglected juveniles.

III. Disposition

[3] Respondents contend that the trial court erred in ordering them to engage in services that were not necessary to remedy the conditions that led or contributed to the adjudications. Specifically, Respondents contest the trial court's authority to order them to: (1) complete a substance abuse assessment and follow all recommendations; (2) complete a mental health assessment and follow all recommendations; (3) obtain and maintain safe and stable housing; and (4) submit to random drug screens.

> The North Carolina General Statutes permit the trial court at its discretion to

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3. Respondents challenge findings and portions of findings not quoted above. Since the quoted findings were sufficient to support the court's neglect adjudication, we do not address these challenges. *See In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006) ("When, however, ample other findings of fact support an adjudication . . ., erroneous findings unnecessary to the determination do not constitute reversible error.").

> determine whether the best interests of the juvenile require that the parent . . . undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent. . . . If the court finds that the best interests of the juvenile require the parent . . . [to] undergo treatment, it may order that individual to comply with a plan of treatment[.]

In re A.S.& M.J.W., 181 N.C. App. 706, 712, 640 S.E.2d 817, 821 (2007) (quoting N.C.G.S. § 7B-904(c) (2005)). N.C.G.S. § 7B-904 also allows the trial court to order a parent to "take appropriate steps" in order to achieve reunification. N.C.G.S. § 7B-904(d1)(3) (2017). "For a court to properly exercise the authority permitted by this provision, there must be a nexus between the step ordered by the court and a condition that is found or alleged to have led to or contributed to the adjudication." *In re T.N.G.*, 244 N.C. App. 398, 408, 781 S.E.2d 93, 101 (2015) (citation omitted); *In re B.O.A.*, __ N.C. __, __, 831 S.E.2d 305, 314-15 (2019). However, the trial court is not limited to ordering services which directly address the reasons for the children's removal from a parent's custody. It may also order services which could aid "in both understanding and resolving the possible underlying causes" of the actions that contributed to the trial court's removal decision. *In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 632-33 (2013). Further:

> [N.C.G.S.] § 7B-901 provides that the "dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile[.] The court may consider any evidence, including hearsay evidence as defined in G.S. 8C–1, Rule 801[.]" "We review a dispositional order only for abuse of discretion. 'An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.' "

T.N.G., 244 N.C. App. at 408, 781 S.E.2d at 100 (citations omitted).

In this case, the children were removed primarily as a result of F.C.'s non-accidental injuries, Respondents' refusal to accept responsibility therefore, and Respondent-Mother's refusal to care for the children if it meant that Respondent-Father could not remain in the home with her. DSS also alleged in the juvenile petitions that it received reports from

several sources that Respondents "were using unidentified illegal substances." Based on the allegations in the petition and the facts found in the adjudication order, the trial court acted within its discretion by requiring Respondents to receive and comply with mental health and substance abuse evaluations and submit to drug screens. These directives would, at minimum, assist the trial court, DSS, and Respondents in understanding whether substance abuse or mental health issues were underlying causes for F.C.'s abuse and the children's neglect. *See A.R.*, 227 N.C. App. at 522–23, 742 S.E.2d at 632–33 (concluding that mental health assessments, substance abuse evaluations, and drug screens would assist "in both understanding and resolving the possible underlying causes of respondents' domestic violence issues"). Thus, the trial court did not abuse its discretion in setting these requirements, as they are "reasonably related to aiding [R]espondents in remedying the conditions which led to the children's removal[.]" *Id.* at 522, 742 S.E.2d at 632.

Respondents further argue that the trial court erred in ordering them to "obtain and maintain safe and stable housing[,]" because this condition was not related to the issues resulting in the children's removal. Respondent-Mother contends "there were no findings of fact addressing the lack of safe and stable housing[,]" and that "[t]he entire adjudication was premised on F.C.'s injury, and not on the status of the house as unsuitable." Relying on N.C.G.S. § 7B-904, Respondent-Father also contends that because the adjudication order did not include findings that that the children's housing was a factor in the adjudications of abuse, neglect, and dependency, the trial court was without authority to order Respondents to obtain and maintain safe and stable housing.

It is true that this Court has held the trial court erred in ordering conditions concerning a respondent-parent's housing when "the petitions did not allege and the district court did not find as fact that [housing] issues led to the juveniles' removal from [the respondent's] custody or formed the basis for their adjudications." *In re H.H.*, 237 N.C. App. 431, 440, 767 S.E.2d 347, 353 (2014); *see also In re W.V.*, 204 N.C. App. 290, 297, 693 S.E.2d 383, 388 (2010) (vacating the portion of the dispositional order requiring the parent to obtain and maintain stable employment where "[n]othing in the record suggests that respondent's employment situation, or lack thereof, led to or contributed to the juvenile's adjudication"). However, in 2019, our Supreme Court in *B.O.A.* overruled this Court's narrow application of N.C.G.S. § 7B-904.[4]

4. Although this Court did not consider N.C.G.S. § 7B-904 in *B.O.A.*, our Supreme Court construed it, along with N.C.G.S. § 7B-1111(a)(2), in order to reach its holding.

In *B.O.A.*, review of the record reveals that the infant child was alleged to have been a neglected juvenile, based upon an allegation that she " 'live[d] in an environment injurious to the juvenile's welfare.' " *B.O.A.*, __ N.C. at __, 831 S.E.2d at 307. The petition was based on allegations that the child's father "choked" the child's mother while the child was present during an altercation at their home. Law enforcement "found [the child] to have a bruise on her right forearm going to her . . . hand" that a doctor testified "was unlikely to have come from the child's bouncy seat" as maintained by the mother. The mother had also been "charged for assault on a juvenile in June 2015" for allegedly throwing a shoe and injuring the eye of the child's three-year-old sibling. The adjudication order included findings supporting the allegations of domestic abuse of the mother by the father, the child having likely been injured by one of her parents, and the opinion of a nurse familiar with the histories of both the child and the mother that the "juvenile's safety [wa]s at risk." The trial court found the child was "living in an injurious environment with [the parents] and [was] a neglected juvenile as defined by law." The disposition order was entered with the adjudication order, and the mother was ordered to follow an Out of Home Service Agreement that required her, *inter alia*, to: obtain mental health assessments and follow recommendations; attend certain domestic violence and sexual abuse group meetings; take certain medications; submit to random drug screens; and "obtain and maintain stable income for at least 3 consecutive months."

On appeal, our Supreme Court stated: "The ultimate issue before us in this case revolves around the manner in which the reference to 'those conditions that led to the removal of the juvenile' contained in N.C.G.S. § 7B-1111(a)(2) should be construed." *B.O.A.*, __ N.C. at __, 831 S.E.2d at 311. The mother argued that "domestic violence and the bruise" were the sole conditions that "caused" the child's removal, and that *when DSS filed the petition*, it "did not know whether [the child] was at risk because [the mother] had medication management issues[,]" whether the mother had "any mental health issues" affecting the child's welfare, or whether the mother had insufficient "parenting skills." The mother noted that the trial court "did not find that domestic violence was caused by substance abuse, mental health issues, parenting skills, or medication management." The mother further argued that conditions that she continue participating in " 'a Sexual Abuse Survivors group[,]' " not talk with the child about the case or "adult issues," and "maintain stable income[,]" "were not removal conditions" and, therefore, could not be considered as bases to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(2).

Our Supreme Court disagreed, relying in part on N.C.G.S. § 7B-904:

> According to N.C.G.S. § 7B-904(d1)(3), a trial judge has the authority to require the parent of a juvenile who has been adjudicated to be abused, neglected, or dependent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." After examining N.C.G.S. § 7B-904(d1)(3), we believe that the General Assembly clearly contemplated that, in the event that a juvenile is found to have been abused, neglected, or dependent, the trial judge has the authority to order a parent to take *any step needed to remediate the conditions that "led to or contributed to" either the juvenile's adjudication or the decision to divest the parent of custody*. Put another way, the trial judge in an abuse, neglect, or dependency proceeding has the *authority to order a parent to take any step reasonably required to alleviate any condition* that directly or indirectly contributed to causing the juvenile's removal from the parental home. In addition, N.C.G.S. § 7B-904(d1)(3) authorizes the trial judge, as he or she gains a better understanding of the relevant family dynamic, *to modify and update a parent's case plan* in subsequent review proceedings conducted pursuant to N.C.G.S. § 7B-906.1. Thus, the relevant statutory provisions appear to contemplate an ongoing examination of the circumstances that surrounded the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and the indirect underlying causes of the juvenile's removal from the parental home[.]

B.O.A., __ N.C. at __, 831 S.E.2d at 311–12 (emphasis added). The Court further concluded:

> [N]othing in the relevant statutory language suggests that the only "conditions of removal" that are relevant to a determination of whether a particular parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent

> juvenile. Instead, the relevant statutory language appears to us to be subject to a number of potentially possible interpretations in addition to that adopted by the Court of Appeals. For example, the relevant statutory language can easily be read to encompass all of the conditions that led to the child's removal from the parental home, including both those inherent in the events immediately surrounding the child's removal from the home and any additional underlying factors that contributed to the difficulties that resulted in the child's removal. A careful examination of the relevant statutory language in the context of other related statutory provisions suggests that a more expansive reading of the reference to "those conditions that led to the removal of the juvenile" contained in N.C.G.S. § 7B-1111(a)(2) is the appropriate one.

B.O.A., __ N.C. at __, 831 S.E.2d at 311.

Although *B.O.A.* was an appeal from a termination order, we find its analysis of N.C.G.S. § 7B-904 binding, and can conceive of no reason why the trial court's imposition of conditions for reunification would be "limited to those [conditions] which are explicitly set out in a petition seeking the entry of a nonsecure custody order or [as findings of fact in] a determination that a particular child is an abused, neglected, or dependent juvenile[,]" when the trial court is free to impose any conditions it believes are relevant to addressing the issues that led to a child's removal—at any time and based upon new or existing evidence—so long as it does not abuse its discretion. *B.O.A.*, __ N.C. at __, 831 S.E.2d at 311.

We believe cases such as *H.H.*, 237 N.C. App. 431, 767 S.E.2d 347 and *W.V.*, 204 N.C. App. 290, 693 S.E.2d 383, relied upon by Respondents, which hold "the court lacked authority to order [the respondent-]mother to maintain stable housing and employment" when "the petitions did not allege and the district court did not find as fact [in its adjudication order] that these issues led to the juveniles' removal from [the respondent-]mother's custody or formed the basis for their adjudications[,]" *H.H.*, 237 N.C. App. at 440, 767 S.E.2d at 353, are in conflict with *B.O.A.* To the extent that *H.H.*, *W.V.*, and other opinions of this Court are in conflict with the analysis and holdings in *B.O.A.*, they have been overruled. *Id.* at __, 831 S.E.2d at 312 (rejecting the reasoning of the Court of Appeals "that the trial court was not entitled to consider certain of the 'conditions' addressed in respondent-mother's court-approved case plan because 'DSS failed to allege any of these conditions in either the

nonsecure custody order or neglect petition to put [r]espondent on notice of these conditions' ").

In this case, DSS included in the "Other Significant Information" section of its 12 July 2018 "Model Court Report for Permanency Planning Hearings" that Respondents had provided DSS with a P.O. Box, but

> refuse[d] to disclose their physical address to [DSS]. They had previously provided an address on Sigmon Street. [Respondent-Father] reported they had issues with the rent and left that residence, to return to their former address on Sunnyhill Road. Child support attempted to serve [Respondents] at both locations, and were informed they do not reside at either location.

DSS recommended that both Respondents "obtain/maintain safe and stable housing suitable for the children." In the report, DSS "ask[ed] the [trial] court to order [Respondents] to disclose the address where they reside today[,]" and "any time they change residences." In the 27 July 2018 disposition order, the trial court considered DSS's report, and found as fact that Respondents had reported having issues with housing, had provided a false address to DSS, and had "refuse[d] to disclose their physical address to [DSS]." The trial court then ordered "[t]hat [Respondents] shall provide [DSS] with their address[,]" and that they both "[o]btain and maintain safe and stable housing."

We hold, considering Respondents were actively attempting to keep their place of residence hidden from DSS, and appeared to have moved multiple times in a relatively short time period, that the trial court's order requiring Respondents to obtain and maintain safe and stable housing, and keep DSS informed of any changes in housing, was a reasonable requirement and did not constitute an abuse of discretion. *See A.R.*, 227 N.C. App. at 522, 742 S.E.2d at 633 ("[p]roviding copies of deeds or leases, of employment or income, and notifying [DSS] of any changes in circumstances is also a reasonable requirement upon respondents as it is a manner in which both [DSS] can stay in contact with respondents and ensure that they are making progress toward having their children returned home").

> [P]arental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B–1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention

> into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home. The adoption of a contrary approach would amount to turning a blind eye to the practical reality that a child's removal from the parental home is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation.

B.O.A., __ N.C. at __, 831 S.E.2d at 313–14. If the trial court can rely on such a case plan as the basis for terminating parental rights pursuant to N.C.G.S. § 7B–1111, the trial court can surely adopt such a case plan, one with "no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life," *id.*, pursuant to N.C.G.S. § 7B-904(d1)(3), in its disposition order. "We do not, of course, wish to be understood as holding that a trial judge's authority to adopt a case plan pursuant to N.C.G.S. § 7B-904(d1)(3) is unlimited[.]" *Id.* at __, 831 S.E.2d at 314.

IV. Visitation

[4] Finally, Respondents contend that the trial court erred in failing to set an appropriate visitation schedule. "This Court reviews the trial court's dispositional orders of visitation for an abuse of discretion." *C.M.*, 183 N.C. App. at 215, 644 S.E.2d at 595. "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *A.R.*, 227 N.C. App. at 520-21, 742 S.E.2d at 632 (quotation marks and citation omitted).

In the present case, the trial court's dispositional and permanency planning order provided "[t]hat the parents shall have one visit each month supervised at [DSS] with their respective children. Contact between [Respondent-Father] and [F.C.] shall be recommended by [F.C.'s] therapist." Respondent-Father contends that, in the latter provision, the trial court erroneously delegated its judicial function of setting visitation between Respondent-Father and F.C. by giving that power to F.C.'s therapist. In support of his argument, Respondent-Father cites to decisions by this Court recognizing that the " 'judicial function [of awarding visitation] may [not] be . . . delegated by the court to the

custodian of the child.' " *In re J.D.R.*, 239 N.C. App. 63, 75, 768 S.E.2d 172, 180 (2015) (quoting *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)); *see also In re C.S.L.B.*, __ N.C. App. __, 803 S.E.2d 429, 2017 WL 3027615 (2017).[5] However, in those cited decisions, this Court determined the trial court erred by establishing baseline visitation plans that could be modified at the discretion of the children's guardian. By contrast, the trial court in this case awarded no visitation with F.C. Nor was any visitation required. N.C.G.S. § 7B-905.1 only requires the setting of a visitation plan between a child and his or her "parent, guardian, or custodian[.]" N.C.G.S. § 7B-905.1(a) (2017). Respondent-Father had none of those relationships with F.C. Thus, the trial court was not required, by statute or by decision of this Court, to provide for any visitation between Respondent-Father and F.C., and it did not err when it declined to award any visitation.

While the trial court denied Respondent-Father scheduled visitation with F.C., it did allow "contact" between Respondent-Father and F.C. if recommended by F.C.'s therapist. This decision was supported by the trial court's finding that F.C.'s therapist noted F.C. was exhibiting significant signs of trauma after the initiation of supervised visitation with Respondent-Father, which resulted in the cessation of visitation. Respondent-Father fails to show the trial court abused its discretion in setting this condition for contact between Respondent-Father and F.C.

Respondent-Mother contends that the trial court abused its discretion by only allowing her to visit with her children once per month. She claims such infrequent visitation frustrates efforts toward the permanent plan of reunification with the children. Similarly, Respondent-Father contends that, as to his visits with A.G. and S.G., this Court must remand for a new visitation plan because the trial court "failed to justify why such limited contact with the parents was appropriate."

Neither Respondent cites to any legal authority that would support their contentions that ordering visitation to occur only once per month constitutes an abuse of discretion. Our case law reflects that this frequency of visitation is not unique. *See, e.g.*, *In re N.B.*, 240 N.C. App. 353, 364, 771 S.E.2d 562, 569 (2015) (trial court awarded "at least one visitation session per month for a minimum of one hour"); *In re J.H.*, 244 N.C. App. 255, 277, 780 S.E.2d 228, 243 (2015) (trial court awarded "monthly visitation"). Furthermore, in making their contentions, Respondents do not challenge the trial court's finding that

5. This case was published by order of this Court on 31 July 2017. However, it appears only in unpublished table format in the Southeastern Reporter.

> [s]ince th[e] date [of the 20 February 2018 adjudicatory hearing], [Respondents] have attended visitation the following dates: 3/7/18, 3/29/18, 4/11/18, and 4/25/18. [Respondents] have missed the following visits: 2/21/18, 2/28/18, 3/14/18, 3/21/18, 3/28/18, 4/4/18, 4/18/18, 5/2/18, 5/9/18, 5/16/18, 5/23/18, 5/30/18. Several of these visits were no call/no show. On 5/30/18 [DSS] sent notice to [Respondents] stating that they must schedule a meeting with [DSS] prior to any further visits being scheduled. This notice was sent due to the amount of no call/no show visits. [Respondents] have not attempted to schedule a meeting with [DSS] and have not visited with the children since 4/25/18.

In light of the frequent missed visits by Respondents and the fact that many of the missed visits were not cancelled ahead of time, the trial court did not abuse its discretion in determining that it was in the children's best interests to only have visits with Respondents once per month.

Both Respondents also contend that the trial court abused its discretion in failing to set a minimum time period for the length of their monthly visitations. DSS and the GAL concede this point, and we agree. While the trial court's order establishing monthly visitation sets a minimum frequency of visits, the order does not establish the length of these visits, as required by N.C.G.S. § 7B-905.1(c). *See In re J.H.*, 244 N.C. App. at 277, 780 S.E.2d at 243 (directing the trial court to comply with the requirements of N.C.G.S. § 7B-905.1 on remand where "[t]he order fails to establish the duration of respondent-mother's monthly visitation"). We vacate this part of the 27 July 2018 order and remand. On remand, the trial court shall comply with N.C.G.S. § 7B-905.1(c) by setting a minimum duration of Respondents' visitation.

V. Conclusion

We affirm the trial court's adjudication order. We vacate and remand part of the disposition order for entry of an appropriate order of visitation. We affirm the remainder of the trial court's dispositional order.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges MURPHY and COLLINS concur.

LONG BROTHERS OF SUMMERFIELD, INC., PLAINTIFF
v.
HILCO TRANSPORT, INC., DEFENDANT

No. COA19-33

Filed 19 November 2019

1. Appeal and Error—writ of certiorari—confusing language in JNOV order

The Court of Appeals issued a writ of certiorari to consider the merits of plaintiff's appeal where the language in the trial court's order granting judgment notwithstanding the verdict created confusion as to whether it was a final judgment (stating that at some point in the future, the court would "enter a final judgment that addresses the award of costs and reflects the granting of Defendant's Motion for Judgment Notwithstanding the Verdict") and defendant was not prejudiced by the delayed notice of appeal.

2. Fraud—constructive—taking advantage of a position of trust—accounting and record-keeping—failure to disclose document

The trial court erred by entering judgment notwithstanding the verdict (JNOV) in favor of defendant trucking company where there was sufficient evidence that defendant committed constructive fraud—that defendant took advantage of a position of trust with plaintiff to benefit itself. In the light most favorable to plaintiff, plaintiff paid defendant to provide accounting and record-keeping services, and defendant failed to disclose the existence of a document that was in defendant's possession and was referenced in a lease contract, which stated that plaintiff had the option to purchase the trucks it leased from defendant for 20% of the original cost ($220,000), rather than the amount invoiced by defendant ($620,000).

3. Unfair Trade Practices—jury instructions—statute of limitations—equitable estoppel

The trial court's denial of plaintiff's motion to treble damages was affirmed where plaintiff's unfair and deceptive trade practices (UDTP) claim was barred by the statute of limitations, even though the jury found that defendant was equitably estopped from asserting the statute of limitations as a defense. The trial court should not have submitted that question to the jury, because there was no evidence that could support such a finding. Further, even though the evidence may have supported a UDTP claim based on another claim (constructive fraud), plaintiff failed to request that jury instruction.

Appeal by Plaintiff from order entered 21 November 2017 and judgment entered 12 January 2018 by Judge Anderson D. Cromer in Forsyth County Superior Court. Cross-appeal by Defendant from order entered 28 March 2018 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 7 August 2019.

Spilman Thomas & Battle, PLLC, by Matthew W. Georgitis and Steven C. Hemric, and Cartledge Law Firm, by Kevin B. Cartledge, for the Plaintiff-Appellant/Cross-Appellee.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr., and Carruthers & Roth, P.A., by J. Patrick Haywood and Mark K. York, for the Defendant-Appellee/Cross-Appellant.

DILLON, Judge.

Plaintiff Long Brothers of Summerfield, Inc., and Defendant Hilco Transport, Inc., are businesses owned by members of the same family and engaged in the commercial trucking industry. A number of years ago, Defendant purchased several commercial trucks and leased them to Plaintiff, giving Plaintiff the option to purchase the trucks at the end of the lease term. At the end of the lease term, Plaintiff sought to exercise its option, but a dispute arose concerning the purchase price. Plaintiff paid Defendant the amount Defendant claimed to be the correct price. Later though, Plaintiff learned that Defendant had documentary evidence in its possession all along tending to prove that the purchase price should have been the amount Plaintiff had thought it should be. Plaintiff brought this action against Defendant to recover the amount it claims it overpaid for the trucks.

A jury entered a verdict in favor of Plaintiff, though the jury did not treble the damages based on Plaintiff's unfair and deceptive trade practices ("UDTP") claim. However, subsequent to the verdict, the trial court not only denied Plaintiff's motion to treble the award, but also granted Defendant's motion for judgment notwithstanding the verdict. Plaintiff entered a notice of appeal from the post-verdict orders.

After Plaintiff noticed its appeal, Defendant moved the trial court to dismiss Plaintiff's appeal, contending that the notice was untimely. The trial court entered an order denying that motion. Defendant cross-appeals from that order.

I. Background

A. Formation of the Parties

Defendant is a family-owned company that has been active in the commercial trucking industry for a number of years. In 2003, Charles Long and his brother Gurney were the primary owners and officers of Defendant. That year, Charles Long helped his daughter, Wendi Brewer, create Plaintiff, in part, as a means for a family member to bid on trucking contracts where woman-owned businesses were favored in the bidding process.

B. Accounting Contract

From the beginning of Plaintiff's existence in 2003, Defendant worked closely with Plaintiff, often sharing their truck fleets to fulfill contract obligations. Also, during this time, Plaintiff paid Defendant to provide accounting, bookkeeping, record-storing, and other managerial services to Plaintiff. Nine years later, though, Plaintiff and Defendant terminated this arrangement, as their relationship soured.

C. The Lease/Option to Purchase Contract for the Trucks

In early 2005, Plaintiff developed a need to grow its own fleet of trucks, as its business continued to grow. Ms. Brewer, however, did not want her company to take on the debt necessary to purchase new trucks. Therefore, she and her father came to an agreement whereby Defendant would purchase several new trucks and then lease them to Plaintiff for four years. They agreed that after the four-year term, Plaintiff would have the option to purchase the trucks from Defendant for a bargain price.

There is no evidence that Ms. Brewer and her father signed a written agreement concerning this transaction. But there is evidence that certain notes were made by them concerning the terms of the agreement. In any event, Ms. Brewer has always maintained that the agreement gave Plaintiff the option to purchase the trucks from Defendant at the end of the lease term at a discount, rather than for the full market value, based on the four years of rental payments it would have paid.

A short time later, in June 2005, before Defendant had actually purchased the trucks to lease to Plaintiff, Ms. Brewer's father died unexpectedly and his brother, her uncle, Gurney Long assumed control of Defendant.

On 1 August 2005, Ms. Brewer, for Plaintiff, and her uncle, for Defendant, entered into a written contract for the lease of the various trucks for four years (the "Lease Contract"). The Lease Contract did not

expressly mention Plaintiff's option to purchase the trucks. The Lease Contract, though, did state that "Schedule 1 and Lease Notes shall be effective at the date of this agreement." "Schedule 1" was a document attached to the Lease Contract and described the trucks. However, there was no "Lease Notes" document attached, at least on the copy that was in Plaintiff's possession.

In 2009, the lease term ended, and Plaintiff sought to exercise its option to purchase the trucks. Defendant agreed to sell the trucks to Plaintiff but sent an invoice stating the price of $620,000, the then-full market value of the trucks. Ms. Brewer disagreed on the purchase price, insisting that she and her father had agreed that Plaintiff would be allowed to purchase the trucks based on a formula which called for the price to be approximately $220,000. Defendant – who at the time still maintained many of Plaintiff's business records and provided accounting and other managerial services to Plaintiff – assured Ms. Brewer that the correct price was $620,000. Plaintiff purchased the trucks, paying Defendant $620,000 as reflected in Defendant's invoice, though still believing that the correct purchase price was a lower amount.

D. The "Lease Notes" Resurface

In 2012, three years after Plaintiff purchased the trucks from Defendant, Plaintiff and Defendant essentially cut all business ties. Plaintiff requested that Defendant turn over all of its corporate records that Defendant had maintained for Plaintiff over the years, which Defendant purportedly did.

The next year, in 2013, Defendant's departing chief financial officer uncovered additional business files belonging to Plaintiff and turned them over to Plaintiff. Among them was the "Lease Notes" document, the document purportedly referenced in the Lease Contract. This "Lease Notes" document essentially confirmed Ms. Brewer's memory of her agreement with her father, that Plaintiff would have the option to "purchase the [trucks] at the end of the 48 month lease at 20% of the [trucks'] original cost." There is evidence that, based on this formula, Plaintiff should have paid only approximately $220,000, rather than the $620,000 that Defendant invoiced, for the trucks.

In summary, Plaintiff was formed in 2003 at which time Defendant began providing accounting and other services for Plaintiff. In 2005, Plaintiff entered into a written agreement to lease several trucks from Defendant, an agreement which made reference to "Lease Notes." In 2009, Plaintiff purchased the trucks from Defendant for approximately $620,000, based on Defendant's invoice and assurances that $620,000 was

the correct price. In 2013, Defendant's departing CFO provided Plaintiff with the "Lease Notes" document which confirmed Ms. Brewer's understanding that Plaintiff should have only paid $220,000 for the trucks. And in 2015, Plaintiff filed this action to recover the overpayment.

E. Procedural History

At the conclusion of the trial in the matter, the jury returned a verdict awarding $450,000 to Plaintiff. The trial court immediately entered judgment on the jury's verdict.

Plaintiff moved to have the jury award trebled, based on its UDTP claim. Defendant, though, moved for Judgment Notwithstanding the Verdict ("JNOV"). In November 2017, the trial court entered an order denying Plaintiff's motion to treble the jury award and an order granting Defendant's motion for JNOV (the "JNOV Order"), which essentially nullified the jury award. The JNOV Order contained language recognizing that the trial court would consider a motion to tax costs.

Two months later, on 12 January 2018, following a hearing on costs, the trial court entered an order which taxed costs against Plaintiff and reiterated that Defendant's motion for JNOV was being granted.

A few days later, Plaintiff filed its notice of appeal from the January 2018 judgment. Defendant filed a motion to dismiss Plaintiff's appeal. The trial court denied that motion.

II. Analysis

A. Defendant's Cross-Appeal

[1] Defendant cross-appeals, contending that Plaintiff's January 2018 notice of appeal was untimely because it came two months after the trial court entered the JNOV Order. Plaintiff, though, asserts that the true final judgment granting JNOV was not entered until January 2018, four days before it noticed its appeal. In the alternative, Plaintiff has asked this Court to issue a writ of *certiorari* to consider the merits of its appeal.

In its earlier JNOV Order, entered two months before Plaintiff's appeal was noticed, the trial court granted Defendant's Rule 50(b) motion for JNOV, which suggests that a final judgment had been entered. We note, though, that the JNOV Order also stated that at some point in the future, the court would entertain a motion on costs and then "enter a final judgment that addresses the award of costs and *reflects the granting of Defendant's Motion for Judgment Notwithstanding the Verdict*." (Emphasis added.)

In either case, to the extent that Plaintiff's notice of appeal was untimely, in the exercise of our discretion, we grant *certiorari* and review Plaintiff's appeal on its merits.[1] *See Dogwood Dev. and Mgmt. Co., Inc. v. White Oak Trans. Co. Inc.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366 (2008) (noting this Court's "core function of reviewing the merits of [an] appeal to the extent possible"). Indeed, the JNOV Order does contain language which could create confusion; and there is no indication that Defendant has otherwise been prejudiced by Plaintiff's noticing an appeal in January 2018, rather than by mid-December 2017. We now turn to the merits of Plaintiff's appeal.

B. Plaintiff's Appeal

To better understand the issues discussed below, it is important to remember that Plaintiff and Defendant had two contractual relationships. First, Defendant agreed to provide accounting, record-keeping, and other services to Plaintiff, an agreement which Plaintiff contends created a fiduciary relationship. Second, Plaintiff agreed to lease, with the option to purchase, several trucks from Defendant, a type of contract which typically does not, in and of itself, involve a fiduciary relationship.

It is also important to understand the jury's special verdict, in which it answered twenty-three (23) questions. In its complaint, Plaintiff alleges that it was damaged by overpaying Defendant for the trucks. Plaintiff puts forth a number of claims and legal theories, including breach of contract, fraud, UDTP, and constructive fraud.

The jury returned a verdict of $450,000, but not based on all of Plaintiff's legal theories for recovery. Specifically, the jury's verdict form consisted of twenty-three (23) questions regarding Plaintiff's theories of the case, which were answered by the jury as follows:

Constructive Fraud Claim/Constructive Trust: In response to three of the questions (Questions 1-3), the jury determined that (1) Defendant committed "constructive fraud" by taking advantage of a "position of

1. We note Defendant's additional argument that Plaintiff's appeal should be dismissed because Plaintiff served its notice of appeal by e-mail, an ordinarily improper method of service under Rule 26 of the Rules of Appellate Procedure. N.C. R. App. P. 26(c) (describing electronic service as acceptable only where the served document was filed electronically). Our Court has repeatedly found a party's failure to adhere to Rule 26(c) to be a non-jurisdictional error. *See Lee v. Wingett Road, LLC*, 204 N.C. App. 96, 693 S.E.2d 684 (2010); *Stephenson v. Bartlett*, 177 N.C. App. 239, 628 S.E.2d 442 (2006). This is especially true where the opposing party obtained actual notice of the appeal. *MNC Holdings, LLC, v. Town of Matthews*, 223 N.C. App. 442, 445-47, 735 S.E.2d 364, 366-67 (2012).

In any event, as explained above, in our discretion, we grant *certiorari*.

trust and confidence" in causing Plaintiff to overpay for the trucks, (2) Plaintiff filed this action (in 2015) within three years of *discovering the facts* constituting the constructive fraud, and (3) Plaintiff was entitled to recover $450,000 in damages for Defendant's constructive fraud.[2]

Other Claims Including UDTP: In response to sixteen (16) of the other questions (Questions 4-14, 17-22), the jury determined that Defendant did commit acts constituting fraud, UDTP, negligent misrepresentation, and breach of contract in connection with the 2009 purchase of the trucks, *but that* Plaintiff did not bring suit within the applicable statute of limitations with respect to those claims. Accordingly, the jury made no damages determination for these other claims.

Curiously, though, in answering the last question on the form, Question 23, the jury found that Defendant was "equitably estopped from asserting that the statute of limitations [had] run against [any of] Plaintiff's claims," suggesting that perhaps the jury *should have* made a damages determination as to *all* claims, including the UDTP claim, which allows for treble damages.

Plaintiff moved that the $450,000 damage award for Plaintiff's constructive fraud claim be trebled, based in large part on the jury's response to Question 23. Defendant moved for JNOV. The trial court denied Plaintiff's motion, but granted Defendant's motion for JNOV.

1. Judgment Notwithstanding the Verdict—Constructive Fraud Claim.

[2] The trial court entered judgment for Defendant on Plaintiff's constructive fraud claim, notwithstanding that the jury awarded Plaintiff $450,000 for this claim.

We review a trial court's decision on a motion for JNOV to determine "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). That is, if there was evidence to support the jury verdict, entry of a JNOV by the trial judge is generally error. And whether a party was entitled to JNOV is a question of law, which we review *de novo*. *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 267 (2013).

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2. Based on the jury's response to these three questions, the jury, in Questions 15 and 16, found that Plaintiff's overpayment was subject to a constructive trust remedy in favor of Plaintiff and that Plaintiff commenced the action within three years after discovering the fraud "which serve[s] [as] the basis for its claim for constructive trust."

For the reasons stated below, we conclude that the trial court erred in entering JNOV, as there was sufficient evidence from which the jury *could have found* that Defendant committed constructive fraud.

To show constructive fraud, a plaintiff must present evidence that (1) "a confidential or fiduciary relationship exists" which (2) "led up to and surrounded the consummation of [a] transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Forbis v. Neal*, 361 N.C. 519, 528, 649 S.E.2d 382, 388 (2007) (internal quotations omitted) (citation omitted).

Our Supreme Court has explained that "constructive fraud" differs from "actual fraud" in that constructive fraud "is based on a confidential relationship rather than a specific misrepresentation." *Barger v. McCoy Hillard*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997). Also, "constructive fraud" differs from a "breach of fiduciary duty" claim in that constructive fraud requires that the defendant took advantage of a position of trust "*to benefit himself*." *Id.* (emphasis added).[3]

Here, we conclude that there was sufficient evidence from which the jury could have found that Defendant held a position of trust with Plaintiff.[4] Specifically, there was evidence before the jury that,

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3. In connection with a purchase contract involving parties where a fiduciary duty exists, our Supreme Court has held that "[w]here a transfer[or] of property stands in a confidential or fiduciary relationship to the transfer[ee], it is the duty of the transfer[or] to exercise the utmost good faith in the transaction and to disclose to the transfer[ee] all material facts relating thereto and his failure to do so constitutes fraud." *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971). And when "the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred." *Forbis*, 361 N.C. at 529, 649 S.E.2d at 388.

4. Our Supreme Court has defined a fiduciary relationship as one "in which there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence[.]" *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (internal quotations omitted).

We note that a "mere family relationship and general allegations of consultations among family members" do not necessarily create a fiduciary relationship. *See Terry v. Terry*, 302 N.C. 77, 86, 273 S.E.2d 674, 679 (1981). Likewise, there is no *per se* fiduciary relationship between an accountant and its client. *Harrold v. Dowd*, 149 N.C. App. 777, 784, 561 S.E.2d 914, 919 (2002) ("We have found no case stating that the relationship between accountant and client is *per se* fiduciary in nature.").

Nonetheless, our courts have been clear that the existence of a fiduciary relationship is a fact-based inquiry unique to each circumstance. *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (explaining that a fiduciary relationship may exist in a "variety of circumstances[,]" including "every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other").

beginning with its formation in 2003, Plaintiff operated under the advice and counsel of Defendant; that Plaintiff worked closely with Defendant in its daily business operations; that Ms. Brewer worked closely with her father in his capacity as an officer of Defendant to make Plaintiff's business decisions; and, significantly, Defendant was paid by Plaintiff to provide Plaintiff with administrative, accounting, bookkeeping, and record-keeping services for years.

Defendant insists that, per the evidence at trial, any semblance of a fiduciary relationship between the parties had evaporated by 2009, as Ms. Brewer testified that she no longer believed that her uncle had Plaintiff's best interests in mind. However, the evidence also shows that, at the time of the transaction, Defendant still had possession of Plaintiff's documents and continued to function in its fiduciary roles for several years past 2009.

Further, there is evidence *viewed in the light most favorable to Plaintiff* that Defendant committed constructive fraud: Defendant failed to disclose the existence of the "Lease Notes" that it maintained as part of Plaintiff's business records, a failure which directly benefitted Defendant in its contract to sell trucks to Plaintiff. That is, as explained below, the constructive fraud was not based on any misrepresentation Defendant made in connection with the truck purchase contract directly, but rather on Defendant's breach of its *fiduciary* duty to help manage Plaintiff's business affairs by its failure to alert Plaintiff about the "Lease Notes."

And, finally, there was evidence from which the jury could have found that the constructive fraud was discovered within three years of this action being filed in 2015. Much of Defendant's argument concerning this issue is based on evidence that even if there was fraud, Plaintiff knew or should have known about it in 2009, but waited six years to bring suit. Indeed, it may seem that the jury verdict is contradictory: The jury found that Plaintiff brought suit within three years of discovering the constructive fraud, *but also found that*, with respect to Plaintiff's ordinary fraud and UDTP claims, Plaintiff did not bring suit within three years of discovering the fraud or within four years of discovering the UDTP.

However, this seeming contradiction can be reconciled. The jury could have determined that Defendant committed fraud in *two different ways*, which were discoverable by Plaintiff at *two different times*: First, there was evidence that Defendant, in its non-fiduciary contractual role as seller of the trucks, committed fraud in 2009 by misrepresenting to the buyer-Plaintiff the price of the trucks in its

2009 invoice, a misrepresentation that Plaintiff suspected and had reason to know about. Indeed, the jury determined that Plaintiff's 2015 complaint was not filed within three years "after discovery of the facts constituting the fraud."

But there is also evidence of a *second* fraud involving a *different* contractual relationship Defendant had with Plaintiff: Defendant, in its contractual role as fiduciary/record-keeper for Plaintiff, committed fraud by withholding from Plaintiff the existence of the "Lease Notes" that it possessed on Plaintiff's behalf, a deception that Plaintiff did not discover until 2013. Indeed, the jury determined that Plaintiff's 2015 suit *was* filed within three years of actually discovering *the act* that constituted the constructive fraud. And though the evidence seems conclusive that Plaintiff had reason to know that Defendant was being misleading concerning the purchase price in 2009, Plaintiff did not learn until 2013 that Defendant was misleading in its fiduciary role as Defendant's record-keeper about the existence of the "Lease Notes" in its possession, a document which confirmed Ms. Brewer's memory of the deal. And there was evidence from which the jury could find that Defendant, as Plaintiff's record-keeper, had a fiduciary duty to disclose the existence of this document back in 2009 when Plaintiff was disputing the invoice, and that Defendant directly benefited from the breach of this duty, thereby supporting Plaintiff's constructive fraud claim.

Therefore, the jury verdict can be reconciled: The jury could not base its constructive fraud finding on Defendant's fraudulent 2009 invoice and other representations in 2009 that the purchase price for the trucks was $620,000. Indeed, the jury clearly found that the constructive fraud claim was based on facts that were not discovered by Plaintiff until after 2012, within three years of the commencement of this action. And the jury otherwise found that Plaintiff already knew in 2009 that Defendant was misrepresenting the price. Rather, the jury award seemingly is based on Defendant's failure, acting in its fiduciary capacity, to turn over the "Lease Notes" to Plaintiff in 2009; a failure which benefitted Defendant directly, to the tune of $400,000, and that Plaintiff did not discover this constructive fraud until 2013.

We note that there is a contradiction in our case law concerning the appropriate statute of limitations for a "constructive fraud" claim. A constructive fraud claim is similar to a "breach of fiduciary duty" claim, which has a three-year statute of limitations. And in a number of cases, our Court has recognized that the statute of limitations for "constructive fraud" is also three years, accruing from the discovery of the facts constituting the fraud. *See Carlisle v. Keith*, 169 N.C. App. 674, 685, 614

S.E.2d 542, 549 (2005) ("The statute of limitations in actions for constructive fraud is three years [] which accrues upon discovery of facts constituting the fraud."); *Hunter v. Guardian Life*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (2003) ("The statute of limitations for fraud, constructive fraud, and negligent misrepresentation is three years.").

But in other cases, our Court has recognized that a claim for constructive fraud is subject to a ten-year statute of limitations:

> Allegations of breach of fiduciary duty that do not rise to the level of constructive fraud are governed by the three-year statute of limitations applicable to contract actions contained in N.C. Gen. Stat. § 1-52(1). In contrast, a claim of constructive fraud based on a breach of a fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56.

Wilson v. Pershing, LLC, 253 N.C. App. 643, 652, 801 S.E.2d 150, 157 (2017) (citations and internal marks omitted). *See also Nationsbank v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000).

In this case, we do not need to resolve this conflict in our case law: Based on the jury findings, Plaintiff brought suit on its constructive fraud claim within either statute of limitations. Plaintiff clearly brought the suit within ten years of the 2009 sale. And the jury found that Plaintiff brought suit within three years of discovery of the facts constituting the constructive fraud.[5]

In conclusion, we vacate the JNOV Order and January judgment, and remand with the instruction to enter judgment based on the jury's original verdict in favor of Plaintiff's constructive fraud claim.

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5. An argument could be made that, assuming the appropriate limitations period is three years for constructive fraud claims, there is evidence from which a jury could have concluded that Plaintiff did not bring its suit in time. Specifically, for fraud-type claims, the cause of action accrues when the plaintiff discovered *or should have discovered* the fraud. Here, though, the jury was merely asked if Plaintiff sued within three years of actually discovering the fraud, rather than within three years of when Plaintiff *should have* discovered the fraud. And there is evidence from which the jury could have found that Plaintiff *should have discovered* the existence of the "Lease Notes" long before 2012. Specifically, Plaintiff's 2005 agreement with Defendant referenced the "Lease Notes." A jury could have determined that Plaintiff should have inquired about these "Lease Notes" in 2009 when it was disputing Defendant's invoice price.

However, Defendant agreed to the wording of the question on the verdict sheet and has otherwise made no argument on appeal concerning the wording of that question. Therefore, any argument Defendant could have raised in this regard is waived.

2. Trebling Damages Based on Plaintiff's UDTP Claim

[3] Plaintiff also appeals from the trial court's refusal to amend the judgment to treble the jury damages award based on the jury's findings that Defendant committed UDTP. We conclude that Plaintiff has failed to show any reversible error.

"North Carolina case law has held that conduct which constitutes a breach of fiduciary duty and constructive fraud is sufficient to support a UDTP claim." *Compton v. Kirby*, 157 N.C. App. 1, 20, 577 S.E.2d 905, 917 (2003). And, most importantly here, a successful claim for UDTP rewards the claimant with *treble* damages, N.C. Gen. Stat. § 75-16 (2017), and attorney's fees, N.C. Gen. Stat. § 75-16.1 (2017). But a UDTP claim must be brought within four years from when the action accrues. N.C. Gen. Stat. § 75-16.2 (2017).

Based on the verdict sheet, the jury found that Defendant committed UDTP based on the 2009 misrepresentations in the invoice for the trucks, *not* based on Defendant's failure to turn over the "Lease Notes." Specifically, on the verdict sheet, the question answered in the affirmative by the jury was whether Defendant committed UDTP by "direct[ing] its accounting department to prepare an invoice for sale of the leased trucks with an inflated sales price and provide this invoice to [P]laintiff knowing it to be false, misleading, and deceptive."

But the jury also found that Plaintiff did not file its UDTP action "within four years from the date the Defendant allegedly prepared [the] invoice," and therefore did not make any damages determination as to this claim.[6] However, Plaintiff's cause of action did not necessarily accrue when Defendant "prepared [the] invoice," but when Plaintiff discovered or should have discovered that the invoice was false. *See Nash v. Motorola*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991) (holding that UDTP claim based on fraud accrues when the plaintiff "discovered or *should have . . . discovered*" the fraud). We conclude, though, that any error in the way the question was phrased on the jury verdict sheet did not constitute reversible error for at least two reasons.

First, Plaintiff did not complain at trial about the language in which the question was phrased on the verdict sheet.

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6. The jury verdict sheet instructed the jury to skip the damage question regarding Plaintiff's UDTP claim *if* it determined that Plaintiff did not bring suit within four years of Defendant's act constituting the UDTP.

And second, the jury otherwise did find, with respect to Plaintiff's common law fraud claim, that Plaintiff *did* discover (or should have discovered) Defendant's fraud of overcharging more than three years before bringing suit, suggesting that the jury determined that Plaintiff knew or should have known *in 2009* that Defendant's invoice misrepresented the agreed-upon price. It may be that Plaintiff may not have had or known about the smoking gun proof of the fraud, i.e., the "Lease Notes" in 2009, but its owner, Ms. Brewer, otherwise knew or had reason to know that Defendant was misrepresenting the price. *See Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951).[7]

Plaintiff, though, argues that the statute of limitations should not have barred its UDTP claim because the jury found, in answer to the last question (Question 23) on the verdict sheet, that Defendant was "equitably estopped" from asserting the statute of limitations as a defense. It is problematic that the trial court did not list this question first. The jury would have then been able to ignore the other statute of limitations question with respect to the UDTP claim and then answered the damages question with respect to that claim.

But we conclude that any error concerning the jury's answer to Question 23 was harmless. Specifically, based on the reasoning below, we hold that the question should never had been asked, as there was *no evidence* from which the jury could have found that Defendant was equitably estopped from relying on the statute of limitations defense.

Indeed, our Supreme Court has held that equitable estoppel will "deny the right to assert [a statute of limitations] defense when the delay [by the plaintiff in filing the suit] has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Nowell v. A&P*, 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959); *see also Christie v. Hartley*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014). For instance, our Supreme Court has stated that equitable estoppel may apply where a defendant "request[s] the [plaintiffs] to delay the pursuit of their legal rights." *Lewis v. N.C. Highway*, 228 N.C. 618, 620, 46 S.E.2d 705, 707 (1948).

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7. In *Vail*, our Supreme Court explained that the statute of limitations for a fraud claim begins to run when the fraud is or should have been discovered. The Court further explained that where one is defrauded by a fiduciary, she "is under no duty to make inquiry until something occurs to excite [her] suspicions." *Vail*, at 117, 63 S.E.2d at 208. But there was evidence here that Ms. Brewer's suspicions had been excited by the invoice . . . that she knew something was amiss, as she was a party to the conversation with her father when the price was established. There was evidence from which the jury could have found that Ms. Brewer knew or should have known of the fraud, as contained in Defendant's invoice, as soon as she received the invoice.

In this case, though, there is no evidence that Defendant ever did anything to induce Plaintiff to delay filing suit after Plaintiff became aware (or should have become aware) of Defendant's misrepresentation of the purchase price. Indeed, the only alleged misrepresentation here is the one concerning the purchase price to be $620,000, a position that Defendant has never repudiated. There was no misrepresentation that Defendant would work with Plaintiff to resolve the dispute or otherwise requested or induced Plaintiff to hold off on filing suit.

Accordingly, we conclude that there was no reversible error concerning the trial court's denial of Plaintiff's motion to treble the damages award. Plaintiff's UDTP claim was based solely on the misrepresentation in 2009 concerning the purchase price. And there was evidence that Plaintiff knew, or should have known, in 2009 – six years before commencing this action – that the price was being misrepresented. And there is no evidence that Defendant did anything to induce Plaintiff to delay filing suit. It may be that Plaintiff would have been successful in submitting a UDTP claim *based on the constructive fraud*, that is, based on Defendant's breach of its fiduciary duty to disclose the existence of the "Lease Notes," rather than based merely on the breach of the lease/sale contract. Indeed, a UDTP claim based on the constructive fraud may have been timely, as Plaintiff did not discover the existence of the "Lease Notes" until 2013. But Plaintiff did not request a jury instruction for UDTP based on Defendant's constructive fraud.

III. Conclusion

As to Defendant's cross-appeal, to the extent that Plaintiff failed to timely notice an appeal, we grant Plaintiff's request for a writ of *certiorari*, in order to reach the merits of Plaintiff's appeal.

As to Plaintiff's appeal, we reverse the trial court's grant of Defendant's JNOV motion but affirm the trial court's denial of Plaintiff's motion to treble the damages award. We remand the matter with instructions to enter judgment in favor of Plaintiff in the amount of the jury's verdict, $450,000.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ZACHARY and BROOK concur.

OCHSNER v. N.C. DEP'T OF REVENUE

[268 N.C. App. 391 (2019)]

NICHOLAS A. OCHSNER, PLAINTIFF
v.
N.C. DEPARTMENT OF REVENUE, DEFENDANT

No. COA18-1126

Filed 19 November 2019

1. Appeal and Error—scope of appeal—multiple orders—appeal from only one order—jurisdiction

In a public records action, where plaintiff distinctly appealed from the final order issued by the trial court but not from a prior order in the case, the Court of Appeals had jurisdiction to review only the final order. Not only could it not be fairly inferred from the notice of appeal that plaintiff made a mistake in designating the order he wished to appeal from, but also plaintiff made no argument on appeal that he had a right to seek review of the earlier interlocutory order.

2. Public Records—mediated settlement agreement—memorandum of understanding—enforcement—trial court's oversight

In a public records action in which the parties signed a memorandum of understanding (MOU) after attending mediation—which limited the scope of plaintiff's public records request—the trial court's determination that defendant state agency "materially and substantially complied with" the MOU and the Public Records Act was supported by the evidence and the court's findings. The state agency produced over 13,000 pages of responsive records to plaintiff and provided detailed information on the methodology it used to ensure compliance with its obligations under the MOU as well as sworn affidavits attesting to its efforts. Plaintiff did not provide specific reasons, other than speculation, that would support his argument that the agency did not actually conduct the required searches or that additional documents existed that were not produced, and the trial court's actions demonstrated sufficient oversight of the case.

Appeal by plaintiff from order entered 4 June 2018 by Judge R. Allen Baddour, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 8 May 2019.

Whitley Law Firm, by Ann C. Ochsner, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Solicitor General Kenzie M. Rakes and Deputy General Counsel Blake W. Thomas, for defendant-appellee.

STROUD, Judge.

Nicholas Ochsner ("Plaintiff") appeals from the trial court's order granting the North Carolina Department of Revenue's ("NCDOR" or "Defendant") motion to enforce a mediated settlement agreement and dismissing the action as moot. After Defendant produced over 13,000 pages of responsive documents, conducted searches of its employees and other persons identified as having potentially responsive records, and provided sworn statements that it had conducted the searches and produced all records discovered, the trial court properly determined Defendant had completed its obligations under the parties' Memorandum of Understanding and thus denied Plaintiff's motion for enforcement and dismissed the action as moot. In addition, the trial court properly exercised its judicial oversight function under the Public Records Act. We therefore affirm.

I. Factual and Procedural Background

On 7 December 2016, Plaintiff filed a "Complaint and Motion for Order to Show Cause" arising out of his request for production of public records from Defendant. Plaintiff alleged that on 8 June 2016, he requested production of public records from Defendant. He alleged that he filed this request "in his capacity as an investigative reporter for WBTV, the CBS affiliate serving the Charlotte, North Carolina market." He alleged in "late 2015 and early 2016" he "reported multiple stories pertaining to government officials, including members of the General Assembly and Governor Pat McCrory." In February, March, and June of 2016, he received notices from Defendant regarding "alleged taxes owed for tax year 2011." Plaintiff had requested production under the North Carolina Public Records Act, of these records:

> -All written communication, including but not limited to email, text messages, letters or memos sent and received between NCDOR employees and any member of the North Carolina General Assembly, including but not limited to the Office of Speaker Tim Moore, their staff and other representatives between September 1, 2015 and June 1, 2016 containing the following words: "Oschner", "Reporter", "WBTV", "Charlotte", "2011", "audit", or "taxes"

> -All written communication, including but not limited to emails, text messages, letters or memos, sent and received between NCDOR employees of the Office of the Governor between September 1, 2015 and June 1, 2016 containing the following words: "Oschner", "Reporter", "WBTV", "Charlotte", "2011", "audit", or "taxes"
>
> -All notices of unpaid taxes, collection notices and other letters regarding unpaid taxes for the 2011 tax year sent by NCDOR between September 1, 2015 and June 1, 2016.
>
> -The entire file and any and all documents related to the tax account of Nicholas A. Ochsner

Defendant's first response was an email on 9 June 2016, stating that a search would be initiated and the records would be provided as soon as possible. On 14 July, 2016, Defendant provided its initial response which included eight pages of internal documents related to Plaintiff's tax account. Plaintiff then "replied to NCDOR to address the deficiencies in" the response. On 8 August 2016, Defendant responded to several questions posed by Plaintiff and provided additional documents to Plaintiff. Defendant noted that it had narrowed the search due to the overly-broad search terms "taxes, audit, and Charlotte" to find email "which might conceivably pertain to your *particular* tax situation." Defendant also certified that it had confirmed no private email addresses and "non-state issued phones" were used in handling his tax matter. Defendant described the various divisions within the NCDOR which may have been involved with the "resolution of your tax matter" and efforts made to search for additional responsive documents and provided six additional documents and Plaintiff's previous state tax returns and corresponding payment information.[1] Plaintiff's complaint included attachments of additional correspondence by email and letter between Plaintiff, his counsel, and Defendant, seeking to address Plaintiff's questions regarding the scope of Defendant's search and his allegations of non-compliance with his request.

On 9 December 2016, the Senior Resident Superior Court Judge entered an order assigning this case under Local Rules For Civil

1. Under North Carolina General Statute § 132-6, "[n]o person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request." N.C. Gen. Stat. § 132-6(b) (2017). Although Plaintiff was not required to disclose the purpose of his request, his complaint includes allegations regarding the purpose of his request. We note this purpose only because Plaintiff identified the purpose and correspondence between the parties both before and after the filing of the complaint addressed this purpose in seeking to identify all responsive documents.

Superior Court, Tenth Judicial District, Rule 2.2 to the Honorable R. Allen Baddour, Jr. Plaintiff did not request mediation and his counsel informed Defendant by email that Plaintiff believed "mediation is not likely to yield a different result and would not be fruitful." Defendant responded that mediation was required by North Carolina General Statute § 7A-38.3E.[2] On 28 December 2016, the trial court *sua sponte* issued a Litigation Hold Order requiring the parties to preserve all potentially relevant records, both paper and electronic, pending resolution of the action. On 12 January 2017, the trial court issued an order requiring the parties to select a mediator and participate in a mediated settlement conference on or before 10 February 2017.

On 24 January 2017, Defendant filed its answer to the complaint, denying the material allegations of the complaint and alleging that it had undertaken a reasonable search of its records and responded "fully and in good faith" to Plaintiff's request. Defendant also raised various affirmative defenses and moved to dismiss the action. Defendant also responded to Plaintiff's first set of interrogatories and request for production of documents.

On 10 February 2017, the parties attended mediation and entered into a Memorandum of Understanding ("MOU"). In the MOU, Plaintiff agreed to limit the time scope of his request to 1 November 2015 to 1 June 2016. Defendant agreed to "identify staff members" of six specific members of the North Carolina House of Representatives and one State Senator within 14 days. Defendant also identified in the MOU seven other people who had a "professional association or connection with the legislature" and agreed to provide "information available to it pertaining" to those individuals within 14 days. Defendant agreed to "conduct a search of everyone in the department" of emails sent and received from personal and business email accounts; text messages sent or received on NCDOR issued phones; text messages sent or received on personal phones; to search for logs pertaining to instant messages or in the absence of such logs to provide the policy in effect for NCDOR employees at the relevant times; and to search "[a]ny and all other forms of written communication." The "goal of the parties" was to complete the searches within 30 days but it was anticipated that production of records may occur after that time, on a rolling basis and as the parties

2. Defendant was correct. This Court held in *Tillett v. Town of Kill Devil Hills*, that "in order to confer jurisdiction upon the trial court in a Public Records Act suit, the plaintiff must initiate mediation within 30 days of the filing of the responsive pleading as required by N.C. Gen. Stat. § 7A-38.3E(b)." ___ N.C. App. ___, ___, 809 S.E.2d 145, 148 (2017). Here, mediation was initiated and completed within 30 days of Defendant's answer being filed.

may agree. The MOU included essentially the same requirements as to the Office of the Governor, for the same time period. Within 30 days, Defendant was also required to certify the "number of notices issued, the date(s) of printing, and the date(s) of mailing" for all "notices of unpaid taxes, collection notices, and other letters regarding unpaid taxes for the 2011 tax year sent by NCDOR between January 1, 2016 and March 1, 2016." Defendant was to provide "[t]he entire file and any and all documents related to the tax account of Nicholas A. Ochsner[,]" including "IRMF data received on or about 31 May 2013 from the IRS;" a "statement regarding its ability to identify, define, access, retrieve or otherwise provide the computer-related data connected to the IRMF file" and any notes regarding Plaintiff's tax file.[3]

On 20 April 2017, the trial court held a status review hearing regarding the ongoing production of the requested records. Plaintiff's counsel expressed concern regarding the accuracy and completeness of the information Defendant produced. Plaintiff's questions arose primarily from the methods of electronic data processing systems of NCDOR and the "electronic footprint" and metadata showing who accessed Plaintiff's information and when. Defendant's counsel argued that Plaintiff's request was "getting beyond a question of access to records. We're getting into an issue of access to information about computer systems" which is protected by North Carolina General Statute § 132-6.1.[4] As to progress on searching for communications between the Governor's Office and Defendant, Defendant's counsel reported that "we're kind of just working through" the "109 names between the General Assembly folks and the office of the Governor." She noted NCDOR had hired additional help to assist and should be able to produce "in accordance with the schedule."

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3. IRMF data refers to information produced by the IRS Information Returns Master File system. As part of the information produced to Plaintiff, Alan Woodard, Director of Examination for NCDOR, described IRMF as follows: "The Information Returns Master File (IRMF) program is an automated process utilized by the NCDOR's Examination Division to identify taxpayers who have sources of income in North Carolina for a tax year but did not file an income tax return. This data is provided by the Internal Revenue Service and is used to generate notices of intent to assess issued by the NCDOR. As referenced, this is an automated process which does not involve or require NCDR employee involvement until communication is received from a taxpayer or a taxpayer's representative regarding inquisition or resolution of the matter."

4. "Nothing in this section shall require a public agency to create a computer database that the public agency has not otherwise created or is not otherwise required to be created. Nothing in this section requires a public agency to disclose security features of its electronic data processing systems, information technology systems, telecommunications networks, or electronic security systems, including hardware or software security, passwords, or security standards, procedures, processes, configurations, software, and codes." N.C. Gen. Stat. § 132-6.1(c) (2017).

On 8 May 2017, while the "rolling productions" contemplated by the MOU were still ongoing, Plaintiff served Defendant with a second set of discovery requests, including interrogatories, requests for production, and requests for admissions. In a letter dated 31 May 2017, Defendant informed Plaintiff that it "has met all of its obligations under the MOU." This included producing over 13,000 pages of responsive documents and providing sworn and certified statements regarding the searches performed to find the information requested as stated in the MOU. Defendant certified that the searches required by the MOU were performed for every employee of NCDOR, the Governor's office, and the legislative staff members identified under the MOU and the responsive documents were produced.

On or about 22 June 2017, Plaintiff served Defendant with a notice of deposition under Rule 30(b)(6) of the North Carolina Rules of Civil Procedure, seeking substantially the same information as the second discovery requests. On or about 7 July 2017, Plaintiff filed a motion under North Carolina General Statute § 132-1.9(d)(1) requesting entry of an order allowing access to records. In this motion, Plaintiff alleged he made a "second, unrelated request for public records" on 4 April 2017, in which he requested:

> 1) All communication—including but not limited to email, text message, iMessage, Slack message, letter or memo—sent or received between January 1, 2017 and April 4, 2017
>
> a. by the following employees: N.C. Janke, Schorr Johnson, Alan Woodard, Jocelyn Andrews, Ronald Penny, Ken Wright, and Anthony Edwards
>
> b. Containing the following key words: "Nicholas", "Nick", "Ochsner", "Audit", "2014", "lawsuit", "case", "Speaker", "Tim", "Moore", or "Tenisha",
>
> 2) All calendar entries maintained between March 1, 2017 and April 4, 2017 for the following individuals: N.C. Janke, Alan Woodard, Jocelyn Andrews, Ronald Penny, Jocelyn Andrews, and Anthony Edwards.
>
> 3) The entire file: and any and all documents related to the tax account of Nicholas A. Ochsner created or received between April 1, 2015 and April 4, 2017.[5]

5. Tenisha S. Jacobs is a Special Deputy Attorney General and was counsel of record for Defendant.

Defendant sent a "letter and disc" to Plaintiff on or about 30 June 2017 including its first production of documents responsive to the request of 4 April 2017, but many of the documents were redacted with notations to North Carolina General Statute § 132-1.9, or 1A-1.[6]

On 14 July 2017, Defendant filed a motion for protective order as to the second set of discovery, notice of deposition, and first set of requests for admission, alleging that Plaintiff was seeking information outside the scope of the MOU and the Public Records Act. Defendant also filed a renewed motion to dismiss based upon North Carolina General Statute § 1A-1, Rule 12(b)(1), (2), and (6).

On 11 August 2017, the trial court held a hearing regarding the pending motions from both parties. On or about 4 October 2017, Plaintiff filed a motion requesting that the trial court make findings of fact and conclusions of law as to its ruling denying Plaintiff's motion for access to records and granting Defendant's motion for protective order. Plaintiff also filed a motion to enforce the MOU.

On 16 November 2017, the trial court entered an order allowing Defendant's motion for protective order, denying Plaintiff's motion for access based upon the second request of 4 April 2017, and denying Defendant's motion to dismiss the action. The trial court also entered an order to seal the documents produced in response to the 4 April 2017 request, which were reviewed *in camera* by the trial court based upon Defendant's claim of trial preparation materials.

On 16 January 2018, Defendant filed a motion to enforce the MOU. Defendant alleged it had produced over 13,000 pages of documents and fully satisfied the obligations of the MOU despite Plaintiff's claims otherwise. On 4 June 2018, the trial court entered an order and opinion releasing the Litigation Hold Order, denying Plaintiff's motion to enforce the MOU, and dismissing the action as moot based upon its determination that Plaintiff "has been given the opportunity to obtain the requested

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6. We assume "1A-1" refers to the Rules of Civil Procedure in general. Plaintiff's motion alleges that one document states, "Redacted per G.S. 120-130(d)." This statute refers to "[d]rafting and information requests to a legislative employee." N.C. Gen. Stat. § 120-130 (2017). "A drafting request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator." N.C. Gen. Stat. § 120-130(a). "Drafting or information requests or supporting documents are not 'public records' as defined by G.S. 132-1." N.C. Gen. Stat. § 120-130(d). Defendant asserted other emails were trial preparation materials for the pending action and thus not discoverable as "public records" under North Carolina General Statute § 132-1.9.

records at issue in this civil action." On 2 July 2018, Plaintiff filed notice of appeal "from the Order and Opinion signed by the Honorable R. Allen Baddour, Jr. on May 24, 2018 and filed with the Clerk on June 4, 2018 denying Plaintiff's motion to enforce mediated settlement agreement and dismissing the action as moot."

II. Standard of Review

Both Plaintiff and Defendant filed motions to enforce the MOU, and the trial court granted Defendant's motion and dismissed the case based upon its determination that Defendant had complied with the MOU. Prior cases have established that we review an order regarding enforcement of a settlement agreement under the Public Records Act under the same standard of review as for a summary judgment order:

> We . . . apply the summary judgment standard of review. It is well-settled that the standard of review for an order granting a motion for summary judgment requires a two-part analysis of "whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party.

Hardin v. KCS Int'l, Inc., 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citations omitted). We therefore review the trial court's order *de novo*.

III. Scope of Appeal

[1] Portions of Plaintiff's argument are based upon his contention that the trial court abused its discretion by granting Defendant's motion for a protective order regarding his second discovery requests and notice of deposition. Plaintiff argues he was "denied the ability to support a motion to enforce the MOU by deposition and answers to his second set of interrogatories because the trial court abused its discretion in granting NCDOR's motion for a protective order." But Plaintiff appealed only from the final order, and he did not appeal from the trial court's order granting the protective order, so we have no jurisdiction to review the protective order.

The North Carolina Rules of Appellate Procedure requires that the notice of appeal "shall designate the judgment or order from

which appeal is taken and the court to which appeal is taken[.]" N.C. R. App. P. 3(d).

> Proper notice of appeal is a jurisdictional requirement that may not be waived. As a general rule, 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. As exceptions to the general rule, there are two situations in which the appellate court may liberally construe a notice of appeal to determine it has jurisdiction over a ruling not specified in the notice. First, if the appellant made a mistake in designating the judgment intended to be appealed, then the appeal will not be dismissed if the intent to appeal from the judgment can be fairly inferred from the notice and the appellee was not misled by the mistake. Second, if the appellant technically fails to comply with procedural requirements in filing papers with the court but accomplishes the functional equivalent of the requirement, then the court may find compliance with the rules.

Chee v. Estes, 117 N.C. App. 450, 452-53, 451 S.E.2d 349, 350-51 (1994) (citations omitted).

Neither exception applies here. Plaintiff clearly identified the order from which he was appealing and we cannot "fairly infer" that he made a mistake in designating the order from which he appealed. *Id.* Nor did Plaintiff technically fail to comply with procedural requirements in filing his notice of appeal. Moreover, Plaintiff makes no argument on appeal that he is entitled to review the protective order under North Carolina General Statute § 1-278. Further, the trial court's ruling on the protective order related to Plaintiff's second discovery requests and notice of deposition did not deny Plaintiff a substantive legal claim. Therefore, we discern no right to appeal the protective order under North Carolina General Statute § 1-278. *See Yorke v. Novant Health, Inc.*, 192 N.C. App 340, 346, 666 S.E.2d 127, 133 (2008). We thus have no jurisdiction to review the trial court's protective order and cannot consider any arguments raised by Plaintiff as to any alleged error in the protective order.[7]

7. We also note that one of the issues Plaintiff argues on appeal as to the protective order arises from documents the trial court determined were protected by attorney-client privilege. The trial court reviewed these documents *in camera* prior to entering the protective order, but the documents are not in our record on appeal. Therefore, we would be unable to review this issue even if we treated the notice of appeal as covering the protective order.

IV. Request for Individual "Tax Information" Under North Carolina General Statute § 105-259

Before we address the issue raised by Plaintiff under the Public Records Act, we must distinguish between the two types of information requested, as they are governed under different statutes. A portion of Plaintiff's request was for his own income tax information from prior years and was not actually a request for public records. Certain "tax information" is specifically excluded from disclosure under the Public Records Acts. "*Tax information may not be disclosed except as provided in G.S. 105-259*. As used in this subsection, 'tax information' has the same meaning as in G.S. 105-259." N.C. Gen. Stat. § 132-1.1(b) (2017) (emphasis added). An individual taxpayer may request his own records under North Carolina General Statute § 105-259, but an individual's state income tax records are not "public records" as defined by North Carolina General Statute § 132-1.1. Thus, Plaintiff's request included both "public records" and his own income tax records, which he as the taxpayer could request under North Carolina General Statute § 105-259.

Plaintiff's arguments on appeal do not differentiate between the two distinct types of information requested—his own personal tax records and communications by and between NCDOR, members of the General Assembly, and Governor's office—but he notes in a footnote that although disclosure of tax information is prohibited as a general rule, "denial of access to a public record is improper on the basis that the public record contains nonpublic information, the responsibility being on the agency to separate the nonpublic information from the public" under North Carolina General Statute § 132-6(c). This is true, but there is no issue on appeal regarding Defendant's separation of "the nonpublic information from the public" within the public records produced. Plaintiff overlooks the real distinctions between the different types of records he requested and the different statutes governing the production of this information, but Defendant has attempted to make this distinction clear from the beginning of this dispute.

On 9 June 2016, the day after Plaintiff's initial request, Trevor Johnson, Director of Public Affairs for NCDOR, informed Plaintiff he would address the portion of the request as to communications such as emails, but the portion of his request regarding "actual taxpayer records" would be forwarded to the Taxpayer Assistance Division. In August 2016, after Mr. Ethan Forrest, as counsel for WBTV, contacted Defendant regarding the public records request, Defendant requested Mr. Forrest to have Plaintiff execute a GEN-58 form, Power of Attorney

and Declaration of Representative. This power of attorney was necessary for Defendant to disclose personal tax information of Plaintiff to Mr. Forrest or anyone other than Plaintiff under North Carolina General Statute § 105-259. Mr. Forrest questioned the need for the GEN-58 noting, "I am counsel for WBTV and Raycom Media, seeking records under the Public Records Act pertaining to a WBTV employee. I am not resolving a taxpayer dispute with your office." However, Plaintiff executed the GEN-58 and Defendant then responded to Mr. Forrest's request. Thus, at its inception, there was confusion as to whether Plaintiff's request involved a "taxpayer dispute" or simply a public records request. The record shows that at least until July 2016, Plaintiff was seeking to resolve a taxpayer dispute with Defendant, as his brief acknowledges by noting that "[b]y July 7, 2016, Oschner's tax liability for 2011 had been resolved, but his public records request had not."[8] In any event, the issues on appeal—except perhaps as to metadata related to Plaintiff's individual income tax returns—all arise from his request under the Public Records Act, and we will address his arguments accordingly. We therefore express no opinion as to Plaintiff's individual taxpayer dispute, if any, with Defendant or as to the production of individual "tax information" under North Carolina General Statute § 105-259.

V. Substantial Compliance with Memorandum of Understanding

[2] Plaintiff argues that "this Court Should Reject The Notion That, As A Matter Of Law, A State Agency Complies With A Settlement Agreement Reached To Resolve A Public Records Dispute By 'Substantial Compliance.' " Plaintiff notes that the trial court's order denying his motion to enforce the MOU and granting Defendant's motion to enforce the MOU "finds that [NCDOR] has materially and substantially complied with the MOU and, in turn, the N.C. Public Records Act." (Alteration in original.) Plaintiff argues that the sworn certifications by various officers that the required searches were conducted and that no responsive documents were found as to particular types of documents are not sufficient as a matter of law to show that Defendant has actually complied with

8. At the hearing on 26 January 2018, the trial court reviewed the various tax years for which Defendant had produced records of Plaintiff's individual returns and sought to clarify which years Plaintiff claimed he had filed in North Carolina but for which Defendant had not produced records. Plaintiff's counsel informed the trial court that he had not filed in 2011, as he had just graduated from Elon and taken a job out of state, and he was not entirely certain at that time as to the exact years he had filed in North Carolina. Defendant's counsel again noted that Plaintiff's "initial request intermingled public records with tax information" and explained that the information regarding his income tax returns could be disclosed to the taxpayer under North Carolina General Statute § 105-259, but it was not a "public record" governed by the Public Records Act.

the MOU. Plaintiff contends these certifications are not sufficient for the trial court to perform its required role of judicial oversight regarding an agency's production of public records.

> The final determination of possession or custody of the public records requested is not properly conducted by the state agency itself. The approach that the state agency has the burden of compliance, subject to judicial oversight, is entirely consistent with the policy rationale underpinning the Public Records Act, which strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that, as noted above, public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.

State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010).

Defendant contends that the undisputed evidence shows it did search for text messages, instant messages, and emails, and it described its search procedures in a certified statement and two affidavits. Specifically, Defendant's Public Affairs Director met with the directors of each of NCDOR's 24 departments and every employee was instructed to search personal and work email and text accounts for communications from the identified individuals. The directors of each department then certified that the searches in their departments were completed and reported the results of the searches. Only 2 of the 24 departments reported finding responsive documents, and those documents were provided to Plaintiff, except for one personal iPhone message ultimately determined not to be responsive because it did not contain any of the search terms.

Defendant argues that the MOU "should be construed under principles of contract law." *See Penn Dixie Lines, Inc. v. Grannick*, 238 N.C. 552, 556, 78 S.E.2d 410, 414 (1953) ("Compromise agreements are governed by the legal principles applicable to contracts generally. As a consequence, a compromise agreement is conclusive between the parties as to the matters compromised."). Therefore, Defendant contends Plaintiff must show a material or substantial breach of the MOU to succeed on his motion for enforcement. *See Supplee v. Miller-Motte Bus.*

Coll., *Inc.*, 239 N.C. App. 208, 220-21, 768 S.E.2d 582, 593 (2015) ("It is well established that in order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." (brackets and quotations marks omitted) (quoting *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003))).

Plaintiff replies that the terms of the MOU do not change Defendant's obligations under the Public Records Act and its provisions should "be construed as if the Act had been written into the settlement agreement." Plaintiff contends that Defendant's argument that the MOU went beyond the requirements of the Public Records Act is irrelevant, as Defendant agreed to the MOU. We do not entirely disagree, but Plaintiff has failed to demonstrate any way in which the trial court failed to consider Defendant's obligations under the Public Records Act. The MOU did not lessen those obligations but simply further defined the scope of the searches Plaintiff requested by setting out the ranges of dates and persons to be searched.

Plaintiff does not contend that the material facts as summarized in the trial court's order are disputed but contends that as a matter of law, Defendant has not fully complied with the MOU by providing sworn statements as to its searches for records. The trial court's order summarizes the facts as follows:

> {6} The basis of Ochsner's Motion is that the Department failed to produce certain documents (e.g., text messages, instant messaging logs, etc.) per the terms of the MOU.
>
> {7} The Motion was supported by an affidavit from Ochsner, in which he alleged that "he has neither received documents responsive to the following MOU items nor any information upon which to make a determination of [the Department's] performance of the following items:"
>
> a. Items 1(e)(i) - emails from personal email accounts;
>
> b. Item 1(e)(ii) - text messages set[sic] or received from NCDOR issued phones;
>
> c. Item 1(e)(iii) - search of text messages sent or received from personal phones;

d. Item 1(e)(iv) - search for any and all logs pertaining to instant messages;

e. Item 1(e)(v) - any and all other forms of written communication;

f. Item 2(c) - the same information contemplated in items 1(e)(i)-(v); and

g. Item 4(c) - the entire file (including metadata) and any and all documents related to the tax account of Nicholas A Oschner.

See Affidavit of Nicholas A Ochsner ("Ochsner Affidavit"), p. 4 at ¶ 18.

{8} The Court disagrees and, for the reasons discussed in Section III, finds that the Department has materially and substantially complied with the MOU and, in turn, with the N.C. Public Records Act.

{9} Accordingly, Ochsner's Motion is DENIED.

II. MOOTNESS

{10} The Department, like Ochsner, filed a Motion to Enforce Mediated Settlement Agreement. It argued that the MOU "resolved the dispute in this civil action" and the Court should "dismiss [Ochsner's] outstanding claims given the Department's performance of all of its obligations thereunder." Defendant's Motion to Enforce Mediated Settlement Agreement, pp. 1-2.

{11} As explained below, the Court agrees that dismissal is appropriate given that the relief sought by Ochsner has been granted, and this case is therefore moot.

A.

SUMMARY OF MATERIAL FACTS

{12} Ochsner submitted a request for public records to the Department dated 8 June 2016 ("June 2016 Request").

{13} In December 2016, Ochsner commenced this civil action in Wake County Superior Court seeking an order: (i) declaring that the records requested by Ochsner

in the June 2016 Request were "public records" and (ii) compelling the Department, pursuant to General Statute 132-9(a) "to make them available for inspection and copying." Complaint and Motion for Order to Show Cause ("Complaint"), p. 8.

{14} The Court, following commencement of the action, ordered the parties to conduct a mediated settlement conference. The parties' mediation resulted in the execution of the MOU, which, per its terms, "memorialize[d] the matters with regard to each item from [the June 2016 Request]." MOU, p. 1.

{15} The four (4) items in the MOD directly correspond to the four (4) categories of documents sought in the June 2016 request. These documents can be generally described as follows:

a. Written communications between the Department and certain individuals with North Carolina General Assembly or otherwise associated therewith;

b. Written communications between the Department and certain individuals with the Office of the Governor;

c. Certain notices of unpaid taxes and collection and other letters regarding unpaid taxed issued by the Department; and

d. The entire file and all documents related to the tax account of Mr. Ochsner.[9]

See MOU and Complaint, Ex. A.

{16} The Department produced documents to Ochsner following execution of the MOU and, on 31 May 2017, informed Ochsner by letter that it had fully satisfied all of its obligations under the MOU.

{17} The Department has provided numerous sworn statements from its employees during the course of this action. These statements include: (a) Certified Statement

9. As noted above, Plaintiff's "tax information" as defined by North Carolina General Statute § 105-259(a)(2) is not a public record, but this portion of the order is not in dispute.

> of Schorr Johnson dated 20 June 2017 ("Johnson Certified Statement"); (b) Certified Statement of David Roseberry dated 19 April 2017 ("Roseberry Certified Statement"); (c) Affidavit of Daniel Garner dated 16 January 2018 ("Garner Affidavit"); (d) Affidavit of Schorr Johnson dated 26 February 2018 ("Johnson Affidavit"); and (e) Affidavit of David Roseberry dated 2 March 2018 ("Roseberry Affidavit").

(Alterations in original.) The trial court then noted several cases addressing when a case may be dismissed as moot:

> {23} Here, Ochsner seeks relief under the North Carolina Public Records Act and, specifically, General Statute 132-9. Subsection (a) of this statute provides, in part:
>
> > Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records; may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such order if the person has complied with G.S. 7A-38.3E.
>
> {24} Accordingly, the recovery provided for by this statute, and which Ochsner sought in commencing this action, is the opportunity to inspect those public records requested from the Department in the June 2016 Request, as modified by the parties' MOU. Ochsner has been given the opportunity to obtain the requested records at issue in this civil action.
>
> {25} Both parties' acknowledge that the MOU limited the scope of the June 2016 Request. See e.g. Ochsner Affidavit, p. 2 at ¶ 6. A mediated settlement agreement, such as the MOU, "is . . . the document used to memorialize the substantive terms reached between the parties during the mediated settlement conference." Barnes v. Hendrick Auto., 2014 N.C. App. LEXIS 73, at *9 (N.C. Ct. App. Jan. 21, 2014). Thus, the MOU reflected the parties' mutual agreement as to what would satisfactorily complete the Department's obligations with respect to the June 2016 Request.

{26} The Department has produced documents in response to each section of the MOU. This included the over [sic] 13,000 pages of documents of written communications provided pursuant to Sections 1 and 2 of the MOU,. the certified statement from a Departmental official addressing the Department's issuance of certain notices provided pursuant to Section 3 of the MOU, and the documents in Ochsner's tax file as delineated in Section 4 of the MOU, some of which were provided to Ochsner prior to the commencement of the civil action.

{27} Ochsner complains that he did not receive certain documents. See Section II, , 7 supra. However, the Department in sworn statements from its Public Affairs Director, the individual with oversight of its public records requests, averred that the Department conducted its search for responsive records in accord with the MOU and explains, in reasonable detail, the scope and method of the Department's search, including the search terms used and locations searched. See Johnson Certified Statement, pp.1-2; Johnson Affidavit, pp. 1-4. Indeed, the Department further explains in these statements that its search included all Departmental employees, that it was for written communications (which included text messages), and that it encompassed all locations likely to contain the requested communications (which included personal and official devices, personal e-mail accounts). See Johnson Affidavit, pp. 1-4.

{28} The Department, in its affidavits and other sworn statements, also explains why some documents were not located. For example, Ochsner complains the Department failed to produce instant messaging logs and text messages on Department issued phones. See Section II, ¶ 7 supra. However, the Department's Chief Information Officer explained that, during the relevant period, Departmental-issued phones "did not have text messaging capability enabled or available," and "there were no instant messaging systems on Department-issued computers." See Roseberry Affidavit. pp. 1-2.

{29} Courts, in context of reviewing public records disputes, have held that similar affidavits from governmental

> entities "are accorded a presumption of good faith" and, when unrebutted, "can prove that an agency satisfied" its obligations under a public records law. See e.g., Powell v IRS, 2017 U.S. Dist. LEXIS 198605, at *14 (D.D.C. Dec. 4, 2017) (internal citations omitted).
>
> {30} Here, there are no positive indications of overlooked materials by the Department that raise doubt about the adequacy of the Department's search. Ochsner's claims that other responsive documents and information exists therefore amount to nothing more than speculation. As explained by the court in Powell when finding that the IRS fulfilled its obligations under FOIA, the good faith presumption afforded to such declarations cannot be rebutted "by purely speculative claims about the existence and discoverability of other documents." Id.
>
> {31} "It is not the function of this Court to consider and rule on imagined controversies." Sbella v. Moon, 125 N.C. App. 607, 610, 481 S.E.2d 363, 365 (1997). Thus, the Court, for the reasons discussed above, finds that Ochsner has been granted the relief he sought by initiating this action under General Statute 132-9 and the issue upon which he sought a determination is moot. The Court therefore dismisses this civil action.

(First alteration in original). (Footnotes omitted.)

The Public Records Act does not require an agency to create or compile records responsive to a request if those records do not exist; the agency must produce only the records which already exist. N.C. Gen. Stat. § 132-6.2(e) ("Nothing in this section shall be construed to require a public agency to respond to a request for a copy of a public record by creating or compiling a record that does not exist. If a public agency, as a service to the requester, voluntarily elects to create or compile a record, it may negotiate a reasonable charge for the service with the requester. Nothing in this section shall be construed to require a public agency to put into electronic medium a record that is not kept in electronic medium."). The MOU went beyond the requirements of the Public Records Act because it required Defendant to create records. For example, Defendant was required to create a list of staff members of six specific members of the House of Representatives and one Senator during the relevant time. The MOU required Defendant to search for certain records and to produce any records responsive to the request. As the

trial court noted, both parties agreed that if the terms of the MOU were met, this would satisfy Plaintiff's request. The MOU did not set forth requirements as to the exact methodology of the searches or who would conduct the searches. This type of information would also go beyond that required by the Public Records Act, since it would require the agency to create records regarding the search. As the trial court noted during the hearing, Plaintiff could have insisted that the MOU include specific requirements regarding the methodology, dates, and persons conducting the searches, but the MOU did not include this requirement.

Although Plaintiff argues that "material" and "substantial" compliance with a settlement agreement regarding public records is contrary to the intent of the Public Records Act, he has cited no authority, and we find none, which would require some higher level of compliance with a settlement agreement in this context than in any other. *See Supplee*, 239 N.C. App. at 220-21, 768 S.E.2d at 593. Although no case in North Carolina has addressed the use of sworn statements by agencies to show good faith efforts to search for requested documents, we find many federal cases under the Freedom of Information Act which have addressed this issue. Where plaintiffs have sought public records and the agency determines those records do not exist, the agency may show "the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts." *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006).

> To meet its burden to show that no genuine issue of material fact exists, with the facts viewed in the light most favorable to the requester, the agency must demonstrate that it has conducted a "search reasonably calculated to uncover all relevant documents." Further, the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was adequate. The adequacy of the search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case. In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith. With the guiding principle of reasonableness in mind, we turn to each of appellant's contentions.

Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (citations omitted).

Here, the trial court determined that Defendant's sworn declarations were sufficient to show that it conducted a reasonable search:

> However, the Department in sworn statements from its Public Affairs Director, the individual with oversight of its public records requests, averred that the Department conducted its search for responsive records in accord with the MOU and explains, in reasonable detail, the scope and method of the Department's search, including the search terms used and locations searched.

The MOU itself did not set any higher standard for Defendant's search efforts or certification of those efforts than would be required under the Public Records Act.

Other than the failure to produce records which Defendant has certified do not exist or at least have not been found despite its reasonable efforts in searching, Plaintiff has failed to identify any other manner Defendant did not comply with the MOU. Plaintiff's primary argument is based upon his disbelief of Defendant's certifications that the directors and employees within NCDOR completed the required searches, based at least in part upon their not finding any text messages responsive to his request. We appreciate the difficulty presented to both Plaintiff and Defendant. The law generally does not require a party to prove a negative, but here, both sides are placed in this position. Defendant has certified that certain personal text messages or emails do not exist, and Plaintiff asks Defendant to prove the negative: that certain personal text messages or emails do not exist. If they do not exist, as Defendant has certified under oath, Defendant cannot produce anything more to prove their nonexistence. On the other side, Plaintiff contends that Defendant did not do a full, good faith search of all of the information in the possession or control of Defendant's employees or other individuals, as the request may apply to personal email accounts, computers, or phones. Since he cannot have direct access to those sources to ensure that every person's accounts and information have in fact been properly searched, Plaintiff is attempting to prove that Defendant did not do what it claims it did. As Plaintiff argued to the trial court:

> With the affidavit of Ochsner here, in paragraph 18 where he says I've not been given any documents or any basis to know whether these things have been performed and we're trying to prove a negative here. We're trying to prove the non-happening, okay, and this affidavit based on personal knowledge pursuant to the requirements of 56(e)

> is sufficient to meet the requirement that his burden of proof, this nonperformance, has not occurred.

The trial court asked Plaintiff's counsel, considering the responses in context and the certifications that Defendant had searched all employees for the various types of documents and none were found in some areas, "how would we ever … know" if the searches were or were not correctly done as to records Defendant claims do not exist? Plaintiff's counsel responded, "I could put somebody under oath and ask them." To which the trial court stated, "This is under oath."[10]

Plaintiff argues he was denied the ability to prove Defendant's lack of compliance by the trial court's protective order as to his second set of discovery, but as noted above we do not have jurisdiction to review the protective order. But we note that Plaintiff did conduct discovery before entry of the MOU, and Defendant responded to Plaintiff's first interrogatories and request for production. Plaintiff did not move to compel further production under the first set of discovery or allege Defendant's responses to the first set of discovery were incomplete. In addition, after the colloquy noted above, at the hearing on 26 January 2018, the trial court had a conference with counsel for both parties and adjourned the hearing to allow Plaintiff the opportunity to present the questions "plaintiff would like answered in order to determine whether NCDOR conducted a search per the terms of the MOU." Plaintiff asked Defendant, with questions tailored to the category of document, for the following information: who conducted the search; when did the search occur; what methodology was used to ensure each account or phone was searched; did the search yield anything responsive to Plaintiff's request; and is Defendant claiming any exemption or exception to disclosure of any item? In response, on 9 March 2018, Defendant's counsel sent a letter to the trial court and Plaintiff with answers to each question, along with sworn affidavits from the Director of Public Affairs for NCDOR and the Assistant Secretary and Chief Information officer for NCDOR. Thus, the trial court, in its role of providing judicial oversight, addressed Plaintiff's concerns regarding how Defendant conducted its searches and Defendant provided the explanation of its searches to the trial court and Plaintiff. Plaintiff's argument on appeal remains the same: he disagrees that Defendant actually conducted all of the required searches, despite the multiple sworn certifications the searches were done and the over 13,000 pages of records actually produced. But based upon the

10. The trial court was referring to the sworn and notarized affidavits submitted by Defendant.

record before us, the trial court properly determined that Defendant substantially and materially complied with the MOU, and Plaintiff has made no showing of any reasonable basis to doubt Defendant's certifications and responses.

Our Supreme Court has addressed a case in which the plaintiff showed that the defendant may have failed to produce responsive records despite its production of hundreds of pages of documents and its claim that no additional documents existed. *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 695 S.E.2d 91 (2010). In *State Employees Association of North Carolina, Inc. v. North Carolina Department of State Treasurer*, our Supreme Court reversed a trial court's order dismissing the plaintiff's claim under North Carolina General Statute § 1A-1, Rule 12(b)(6) holding that the plaintiff's complaint was sufficient to state a claim under the Public Records Act because plaintiff had shown a "reasonable inference" that some responsive documents had not been provided. *Id.* at 212, 695 S.E.2d at 96. Plaintiff had requested certain information from defendant, and defendant produced 700 pages of documents. *Id.* at 207, 695 S.E.2d at 93. After the initial response, plaintiff sent several letters noting deficiencies and requesting that all of the responsive records be produced. *Id.* at 207-08, 695 S.E.2d at 93-94. Ultimately, the plaintiff filed its lawsuit under the Public Records Act. *Id.* at 209, 695 S.E.2d at 209. Our Supreme Court noted that based upon the documents produced, plaintiff had identified

> *specific reasons why plaintiff believed that additional public records implicated by its initial requests existed, but had not been provided.* For example, in regards to its 1 March 2007 request, plaintiff stated, *inter alia*:
>
> > [I]t is clear that not all documents containing correspondence from Forbes has been provided. The January 19, 2007, 3:43 p.m. e-mail from Kai Falkenberg to Ms. Lang refers to an attached letter "a copy of which—with enclosures—has also been sent to you by fax." You have provided neither that letter nor the enclosures. Moreover, Neil Weinberg's message on the same date refers to a letter faxed to Ms. Lang from Forbes' attorney. If this is not the same letter referred to by Ms. Falkenberg, then you have not provided a copy of it.
> >
> > In addition, except for some responses that are attached to the Forbes e-mails, you have

> not provided all responses from Ms. Lang to Forbes. For example, attached to the February 14, 2007, e-mail message from Jason Storbakken is an e-mail from Ms. Lang stating: "Please see answers inserted in your original e-mail below." However, you have not produced the e-mail that contains Ms. Lang's answers. Moreover, attached to Jason Storbakken's message of February 14, 2007, 6:16 p.m., is a message stating: "On 2/14/07 PM, 'Sara Lang' . . . wrote:" but the text of Ms. Lang's message is omitted. It is difficult for me to draw any conclusion except that Ms. Lang's message has been intentionally deleted from the document.
>
> Finally, based on the size of the fee paid to the retained law firm and, thus, the number of hours that firm must have worked on this issue, it would appear that there must have been electronic or written correspondence between your office and that law firm regarding the Forbes public information request. However, no copies of any such correspondence have been produced.
>
> *Thus, plaintiff's allegations that additional public records exist that have not yet been disclosed are based on reasonable inferences.*

Id. at 211-12, 695 S.E.2d at 96 (alterations in original) (emphasis added).

Here, Defendant produced over 13,000 pages of information to Plaintiff, but Plaintiff has not identified anything from those documents which might lead to a "reasonable inference" that other responsive documents exist. Plaintiff has identified no "specific reasons why plaintiff believed that additional public records implicated by its initial requests existed, but had not been provided." *Id.* As to the documents Defendant avers do not exist, Defendant provided the portion of its Security Policy Manual regarding "Messaging Systems" and its Email Retention Policy. The Security Policy provides that employees are "expressly prohibited" from using "alternate messaging systems for the purpose of conducting Agency business." If Defendant's employees complied with its policy, searches of their personal email, text message, or other accounts or devices would not produce any responsive documents. Emails sent or received on employees' official accounts were captured by the department's "Email Repository" and stored so

they would not be deleted. Emails stored in the repository are searchable, so Defendant's searches should have discovered any responsive emails sent or received by employees, even if an employee attempted to delete an email. In addition, since most of the information produced by Defendant is not in our record, we have no means of reviewing the trial court's analysis of its completeness.

Plaintiff argues that "[t]he practical effect" of the trial court's ruling that Defendant had materially and substantially complied with the MOU and dismissing the action as moot "is to permit NCDOR to police itself and declare compliance with the MOU and Public Records Act, contrary to its spirit and intent." We disagree with Plaintiff's claim that the trial court allowed Defendant to "police itself." The trial court vigorously exercised its judicial oversight function. Almost immediately after the action was filed, it entered a litigation hold order and mediation order *sua sponte*. It held status conferences to oversee the ongoing production of documents. Even after Defendant had produced thousands of pages of records and many certifications, the trial court still required Defendant to respond to Plaintiff's detailed questions regarding the search methodology and did not enter the order dismissing the action until all of the questions had been answered. This argument is without merit.

VI. Conclusion

We therefore affirm the trial court's order.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

PRICKETT v. N.C. OFF. OF STATE HUM. RES.

[268 N.C. App. 415 (2019)]

DAVID PRICKETT, PETITIONER
v.
NORTH CAROLINA OFFICE OF STATE HUMAN RESOURCES, RESPONDENT

No. COA19-37

Filed 19 November 2019

1. Public Officers and Employees—State Human Resources Act—exempt status—changed by governor—statutory power

An outgoing governor lacked authority to change a state employee's status from exempt to non-exempt (from the State Human Resources Act) where the employee had been designated exempt under N.C.G.S. § 126-5(c) and the governor's power to reverse exempt status under N.C.G.S. § 126-5(d)(6) applied only to cabinet department employees listed in section (d)(1)—and the employee's department, the Office of State Human Resources, had been removed from that list.

2. Public Officers and Employees—State Human Resources Act—exempt status—changed by governor—Career Status Law inapplicable

The administrative law judge erred in finding that a state employee had career status where the employee had been designated exempt under N.C.G.S. § 126-5(c)(2) and the Career Status Law conferred immediate career status only on positions listed in subsection (d)(1) that were changed to non-exempt by the governor. Furthermore, even if the Career Status Law did apply to the employee, the law was found unconstitutional shortly after its enactment.

3. Public Officers and Employees—State Human Resources Act—exempt status—changed by governor—10-day notice period

Where a state employee had been designated exempt (from the State Human Resources Act) under N.C.G.S. § 126-5(c)(2), the Career Status Law did not apply to him, so any violation of the 10-day notice period (N.C.G.S. § 126-5(g)) upon reversal of his status from non-exempt back to exempt was non-substantive, and reinstatement was not the appropriate remedy.

Appeal by respondent from final decision dated 11 September 2018 by Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 17 October 2019.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for Petitioner-Appellee.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for Respondent-Appellant North Carolina Office of State Human Resources.

ARROWOOD, Judge.

Respondent North Carolina Office of State Human Resources ("OSHR") appeals from a final decision of the Office of Administrative Hearings ("OAH") granting a motion for summary judgment by David Prickett ("petitioner") and denying OSHR's motions for summary judgment. For the following reasons, we reverse.

I. Background

On 25 September 2014, petitioner was hired as a "Communications Director" for OSHR, and was to report directly to the Chief Deputy State Human Resources Director. His position was characterized as a "confidential assistant," and was therefore deemed statutorily exempt from the State Human Resources Act pursuant to N.C. Gen. Stat. § 126-5(c)(2) (2017). As an exempt employee, petitioner could be fired at-will for any nondiscriminatory reason. Petitioner worked in this exempt position from 13 October 2014 through 22 December 2016, at which point then-Governor Pat McCrory changed petitioner's exempt status to non-exempt.

On 19 December 2016, following the election of Governor Roy Cooper, the General Assembly passed Session Law 2016-126, which made several amendments to Chapter 126 of the North Carolina General Statutes (the "State Human Resources Act" or "SHRA"). Specifically, an amendment to N.C. Gen. Stat. § 126-5(d)(1) reduced the number of state government positions the Governor could deem "exempt" from the State Human Resources Act from 1500 to 425. 2016 N.C. Sess. Law ch. 126, §§ 7, 8. It also removed OSHR from the list of cabinet department positions the Governor could deem exempt. In addition, a new provision, codified at N.C. Gen. Stat. § 126-5(d)(2c), provided that employees designated exempt pursuant to N.C. Gen. Stat. § 126-5(d)(1) who the Governor changes to "non-exempt" would gain immediate career State employee status (hereinafter the "Career Status Law"). *Id.*

As a career State employee, an employee enjoys the protection of the SHRA and can only be fired for cause. Prior to the enactment of the Career Status Law, an employee was required to work in a non-exempt

position for at least twelve consecutive months before they could attain career status. *See* N.C. Gen. Stat. § 126-1.1(a) (2017). During that 12-month period, the non-exempt employee was considered to be probationary and not yet subject to the provisions of the SHRA. *Id.* The Career Status Law effectively eliminated this probationary period for certain previously exempt employees whose designation was changed to non-exempt.

Following the passage of these amendments, then-Governor McCrory changed petitioner's position from exempt to non-exempt effective 22 December 2016. On 30 December 2016, Governor-elect Cooper filed a lawsuit, *Cooper, III v. Berger*, No. 16 CVS 15636, 2017 WL 1433245 (N.C. Super. Mar. 17, 2017) (hereinafter "*Cooper I*"), challenging the recent amendments to the SHRA. This lawsuit included a challenge to the Career Status Law. *Cooper I*, 2017 WL 1433245, at *2. On 3 January 2017, the Chief Justice of the North Carolina Supreme Court appointed a three-judge panel of the Superior Court to hear C*ooper I*. *Id.* at *1. While that case was pending, petitioner received a letter on 19 January 2017 informing him that Governor Cooper reversed his position back to exempt status, and that he was terminated as of the end of day. On 27 January 2017, petitioner filed a Petition for Contested Case Hearing in the OAH, challenging his termination on grounds he could only be fired for cause.

On 17 March 2017, the three-judge panel appointed to hear *Cooper I* granted summary judgment to Governor Cooper. The panel found that N.C. Gen. Stat. § 126-5(d)(2c), the Career Status Law, was unconstitutional and enjoined its enforcement. *Cooper I*, 2017 WL 1433245, at *13. The defendants subsequently appealed that decision to this Court. Prior to this Court considering the appeal, the Career Status Law was repealed on 25 April 2017 by Session Law 2017-6. 2017 N.C. Sess. Law 6, § 1. On 26 April 2017, the *Cooper I* defendants filed a motion asking this Court to dismiss as moot their appeal of the Career Status Law, and to vacate the lower court's decision. On 11 May 2017, this Court granted the motion to dismiss the appeal, but denied the motion to vacate the lower court's decision. On 11 September 2018, the administrative law judge ("ALJ") issued a final decision granting summary judgment to petitioner and denying OSHR's motions for summary judgment. OSHR appealed the ALJ's decision on 11 October 2018.

II. Discussion

On appeal, OSHR contends the ALJ erred in granting petitioner's motion for summary judgment and denying its motions for three reasons.

First, former Governor McCrory had no authority in the first instance to change petitioner's status from exempt to non-exempt. Second, the ALJ's decision runs contrary to the Superior Court ruling in *Cooper I*, which found the Career Status Law to be unconstitutional. Finally, any notice violation was procedural in nature, not substantive, and thus the appropriate remedy is not reinstatement of petitioner.

This Court "appl[ies] the same review standard established by Rule 56 of the North Carolina Rules of Civil Procedure when reviewing an agency's summary judgment ruling, and our scope of review is *de novo*." *Heard-Leak v. N.C. State Univ. Ctr. for Urban Affairs*, 250 N.C. App. 41, 45, 798 S.E.2d 394, 397 (2016).

As an initial matter, we address this Court's jurisdiction to hear the present case. The ALJ instructed the parties to file an appeal directly with this Court pursuant to N.C. Gen. Stat. § 126-34.02 (2017). However, this case was originally filed under N.C. Gen. Stat. § 126-5(h), which provides: "[i]n case of dispute as to whether an employee is subject to the provisions of this Chapter, the dispute shall be resolved as provided in Article 3 of Chapter 150B." N.C. Gen. Stat. § 126-5(h) (2017). Article 3 of Chapter 150B provides a right to a contested case hearing in an administrative proceeding, in which the ALJ shall make a final decision or order. N.C. Gen. Stat. §§ 150B-22, 150B-34 (2017). Article 4 of that Chapter in turn provides "[a]ny party or person aggrieved by the final decision in a contested case . . . is entitled to judicial review of the decision under this Article[.]" N.C. Gen. Stat. § 150B-43 (2017). Thus, Chapter 150B, which governs contested case hearings before an ALJ, also provides a right of appeal of the ALJ's final decisions. However, it is unclear whether an appeal may be made directly to this Court.

Even if N.C. Gen. Stat. § 126-5(h) does not provide a direct right of appeal to this Court, "[t]his Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) 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) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985)). Acknowledging the law is unclear in this area, the parties have both requested that this appeal be treated as a petition for *writ of certiorari*. In the interest of judicial economy, we consider OSHR's brief as a petition for *writ of certiorari*, grant the petition, and determine the merits of this appeal.

We now address the merits of the case.

At the outset, we note petitioner's argument relies heavily on *Wright v. N.C. Office of State Human Res.*, No. COA18-276, 2019 WL 1283831 (N.C. Ct. App. Mar. 19, 2019), an unpublished decision of this Court. Indeed, petitioner contends *Wright* renders moot many of the issues in the present case. However, petitioner's reliance on our decision in *Wright* is misplaced for two reasons. First, as an unpublished disposition, *Wright* is not binding precedent. Second, *Wright* is easily distinguishable from the present case. There, the Court held the petitioner was a career State employee on grounds not applicable here.

In *Wright*, the petitioner worked in a non-exempt position for almost twelve consecutive months. *Wright*, 2019 WL 1283831, at *1. Just one day before the petitioner would have attained career State employee status, she received a letter informing her that her status was changed to exempt and that she was terminated. *Id.* at *2. However, because the petitioner was notified of the exempt designation the same day it took effect, OSHR violated N.C. Gen. Stat. § 126-5(g) (2017), which required 10 working days prior written notice before placing an employee in an exempt position. Reasoning that the petitioner would have attained career State employee status had the statutory notice period been honored, we held the petitioner in *Wright* was a career State employee at the time of her termination, and could thus not be terminated without cause. *Id.* at *5. Furthermore, we held the General Assembly's placement of OSHR in the Governor's Office for organizational purposes did not grant the Governor authority to exempt the petitioner. *Id.* at *8. Importantly, the facts of *Wright* differ from those of the present case, and compel us to reach a different conclusion.

We find that all three arguments advanced by OSHR have merit, and that each, standing alone, would justify reversal. Nevertheless, in order to make the record clear, we address each argument in turn below.

A. Reversal of Exempt Status

[1] On appeal, OSHR first argues petitioner was not a career State employee and could thus be dismissed without cause because former Governor McCrory had no authority in the first instance to change petitioner's status to non-exempt. We agree.

Section (d) of the SHRA grants the Governor the authority to designate as exempt certain cabinet department positions, as provided below:

> (d) (1) Exempt Positions in Cabinet Department. - Subject to the provisions of this Chapter, which is known as the North Carolina Human Resources

> Act, the Governor may designate a total of 425 exempt positions throughout the following departments and offices:
>
> a. Department of Administration.
> b. Department of Commerce.
> c. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
> d. Department of Public Safety.
> e. Department of Natural and Cultural Resources.
> f. Department of Health and Human Services.
> g. Department of Environmental Quality.
> h. Department of Revenue.
> i. Department of Transportation.
> j. Repealed by Session Laws 2012-83, s. 7, effective June 26, 2012, and by Session Laws 2012-142, s. 25.2E(a), effective January 1, 2013.
> k. Department of Information Technology.
> *l.*, m. Repealed by Session Laws 2016-126, 4th Ex. Sess., s. 7, effective December 19, 2016.
> n. Department of Military and Veterans Affairs.

N.C. Gen. Stat. § 126-5(d)(1) (2017). Section (d) further grants the Governor the authority to reverse the designation of a position the Governor designated exempt, as follows:

> (d) (6) Reversal. - Subsequent to the designation of a position as an exempt position as hereinabove provided, the status of the position may be reversed and made subject to the provisions of this Chapter by the Governor or by an elected department head in a letter to the Director of the Office of State Human Resources, the Speaker of the North Carolina House of Representatives, and the President of the North Carolina Senate.

N.C. Gen. Stat. § 126-5(d)(6).

In a letter dated 28 December 2016, then-Governor McCrory reversed petitioner's position from exempt to non-exempt effective 22 December 2016. In so doing, then-Governor McCrory cited authority under N.C.

Gen. Stat. § 126-5(d)(6). However, the organization and language of N.C. Gen. Stat. § 126-5 as a whole reveals the Governor's power to reverse exempt status under N.C. Gen. Stat. § 126-5(d)(6) only applies to cabinet department employees the Governor has power to designate exempt in section (d). Section (d) begins by listing the departments in which the Governor may designate exempt positions. N.C. Gen. Stat. § 126-5(d)(1). The Session Law 2016-126 amendments to the SHRA removed OSHR, the department in which petitioner was employed, from that list. 2016 N.C. Sess. Law ch. 126, § 7. In addition, petitioner's position was initially designated exempt not under N.C. Gen. Stat. § 126-5(d), but under N.C. Gen. Stat. § 126-5(c), which rendered petitioner statutorily exempt as a "confidential assistant." *See* N.C. Gen. Stat. § 126-5(c) (2017). Thus, then-Governor McCrory had no authority to designate petitioner's position as exempt in the first instance; rather, petitioner's position was designated exempt under a different statutory provision. It follows, then, that he also had no authority to reverse such designation. Accordingly, petitioner's position was still exempt from the SHRA at the time of his termination, and OSHR was well within its rights to terminate petitioner at will.

The ALJ correctly found "McCrory's authority under N.C. Gen. Stat. § 126-5(d)(6) was left intact during the General Assembly's amendment of N.C. Gen. Stat. § 126-5 in Session Law 2016-126." However, it failed to consider the limited circumstances in which such authority may be exercised. We therefore hold the ALJ erred in finding petitioner was a career State employee because the Governor had no authority to reverse petitioner's exempt status.

B. Career Status Law Unconstitutional

[2] OSHR next argues the ALJ erred in finding petitioner was a career State employee because the Career Status Law was inapplicable to petitioner and the ALJ's decision runs directly contrary to the superior court's ruling in *Cooper I*. We agree.

The Session Law 2016-126 amendments added the following subsection to the SHRA:

> Changes in Cabinet Department Exempt Position Designation. - If the status of a position designated exempt pursuant to subsection (d)(1) of this section is changed and the position is made subject to the provisions of this Chapter, an employee occupying the position who has been continuously employed in a permanent position for the immediate 12 preceding months, shall be deemed a

> career State employee as defined by G.S. 126-1.1(a) upon the effective date of the change in designation.

2016 N.C. Sess. Laws ch. 126, § 7, codified at N.C. Gen. Stat. § 126-5(d)(2c). A "career State employee" is defined as one who "(1) [i]s in a permanent position with a permanent appointment, and (2) [h]as been continuously employed by the State of North Carolina or a local entity as provided in G.S. 126-5(a)(2) in a position subject to the [SHRA] for the immediate 12 preceding months." N.C. Gen. Stat. § 126-1.1(a) (2017). Protected under the SHRA, career State employees may generally only be fired for cause and after some due process. An employee who has not yet worked the full twelve consecutive months in a non-exempt position is considered a probationary State employee not subject to the SHRA, and can be terminated at will. N.C. Gen. Stat. § 126-1.1(b). However, the Career Status Law effectively eliminated the probationary period for employees designated exempt pursuant to subsection (d)(1) whose exempt status was changed to non-exempt.

Days after its enactment, Governor-elect Cooper challenged the Career Status Law and other amendments in *Cooper I*. On 17 March 2017, the three-judge panel in *Cooper I* found the Career Status Law unconstitutional. Noting that the Career Status Law, "by affording 'career' status to those employees who were exempt in the prior administration, has also substantially limited the Governor's ability to remove them[,]" the panel concluded that the law "leave[s] the Governor 'with little control over the views and priorities of the officers' holding key decision-making positions in the executive branch." *Cooper I*, 2017 WL 1433245, at *13. Because it "prevent[ed] the Governor from taking care that the laws are faithfully executed," the three-judge panel permanently enjoined the Career Status Law and declared it unconstitutional. *Id.* at *14. On 11 May 2017, this Court granted the *Cooper I* defendant's motion to dismiss their appeal, but denied the motion to vacate the lower court's decision. Petitioner's contested case was heard and a final decision issued in the OAH on 11 September 2018, after *Cooper I* was decided.

"It is a rule of statutory construction that a statute declared unconstitutional is void *ab initio* and has no effect." *Am. Mfrs. Mut. Ins. Co. v. Ingram*, 301 N.C. 138, 147, 271 S.E.2d 46, 51 (1980) (citations omitted). Indeed, as the Supreme Court has recognized, "[a]n unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cty.*, 118 U.S. 425, 442, 30 L. Ed. 178, 186 (1886). Nevertheless, noting that "[t]he actual existence of a statute, prior to [ ] a determination [of unconstitutionality], is

an operative fact and may have consequences which cannot justly be ignored[,]" the Supreme Court has rejected a general rule of retroactivity. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 84 L. Ed. 329, 332-33 (1940). North Carolina courts have followed suit, holding that, ultimately, "a test of reasonableness and good faith is to be applied in determining the effect which a judicial decision that a statute is unconstitutional will have on the rights and obligations of parties who have taken action pursuant to the invalid statute." *Ingram*, 301 N.C. at 149, 271 S.E.2d at 52.

Here, petitioner was designated exempt pursuant to N.C. Gen. Stat. § 126-5(c)(2), not N.C. Gen. Stat. § 126-5(d)(1). The Career Status Law conferred immediate career State employee status only on "a position designated exempt pursuant to subsection (d)(1) of [ ] section [(d)]" that was changed to non-exempt. 2016 N.C. Sess. Laws ch. 126, § 7. Thus, it did not apply to petitioner. Accordingly, even if the Governor's reversal of petitioner's status was valid, petitioner at most became a probationary State employee in a non-exempt position. As such, he was required to work in a non-exempt position for twelve consecutive months before he could achieve career state status. As of 19 January 2017, the date petitioner was terminated, petitioner had only served in a non-exempt position for 29 days. Therefore, he was not a career State employee, and could be fired at will.

Furthermore, even if, assuming *arguendo*, the Career Status Law did apply to petitioner, it was found to be unconstitutional shortly after its enactment. Because we denied the appellant's motion to vacate the judgment, the reasoning stands. In addition, though petitioner argues *Cooper I* was not binding on the OAH, we disagree. Chapter 150B grants the superior court authority to review final decisions of the OAH, such as the one at issue here. *See* N.C. Gen. Stat. § 150B-43. Thus, the superior court's rulings with regard to disputes of whether an employee is subject to the SHRA are binding on the OAH. *Cooper I* concerned a provision directly related to whether an employee was subject to the SHRA. We therefore hold its decision was binding on the OAH.

In addition, while North Carolina courts have "retreated from the absolute rule that an unconstitutional statute is a nullity," we hold the Career Status Law is null under the *Ingram* test. *Ingram*, 301 N.C. at 149, 271 S.E.2d at 52. Pursuant to *Ingram*, we will not retroactively apply a holding of unconstitutionality unless the parties who relied on the unconstitutional statute acted unreasonably or in bad faith. Here, while it may have been lawful for then-Governor McCrory to rely on the

Career Status Law when he changed petitioner's status to non-exempt, and thereby attempted to confer immediate career status on petitioner, we find no support in the record to persuade us that he acted reasonably or in good faith.

Only days prior to the end of his term, then-Governor McCrory acted to prevent the removal of exempt employees hired under his administration by making them non-exempt, with the expectation that the Career Status Law would protect them from being fired without cause by the next Governor. This action was clearly an attempt to permanently install employees hired by then-Governor McCrory—who had been defeated in his bid to retain his seat—who may not be favorable to the incoming administration. Thus, then-Governor McCrory's actions taken pursuant to the Career Status Law would serve to thwart the duly elected Governor's authority to hire employees to carry out the will of the people. Therefore, these unreasonable actions done under this unconstitutional statute should not be allowed to stand. Moreover, retroactively applying the *Cooper I* decision will not result in untoward consequences. Those employees whose positions then-Governor McCrory changed to non-exempt are, though unable to attain *immediate* career status, still eligible for career status upon their completion of the twelve month probationary period, as has been the policy for years.

C. 10-Day Notice

[3] Finally, OSHR argues that if petitioner was entitled to a 10-day notice period upon reversal of his status from non-exempt back to exempt, any notice violation was procedural in nature, not substantive, and thus the appropriate remedy is not reinstatement of petitioner. We agree.

Pursuant to N.C. Gen. Stat. § 126-5(g), "No employee shall be placed in an exempt position without 10 working days prior written notification that such position is so designated." N.C. Gen. Stat. § 126-5(g) (2017).

Because we have held that even if petitioner was a non-exempt employee the Career Status Law did not apply to him, we also hold that even if there was a violation of the 10-day notice period, it would not have been substantive. Had the notice period been honored, petitioner still would not have had a protected property interest in his position. The Career Status Law did not apply to petitioner, and even if it did, it has been struck down as unconstitutional and, as discussed *supra*, is void *ab initio*. Thus, petitioner at most was a probationary State employee at the time of his termination. As such, he was required to work in a non-exempt position for twelve consecutive months before he could attain career State employee status and thereby gain a protected

property interest in his continued employment. *See* N.C. Gen. Stat. § 126.1-1. However, petitioner only worked in a non-exempt position for 29 days before he was terminated. Even if OSHR had waited 10 working days to terminate him, petitioner would not have attained career State employee status in that time period, as he still had eleven more months to go. Accordingly, any violation of the 10-day notice period was procedural in nature, not substantive, and reinstatement was not the appropriate remedy.

III. Conclusion

For the foregoing reasons, we reverse the decision of the OAH.

REVERSED.

Judges COLLINS and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
ALLISON MACKIE HALL, Defendant

No. COA19-230

Filed 19 November 2019

Search and Seizure—motion to suppress—consent to search—voluntariness—conflicting evidence—sufficiency of finding

In a prosecution for possession of heroin and drug paraphernalia, the trial court properly denied defendant's motion to suppress where the court found that defendant voluntarily consented to a warrantless search of her purse, and therefore the search did not violate the Fourth and Fourteenth Amendments. Competent evidence supported this finding where the officer who performed the search testified that he asked defendant for permission first and she replied, "Sure." Although other evidence conflicted with the officer's testimony, it was the proper role of the trial court to weigh all the evidence and resolve any conflict therein.

Appeal by defendant from judgment entered 9 July 2018 by Judge Anna M. Wagoner in Rowan County Superior Court. Heard in the Court of Appeals 18 September 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Dylan C. Sugar, for the State.

Gilda C. Rodriguez for defendant-appellant.

BERGER, Judge.

Allison Mackie Hall ("Defendant") appeals the trial court's denial of her motion to suppress evidence obtained from a search of her purse. Following denial of her motion, Defendant pleaded guilty to possession of heroin and possession of drug paraphernalia pursuant to a plea arrangement with the State that preserved her ability to appeal.

On appeal, Defendant contends the trial court erred when it denied her motion to suppress evidence because the court made insufficient findings of fact related to her consent to search her vehicle and her purse. We disagree.

Factual and Procedural Background

On April 8, 2017, at approximately 7:50 p.m., Defendant was asleep in her car at Dan Nicholas Park in Rowan County, North Carolina. The park was scheduled to close at 8:00 p.m. that evening.

Lieutenant William Andrew Downs ("Lieutenant Downs"), with the Rowan County Sheriff's Office, was performing a routine sweep of the park prior to closing when he discovered Defendant's vehicle in the parking area. Lieutenant Downs called in the vehicle's registration number and then approached the driver's side window to see if anyone was inside the vehicle. He observed Defendant slumped over in the driver's seat with her upper body leaning into the passenger's seat.

Lieutenant Downs was concerned that there was a medical emergency based on Defendant's positioning, and he knocked on the window of the vehicle. After Lieutenant Downs knocked several times, Defendant sat up, looked at him, and opened the driver's side door. Defendant informed Lieutenant Downs that she was camping in the park with her son and his Boy Scout troop, and that she decided to take a nap in her vehicle. According to Lieutenant Downs, Defendant's speech was slurred, her eyes were bloodshot, and she was unsteady on her feet when she exited the vehicle.

While interacting with Defendant, Lieutenant Downs noticed track marks on Defendant's arms consistent with heroin use. Lieutenant Downs asked Defendant if she had any narcotics in her vehicle or purse,

and Defendant responded that she did not. Lieutenant Downs then asked for Defendant's driver's license and checked for outstanding warrants. While still in possession of Defendant's license, Lieutenant Downs asked for consent to search her vehicle and purse. Defendant's purse was sitting in the front seat of the vehicle.

The State and Defendant presented conflicting evidence concerning the events that followed. According to Lieutenant Downs, he asked Defendant for consent to search her vehicle and purse one time, and Defendant responded, "Sure." In contrast, Defendant testified that Lieutenant Downs asked for permission to search her vehicle three times, and that each time Defendant responded, "I would really rather you not." According to Defendant, she only consented to the search after Lieutenant Downs threatened to take her away in handcuffs.

During the search, Lieutenant Downs found multiple syringes in the top section of Defendant's purse, and, again, asked her if she was carrying anything illegal. Defendant responded, "Am I going to jail?" According to Lieutenant Downs, he promised Defendant that he would not take her to jail that night if she cooperated. Defendant then informed Lieutenant Downs that she had a syringe containing heroin in the side compartment of her purse. Lieutenant Downs found the syringe in Defendant's purse, along with a burnt spoon and approximately two grams of heroin. Lieutenant Downs told Defendant to leave her vehicle in the parking area and allowed Defendant to return to her son for the rest of the evening.

On March 14, 2018, the Rowan County Grand Jury indicted Defendant on one count of possession of heroin and one count of possession of drug paraphernalia. Defendant filed a motion to suppress the evidence obtained from the search, alleging the search violated her rights under the Fourth and Fourteenth Amendments of the United States Constitution. On September 6, 2018, the trial court entered an order denying the motion to suppress. Defendant subsequently pleaded guilty to both charges but preserved her right to appeal the denial of her motion to suppress evidence pursuant to Section 15A-979 of the North Carolina General Statutes.

Standard of Review

In reviewing a trial court's denial of a motion to suppress, this Court's review "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). When supported by competent evidence, the trial court's factual findings are conclusive on appeal, even where the evidence might sustain findings to the contrary. *State v. Mello*, 200 N.C. App. 437, 439, 684 S.E.2d 483, 486 (2009).

The trial court's conclusions of law are reviewed *de novo*. *State v. Allen*, 197 N.C. App. 208, 210, 676 S.E.2d 519, 521 (2009). In addition, our Court will not disturb the correct decision of a lower court on review "simply because an insufficient or superfluous reason is assigned." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987). "The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *Id.* at 290, 357 S.E.2d at 650.

Analysis

On appeal, Defendant argues the trial court erred when it denied her motion to suppress. Specifically, Defendant contends that her consent to the search was not voluntarily given, and the trial court's findings on this issue were insufficient. We disagree.

Under the Fourth Amendment of the United States Constitution,

> [t]he 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. "The Fourth Amendment protects the right to be free from unreasonable searches and seizures, but it is silent about how this right is to be enforced." *Davis v. United States*, 564 U.S. 229, 231-32 (2011) (quotation marks omitted). To supplement the bare text of the Fourth Amendment, the United States Supreme Court "created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." *Id.* at 231-32. "The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (citation omitted).

"The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable

unless the search falls within a well-delineated exception to the warrant requirement . . . ." *Cooke*, 306 N.C. at 135, 291 S.E.2d at 620.

> Consent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given. For the warrantless, consensual search to pass muster under the Fourth Amendment, consent must be given and the consent must be voluntary. Whether the consent is voluntary is to be determined from the totality of the circumstances.

Smith, 346 N.C. at 798, 488 S.E.2d at 213 (citations omitted).

Defendant contends that the voluntariness of a search presents a question of law and argues that the trial court made insufficient findings of fact on the legal issue of whether her consent to the search was voluntarily given. In support of the argument that the voluntariness of a search presents a legal question, Defendant's appellate brief cites numerous authorities all of which stand for the proposition that the voluntariness of a *confession under the Fifth Amendment* is a question of law. *See State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) ("The conclusion of voluntariness . . . is a legal question which is fully reviewable. . . . [W]e conclude that the trial court correctly concluded that defendant's confession was voluntary."); *State v. Barlow*, 330 N.C. 133, 139, 409 S.E.2d 906, 910 (1991) ("[T]he question of the voluntariness of a confession is one of law, not of fact."). These cases do not govern the voluntariness of consent to a search under the Fourth Amendment.

In *Schneckloth v. Bustamonte*, the United States Supreme Court held that "the question whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." 412 U.S. 218, 227 (quotation marks omitted). In 2017, our State Supreme Court cited *Bustamonte* approvingly, concluding that the voluntariness of a search under the Fourth Amendment is a question of fact to be determined from the totality of the circumstances. *State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 652 (2017). Moreover, our Supreme Court has previously reversed the decision of this Court based upon the trial court's failure to "make a specific finding as to whether [the defendant] voluntarily consented" to a search. *Smith*, 346 N.C. at 801, 488 S.E.2d at 214.

Thus, the question of whether consent to a search is voluntarily given by a defendant under the Fourth Amendment is one of fact, not

law. *Romano*, 369 N.C. at 691, 800 S.E.2d at 652; *Smith*, 346 N.C. at 801, 488 S.E.2d at 214. In determining the voluntariness of consent to a search, the State bears the burden of proving "that consent was, in fact, freely and voluntarily given." *Romano*, 369 at 691, 800 S.E.2d at 653 (citation and quotation marks omitted).

> Consent is not voluntary if it is the product of duress or coercion, express or implied. A court's decision regarding whether a suspect's consent was voluntary is based on . . . careful scrutiny of all the surrounding circumstances and does not turn on the presence or absence of a single controlling criterion. The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness.

Id. at 691, 800 S.E.2d at 653 (*purgandum*).

As previously discussed, "[a]t a hearing to determine the voluntariness of a defendant's consent to a search of his property, the weight to be given the evidence is peculiarly a determination for the trial court, and its findings are conclusive when supported by competent evidence." *State v. Aubin*, 100 N.C. App. 628, 633, 397 S.E.2d 653, 656 (1990). "Where the evidence is conflicting, the [trial court] must resolve the conflict. . . . The appellate court is much less favored because it sees only a cold, written record." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971) (parenthetical omitted). Accordingly, "the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence." *Id.* at 41, 178 S.E.2d at 601.

After determining the trial court's findings are supported by competent evidence, we must then determine whether those findings support the court's ultimate conclusion of law—that a warrantless search did or did not violate a defendant's rights under the Fourth and Fourteenth Amendments. *Smith*, 346 N.C. at 801, 488 S.E.2d at 214.

In this case, the trial court made the following pertinent finding of fact, "[Defendant] freely gave consent to [Lieutenant] Downs to search her vehicle and her purse." At the suppression hearing, Lieutenant Downs testified that he asked Defendant once for consent to search her vehicle and purse and that Defendant responded, "Sure." Verbal confirmation of consent to a search is sufficient to support a finding of voluntariness. *Bustamonte*, 412 U.S. at 220 (finding voluntary consent where, at a stop with three officers present, an officer asked for permission to search the defendant's vehicle and the defendant responded, "Sure, go ahead.").

Although Defendant's testimony contradicted Lieutenant Downs' testimony in several respects, it is clear from the order denying Defendant's motion to suppress that the trial court afforded more weight to the State's evidence. Therefore, the trial court's determination that Defendant's consent was "freely given" was supported by competent evidence and is binding on this Court. *Mello*, 200 N.C. App. at 439, 684 S.E.2d at 486.

Next, we must determine whether the trial court's findings support the ultimate conclusion of law. In the order denying Defendant's motion to suppress evidence, the trial court failed to make a specific finding that the search of Defendant's vehicle and purse did not violate her rights under the Fourth and Fourteenth Amendments. However, based on the trial court's findings of fact that Defendant voluntarily consented to the search, we conclude that the search did not violate Defendant's rights under Fourth Amendment. Therefore, the trial court did not err in denying Defendant's motion to suppress because the search was valid under the Fourth and Fourteenth Amendments.

AFFIRMED.

Judges INMAN and MURPHY concur.

STATE OF NORTH CAROLINA
v.
WEIPENG "JIMMY" LU, DEFENDANT

No. COA19-80

Filed 19 November 2019

1. Probation and Parole—probationary period—misdemeanors—violation of statutory mandate—clerical errors

Defendant's two convictions for drug-related misdemeanors were remanded for resentencing where the trial court placed defendant on thirty-six months' probation for those offenses, which violated a statutory mandate restricting the probationary period for misdemeanors to 12 to 24 months unless the court makes specific findings that a longer period is necessary (N.C.G.S. § 15A-1343.2(c)(2)). Additionally, the trial court was directed to address certain clerical errors in each judgment on remand.

2. Drugs—possession of drug paraphernalia—other than for marijuana—storage item not specified—jury instructions—plain error analysis

At a trial for possession of drug paraphernalia, where defendant stored bags of marijuana and a beer can full of Methylone inside his vehicle, the trial court did not commit plain error by failing to instruct the jury that the beer can served as the basis for the charge. The item's identity was not an essential element of the offense, and even though the trial court erred by mentioning marijuana in its instructions for possession of drugs other than marijuana—because it improperly allowed the jury to convict defendant under an alternate theory (possession of marijuana paraphernalia)—it was highly improbable that the jury would have identified the bags of marijuana as the basis for defendant's paraphernalia charge.

Appeal by Defendant from judgments entered 18 September 2018 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 5 June 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Kraus, for the State.

The Epstein Law Firm, PLLC, by Drew Nelson, for defendant-appellant.

MURPHY, Judge.

A jury found Defendant, Weipeng "Jimmy" Lu, guilty of felony possession of a Schedule I controlled substance (Methylone), misdemeanor possession of marijuana, and misdemeanor possession of drug paraphernalia. Defendant argues that his probation terms exceed the statutory maximum and that the trial court committed plain error by giving jury instructions that vary from the indictment. After careful review, we vacate and remand for resentencing and hold that the trial court did not commit plain error.

BACKGROUND

At a traffic checkpoint, Sergeant Amanda Efird ("Efird") screened a vehicle in which Defendant was a passenger. Efird detected "[t]he overwhelming odor of marijuana emitting from the vehicle," and Defendant confirmed the presence of marijuana. Efird proceeded to search the vehicle with another officer's assistance. Defendant told Efird that

the marijuana was located "in a bag behind the driver's seat," and Efird located a drawstring bag, which Defendant professed to own along with its contents.[1] Within the drawstring bag, the officer discovered two sealable plastic bags containing marijuana, a hookah, a "snort straw," and a beer can. The beer can had been altered to serve as an unscrewable container, and inside Efird found "two white crystallized substances"—later identified as Methylone—and a Lorazepam tablet.

Defendant was indicted on three offenses, and one indictment specified "an altered beer can" as the sole basis for a possession of drug paraphernalia charge. At trial, the judge gave instructions regarding the possession of drug paraphernalia charge, and, although only the "altered beer can" was named in the paraphernalia indictment, the instructions did not specify the item(s) deemed to be drug paraphernalia.

The jury found Defendant guilty of all charges, including possession of drug paraphernalia. He received a suspended sentence of 6-17 months for the felony. Defendant also received two consecutive sentences of 120 days for the two misdemeanor possession offenses. Each sentence was suspended pending a probation period of 36 months and a 12-day split active sentence was imposed for the felony. If activated, the sentences were to run consecutively: the felony sentence first and then the misdemeanor possession sentences.

ANALYSIS

A. Probation Sentencing Error and Clerical Error

[1] Defendant argues the trial court violated N.C.G.S. § 15A-1343.2(c)(2) when it placed him on 36 months' probation for his misdemeanor convictions. We agree.

We review alleged statutory errors de novo. *State v. Wilkerson*, 223 N.C. App. 195, 200, 733 S.E.2d 181, 184 (2012). On review, "[w]hen a trial court acts contrary to a statutory mandate, the error ordinarily is not waived by the defendant's failure to object at trial." *State v. Hucks*, 323 N.C. 574, 579, 374 S.E.2d 240, 244 (1988) (emphasis omitted). The statutory mandate, in this case, restricts the probationary period for misdemeanants sentenced to intermediate punishment, and that time must be between 12 and 24 months "[u]nless the court makes specific findings that longer or shorter periods of probation are necessary . . . ." N.C.G.S. § 15A-1343.2(d)(2) (2017). When a "trial court [does] not make specific

1. Some disagreement emerged at trial as to whether Defendant intended to communicate that he owned all of the bag's contents, or only some.

findings that a longer period of probation [is] necessary," we remand. *State v. Wheeler*, 202 N.C. App. 61, 71, 688 S.E.2d 51, 57 (2010); *see also State v. Love*, 156 N.C. App. 309, 576 S.E.2d 709 (2003).

Here, Defendant argues that the record lacks specific findings to justify a 36-month probation period. The State does not disagree and our review of the record supports Defendant's argument. Thus, the probation period set at trial is vacated and remanded.

Defendant also argues that the trial court erred by issuing written judgments containing clerical errors, including misnumbering the prior conviction points and conviction numbers. The State does not oppose this argument. However, if a judgment containing a clerical error is vacated, then the clerical error is moot. *See Shaner v. Shaner*, 216 N.C. App. 409, 410, 717 S.E.2d 66, 68 n.2 (2011) (noting "this clerical error has no impact on our minimum contacts analysis and, in light of our reversal of the order, [defendant]'s argument on this point is moot."). As we are remanding to the trial court for resentencing, clerical errors contained in the judgments can be addressed at that time.

B. Plain Error

[2] Defendant argues that the trial court erred when its jury instructions did not identify the item that served as the basis for Defendant's drug paraphernalia charge. Defendant did not object to the possession of drug paraphernalia jury instruction at trial and we review for plain error. N.C. R. App. P. 10(a)(4); *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). The standard for plain error is well-established:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal marks and citations omitted). We find no plain error in this case.

We have held that "it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). We have "found that a trial court's jury instructions which

vary from the allegations of the indictment might constitute error where the variance is regarding an *essential element* of the crime charged." *State v. Lark*, 198 N.C. App. 82, 92, 678 S.E.2d 693, 700-01 (2009). A "trial court's jury instructions [are] fundamentally erroneous [when] the jury [is] instructed on a theory based on a different subsection from the subsection under which the defendant was charged in the indictment." *Id.* at 92, 678 S.E.2d at 701 (citing *State v. Williams*, 318 N.C. 624, 631, 350 S.E.2d 353, 357 (1986)). In *State v. Williams*, the trial court committed fundamental error when the indictment charged the defendant with rape by force under N.C.G.S. § 14-27.2(a)(2), but the trial court instructed the jury on the elements for rape of a victim under the age of 13, which falls under N.C.G.S. § 14-27.2(a)(1).[2] *Williams*, 318 N.C. at 628, 350 S.E.2d at 356. Although two crimes may share similar elements, the trial court cannot give the jury instructions for a separate crime unspecified in the indictment. *See Lark*, 198 N.C. App. at 92, 678 S.E.2d at 700-01.

Yet, the instructions need not mirror the indictment in at least three respects. First, a "trial judge is not required to instruct the jury with any greater particularity upon any element of the offense than is necessary to enable the jury to apply the law with respect to such element to the evidence bearing thereon." *State v. Spratt*, 265 N.C. 524, 527, 144 S.E.2d 569, 572 (1965). Second, nor does the trial judge need "to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence . . . ." *State v. Wallace*, 104 N.C. App. 498, 504, 410 S.E.2d 226, 230 (1991). Finally, additional instructions "beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Bollinger*, 192 N.C. App. 241, 246, 665 S.E.2d 136, 139 (2008), *aff'd per curiam*, 363 N.C. 251, 675 S.E.2d 333 (2009). We reasoned that "[t]he gist of the offense is carrying a *concealed weapon*" and "the additional language, 'to wit: *a Metallic set of Knuckles*' . . . is mere surplusage and not an essential element of the crime of carrying a concealed weapon." *Id.*, 665 S.E.2d at 139-40.

Our holding in *McNair* is particularly instructive on surplus language in jury instructions. In that case, the defendant was charged with possession of burglary tools and argued that "the indictment on the charge of possession of burglary tools only identified the pry bar and the bolt cutters as implements of housebreaking in [d]efendant's possession," but "the trial court nevertheless instructed the jury that it could find [d]efendant guilty if it found that he possessed either the pry bar,

2. Effective 1 December 2015, this statute was recodified as § 14-27.21 by S.L. 2015-181, § 3(a).

the bolt cutters, *or the work gloves*." *State v. McNair*, 253 N.C. App. 178, 188-189, 799 S.E.2d 631, 640 (2017), *review dismissed*, *cert. denied*, 370 N.C. 77, 803 S.E.2d 394 (2017). We held that "[t]he mere fact that the court mentioned three implements of housebreaking rather than two [did] not constitute error[]" because "the trial court properly instructed the jury as to both essential elements of the offense." *Id.* at 190-191, 799 S.E.2d at 641.

In short, jury instructions must materially align with the indictment just as the indictment must align with the crime.

The relevant crime in this case, possession of drug paraphernalia, consists of three essential elements: (1) "any person to knowingly use, or to possess with intent to use," (2) "drug paraphernalia" (3) "to . . . package, store, . . . or conceal a controlled substance *other than marijuana* which it would be unlawful to possess . . . ." N.C.G.S. § 90-113.22(a) (2017) (emphasis added). Possession of *marijuana* drug paraphernalia is now a separate offense. *See* N.C.G.S. § 90-113.22A (2017) (making it a crime "for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . package, . . . store, . . . or conceal marijuana . . . .").[3]

Here, the indictment charged Defendant with "Possession of Drug Paraphernalia":

> III. POSSESSION OF DRUG PARAPHERNALIA
>
> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully and willfully did knowingly possess with intent to use drug paraphernalia, *an altered beer can*, for the purpose of packaging, storing, or concealing a controlled substance which it would be unlawful to possess. This act was in violation of the law referenced above.

As in *McNair*, the superseding indictment charged the Defendant with all essential elements of the drug paraphernalia offense by asserting that Defendant (1) "unlawfully and willfully did knowingly possess with intent to use" (2) "drug paraphernalia" (3) "for the purpose of packaging, storing, or concealing a controlled substance which it would be unlawful to possess." Naming a specific item of drug paraphernalia was "mere surplusage." *See Bollinger*, 192 N.C. App. at 246, 665 S.E.2d at 139-40.

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3. N.C.G.S. § 90-113.22A became effective 1 December 2014 after passage of S.L. 2014-199.

Next, the trial court's jury instructions for drug paraphernalia possession stated:

> The defendant has been charged with unlawfully and knowingly possess with intent to use drug paraphernalia. For you to find the defendant guilty of this offense the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant possessed certain drug paraphernalia. Drug paraphernalia means all equipment, products and materials of any kind that are used to facilitate or intended or designed to facilitate violations of the Controlled Substances Act.
>
> Second, that the defendant did this knowingly. A person possessed drug paraphernalia knowingly when the defendant is aware of its presence and has either by himself or together with others both the power and intent to control the disposition or use of said paraphernalia.
>
> And third, that the defendant did so with the intent to use said drug paraphernalia in order to package, store or conceal a controlled substance which would be unlawful to possess.
>
> Methylone is a controlled substance in North Carolina that is unlawful to possess.
>
> Marijuana is a controlled substance in North Carolina that is unlawful to possess.

This instruction gave the jury the essential elements for possession of drug paraphernalia but added an alternate element for possession of *marijuana* drug paraphernalia. Unlike the gloves in *McNair* that were within the sphere of housebreaking implements, marijuana paraphernalia is not within the sphere of drug paraphernalia under N.C.G.S. § 90-113.22. Indeed, possession of marijuana drug paraphernalia is in violation of N.C.G.S. § 90-113.22A, which is a section entirely separate from possession of drug paraphernalia. This permitted the jury to convict under N.C.G.S. § 90-113.22A, which is an alternate theory from the possession of drug paraphernalia indictment under N.C.G.S. § 90-113.22. Thus, naming marijuana in the instructions varied from the indictment and was in error.

Having found error by the trial court, we must now determine whether

> 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.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (internal marks and citations omitted). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *State v. Tirado*, 358 N.C. 551, 574, 599 S.E.2d 515, 532 (2004) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed.2d 203, 212 (1977)). A defendant bears the "burden of showing that the trial court's inclusion of [an alternative theory] in the jury instruction had any *probable* impact on the jury's verdict." *State v. Martinez*, 253 N.C. App. 574, 582, 801 S.E.2d 356, 361 (2017).

Here, Defendant has a sole surviving contention for plain error: "by instructing the jury on the illegality of Methylone *and* marijuana, the trial court invited the jury to consider the items associated with marijuana." The marijuana-related items include "the drawstring bag, the smaller bags containing the marijuana, and the glass jar and bag containing the marijuana residue."

Upon review of the Record, three facts presented during trial undercut any perceived probable impact on the jury verdict under plain error review. First, Efird gave substantially more testimony regarding the "altered beer can" and its contents than the other containers. Although all bags in question were discussed throughout the trial, they were never discussed in detail beyond basic features, with the bags directly containing the marijuana described only as "Ziploc bag[s]" designed to contain a "half sandwich" each. By contrast, the "altered beer can" was the subject of focused and specific questions, with descriptions detailing the manner in which it was discovered as well as its weight and temperature relative to a typical beer can. The jury was also given a demonstration of how it unscrewed. Second, the marijuana was entered into evidence still inside the plastic bags, indicating that the bag was part and parcel of the marijuana possession; the "altered beer can," meanwhile, was an independent exhibit. Finally, the drawstring bag was not entered into evidence at all. As such, the likelihood that the jury understood either the plastic bags or the drawstring bag to be the "paraphernalia" used to "package, maintain, store, or conceal" any controlled substance is limited.

Similarly, it is uncontroverted that the "altered beer can," explicitly named in the possession of drug paraphernalia indictment, contained the Methylone and no marijuana. The jury found that Defendant was in possession of Methylone, and it is probable the jury also concluded that Defendant possessed the "altered beer can" that stored the Methylone. It is illogical that the jury simultaneously concluded that the can stored marijuana.

Furthermore, even if the jury did consider the plastic or drawstring bags paraphernalia, the fact that it convicted Defendant on the Schedule I charge for a drug contained *exclusively* in the "altered beer can" strongly suggests that the jury also believed that Defendant possessed the can itself—a can designed, unlike the other items, for the specific purpose of containing and concealing drugs.

The instruction's prejudicial impact was not probable. Thus, because Defendant has failed to show that the trial court's error did not have a probable impact on the jury's finding of guilt, there was no plain error to award a new trial.

CONCLUSION

We vacate in part and remand for resentencing, which will also address any alleged clerical errors. In addition, although we agree that the trial court erred in adding marijuana to the possession of drug paraphernalia instruction, Defendant has failed to show this error had a probable impact on the jury's finding of guilt to award a new trial.

VACATED IN PART AND REMANDED FOR RESENTENCING; NO PLAIN ERROR IN PART.

Judges TYSON and YOUNG concur.

STATE v. ROMANO

[268 N.C. App. 440 (2019)]

STATE OF NORTH CAROLINA
v.
JOSEPH MARIO ROMANO, DEFENDANT

No. COA19-133

Filed 19 November 2019

1. Criminal Law—order granting motion to suppress—upheld on appeal—State proceeding to trial without suppressed evidence

In a habitual impaired driving case, where both the Court of Appeals and the Supreme Court upheld a pretrial order granting defendant's motion to suppress an alcohol blood test conducted by law enforcement, the trial court on remand properly denied defendant's motion to dismiss the entire case. Although the State certified in its appeal from the pretrial order that the test results were "essential" to the prosecution, neither the appellate courts' interlocutory decisions nor any North Carolina statute precluded the State from proceeding to trial without the suppressed evidence on remand.

2. Motor Vehicles—habitual impaired driving—suppression of blood test by law enforcement—motion to suppress blood test by hospital—no written order

In a habitual impaired driving case, where both the Court of Appeals and the Supreme Court upheld a pretrial order granting defendant's motion to suppress an alcohol blood test conducted by law enforcement, the trial court on remand properly denied defendant's supplemental motion to suppress his medical records, which contained a separate blood alcohol test from the hospital that treated him on the day of his arrest. Although both tests came from the same blood draw, the order granting defendant's first suppression motion did not encompass all records related to that blood draw, and the Supreme Court only upheld the suppression of the blood test by law enforcement. Moreover, the trial court was not required to enter a written order denying defendant's second suppression motion because there were no material conflicts in the evidence and the court explained its rationale for the ruling from the bench.

3. Evidence—impaired driving—medical records—right to confront witnesses—hearsay—prejudice

In a habitual impaired driving case, where defendant was hospitalized for extreme intoxication on the day of his arrest, the admission of defendant's medical records at trial—including a blood alcohol test conducted by the hospital—did not violate his confrontation rights under the Sixth Amendment because the records were not testimonial and they were admissible under the business records exception to the hearsay rule. Furthermore, testimony by an expert on blood alcohol testing did not violate defendant's confrontation rights because the expert gave an independent opinion about defendant's test results, and defendant was able to cross-examine him. Finally, admission of defendant's medical records was not prejudicial because the State presented ample alternative evidence that defendant had been driving while impaired.

Appeal by defendant from judgment entered 4 June 2018 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 4 September 2019.

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

Meghan Adelle Jones for defendant-appellant.

BERGER, Judge.

On April 19, 2016, this Court affirmed the trial court's pre-trial order granting Joseph Mario Romano's ("Defendant's") motion to suppress a State Bureau of Investigation ("SBI") test result. *State v. Romano*, 247 N.C. App. 212, 785 S.E.2d 168 (2016) ("*Romano I*"). Both parties subsequently sought review of *Romano I* to our Supreme Court, which "modified and affirmed," and remanded to our Court for "further remand to the trial court for additional proceedings." *State v. Romano*, 369 N.C. 678, 695, 800 S.E.2d 644, 655 (2017) ("*Romano II*").

This case is now before us for a second time to determine whether the trial court, upon remand from the State's interlocutory appeal, should have granted Defendant's motion to dismiss because the evidence the State deemed "essential to the case," the SBI test result, was ordered suppressed. Defendant also argues, in the alternative, that his supplemental motion to suppress medical records should have been granted because the original motion to suppress encompassed all records related to the blood draw on the day in question. We find no error.

Factual and Procedural Background

The factual history of this case has been discussed in *Romano I* and *Romano II*. We adopt and include the pertinent factual history from *Romano II*, discuss the procedural history of *Romano I* and *II*, and include additional procedural history as needed to understand the legal issues herein.

> The record shows that defendant stopped his vehicle at a congested intersection in the middle of the day, left the vehicle while wearing his sweater backwards, and proceeded to stumble across four lanes of traffic. Defendant had a bottle of rum in his possession, and had vomited on himself and in his vehicle before exiting the SUV. When police arrived, defendant was incoherent with slurred speech; his eyes were bloodshot; he smelled strongly of alcohol; and he could not stand or sit without assistance.
>
> . . . .
>
> Defendant was arrested for driving while impaired (DWI), and, due to his extreme level of intoxication, defendant was transported to a hospital for medical treatment. Officer Bryson requested the assistance of Sergeant Ann Fowler, a Drug Recognition Expert.
>
> Defendant was belligerent and combative throughout his encounters with law enforcement and medical personnel. At the hospital, medical staff and law enforcement attempted to restrain defendant. Medical personnel determined it was necessary to medicate defendant to calm him down. Sergeant Fowler told the treating nurse "that she would likely need a blood draw for law enforcement purposes." Before defendant was medicated, Sergeant Fowler did not "advise[ ] [him] of his chemical analysis rights," "request[ ] that he submit[ ] to a blood draw," or obtain a warrant for a blood search. After defendant was medically subdued, the treating nurse drew blood for medical treatment purposes; however, the nurse drew more blood than was needed for treatment purposes and offered the additional blood for law enforcement use. Before accepting the blood sample, Sergeant Fowler attempted to get defendant's consent to the blood draw or receipt of the evidence, but she was unable to wake him. . . .

> Sergeant Fowler did not attempt to obtain a warrant for defendant's blood nor did she believe any exigency existed. Instead, she "expressly relied upon the statutory authorization set forth in [N.C.G.S. §] 20-16.2(b)," which allows the taking and testing of blood from a person who has committed a DWI if the person is "unconscious or otherwise in a condition that makes the person incapable of refusal." After taking possession of defendant's blood, Sergeant Fowler "drove to the Buncombe County Magistrate's Office and swore out warrants for the present charges," and then returned to the hospital and served the warrants on defendant.

Romano II, 369 N.C. at 681, 693, 800 S.E.2d at 646-47, 654.

On January 26, 2015, Defendant filed a pre-trial motion to suppress "any analysis or the report thereof" resulting from the warrantless blood draw. On February 3, 2015, the State filed a motion for Defendant's medical records related to treatment received on February 17, 2014, which the trial court granted. After a hearing on Defendant's motion to suppress, the trial court filed an order suppressing "[t]he blood seized by [Sergeant] Fowler and any subsequent test results performed on the same by the SBI Crime Laboratory."

The State appealed the order and certified to this Court that the suppressed evidence was essential to the prosecution of the case. On April 19, 2016, our Court affirmed the trial court's order suppressing the evidence. *Romano I*, 247 N.C. App. at 212, 785 S.E.2d at 168. Both parties then petitioned our Supreme Court for discretionary review and our Supreme Court in *Romano II* ultimately "modified and affirmed" the decision of this Court, and remanded to our Court for "further remand to the trial court for additional proceedings." *Romano II*, 369 N.C. at 695, 800 S.E.2d at 655. Our Supreme Court held "that N.C.G.S. § 20-16.2(b) is unconstitutional under the Fourth Amendment as applied to defendant in this case," and as a result, the trial court correctly suppressed the SBI test result. *Id*. at 695, 800 S.E.2d at 655.

Prior to the decision in *Romano II*, on April 25, 2016, the State filed a second motion for medical records stating that the hospital's first production of medical records pursuant to the February 2015 order was for a date unrelated to the charged offense. Eventually, the proper medical records were produced. The State then proceeded to try the case for habitual impaired driving and driving while license revoked after impaired driving without reliance on the suppressed SBI blood test.

Defendant filed a pre-trial motion to dismiss the charges on January 29, 2018. Defendant also filed a supplemental motion to suppress medical records and 911 calls (the "supplemental motion to suppress")[1] on February 6, 2018. At trial, the court denied Defendant's motion to dismiss, stating that "[o]bviously the ruling by the Supreme Court is binding on the [S]tate as to the evidence that was dealt with by the Court, but that does not prevent the [S]tate from proceeding to trial absent that evidence." The court also denied the supplemental motion to suppress.

Defendant's medical records, which included the results of a blood alcohol test performed by the hospital, were admitted into evidence at trial. The State tendered Paul Glover ("Glover") as an expert in blood alcohol testing. Glover testified about the instrumentation and methodology used by the treating hospital in testing Defendant's blood sample. After explaining how the hospital determined Defendant's alcohol concentration in milligrams per deciliter, Glover explained the method and formula used in converting it to grams per 100 milliliters of whole blood. Based on this formula, Glover testified Defendant had a blood alcohol level of .33 grams per 100 milliliters of whole blood.

Defendant was found guilty of habitual impaired driving and driving while license revoked following impaired driving revocation. The trial court sentenced Defendant to fifteen to twenty-seven months imprisonment, and he was ordered to pay a $2,500.00 fine. Defendant appeals.

Analysis

I. Motion to Dismiss

[1] Defendant first argues the trial court erred when it denied his motion to dismiss because this Court and our Supreme Court determined that the trial court properly suppressed the SBI test result conducted by law enforcement. Specifically, Defendant contends the State should not have been able to try the case against Defendant upon remand because the SBI test result, which the State deemed essential to convict Defendant, had been ordered suppressed. We disagree.

A motion to suppress is a type of motion *in limine*. *State v. McNeill*, 170 N.C. App. 574, 579, 613 S.E.2d 43, 46 (2005). A "decision on a motion *in limine* is not final" because "a ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if

1. On appeal, Defendant only challenges the trial court's denial of his supplemental motion to suppress medical records. He does not challenge the trial court's decision relating to the 911 calls.

circumstances develop which make it necessary." *Id.* at 581, 579, 613 S.E.2d at 46 (*purgandum*).

"A trial court's decision to grant a pretrial motion to *suppress* evidence 'does not mandate a pretrial dismissal of the underlying indictments' because '[t]he district attorney may elect to dismiss or proceed to trial without the suppressed evidence and attempt to establish a *prima facie* case.' " *State v. Fowler*, 197 N.C. App. 1, 28-29, 676 S.E.2d 523, 545 (2009) (quoting *State v. Edwards*, 185 N.C. App. 701, 706, 649 S.E.2d 646, 650 (2007)). In addition, prior to trial, the State may also elect to appeal to this Court an order by the superior court granting a motion to suppress. N.C. Gen. Stat. § 15A-979(c) (2017). "The burden is on the State to show that it has the right to appeal and has appealed in accordance with the requirements of the statute." *State v. Judd*, 128 N.C. App. 328, 329, 494 S.E.2d 605, 606 (1998). Therefore, after a superior court grants a defendant's motion to suppress, the State may elect to dismiss the case, proceed to trial without the suppressed evidence, or appeal the order suppressing the evidence prior to trial.

Here, the State elected to appeal the trial court's order suppressing the SBI result. Ultimately, both this Court and our Supreme Court agreed that the SBI result had been properly suppressed. These were *interlocutory decisions*, not final decisions, and did not preclude the State from proceeding to trial without the suppressed evidence upon remand. However, Defendant contends the State should not have appealed the order granting the motion to suppress unless the State did not think it could convict Defendant without the suppressed evidence because it certified that the suppressed evidence was "essential to the case" in its appeal. We disagree.

"[T]he State cannot appeal proceedings from a judgment in favor of the defendant in a criminal case in the absence of a statute clearly conferring that right," and statutes authorizing an appeal by the State in criminal cases "must be strictly construed." *State v. Dobson*, 51 N.C. App. 445, 446-47, 276 S.E.2d 480, 481-82 (1981). The statutory authority which permits the State to appeal from superior court to this Court is contained in Section 15A-1445 of the North Carolina General Statutes, which states in pertinent part:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

> (2) Upon the granting of a motion for a new trial on the ground of newly discovered or newly available evidence but only on questions of law.
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979.

N.C. Gen. Stat. § 15A-1445(a)(1)-(2), (b) (2017). Section 15-979 provides:

> (c) An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case. The appeal is to the appellate court that would have jurisdiction if the defendant were found guilty of the charge and received the maximum punishment. If there are multiple charges affected by a motion to suppress, the ruling is appealable to the court with jurisdiction over the offense carrying the highest punishment.

N.C. Gen. Stat. § 15A-979(c) (2017). Thus, Section 15A-979(c) sets out the jurisdictional requirements for this Court to hear the State's interlocutory appeal.

Failure to comply with jurisdictional rules requires dismissal of the appeal. *State v. Webber*, 190 N.C. App. 649, 652, 660 S.E.2d 621, 622 (2008) ("Unless jurisdictional prerequisites are met, an appeal must be dismissed.").

> [I]n looking at the purpose of N.C.G.S. § 15A-979(c), it is clear that this statute is intended to be a procedural safeguard for defendants against the State, rather than an insurmountable burden for the State. Our Courts have held that the certification requirement under N.C.G.S. § 15A-979(c) is paramount in that by failing to file a certificate pursuant to N.C.G.S. § 15A-979(c), the State may not pursue its appeal.

State v. Williams, 234 N.C. App. 445, 448, 759 S.E.2d 350, 352 (2014). Therefore, the certification requirements under Section 15A-979(c) are procedural safeguards to determine whether or not the State may pursue its *appeal*, not whether or not it may pursue its *underlying indictments*.

Here, the State complied with Section 15A-979(c)'s certification requirements by certifying that its appeal was not taken for the purpose

of delay and that the evidence was essential to the case. Because the State complied with Section 15A-979(c)'s certification requirements, this Court had jurisdiction to hear the appeal and render a decision.

This Court's decision in *Romano I* affirmed the trial court's order. On discretionary review to our Supreme Court, it "modified and affirmed" the *Romano I* decision, and remanded to this Court for "further remand to the trial court for additional proceedings." Even though this Court and our Supreme Court agreed the trial court properly suppressed the evidence, that did not impede the State from proceeding to trial without the suppressed evidence since our appellate courts' decisions on the motion to suppress were made prior to trial.

Thus, after our appellate courts, on interlocutory appeal, affirm a superior court order granting a motion to suppress, nothing in our statutes suggests that the State may not elect to proceed to trial without the suppressed evidence. If the General Assembly had intended such a procedure, it would have so provided. The practical result of Defendant's argument would require dismissal of every criminal case in which a defendant's pre-trial motion to suppress was granted and then upheld on appeal. Such a result is neither found in statute nor is it grounded in the realities of trial work. Trials are fluid and ever changing based on rulings by judges, availability of witnesses and evidence, and the skillfulness of the attorneys. A piece of evidence that was essential to trial strategy at one moment may not be significant at the next based on any number of factors. To bind a party to a theory before a trial ever begins runs counter to the practical realities of trial work. Instead, our statutes and case law dictate that once our appellate courts decide, on interlocutory appeal, whether a trial court properly ruled on a motion to suppress prior to trial, the State, on remand, may elect to dismiss the case or, as here, proceed to trial without the suppressed evidence.

Because the State was not prohibited from proceeding to trial without the suppressed evidence, we now address whether the trial court erred when it denied Defendant's motion to dismiss. At trial, Defendant moved to dismiss the charges on the ground that the State was estopped from adjudicating its case against Defendant because the trial court suppressed the SBI test result, the evidence the State had previously deemed essential to its case. Defendant made no alternative argument. On appeal, Defendant renewed this same argument and makes no other argument regarding the motion to dismiss. *See State v. Walker*, ___ N.C. App. ___, ___, 798 S.E.2d 529, 532 (emphasizing this Court only reviews arguments raised before the trial court, especially if the argument made below is narrow in scope), *review denied*, 369 N.C. 755, 799 S.E.2d 619

(2017). As explained above, we hold the trial court's order suppressing the SBI test result did not prohibit or otherwise impede the State from proceeding to trial. Accordingly, the trial court did not err in denying Defendant's motion to dismiss.

II. Motion to Suppress

[2] Defendant also contends, in the alternative, the trial court erred when it denied his supplemental motion to suppress and admitted Defendant's medical records, which contained the results of a blood alcohol test performed by the hospital. He specifically contends the trial court's order granting his first motion to suppress included the suppression of *all records* related to the blood draw from the day in question. We disagree.

Generally, our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000). However, in this case, the trial court did not make written findings of fact and conclusions of law. While neither party challenges the trial court's lack of written findings and conclusions of law when it ruled on Defendant's supplemental motion to suppress, we need to address it in order to apply the appropriate standard of review.

When a trial court is deciding a motion to suppress, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2017). A trial court is not required to enter a written order denying a motion to suppress "[i]f the trial court provides the rationale for its ruling from the bench and there are no material conflicts in the evidence." *State v. Wainwright*, 240 N.C. App. 77, 83, 770 S.E.2d 99, 104 (2015). "If these two criteria are met, the necessary findings of fact are implied from the denial of the motion to suppress." *Id.* at 83, 770 S.E.2d at 104 (citations and quotation marks omitted). "If there is not a material conflict in the evidence, it is not reversible error to fail to make such findings because we can determine the propriety of the ruling on the undisputed facts which the evidence shows." *Id.* at 83, 770 S.E.2d at 104 (citations and quotation marks omitted). "[A] material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected." *State v. Baker*,

208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010). "[A] material conflict in the evidence does not arise when the record on appeal demonstrates that defense counsel cross-examined the State's witnesses at the suppression hearing." *Id.* at 383, 702 S.E.2d at 830.

In the present case, defense counsel requested the hearing on his supplemental motion to suppress be heard during a *voir dire* of Glover to determine whether he was an expert in blood alcohol testing. Prior to the *voir dire* hearing, Defendant challenged the relevancy and prejudicial impact the medical records would have as a whole and challenged the State's ability to lay a proper foundation for Glover to opine on the results of the blood alcohol test performed by the hospital. In response, the State argued the medical records would be introduced under the business record exception to the hearsay rule. The State further argued a proper foundation would be laid for both the medical records and the results of the blood alcohol test performed by the hospital. In order to lay a foundation, the manager of the hospital's medical records department testified regarding the management of hospital records. Additionally, a medical technologist testified regarding the hospital's methods and procedures for conducting laboratory tests. After the *voir dire* hearing concluded, the trial court admitted Glover as an expert. The trial court then made an oral ruling from the bench and denied Defendant's supplemental motion to suppress and provided the following rationale:

> At this time I'm also going to rule as to the medical records. I'm going to rule that the medical records are admissible as well as the blood test results contained therein, that they are, indeed, an exception under *Crawford*. That they are not testimonial because they were not – the blood wasn't taken for the purposes of testimony in court or for the treatment of the Defendant on this date, and there has been no indication for lack of trustworthiness in those medical records, the testing of the blood. So I will allow the medical records to be admitted. I will deal with any issues with regard to any portion of those that may be more prejudicial than probative should that become a question and the jury wants to see the whole disk.

Although minimal, this rationale does provide sufficient findings and conclusions to review on appeal. Also, there were no material conflicts in the evidence as Defendant did not challenge the legitimacy of the medical records. After cross-examining Glover during *voir dire*, defense counsel stated that there was nothing wrong with the actual medical records but continued to contend that a proper foundation

had not been laid. The trial court then concluded the medical records were not testimonial or lacking in trustworthiness. It also reserved any issues regarding whether any portion of the medical records were more prejudicial than probative.

Because the trial court provided its rationale from the bench and there were no material conflicts in the evidence presented at the hearing on Defendant's supplemental motion to suppress, the trial court was not required to enter a written order. Therefore, we now review the trial court's conclusions of law.

Defendant contends the holding in *Romano II* stands for the position that the trial court's order granting Defendant's first motion to suppress included the suppression of all records related to the blood draw because *Romano II* contained the following two statements: (1) "the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant," *Romano II*, 369 N.C. at 692, 800 S.E.2d at 653, and (2) "we affirm as modified herein the Court of Appeals' opinion affirming the trial court's order suppressing any testing of defendant's blood." *Id.* at 695, 800 S.E.2d at 655. Defendant's argument is misplaced.

The order referred to in *Romano II* states the following: "The blood seized by [Sergeant] Fowler and any subsequent test results performed on the same by the SBI Crime Laboratory is hereby suppressed." Therefore, the testing our Supreme Court referred to concerned any *law enforcement testing* conducted on the blood Sergeant Fowler seized. We further note the question of whether Defendant's medical records, including blood testing results by medical personnel, should have been suppressed was not before this Court or our Supreme Court.[2] The only issue addressed in *Romano I* and *II* was whether the blood seized by Sergeant Fowler and subsequent *law enforcement testing* on the blood seized was properly suppressed.

[3] The trial court correctly concluded the admittance of Defendant's medical records did not violate Defendant's rights under *Crawford v. Washington*, 541 U.S. 36 (2004).

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2. We note the trial court granted the State's first motion seeking Defendant's medical records on February 9, 2015. On March 31, 2015, the State filed its notice of appeal from the order suppressing the SBI test result. Then, on April 25, 2016, prior to the filing of *Romano II*, the State filed a second motion for medical records stating that the hospital's first production of medical records pursuant to the February order was for a date unrelated to the charged offense. It is unclear when the proper medical records were actually produced. Nonetheless, it is clear the State did not have the medical records it sought before it filed its notice of appeal from the order suppressing the SBI test result to this Court or before it petitioned for discretionary review to our Supreme Court.

"The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, . . . provides that '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' " *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (quoting *Crawford v. Washington*, 541 U.S. at 51). "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Id.*

Medical reports created for treatment-related purposes are not testimonial statements for Confrontation Clause purposes. *Id.* at 312 n.2 (stating "medical reports created for treatment purposes" are not testimonial in nature).[3] Furthermore, medical records may qualify as business records, *State v. Miller*, 80 N.C. App. 425, 428, 342 S.E.2d 553, 555 (1986), and therefore, may be admissible as an exception to hearsay under the business records exception if properly authenticated. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2017).

> Business records stored electronically are admissible if (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

State v. Crawley, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011) (citation and quotation marks omitted). "There is no requirement that the records be authenticated by the person who made them." *Id.* at 516, 719 S.E.2d at 637-38.

At trial, the State called the nurse who withdrew Defendant's blood on the day in question and a custodian of the hospital's medical records as witnesses. Their testimony showed that the nurse on duty withdrew the blood sample under routine procedure; a doctor of the hospital ordered that a serum alcohol test be conducted of the blood sample; the hospital's serum alcohol test was performed about an hour after the blood draw; and the results of the serum alcohol test were recorded in

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3. Although unpublished, the following two cases similarly held the admittance of the defendants' medical records did not violate their rights under *Crawford v. Washington* or *Melendez-Diaz v. Massachusetts: State v. Wood*, 225 N.C. App. 268, 736 S.E.2d 649 (2013) and *State v. Howard*, 237 N.C. App. 617, 767 S.E.2d 704 (2014).

milligrams per deciliter and uploaded to Defendant's medical file. Thus, the blood test was conducted by the hospital and the records documenting the results of the blood test were for medical treatment purposes and made and kept in the ordinary course of business. The trial court did not err in holding that Defendant's confrontation rights were not violated by the admission of his medical records.

Even if the results of a blood alcohol test performed by the hospital were considered testimonial, Defendant's rights were not violated under *Crawford* or *Melendez-Diaz*. When "the State seeks to introduce forensic analyses, '[a]bsent a showing that the analysts [are] unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them' such evidence is inadmissible under *Crawford*." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009) (quoting *Melendez-Diaz*, 557 U.S. at 311). However,

> when an expert gives an opinion, it is the expert opinion itself, not its underlying factual basis, that constitutes substantive evidence. Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field' does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely surrogate testimony parroting otherwise inadmissible statements.

State v. Ortiz-Zape, 367 N.C. 1, 8-9, 743 S.E.2d 156, 161-62 (2013) (*purgandum*).

In the present case, the analyst who performed the hospital's blood alcohol test was not available to testify about the results of her chemical analysis. However, the State called Glover, an expert in blood alcohol testing, to testify about his opinion regarding Defendant's blood alcohol level. On *voir dire*, Glover testified he was familiar with the two methods of testing blood for alcohol and he was familiar with

the hospital's policies and procedures for testing blood samples. After testifying about how the hospital determined Defendant's alcohol concentration in milligrams per deciliter, Glover explained the method and formula used in converting it to grams per 100 milliliters of whole blood. Based on the formula, Glover testified Defendant had a blood alcohol level of .33 grams per 100 milliliters of whole blood.

Glover testified that in order to form his opinion, he needed the time of the incident, the time of the blood collection, and the hospital's reported blood concentration. He explained, in order to answer these questions and reach his opinion, he reviewed Defendant's medical records and the District Attorney's documentation surrounding the investigation, including photographs and statements. He also testified he relied on his background and experience and medical literature on blood testing for alcohol. Thus, these sources allowed Glover to form an independent opinion obtained through his own analysis. Moreover, defense counsel was able to cross-examine Glover and did cross-examine him. Because Glover's testimony was based on his own expert opinion, Defendant's right to confront the witnesses against him was not violated. *See State v. Pless*, ___ N.C. App. ___, ___, 822 S.E.2d 725, 732-33 (2018) (determining the defendant's confrontation rights were not violated when a chemist, who did not perform the chemical analysis of the seized substance, testified at trial because she provided an independent basis for her opinion).

Accordingly, the trial court did not err when it denied Defendant's supplemental motion to suppress.

Defendant further contends the admittance of the medical records was prejudicial because, without the results of the blood test performed by the hospital, there is a reasonable possibility that the jury would not have convicted Defendant. *See* N.C. Gen. Stat. § 15A-1443(a) (2017). He specifically contends that, without the result of the blood test performed by the hospital, there was insufficient evidence that he operated the vehicle while under the influence of an impairing substance. This argument is without merit.

"A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense." N.C. Gen. Stat. § 20-138.5(a) (2017). The essential elements of driving while impaired under Section 20-138.1 are: "(1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this

State; (3) while under the influence of an impairing substance." *State v. Mark*, 154 N.C. App. 341, 345, 571 S.E.2d 867, 870 (2002) (citation omitted). A defendant 'drives' a vehicle when "he is in actual physical control of a vehicle which is in motion or which has the engine running." *State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985). Actual physical control of a vehicle can be evidenced by showing that "the defendant sat behind the wheel of the car in the driver's seat and started the engine." *Id.* at 406, 335 S.E.2d at 70. Thus, "once the car engine is running, the person behind the steering wheel is considered to be driving or operating the car." *Brunson v. Tatum*, 196 N.C. App. 480, 486, 675 S.E.2d 97, 101 (2009).

Here, the trial court instructed the jury it could find Defendant guilty of impaired driving as follows:

> First, that the Defendant was driving a vehicle. Second, that the Defendant was driving that vehicle upon a highway or street within this state. Third, that at the time the Defendant was driving that vehicle, the Defendant: A, was under the influence of an impairing substance. Alcohol is an impairing substance. Defendant is under the influence of an impairing substance when the Defendant has consumed a sufficient quantity of that impairing substance to cause the Defendant to lose the normal control of the Defendant's bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties. *And/or* B, had consumed sufficient alcohol that at any relevant time after the driving the Defendant had an alcohol concentration of 0.08 or more grams of alcohol per 100 milliliters of blood. The relevant time is any time after the driving that the driver still has in the driver's body alcohol consumed before or during driving.

(Emphasis added).

In order to prove its case, the State introduced a witness who testified that he called 911 to report that another driver wearing a gray sweater almost hit him while at an intersection. The same witness further testified that the same driver then stopped in the middle of the road, got out of the car with a bottle of alcohol in hand, and stumbled off. A sergeant with the Asheville Police Department testified when he arrived on scene that, although the vehicle was off and a key was not in the ignition, vomit was all over the steering wheel and that the hood of the vehicle was warm to the touch. Another sergeant testified that Defendant

was wearing clothing that matched the description provided by the caller. After hearing this evidence, coupled with the fact that Defendant had been incoherent with slurred speech, had bloodshot eyes, smelled strongly of alcohol, and had been unable to stand or sit without assistance, there is not a reasonable possibility that the jury would not have convicted Defendant of driving while impaired.

The holding in *Romano II* did not preclude the introduction of Defendant's medical records into evidence. The trial court did not err when it admitted the medical records, including the results of the blood alcohol test performed by the hospital, and admittance of the medical records did not prejudice Defendant's case. Therefore, the trial court did not err when it denied Defendant's supplemental motion to suppress medical records.

Conclusion

The trial court did not err when it denied Defendant's motion to dismiss the charges and Defendant's supplemental motion to suppress his medical records.

NO ERROR.

Judges INMAN and MURPHY concur.

STATE OF NORTH CAROLINA
v.
BRANDISS TAYLOR

No. COA18-1242

Filed 19 November 2019

Constitutional Law—Brady violation—destruction of dash camera footage—N.C.G.S. § 15A-954(a)(4)—dismissal of charges—bad faith

The State's failure to preserve dash camera footage of defendant's traffic stop did not constitute a *Brady* violation requiring dismissal of multiple traffic charges pursuant to N.C.G.S. § 15A-954(a)(4) where there was no evidence detailing what the footage would have shown. Since the destroyed material merely had the potential to exculpate defendant, the matter was remanded for the trial court

to determine whether the State's destruction of the footage was done in bad faith.

Judge BERGER dissenting.

Appeal by State from Order entered 12 June 2018 by Judge Phyllis M. Gorham in Wayne County Superior Court. Heard in the Court of Appeals 5 June 2019.

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

Strickland Agner Pittman, by Dustin B. Pittman, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

The State appeals from the trial court's Order granting Defendant's Motion to Dismiss Based on Loss and Destruction of Exculpatory Evidence (Motion to Dismiss). The Record tends to show the following:

On 27 November 2016, Brandiss Taylor (Defendant) was arrested and given a citation for Impaired Driving and Failure to Maintain Lane Control. On 4 December 2017, a Wayne County Grand Jury returned an Indictment charging Defendant with Habitual Impaired Driving, Driving While License Revoked, and Driving Left of Center. On 25 April 2018, Defendant filed her Motion to Dismiss, which came on for a hearing in Wayne County Superior Court on 11 June 2018. At the beginning of this hearing, both the State and Defendant stipulated to the following Factual Allegations from Defendant's Motion to Dismiss:

1. On 27 November 2016 at approximately 1:20 A.M., Trooper Adam J. Hostinsky of the North Carolina Highway Patrol [(Trooper Hostinsky)] observed a truck merge onto U.S. 117 South from a parking area;

2. The truck made a number of maneuvers that alerted [Trooper Hostinsky] to its presence and he began to follow. [Trooper Hostinsky] noted varying speeds, failure to maintain lane and the truck drive left of the center line twice with sharp corrections back. In [Trooper Hostinsky's] words "it appeared the driver may be lost or unsure of where they are going;"

3. Based on those observed traffic violations, [Trooper Hostinsky] conducted a traffic stop on the truck and it pulled to the side of the road and the "truck was put into park while still travelling about 15 MPH;"

4. When [Trooper Hostinsky] approached the truck, he found two people sitting on the passenger side of the truck, [Defendant] and another individual named Roy Lee;

5. [Trooper Hostinsky] indicates in his written notes that he identified [Defendant] as the driver and that he "saw the driver make their way to the passenger side of the vehicle" after the traffic stop was conducted;

6. [Defendant] has from the very beginning denied driving the truck that night and has maintained that throughout the life of this case;

7. As early as 28 November 2016, Trooper Hostinsky notes that [Defendant] was being considered for the felony charge of Habitual Impaired Driving;

8. On 16 December 2016, less than 30 days after the initial DWI charge was filed, agents of the Office of the District Attorney began requesting certified copies of records of prior convictions of [Defendant], presumably to prepare an indictment for Felony Habitual Impaired Driving; . . . .

9. On 29 December 2016, thirty-two (32) days after the traffic stop was conducted, Trooper Hostinsky submitted his investigative file to the Office of the District Attorney and certified his compliance with N.C. Gen. Stat. § 15A-501(6) in gathering "all materials and information acquired in the course of all felony investigations;" . . . .

10. On 28 July 2017, [defense counsel] filed a "Request for Voluntary Discovery (Alternative Motion to Compel Discovery) in a Driving While Impaired Case; . . . .

11. Even though the investigative file was submitted some seven months before the request, discovery was not released to [defense counsel] until 6 December 2017 as [defense counsel] has been informed multiple times

by Assistant District Attorneys and their staff that "discovery does not exist in district court" especially as it relates to Driving While Impaired offenses;

12. In the request for discovery, Defendant makes specific request for any and all video including Dash Camera and Body Camera footage;

13. The case was submitted to the Grand Jury in December 2017 and a true bill of indictment was returned for Felony Habitual Impaired Driving;

14. [Defense counsel] made additional request of the State for the Dash Camera footage in January of 2018;

15. [Defense counsel] was informed in February 2018 that the video had been deleted from the "local server" and the Highway Patrol was attempting to locate it from other sources;

16. [Defense counsel] was informed in March of 2018 that the video had been "purged" and was not available for release;

17. Upon information and belief, it is the policy of the North Carolina Highway Patrol to only download and release dash camera footage upon request of the Office of the District Attorney;

18. Upon information and belief, it is the policy of the North Carolina Highway Patrol to maintain video for ninety (90) days following its creation unless such a request is made;

19. Upon information and belief, the Office of the District Attorney was notified of this policy and the existence of this video while it was still in existence, at least prior to 3 February 2017, and failed to take adequate steps to ensure its preservation.

After hearing testimony from Trooper Hostinsky and arguments from the State and defense counsel, the trial court took the matter under advisement. On 12 June 2018, the trial court entered its Order granting Defendant's Motion to Dismiss. In this Order, the trial court concluded that the dash camera footage was relevant, "material[,] and exculpatory in nature" and that the State's failure to provide this evidence flagrantly violated Defendant's constitutional rights and caused

irreparable prejudice to Defendant. Based on this conclusion, the trial court dismissed the charges against Defendant pursuant to N.C. Gen. Stat. § 15A-954(a)(4). On 14 June 2018, the State timely filed Notice of Appeal. *See* N.C. Gen. Stat. § 15A-1445(a)(1) (2017) (allowing the State to appeal "[w]hen there has been a decision . . . dismissing criminal charges as to one or more counts").

Issue

The sole issue on appeal is whether the trial court erred by concluding the destruction of the dash camera footage violated Defendant's *Brady* protections,[1] requiring dismissal of the charges against Defendant.

Analysis

I. Standard of Review

In reviewing a trial court's grant of a criminal defendant's motion to dismiss, we are "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. Williams*, 362 N.C. 628, 832, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). We, however, review a trial court's conclusions of law de novo. *See State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations omitted).

II. Motion to Dismiss

Section 15A-954(a)(4) of our General Statutes requires a trial court to dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2017). Defendant has "the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case." *Williams*, 362 N.C. at 634, 669 S.E.2d at 295. Because this Statute "contemplates drastic relief," our Supreme Court has cautioned that "a motion to dismiss under its terms should be granted sparingly." *Id.* (citation and quotation marks omitted).

"Whether a failure to make evidence available to a defendant violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North

1. *See Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963).

Carolina Constitution depends in part on the nature of the evidence at issue." *State v. Taylor*, 362 N.C. 514, 525, 669 S.E.2d 239, 252 (2008) (citation omitted). In *Brady*, the United States Supreme Court held that "suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 10 L. Ed. 2d at 218 (emphasis added). However, "when the evidence is only *potentially useful* or when no more can be said of the evidence than that it could have been subjected to tests, the results of which might have exonerated the defendant, the state's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the state." *Taylor*, 362 N.C. at 525, 669 S.E.2d at 253 (emphasis added) (alteration, citations, and quotation marks omitted).

Here, the trial court concluded the destruction of the dash camera footage constituted a *Brady* violation, requiring dismissal of Defendant's charges. In reaching this conclusion, the trial court determined the dash camera footage was "material and exculpatory in nature[.]" However, the trial court made no findings concerning what the dash camera footage would have shown and, on this record, could not have made such a finding because there is no actual record of what it may have shown. Rather, the dash camera footage was only "potentially useful" to Defendant, which requires Defendant to establish bad faith on the part of the State in order to show a constitutional violation. *Id.* (citations and quotation marks omitted); *see State v. Dorman*, 225 N.C. App. 599, 621, 737 S.E.2d 452, 466-67 (2013) (holding bones of the alleged victim that were destroyed prior to the defendant being able to examine them made it "speculative to evaluate to what degree, if at all, those bones would have been material and favorable to [the defendant's] case . . . [and thus the defendant] cannot meet his burden of demonstrating the evidence was actually, as opposed to potentially, material and favorable to his defense"). Therefore, because the dash camera footage was not exculpatory but rather only *potentially* exculpatory, the trial court erred by applying the *Brady* analysis and by concluding its destruction warranted dismissal, irrespective of bad faith on the part of the State. *See Taylor*, 362 N.C. at 525, 669 S.E.2d at 253 (citations omitted).

Instead, the trial court was required to assess whether or not the footage was destroyed in bad faith. Here, because the trial court perceived the destruction of the dash camera footage to constitute a *Brady* violation, the trial court made no findings or conclusions relating to whether the State's destruction of the dash camera footage was in bad

faith. Therefore, because the trial court erroneously based its ruling on the dash camera footage, in fact, being exculpatory and thus controlled by *Brady*, we remand the matter to the trial court for a determination of whether, on these facts, the State's destruction of the footage was done in bad faith. *See State v. Young*, 368 N.C. 188, 215, 775 S.E.2d 291, 309 (2015) ("According to well-established North Carolina law, where a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." (alteration, citation, and quotation marks omitted)).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order and remand this matter for a determination of whether bad faith existed on the part of the State in failing to preserve the dash camera footage.

VACATED AND REMANDED.

Judge DIETZ concurs.

Judge BERGER dissents in a separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent because we should take the additional step of reversing the trial court's order.

Section 15A-954(a)(4) of the North Carolina General Statutes requires a trial court to dismiss criminal charges where a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." N.C. Gen. Stat. § 15A-954(a)(4) (2017). The "defendant bears the burden of showing the flagrant constitutional violation and of showing irreparable prejudice to the preparation of his case. This statutory provision contemplates drastic relief, such that a motion to dismiss under its terms should be granted sparingly. " *State v. Williams*, 362 N.C. 628, 634, 669 S.E.2d 290, 295 (2008) (citation and quotation marks omitted).

In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of

the prosecution." 373 U.S. 83, 87 (1963). However, the Supreme Court subsequently clarified that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material . . . which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. "However, evidence of bad faith standing alone, even if supported by competent evidence, is not sufficient to support a dismissal under N.C. Gen. Stat. § 15A-954(a)(4)." *State v. Hamilton*, ___ N.C. App. ___, ___, 822 S.E.2d 548, 552 (2018) (citation and quotation marks omitted), *review dismissed*, ___ N.C. ___, 830 S.E.2d 822 (2019), and *review denied*, ___ N.C. ___, 830 S.E.2d 824 (2019). Thus, a defendant must demonstrate not only that the State's failure to preserve potentially exculpatory evidence was done in bad faith, but also that he was irreparably prejudiced in the preparation of his case in order to show a violation of due process sufficient to justify dismissal.

In *State v. Hamilton*, this Court analyzed a similar issue to the present action. In *Hamilton*, the Macon County Sheriff's Department received a drug trafficking tip that contained specific information identifying the individuals and vehicles involved. *Id.* at ___, 822 S.E.2d at 550. After locating one of the aforementioned vehicles, the officer stopped the vehicle for failing to stop at a stop sign and conducted a free air sniff of the car with a K9 unit. *Id.* at ___, 822 S.E.2d at 550. The K9 unit alerted on the vehicle and the occupants of the vehicle were arrested with more than two pounds of methamphetamine in their possession. *Id.* at ___, 822 S.E.2d at 550. The officer asked the occupants if they would assist in proving that the defendant was involved in the drug trafficking, and the occupants agreed. *Id.* at ___, 822 S.E.2d at 550. The officer attempted to record the phone call between the defendant and the occupants, however, no audio was captured because the officer was not familiar with the new equipment. *Id.* at ___, 822 S.E.2d at 551. At trial, the defendant filed a motion to dismiss which was denied, and on appeal, the defendant argued that the trial court erred in denying the motion to dismiss because the State failed to preserve and disclose the audio recording. *Id.* at ___, 822 S.E.2d at 551. This Court affirmed the trial court's denial and found no bad faith on behalf of the State because the defendant (1) "had the opportunity to question [the occupant] about his phone call with [d]efendant," (2) "cross-examine [the officer] about destruction of the blank audio recording, and argue the significance of the blank audio recording to the jury," and (3) the defendant "failed to show bad faith on the part of [the officer]." *Id.* at ___, 822 S.E.2d at 552.

Here, Defendant had the opportunity to cross-examine Trooper Hostinsky about the loss of the dash camera footage and argue its significance to the jury. Further, Defendant failed to make a showing that Trooper Hostinsky exercised bad faith in failing to preserve the dash camera footage. At trial, Trooper Hostinsky testified to his understanding of the dash camera recording system as follows:

> [Trooper Hostinsky]. So at the initial point in time, this is a newer technology for the highway patrol, we were given training by a WatchGuard company representative, he told us that the way the cameras were to be set up was that if we tagged, tagged the videos, whether it be a warning stop, a stop for speeding, seatbelts, et cetera, that it would be a 90 day retention schedule on the server. He said there were four events that which we tagged it would remain on the server for three years. As I was initially understanding it, the four events for the three year retention schedule was anything involving a pursuit, an emergency response, a use of force, or a driving while impaired offense.
>
> [The State]. And since that time have you come to understand something different about the retention policy?
>
> [Trooper Hostinsky]. Yes, sir.
>
> [The State]. Could you describe that for the Court?
>
> [Trooper Hostinsky]. Just earlier this year after speaking with our technical services units I learned that the only incidences that are saved for the three year period is a chase or a use of force. The emergency response and the driving while impaired are actually just a 90 day retention schedule.
>
> [The State]. And, and how did you mark this video?
>
> [Trooper Hostinsky]. As a DWI.
>
> [The State]. Okay. And so, per your knowledge, how long was this video retained?
>
> [Trooper Hostinsky]. I, I assumed the video would be available for three years at the time of the incident. . . .
>
> [The State]. Okay. And when did you first speak to the Wayne County DA's office about this video?

> [Trooper Hostinsky]. The, the earliest recollection I have of it was either January or February of this year, of 2018.
>
> [The State]. Okay. And could you just sort of briefly summarize what that was for the Court?
>
> [Trooper Hostinsky]. I was reached out to by Ms. Tracy Moore asking how she could get a copy of the video, I told her just simply go to the district office and ask one of the sergeants to pull it from the server and burn it onto a DVR. I was contacted after that, told that the video was not available, so I began to personally reach out to my sergeant when I was located here. He said he could not locate the video. I then called our technical services unit in Raleigh and got ahold of the gentleman who runs the WatchGuard platform for us, and after going back and forth with him, he attempted to locate it, and the video was not available on either the main server or any of their redundancy servers.
>
> . . . .
>
> [The State]. Did anyone at the DA'S office ever tell you to delete this video?
>
> [Trooper Hostinsky]. Absolutely not.
>
> [The State]. Did you ever take any action to delete this video?
>
> [Trooper Hostinsky]. No, sir.
>
> [The State]. Did you ever . . . did you ever specifically choose not to take an action because you had an intention to deprive the Defendant of the video in this case?
>
> [Trooper Hostinsky]. No, sir.
>
> [The State]. Are you aware of such an intention on the part of anybody else in the DA's office or in law enforcement?
>
> [Trooper Hostinsky]. No, sir.

From this testimony, it is apparent that Trooper Hostinsky was given conflicting information regarding the dash camera recording system, and he was simply operating under a misunderstanding about how the new system worked. As in *Hamilton*, there is no evidence in the record

that Trooper Hostinsky deleted the dash camera footage in bad faith. Rather, the testimony at the suppression hearing tends to show that he made a mistake because he was using a new recording system without adequate training.

Defendant failed to demonstrate bad faith on the part of Trooper Hostinsky or the prosecutor at the hearing. This is plainly evident because the trial court did not make a finding that either Trooper Hostinsky or the prosecutor acted in bad faith. Because the evidence presented could not support a finding of bad faith, Defendant cannot satisfy *Youngblood* and has failed to show irreparable prejudice. The trial court's order of dismissal should be reversed.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 NOVEMBER 2019)

CALE v. ATKINSON No. 19-296	Edgecombe (18CVD119)	Affirmed
COMPLETE MKTG. SOLS., LLC v. LAKE CREEK CORP. No. 19-129	Craven (15CVS1544)	Vacated and Remanded
DIPASUPIL v. NEELY No. 18-1207	Union (18CVS559)	Reversed
HANCOCK v. CITY OF MONROE No. 19-236	Union (18CVS1410)	Affirmed
IN RE B.A.S. No. 18-1221	Iredell (17JT75)	Affirmed
IN RE FORECLOSURE OF CRABTREE No. 19-343	Wake (17SP3074)	Reversed and Remanded
IN RE N.A. No. 19-102	Durham (16JT69-71)	Affirmed
IN RE N.R.R. No. 19-269	Sampson (18JA55)	Reversed
IN RE N.S. No. 19-420	Cabarrus (18JB38)	Vacated
IN RE T.G.H. No. 18-1314	Cabarrus (16JT50-52)	Affirmed
KAPLAN v. KAPLAN No. 19-103	Union (15CVD305)	Dismissed
MILLER v. GRAHAM CNTY. No. 18-1310	Graham (17CVS153)	Dismissed in part; Reversed in part.
MORGUARD LODGE APARTMENTS, LLC v. FOLLUM No. 18-1014	Wake (18CVD3821)	Affirmed
MORRISON v. GONZALEZ No. 19-152	Onslow (14CVD2729)	Affirmed

QUALITY BUILT HOMES, INC. v. TOWN OF ABERDEEN No. 19-240	Moore (15CVS869)	DISMISSED AND REMANDED
SOMMER v. SOMMER No. 18-1049	Alamance (17CVD491)	Dismissed in part; Reversed in part and affirmed in part and remanded.
STATE v. ADAMS No. 18-968	Gaston (15CRS59186-87) (15CRS59230) (16CRS8087)	No Error in Part; Vacated and Remanded in Part
STATE v. BLAKNEY No. 19-242	Mecklenburg (15CRS228616-17) (15CRS228619) (15CRS228625)	No Error
STATE v. CLEMONS No. 18-469	Forsyth (14CRS58974)	Reversed
STATE v. IYAPO No. 19-139	Mecklenburg (15CRS232060)	Affirmed
STATE v. LATTA No. 18-1123	Mecklenburg (13CRS233771) (13CRS233773) (13CRS234059)	No Error
STATE v. MELVIN No. 18-843	Wake (15CRS218490) (15CRS218494-98) (15CRS218500-05)	No Error in Part; Vacated and Remanded in Part
STATE v. OCAMPO No. 19-20	Chatham (17CRS50315-17)	No Error
STATE v. WEAVER No. 19-67	Burke (18CRS50062)	Vacated and Remanded
STATE v. WILSON No. 19-274	Guilford (18CRS24265) (18CRS71786)	No Error

COOPER v. BERGER

[268 N.C. App. 468 (2019)]

ROY A. COOPER, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA, PLAINTIFF

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; CHARLTON L. ALLEN, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION; AND YOLANDA K. STITH, IN HER OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION, DEFENDANTS

No. COA18-978

Filed 3 December 2019

Constitutional Law—state budget process—federal block grants—subject to legislative appropriation

In a case of first impression, the Court of Appeals rejected the governor's as-applied constitutional challenge to the legislature's appropriation of federal block grants, because block grants come within the "State treasury" as used in Art. V, Section 7 of the N.C. Constitution and neither state law nor the language of the block grants themselves precluded the block grants from being subject to the legislature's appropriations power.

Appeal by Plaintiff from an order and judgment entered 9 April 2018 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 October 2019.

BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, L.L.P., by Daniel F. E. Smith, Jim W. Phillips, Jr., and Eric M. David, for Plaintiff-Appellant.

NELSON MULLINS RILEY & SCARBOROUGH LLP, by D. Martin Warf and Noah H. Huffstetler, III, for Defendants-Appellees Philip E. Berger and Timothy K. Moore.

No briefs filed by Charlton L. Allen and Yolanda K. Stith.

INMAN, Judge.

Plaintiff-Appellant Roy A. Cooper, III, the Governor of North Carolina, appeals from an order and judgment dismissing his claim challenging the General Assembly's appropriation of federal block grant funds awarded to the State in a manner inconsistent with the Governor's

recommended budget. The Governor contends the federal funds are not within the General Assembly's constitutional authority to control, and that the General Assembly has interfered with the Governor's constitutional duty to faithfully execute the law.

After careful review, and with the benefit of ample and able briefing and argument from the parties, we hold that the block grant funds are, despite their source in the federal government, subject to appropriation by the General Assembly. We affirm the trial court.

FACTUAL AND PROCEDURAL HISTORY

The record below shows the following:

In 2017, the Governor filed suit against Defendants-Appellees Philip E. Berger, President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, Speaker of the North Carolina House of Representatives (the "Legislative Defendants"), challenging the constitutionality of two session laws and six statutes.[1] While those claims were pending, the Governor and the General Assembly continued in the execution of their duties, which included the preparation of the State budget for the 2017-2019 biennium. The Governor submitted a recommended budget proposing, among other things, specific allocations of various federal block grant funds awarded to North Carolina. Those federal block grants included the Community Development Block Grant ("CDBG"), the Maternal and Child Health Block Grant ("MCHBG"), and the Substance Abuse Prevention and Treatment Block Grant ("SABG," collectively with the CDBG and MCHBG as the "Block Grants").

The General Assembly disagreed with the Governor's proposed allocations of the Block Grants and passed the State budget as Session Law 2017-57 on 28 June 2017, which altered the allocations as follows:

[SPACE INTENTIONALLY LEFT BLANK]

1. Charlton Allen and Yolanda K. Stith were also named as defendants; however, because they have not entered an appearance in this appeal and the order and judgment at issue here does not involve any claims against them, we omit them from further discussion in this opinion.

Community Development Grant

Item	Governor's Budget	S.L. 2017-57	Difference
Scattered Site Housing	$10,000,000	$0	($10,000,000)
Neighborhood Revitalization	$0	$10,000,000	$10,000,000
Economic Development	$13,737,500	$10,737,500	($3,000,000)
Infrastructure	$18,725,000	$21,725,000	$3,000,000

Substance Abuse Grant

Item	Governor's Budget	S.L. 2017-57	Difference
Substance Abuse Services – Treatment for Children/ Adults	$29,322,717	$27,722,717	($1,600,000)
Competitive Block Grant	$0	$1,600,000	$1,600,000

Maternal and Child Health Grant

Item	Governor's Budget	S.L. 2017-57	Difference
Women and Children's Health Services	$14,070,680	$11,802,435	($2,268,245)
Every Week Counts[2]	$0	$2,200,000	$2,200,000
Perinatal Strategic Plan Support Position	$0	$68,245	$68,245

2. Every Week Counts is "a demonstration project in two counties . . . of North Carolina to study (i) the extent to which a home-based prenatal care model can reduce the rate of preterm birth among multiparous women and (ii) whether multiparous women without a prior preterm birth, but with multiple risk factors for preterm birth in the current pregnancy, may benefit from 17 Alpha-Hydroxyprogesterone Caproate (17P) therapy." 2017 N.C. Sess. Laws 57 § 11E.12.(a).

See 2017 N.C. Sess. Laws 57 §§ 11A.14.(a), 11L.1.(a), 11L.1.(y)-(z), 11L.1.(aa)-(ee), 15.1.(a), 15.1.(d) (collectively, the "Block Grant Appropriations").

In response to passage of the State budget, the Governor amended his complaint to add a claim challenging the constitutionality of the Block Grant Appropriations. This new claim asserted that the "Block Grant Appropriations are unconstitutional because they prevent the Governor from performing his core function under [Article III, Section 5(4) of] the North Carolina Constitution to 'take care that the laws be faithfully executed[,]" and, "[t]o the extent the Block Grant Appropriations are part of the State budget, they also violate Article III, Section 5(3) of the North Carolina Constitution because they encroach on the Governor's duty to administer the budget."[3]

The Legislative Defendants filed a combined motion to dismiss and answer to the Governor's amended complaint. The Governor then filed a motion for partial summary judgment and permanent injunction declaring the Block Grant Appropriations unconstitutional "as applied in this case[.]" Two days later, the Legislative Defendants filed a motion for judgment on the pleadings as to that same claim. After briefing and argument, Judge Henry W. Hight, Jr., entered a combined order and judgment on 9 April 2018 resolving all motions in favor of the Legislative Defendants.

The trial court concluded that the federal block grant funds "are designated for the State of North Carolina and will be paid into the State Treasury." It also concluded that "Article V, Section 7 of the Constitution unambiguously states that *no* money can be drawn from the State Treasury without an appropriation[,]" and rejected the Governor's argument that the federal block grants constitute "custodial fund[s]" exempt from the constitutional and statutory budgetary and appropriations processes as without precedent under state law. The trial court ultimately concluded that: (1) the Governor failed to allege and forecast evidence "that the challenged portions of Session Law 2017-57 violate his duty to take care that the laws be faithfully executed or otherwise encroach on his duty to administer the budget;" and (2) that, therefore, the challenged provisions of Session Law 2017-57 are not unconstitutional.

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3. The Governor's amended complaint also included a claim challenging additional portions of Session Law 2017-57 related to the appropriation of settlement funds set aside for North Carolina as part of a federal lawsuit against Volkswagen. Although review of that claim was originally part of this appeal, we granted a motion, filed by the Governor, to dismiss that portion of the appeal. Our review is therefore limited to the constitutionality of the Block Grant Appropriations.

Judge Hight certified the order and judgment for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The Governor appeals.

ANALYSIS

I. Appellate Jurisdiction

In general, no right of immediate appeal from an interlocutory order exists. *Paradigm Consultants, Ltd. v. Builders Mutual Ins. Co.*, 228 N.C. App. 314, 317, 745 S.E.2d 69, 72 (2013).

> However, there are two avenues by which a party may immediately appeal an interlocutory order or judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A–1, Rule 54(b), an immediate appeal will lie. Second, an appeal is permitted under N.C. Gen. Stat. §§ 1–277(a) and 7A–27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.

N.C. Dep't of Transp. v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (citations omitted). Because the order and judgment at issue in this case was final as to the Governor's challenge to the Block Grant Appropriations and certified by the trial court for immediate appeal pursuant to Rule 54(b), we possess jurisdiction to hear the Governor's appeal. *See, e.g.*, *Estate of Tipton By & Through Tipton v. Delta Sigma Phi Fraternity, Inc.*, ___ N.C. App. ___, ___, 826 S.E.2d 226, 231-32 (2019) (holding a grant of partial summary judgment on less than all claims was subject to immediate appeal when the order contained a Rule 54(b) certification).

II. Standard of Review

A trial court's entry of judgment on the pleadings—or of summary judgment—is subject to *de novo* review on appeal. *See N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 202 N.C. App. 334, 336, 688 S.E.2d 534, 535 (2010) (acknowledging *de novo* review applies to entry of judgment on the pleadings); *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) ("Our standard of review of an appeal from summary judgment is de novo[.]" (citation omitted)). "Judgment on the pleadings is properly entered only if 'all the material allegations of fact are admitted[,] . . . only questions of law remain,' and no question of fact is left for jury determination." *N.C. Concrete Finishers*, 202 N.C. App. at 336, 688 S.E.2d at 535 (quoting *Ragsdale v. Kennedy*,

286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)) (alteration in original). 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." *Jones*, 362 N.C. at 573, 669 S.E.2d at 576 (citation and internal quotation marks omitted).

Our Supreme Court has recently explained the standard of review for constitutional questions:

> We review constitutional questions de novo. In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt. In other words, the constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

State ex rel. McCrory v. Berger, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citations and quotations omitted).

III. Historical and Legislative Context

The Governor's appeal presents an as-applied constitutional challenge to the Block Grant Appropriations identified in his complaint, but it turns on a broader constitutional issue of first impression: whether the North Carolina Constitution permits the General Assembly to appropriate federal funds designated to the State through federal block grants. This Court has not previously been presented with this issue. Our Supreme Court was presented with—and declined to answer—this exact query in *Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 779, 295 S.E.2d 589, 594-95 (1982). There, the Supreme Court demurred because "[t]he briefs and materials submitted to us contain very little, if any, information about the grants, their purposes, for whom they are intended, and the conditions placed on them by Congress." *Id.*

We are not so bereft of congressional context here, however, and, as pointed out by both parties, other states' supreme courts have squarely resolved the issue by considering their respective constitutions and looking to the texts, nature, purposes, and contours of the block grants at issue and the federal grants-in-aid regime generally. *Compare Colorado General Assembly v. Lamm*, 738 P.2d 1156 (Colo. 1987) (surveying the federal block grant landscape and examining the terms and conditions

of eight specific federal block grants, including the Block Grants at issue here, before holding that each was not subject to appropriation by the state's legislature under Colorado's constitution), *with Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978) (holding federal block grant funds were subject to appropriation by Pennsylvania's legislature under the state's constitution in part because Congress's authorizing legislation did not suggest the contrary).

A. Federal Grants-In-Aid

For the first half of the twentieth century, the federal government operated a relatively small grants-in-aid system as compared to current standards. *See Shapp*, 480 Pa. at 466, 391 A.2d at 603 (noting that federal aid to states grew from $2.9 billion in 1954 to $60 billion in 1976); Robert Jay Dilger & Michael H. Cecire, Cong. Research Serv., R40638, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues* 39 (2019) (hereinafter "*Federal Grants*") (observing that President Donald Trump's budget request for fiscal year 2020 "estimates that total outlays for grants to state and local governments will increase from $696.5 billion in FY2018 to an anticipated $749.5 billion in FY2019 and $750.7 billion in FY2020").[4] President Lyndon Johnson's "Great Society" platform enacted during the 1960s expanded federal funding for states; the number of federal grants-in-aid tripled between 1960 and 1968, and "[m]ost . . . were designed purposively by Congress to encourage state and local governments to move into new policy areas, or to expand efforts in areas identified by Congress as national priorities." *Federal Grants* at 21-22. The grants were generally structured to provide "an increased emphasis on narrowly focused project, categorical grants to ensure that state and local governments were addressing national needs." *Id.* at 22. These categorical grants are the most restrictive form of federal grants-in-aid:

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4. The Congressional Research Service's "primary function is to respond to congressional research requests[,]" *Bowsher v. Synar*, 478 U.S. 714, 758, 92 L. Ed. 2d 583, 616, n.25 (1986) (Stevens, J., concurring), and the Service is tasked with carrying out its statutory duties "without partisan bias[.]" 2 U.S.C. § 166(d) (2018). Other courts frequently cite to the Service's reports to provide historical or other context when addressing legal issues. *See, e.g.*, *United States v. Valdovinos*, 760 F.3d 322, 331 (4th Cir. 2014) (citing to Congressional Research Service reports for "some necessary and useful background" on incarceration); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103, 181 L. Ed. 2d 586, 596 (2012) (citing a Congressional Research Service report for the proposition that the use of arbitration clauses in consumer contracts rose during the early 1990s). Both parties in this case cite to a Congressional Research Service report in their appellate briefs to provide general background information on federal block grants.

> [P]roject categorical grants typically impose the most restraint on recipients . . . . Federal administrators have a high degree of control over who receives project categorical grants (recipients must apply to the appropriate federal agency for funding and compete against other potential recipients who also meet the program's specified eligibility criteria); recipients have relative little discretion concerning aided activities (funds must be used for narrowly specified purposes); and there is a relatively high degree of federal administrative conditions attached to the grant, typically involving the imposition of federal standards for planning, project selection, fiscal management, administrative organization, and performance.

Robert Jay Dilger & Eugene Boyd, Cong. Research Serv., R40486, *Block Grants: Perspectives and Controversies* 2 (2014) (hereinafter "*Block Grants*").

Despite Congress's preference for categorical grants and the federal control they offered during the 1960s, that decade also saw the creation of the first two federal block grants. *Federal Grants* at 22. Block grants differ from categorical grants in several key ways:

> Block grants are at the midpoint in the continuum of recipient discretion. Federal administrators have a low degree of discretion over who receives block grants (after setting aside funding for administration and other specified activities, the remaining funds are typically allocated automatically to recipients by a formula or formulas specified in legislation); recipients have some discretion concerning aided activities (typically, funds can be used for a specified range of activities within a single functional area); and there is a moderate degree of federal administrative conditions attached to the grant, typically involving more than periodic reporting criteria and the application of standard government accounting procedures, but with fewer conditions attached to the grant than project categorical grants.

Block Grants at 3.

As the expansion of the federal grants-in-aid system continued through the 1960s—largely through continued creation of restrictive categorical grants—there "came 'a rising chorus of complaints from state and local government officials' concerning the inflexibility of fiscal and administrative requirements attached to the grants." *Federal Grants*

at 23 (quoting Advisory Comm'n on Intergovernmental Relations, *Categorical Grants: Their Role and Design*, A-52, 29 (1978), *available at* https://library.unt.edu/gpo/acir/Reports/policy/a-52.pdf);[5] *see also Lamm*, 738 P.2d at 1158-59 (noting that the Commission "suggested that federal assistance to the states be restructured to allow revenue sharing and block grants in addition to categorical grants."). State governments found willing allies in the presidential administrations of the 1970s, when Presidents Richard Nixon and Gerald Ford advocated for more block grants and revenue sharing programs because "block grants and general revenue sharing provided state and local governments additional flexibility in project selection and promoted program efficiency by reducing administrative costs." *Federal Grants* at 23. By 1976, the Commission "determined that state legislative control over federal funds does not contravene federal policy and is, in fact, the desirable mode of administration." *Shapp*, 480 Pa. at 470, 391 A.2d at 605.

President Ronald Reagan continued the push started by his Republican predecessors to "increase the emphasis on block grants to provide state and local government officials greater flexibility in determining how the program's funds are spent," and, in 1981, Congress significantly altered the federal grants-in-aid system by consolidating 77 categorical grants and two block grants into nine new block grants as part of the Omnibus Budget Reconciliation Act of 1981 ("OBRA"). *Federal Grants* at 28-29.[6] In enacting OBRA, "Congress did not include . . . the comptroller general's recommendation that would have required state legislative appropriation of the OBRA block grants[,]" and instead was simply "silent regarding the authority of state legislatures to appropriate federal block grant funds[.]" *Lamm*, 738 P.2d at 1160.

Despite OBRA's shift from categorical grants towards block grants, Congress passed only one of the 26 additional block grants President Reagan proposed over the remainder of his two terms, *Federal Grants* at 30, and "[t]he emphasis on categorical grants . . . continued" through

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5. The Advisory Commission on Intergovernmental Relations ("the Commission") was created by Congress as a "permanent bipartisan commission" whose purposes included "giv[ing] critical attention to the conditions and controls involved in the administration of Federal grant programs" and "recommend[ing], within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government." Act of Sept. 24, 1959, Pub. L. No. 86-380 §§ 1-2, 73 Stat. 703, 703-04. The Commission was terminated by an act of Congress in 1995. Independent Agencies Appropriations Act of 1996, Pub. L. No. 104-52, 109 Stat. 480, 480 (1995).

6. The Block Grants at issue in this case were among the nine new block grants created in 1981.

the 1990s. *Id.* at 33. Block grants have nonetheless become more common in the past two decades. *Compare id.* (counting four block grants in existence as of 1980), *with Block Grants* at 5 (counting 23 federal block grants as of 2014). As noted *supra*, the federal grants-in-aid system now totals in excess of $740 billion; in North Carolina, federal grants-in-aid comprised 28.4 percent of the State's spending in fiscal year 2017. *Federal Aid to State and Local Governments*, Center on Budget and Policy Priorities (Apr. 19, 2018), https://www.cbpp.org/research/state-budget-and-tax/federal-aid-to-state-and-local-governments.

B. The Block Grants

Each of the Block Grants at issue in this appeal fits within the general definition and structure of block grants as outlined *supra*.

The Community Development Block Grant awards federal funds to state government applicants who submit a consolidated plan for each program year, including an action plan detailing how CDBG funds will be allocated. 24 C.F.R. §§ 91.10, 91.300, 91.320, & 570.485(a) (2019). The consolidated plan must identify "[t]he lead agency or entity responsible for overseeing the development of the plan." 24 C.F.R. § 91.300(b)(1) (2019). In North Carolina, that agency is the Department of Commerce ("N.C. DOC"). *See* N.C. Dep't of Commerce et al., *North Carolina 2016-2020 Consolidated Plan and 2016 Annual Action Plan* 3 (2016), *available at* https://files.nc.gov/nccommerce/documents/Rural-Development-Division/CDBC/Con-PlansCDBG/20162020-ConPlan.pdf (designating N.C. DOC as the "CDBG Administrator"). CDBG funds must be spent to benefit low- and moderate-income persons, to prevent or eliminate slums or blight, or to meet urgent needs threatening community health or welfare. 42 U.S.C. § 5304(b)(3) (2018). Congress has enumerated 26 community development activities that can be funded by this block grant. 42 U.S.C. § 5305(a) (2018). At least 70 percent of grant expenditures must benefit low- or moderate-income persons. 24 C.F.R. § 570.484 (2019). Congress prohibits States from using the funds for certain expenditures. *See*, *e.g.*, 42 U.S.C. § 5305(h) (2018) (prohibiting the use of CDBG funds to assist in relocations of certain industrial facilities).[7]

7. A more detailed summary of the Community Development Block Grant and its requirements is available from the U.S. Department of Housing and Urban Development ("HUD"), which administers the CDBG at the federal level. *See* U.S. Dep't of Hous. and Urban Dev., Office of Block Grant Assistance, *Basically CDBG for States* (July 2014), *available at* https://www.hudexchange.info/resource/269/basically-cdbg-for-states/. HUD's guidance acknowledges that states are responsible for "[s]etting priorities and deciding what activities to fund[,]" and, "[u]nder the state CDBG program, states are provided maximum feasible deference." *Id.* at 1-2.

The Maternal Child Health Block Grant operates similarly. State government applicants request funds each year. 42 U.S.C. § 705 (2018). By statute, "[t]he State health agency of each State shall be responsible for the administration (or supervision of the administration) of programs carried out with [MCHBG] allotments." 42 U.S.C. § 709(b) (2018). The North Carolina Department of Health and Human Services ("N.C. DHHS") administers these programs in North Carolina. The federal government awards the funds "for the purpose of enabling each State . . . to provide and to assure mothers and children (in particular those with low income or with limited availability of health services) access to quality maternal and child health services." 42 U.S.C. § 701(a)(1)(A) (2018). Each state receiving funds must allocate at least 30 percent toward preventive and primary care for children, at least 30 percent toward services for children with special needs, and no more than ten percent toward administration of the grant; the remaining funds may be spent however the state decides, consistent with the governing statutes and regulations. 42 U.S.C. §§ 701(a)(1)(A), 704(a), 704(d) & 705(a)(3) (2018). MCHBG funds may not be spent in particular ways, such as to purchase land. 42 U.S.C. § 704(b) (2018).[8]

Congress also requires states to apply annually for the Substance Abuse Block Grants. 42 U.S.C. § 300X-32(b)(1)(C); 45 C.F.R. § 96.122(g)(2) (2019). Applicants must "identif[y] the single State agency responsible for the administration of the program[,]" 42 U.S.C. 300x-32(b)(1)(A)(i) (2018), which, for North Carolina, is currently N.C. DHHS. Recipients expend SABG funds within the framework of their plans according to their discretion, with a minimum of 20 percent spent on substance abuse prevention. 42 U.S.C. §§ 300x-21(b) & 300x-22(a)(1) (2018).[9] As a

8. The U.S. Department of Health and Human Services ("U.S. DHHS") administers both the Maternal Child Health Block Grant and the Substance Abuse Block Grant. A detailed breakdown of the application, spending, and reporting requirements is available from the agency. U.S. Dep't of Health and Human Servs., Health Res. and Servs. Admin., Maternal and Child Health Bureau, Div. of State and Cmty. Health, OMB No. 0915-0172 *Title V Maternal and Child Health Services Block Grant to States Program: Guidance and Forms for the Title V Application/Annual Report* (expires Dec. 31, 2020), *available at* https://grants6.tvisdata.hrsa.gov/uploadedfiles/Documents/blockgrantguidance.pdf.

9. A fact sheet authored by U.S. DHHS discloses that outside of the 20 percent allocated toward primary prevention, five percent of Substance Abuse Block Grant funds are set aside for federal data collection purposes, an additional five percent must be spent by certain states on HIV treatment, and "[t]he remainder . . . can be expended by the States . . . for substance abuse prevention, early intervention, treatment and recovery support services at grantees' discretion." U.S. Dep't of Health and Human Services, Substance Abuse and Mental Health Services Admin., *Fact Sheet: Substance Abuse Prevention and Treatment Block Grant* 2 (2013), *available at* https://www.samhsa.gov/sites/default/files/sabg_fact_sheet_rev.pdf.

prerequisite to receiving these funds, each state must enact and enforce laws that prohibit the sale or distribution of tobacco products to minors. 42 U.S.C. § 300x-26(a)(1) (2018). No more than five percent of the grant may be used to administer the block grant, 45 C.F.R. § 96.135(b)(1) (2019), and states are prohibited from using SABG funds on six specific activities. 45 C.F.R. § 96.135(a) (2019).

In sum, while the Block Grants all impose certain restrictions and criteria for the application, acceptance, and expenditure of their respective grant funds, each affords significant discretion to the recipient states on how that money is ultimately spent. *See* Eugene Boyd, Cong. Research Serv., R43520, *Community Development Block Grants and Related Programs: A Primer* 1 (2014) ("Although . . . states are given great discretion and flexibility in the selection of activities to be funded, the [CDBG] program's governing statute requires that all activities meet one of three national objectives."); Victoria L. Elliott, Cong. Research Serv., R44929, *Maternal and Child Health Services Block Grant: Background and Funding* 13 (2017) ("Beyond . . . broad requirements, states determine the actual services provided under the [MCHBG] block grant."); Erin Bagalman, Cong. Research Serv., R44510, *Substance Abuse and Mental Health Services Administration (SAMHSA): Agency Overview* 2 (2016) ("States have flexibility in the use of SABG funds within the framework of the state plan and federal requirements.").

According to affidavits in the record, the State of North Carolina receives and expends federal grant funds through a process that is roughly uniform across each of the Block Grants. Funds are held by the federal government up until N.C. DOC or N.C. DHHS submits a discrete request tied to a given expenditure; in response, the federal government remits the requested funds into an account in the name of the North Carolina Department of State Treasurer (the "Treasurer"). The funds are assigned a budget code tied to the State agency on receipt by the Treasurer, and the agency submits a requisition to the Office of the State Controller to transfer the coded funds to a disbursing account tied to the agency—also held and maintained by the Treasurer. Those funds are then disbursed through a paper warrant or electronic transfer, at which time they enter the hands of a sub-grantee, a third party, another division within the agency, or are used to satisfy an administrative expense of the agency itself.

C. State Expenditures Under The North Carolina Constitution

The North Carolina Constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations

made by law." N.C. Const. art. V, § 7(1). The General Assembly's primacy over State expenditures embodied in this language dates to the genesis of the State. *See* John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 154 (2d ed. 2013) (noting that "[t]he power of the purse is the exclusive prerogative of the General Assembly[,]" and "Subsection 1 dates from the 1776 constitution"). Legislative—rather than executive—authority over the State's expenditure of funds was intrinsic to the State's founding, as "Colonial Americans were acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives." *Id*. The drafters of the State's first constitution expressly made the Governor's authority over public funds subordinate to the General Assembly's authority, while employing language that recognized the appropriations power as a means of oversight. *See* N.C. Const. of 1776, § XIX ("That the Governor, for the Time being, shall have Power to draw for, and apply, *such Sums of Money as shall be voted by the General Assembly* for the Contingencies of Government, *and be accountable to them for the same*." (emphasis added)).

The language now found in Article V, Subsection 7(1) was first adopted in 1868. N.C. Const. of 1868 art. XIV § 3. It remained unchanged until 1971, when the provision was reorganized and restated in Article V without further alteration. N.C. Const. of 1971 art. V § 7(1). Although the verbiage of the provision has evolved, its paramount importance has not: "It is the power of the purse, to which the power of the sword is a mere sequence." *Wilmington & W.R. Co. v. Alsbrook*, 110 N.C. 137, 145, 14 S.E. 652 (1892); *see also White v. Hill*, 125 N.C. 194, 200-01, 34 S.E. 432, 433-34 (1899) (Clark, J., dissenting) (reviewing Article XIV, Section 3 of the 1868 Constitution and observing that "[t]he legislative power is supreme over the public purse. . . . The power of the purse is essentially the supreme power, and by it alone in England and in this country the power of the sword has been subordinated to the civil power."). Nor has the power been diverted from the legislature's exclusive control: "Article XIV, section 3, [now Article V, section 7], of the North Carolina Constitution . . . states in language no man can misunderstand that the legislative power is supreme over the public purse." *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967).

Both the General Assembly and the Governor exercise certain constitutional duties in crafting the State's budget. Our Constitution provides that "[t]he Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and

proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor." N.C. Const. art. III § 5(3). The General Assembly has, since at least 1981, appropriated block grant funds through the budget process. *See*, *e.g.*, 1981 N.C. Sess. Laws ch. 1282 § 6 (appropriating $193,701,970 of federal block grant funds, including the Community Development Block Grant, Maternal Child Health Block Grant, and Substance Abuse Block Grant for the 1982-83 fiscal year).

IV. The Block Grant Appropriations Are Constitutional

The Governor asserts that the Block Grant funds are not within "the State treasury" as used in Article V, Section 7, and therefore are not subject to appropriation by the General Assembly. To support that claim, the Governor posits that: (1) under North Carolina law, the only funds in "the State treasury" for constitutional purposes are those raised by the State through taxation, fines, or penalties; (2) Congress did not intend the General Assembly to have spending power over the Block Grant funds; and (3) the funds are therefore "custodial funds" held by the State to accomplish federal goals, and the Governor—not the General Assembly—has exclusive authority to direct the funds outside the constitutional appropriation and budgetary processes to further those aims. We address each point in turn.

A. The Block Grant Funds Are Within The State Treasury

Our Supreme Court defined the term "State treasury" in *Gardner v. Board of Trustees of N.C. Local Governmental Employees' Retirement System*, 226 N.C. 465, 38 S.E.2d 314 (1946), and both parties seize on this decision to support or rebut any conclusion that the Block Grant funds are outside the ambit of Article V, Section 7. In *Gardner*, a Charlotte police officer was a member of the Law Enforcement Officers' Benefit and Retirement Fund, which was established by statute, financed by a two dollar fee assessed against convicted criminal defendants, and held in a special fund with the State Treasurer. 225 N.C. at 466-67, 38 S.E.2d at 315-16. The officer sought membership in a second state retirement fund, the Local Governmental Employees' Retirement System; however, that system's enabling statute provided that "[p]ersons who are . . . members of any existing retirement system and who are . . . entitled to benefits . . . at the expense of funds drawn from the treasury of the State of North Carolina . . . shall not be members." *Id.* at 466, 38 S.E.2d at 315. The Local system denied the officer membership, and he filed suit, ultimately arguing before the Supreme Court that the prohibition did not apply because benefits under the Law Enforcement fund were not paid

out of the treasury's general funds derived from general taxation. *Id.* at 466-67, 38 S.E.2d at 315-16.

The Supreme Court held that the Law Enforcement fund's benefits were drawn from the State treasury. *Id.* at 467-68, 38 S.E.2d at 316. The fact that the monies were raised outside of the general taxation powers, set aside for a special purpose, and kept in a separate account was not "controlling, since it is the duty of the State Treasurer 'to receive all monies which shall from time to time be paid into the treasury of this state.' " *Id.* at 468, 38 S.E.2d at 316 (quoting N.C. Gen. Stat. § 147-68 (1945)). The Supreme Court continued:

> And once in the treasury, "No money shall be drawn from the treasury but in consequence of appropriations made by law." Moneys paid into the hands of the State Treasurer by virtue of a State Law become public funds for which the Treasurer is responsible and may be disbursed only in accordance with legislative authority. A treasurer is one in charge of a treasury, and a treasury is a place where public funds are deposited, kept and disbursed.

Id. (quoting N.C. Const. of 1868, art. XIV § 3) (citing Webster's Dictionary).[10] Thus, the State treasury is a depository of "public funds," and "[m]oneys paid into the hands of the State Treasurer by virtue of State Law become public funds[.]" *Id.*

We are not persuaded that *Gardner* compels us to interpret or treat the Block Grant funds as being outside "the State treasury" as used in Article V, Subsection 7(1). The Supreme Court's definition of "public funds" in *Gardner* did not, by its plain language, exclude sources of money other than State-levied taxes, fines, or penalties, and, when read in context, *expanded* the sources of monies that constitute "public funds" in the "State treasury." Also, the federal Block Grant funds at issue here do, strictly speaking, enter "into the hands of the State Treasurer by virtue of a State Law." *Id.* Neither party disputes that the Block Grant funds are received and deposited in an account maintained by the Treasurer, a practice consistent with our general statutes:

> All funds belonging to the State of North Carolina, in the hands of any head of any department of the State which

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10. It is unclear from the opinion which edition of Webster's Dictionary the Supreme Court cited; however, Merriam-Webster currently provides a substantively identical definition for "treasury." *Treasury*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/treasury (last visited Nov. 11, 2019).

> collects revenue for the State *in any form whatsoever*, and every institution, agency, officer, employee, or representative of the State or any agency, department, division or commission thereof, except officers and the clerks of the Supreme Court and Court of Appeals, collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, selected or designated by the State Treasurer, in the name of the State Treasurer.

N.C. Gen. Stat. § 147-77 (2019) (emphasis added).

Finally, *Gardner* did not involve federal funds. There is no indication that the Supreme Court in 1948 considered federal block grant funds in its analysis, particularly given the facts before it. As the Supreme Court of Pennsylvania observed in rejecting a substantially identical argument by its governor based on a Pennsylvania decision from 1941:

> The Court in 1941 could not anticipate that another source of income would become available for wide-spread administration of programs on the State level, and that within three decades, federal funds would constitute a large portion of the budgets of most states in the union.
>
> . . . .
>
> In an age when state funds were provided almost entirely through state taxation, the [court in 1941] had no reason to foresee the vast impact that federal funding would eventually have on state fiscal matters. To interpret its choice of words as excluding such federal funds from state monies available for appropriation is as illogical as to exclude regulation of air traffic from the Congress' constitutional Commerce Clause powers because [it was] not mentioned or contemplated by the framers.

Shapp, 480 Pa. at 466-67, 391 A.2d at 603. *Gardner* is likewise distinguishable.

In short, *Gardner* is not controlling to our decision here, and, to the extent that it is pertinent, its expansive reading of "State treasury" and "public funds" such that non-tax dollars deposited in a special fund for a specific purpose are nonetheless subject to appropriation suggests that the Block Grant funds are within the "State treasury" for purposes of Article V, Subsection 7(1).

The Governor also cites our Supreme Court's decision in *Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898), describing the State Treasurer as "the officer in whose hands the legislative department has placed the funds it has raised and appropriated." 122 N.C. at 256, 29 S.E. at 366. *Garner*, however, dealt only with the question of whether the judiciary, by writ of mandamus, could compel the State Treasurer to pay a judgment entered against the State without legislative appropriation. *Id.* The case did not involve federal funds or a dispute about whether the Treasurer had constitutional authority over or possession of funds. *Id.*

Garner is therefore distinguishable from the facts before us for the same reasons as *Gardner*, and the language relied upon by the Governor is non-binding *dicta*. *See*, *e.g.*, *Tr. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, *Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." (citations omitted)).

B. Legislative Appropriation Is Not Prohibited by Federal Law

We also disagree with the Governor's contention that the Block Grants' enabling statutes and governing federal regulations demonstrate Congress's intent to give North Carolina's executive branch unfettered discretion over the allocation of the Block Grant funds to the exclusion of the appropriation power of the General Assembly. Though the Governor cites several decisions from other jurisdictions holding, under their respective state constitutions, that federal grant-in-aid funds are not subject to appropriation by their state legislatures, those decisions are not premised on the legal conclusion that Congress intended state legislatures to have no say over the allocation and expenditure of block grant funds. *See State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 985-86 (N.M. 1974) (holding New Mexico's legislature could not appropriate federal funds designated to the state's public institutions of higher learning because the state's constitution vested authority over those funds with a separate Board of Regents); *Opinion of the Justices to the Senate*, 375 Mass. 851 (1978) (following long-established state precedents and case-law to opine that federal funds carrying federal statutory conditions are held in trust outside the commonwealth's treasury as established in its constitution and are therefore not subject to appropriation); *In re Okla. ex rel. DOT*, 646 P.2d 605, 609-10 (Okla. 1982) (holding federal grants-in-aid are not subject to appropriation under state law without addressing Congressional intent as to state legislative appropriation).

The only out-of-state decision cited by the Governor that addresses whether Congress intended to prohibit state legislatures from

appropriating federal block grant funds is contrary to and undercuts his argument. The Colorado Supreme Court's decision in *Lamm* reviewed the federal grants-in-aid system and several specific block grants, including the CDBG, MCHBG, and SABG, and concluded that "Congress has left the issue of state legislative appropriation of federal block grants for each state to determine." *Lamm*, 738 P.2d at 1169.

Other state courts examining Congress's intent for allocation of federal block grant funds have reached the same conclusion. *See*, *e.g.*, *Shapp*, 480 Pa. at 468, 391 A.2d at 604 ("Appellants have cited nothing which dictates that the federal laws pursuant to which these programs are funded requires that the Pennsylvania legislature is to be by-passed."); *Anderson v. Regan*, 53 N.Y.2d 356, 368 n.12 (1981) (observing, in a decision holding that federal grants-in-aid are subject to state legislative appropriation, that "the mere application of the appropriation requirement to Federal funds received by the State is not inherently at odds with any of the existing Federal mandates"). We agree with the conclusion reached by the *Lamm* court and others cited, particularly in light of the apparent intent of the block grant structure. *See supra* Part III.A.[11]

Counsel for the Governor conceded at oral argument that all of the purposes for which the General Assembly appropriated the Block Grants fall within the terms of the federal statutes and regulations governing them, and did not identify any federal law expressly prohibiting state legislative appropriation.

We are also unpersuaded by the Governor's argument that the Block Grants' enabling statutes and regulations award the grants directly to the Governor or to a specific state agency. Each of the pertinent statutes directs the grants to be awarded to the "State," 42 U.S.C. §§ 300x-21, 702(c), & 5303 (2018), and the definition of "State" in each statute does

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11. Several legal scholars agree with this analysis of the federal block grant scheme. *See*, *e.g.*, Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich. L. Rev. 1201, 1260-61 (1999) ("[T]hese [block grant] laws are usually silent about the role of state legislatures. But such silence should not be read to exclude state legislatures' role in appropriating federal revenue. . . . [N]othing in the legislative history suggests a conscious congressional decision to exclude legislative involvement. . . . [T]here seems little reason to exclude all legislative appropriation of federal grants as a matter of federal law."); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretations in State Constitutional Law*, 44 Wm. & Mary L. Rev. 1725, 1752 n.97 (2003) (observing that the U.S. General Accounting Office—now the U.S. Government Accountability Office—recommended Congress increase state legislative involvement in federal grants-in-aid in 1980, and that "Congress seems to have followed this recommendation").

not compel the conclusion that the Executive Branch is the necessary and lone beneficiary or arbiter of the funds rather than the administrator on behalf of the State as a whole. *See* 42 U.S.C. § 5302(a)(2) (2018) (defining "State" under the CDBG as "any State of the United States, *or* any instrumentality *thereof* approved by the Governor" (emphasis added)); 42 U.S.C. § 701(c)(5) (2018) (defining "State" for purposes of the MCHBG as "each of the 50 States and the District of Columbia"); 42 U.S.C. § 300x-64(b)(2) (2018) (defining "State" as used in the statute creating the SABG as "each of the several States").[12] The fact that specific State agencies are tasked with administering each Block Grant does not render those agencies the sole beneficiaries or allocators to the exclusion of the rest of the State. *Cf. Shapp*, 480 Pa. at 468, 391 A.2d at 604 ("The funds which Pennsylvania receives from the federal government do not belong to officers or agencies of the executive branch. They belong to the Commonwealth. The agency or official who is authorized to apply for federal funds does so only *on behalf of* the Commonwealth." (emphasis in original)).[13]

The Governor also points out that other federal block grant statutes expressly authorize state legislative appropriation, and contends that the absence of such authorization in the CDBG, MCHBG, and SABG statutes reflects an intent to prohibit the General Assembly from appropriating those funds. *See*, *e.g.*, 29 U.S.C. § 3251(a) (2018) (providing that funds awarded to states under the Workforce Innovation and Opportunity Grants program "shall be subject to appropriation by the State legislature, consistent with the terms and conditions required under this subchapter"). We construe that language to permit legislatures in some states—such as Colorado and Massachusetts—to appropriate those block grant funds where they would otherwise be barred from doing so under state law. The absence of this language from the Block Grants at

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12. Even if the grants were awarded directly to the Governor or an Executive Branch agency, that would not necessarily indicate a choice by Congress to preclude the General Assembly from appropriating the funds consistent with North Carolina law. *See* Hills, *supra* note 11, at 1260-61 (noting that even where federal grants are "bestow[ed] . . . on state executive agencies or governors[,]" legislative history does not support excluding state legislatures from appropriating the funds); Gardner, *supra* note 11, at 1752-53 (acknowledging that while Congress may elect to give federal funds "directly to specific state executive agencies[,]" such an action does not prohibit state legislative appropriation).

13. We note that just as nothing in the North Carolina Constitution appears to enable the General Assembly to "receive" funds outside the State treasury and to the exclusion of the other branches, *In re Separation of Powers*, 305 N.C. at 778, 295 S.E.2d at 596, nothing in the Constitution appears to give the Executive Branch that authority either.

issue here does not alter our conclusion that Congress left the issue of state legislative appropriation power to the individual states.[14]

C. The Block Grants Are Not Otherwise "Custodial Funds" Under State Law

The Governor also contends that the Block Grants are "custodial funds" held in trust and not subject to appropriation, but—aside from *Gardner* and *Garner* addressed *supra*—cites no North Carolina authority suggesting the existence of a *constitutional* concept of "custodial funds" that are in the hands of the state treasurer yet entirely beyond the reach of the General Assembly.[15] The Governor does, however, point out that the State Budget Act, N.C. Gen. Stat. §§ 143C-1-1 *et seq.* (2019), defines "State funds" as "[a]ny moneys including federal funds deposited in the State treasury except moneys deposited in a[n] . . . agency fund[,]" N.C. Gen. Stat. § 143C-1-1(d)(25), and defines "agency funds" as "[a]ccounts for resources held by the reporting government in a purely *custodial* capacity." N.C. Gen. Stat. § 143C-1-3(a)(8) (emphasis added). The Legislative Defendants concede that agency funds are not appropriated under the ordinary budget process called for by the Budget Act. The Governor argues that the Budget Act's exclusion of agency funds constitutes the General Assembly's "recognition" that there are funds held by the State that are not subject to legislative appropriation.

We are not convinced. The fact that the legislature may elect to treat some funds as custodial in nature as a *statutory* matter does not mean the funds are "custodial funds" and not subject to appropriation as a *constitutional* matter. *Cf. Gardner*, 226 N.C. at 467-68, 38 S.E.2d at 316

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14. The Governor's argument that the act of legislative appropriation itself violates congressional intent raises the syllogism that the Block Grant Appropriations are preempted under the Supremacy Clause of the United States Constitution: if federal law governing the Block Grants prohibits the General Assembly from appropriating the funds, then any state budget act appropriating them is preempted by that federal law. Given that we have discerned no Congressional intent to prohibit state legislative appropriation and there appears to be no actual conflict with the Block Grants' enabling statutes—either as to the act of appropriation or the purposes for which they were appropriated—no preemption has occurred. *See, e.g.*, *Stephenson v. Bartlett*, 355 N.C. 354, 369, 562 S.E.2d 377, 388 (2002) (noting that North Carolina law is preempted under the Supremacy Clause where Congress expressly or impliedly intends to preempt state law or where federal law actually conflicts with state law).

15. As explained *supra*, the out-of-state decisions the Governor cites in support of the "custodial fund" concept were decided against the backdrop of their respective state constitutions and related jurisprudence. *See, e.g.*, *Lamm*, 738 P.2d at 1169-72 (relying on a body of state caselaw dating as far back as 1922 for the concept of "custodial funds" under the Colorado constitution).

(holding that non-tax monies held by the state treasurer in a special fund for a limited purpose pursuant to statute were nonetheless within the State treasury and subject to legislative appropriation); *Shapp*, 480 Pa. at 468, 391 A.2d at 604 ("That funds are designated custodial funds does not mean that legislative action approving the use of the funds is not needed." (citations omitted)).

Nor does it appear that the Block Grant funds are "agency funds" within the meaning of the Budget Act.[16] The General Assembly has been appropriating block grants—including these Block Grants—without challenge through the budgetary appropriations process since 1981. And, the Governor's brief acknowledges that his preferred allocations of the Block Grant funds were accounted for in his proposed annual budget, which was submitted to the General Assembly pursuant to the State Budget Act.

Further, the State Budget Act provides that "[e]xcept where provided otherwise by federal law, funds received from the federal government become State funds when deposited in the State treasury and shall be classified and accounted for in the Governor's budget recommendations no differently from other sources[,]" N.C. Gen. Stat. § 143C-3-5(d), and the Governor is specifically required to "submit [federal] Block Grant plans to the General Assembly *as part of* the Recommended State Budget submitted pursuant to [Section] 143C-3-5." N.C. Gen. Stat. § 143C-7-2(a) (emphasis added). While some federal funds may therefore be considered custodial agency funds for purposes of the State Budget Act depending on the circumstances—such as where required by federal law—the State Budget Act treats federal block grants as state funds subject to appropriation through the statutory budgetary process. We do not see, and the Governor has not otherwise identified, any federal prohibition against treating the Block Grant funds as state funds subject to legislative appropriation.

The logistics by which the State of North Carolina accepts, receives, and expends the Block Grant funds do not alter our analysis. Although the Governor asserts generally that the Block Grant Appropriations interfere with the draw-down process employed to receive and spend Block Grant funds, no evidence in the record suggests that to be the

16. Per the evidence in the record, "agency funds" are generally understood, by way of example, to include monies akin to county vehicle property taxes that the State, through the Division of Motor Vehicles, collects during the vehicle registration renewal process on the counties' behalf and later remits back to the counties for their own appropriation and use.

case. Rather, and by way of example, it appears that instead of drawing and expending Community Development Block Grant monies for a project related to "scattered site housing," as proposed by the Governor, the North Carolina Department of Commerce must simply draw down and expend CDBG monies for a project aimed at "neighborhood revitalization," as appropriated by the General Assembly. This election of which broad policy aims to fund within the larger national objective of community development is, fundamentally, a legislative one:

> The legislative branch of government is without question the policy-making agency of our government[.] . . . [T]he General Assembly is well equipped to weigh all the factors surrounding a particular problem, balanc[e] the competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time[.]

Rhyne v. K-Mart Corp., 358 N.C. 160, 169-70, 594 S.E.2d 1, 8-9 (2004) (citations and internal quotation marks omitted) (third alteration in original). Nothing shows that the founders of this State, in drafting our Constitution, intended for the Executive Branch to wield such authority over a category of funds that now constitutes more than a quarter of all State expenditures, and that it could do so free from legislative control, appropriation, and substantial oversight. This same concern was raised by New York's court of last resort:

> Although the framers of the [New York] Constitution obviously could not have anticipated the massive role that Federal funds were to play in the composition of future treasuries, the concerns they expressed at the time that the appropriation rule was adopted remain of equal concern today.
>
> . . . .
>
> Even more important, however, is the need to ensure a measure of accountability in government. As the framers of the Constitution astutely observed, oversight by the people's representatives of the cost of government is an essential component of any democratic system. Under the present system, some one third of the State's income is spent by the executive branch outside of the normal legislative channels. The absence of accountability in this sector of government is, manifestly, an unacceptable state of affairs in light of the framers' intention that *all* of the expenditures of government be subjected to legislative scrutiny.

> Finally, we note that application of the strictures imposed by section 7 of article VII to Federal funds is necessary to the maintenance of the delicate balance of powers that exists between the legislative and executive branches of government. . . . When the appropriation rule is bypassed[,] . . . the Legislature is effectively deprived of its right to participate in the spending decisions of the State, and the balance of power is tipped irretrievably in favor of the executive branch.

Anderson, 53 N.Y.2d at 364-66 (emphasis in original).

In sum, neither the North Carolina Constitution and statutes nor decisions from other states interpreting their own constitutions suggest the existence of a category of "custodial funds" held by the State but outside the appropriations power vested in the General Assembly under Article V, Subsection 7(1) of the North Carolina Constitution. The Governor does not identify any North Carolina constitutional provision or caselaw creating one. This Court cannot fashion such a category out of whole cloth. *See Shera v. N.C. State Univ. Veterinary Teaching Hosp.*, 219 N.C. App. 117, 127, 723 S.E.2d 352, 358 (2012) ("This Court is an error-correcting court, not a law-making court.").

CONCLUSION

The North Carolina Constitution plainly provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law[.]" N.C. Const. art. V § 7(1). The federal laws governing the Block Grants identify the State as the beneficiary of the funds, and they do not prohibit their appropriation by our General Assembly—the branch that wields exclusive constitutional authority over the State's purse. Though some states, applying their own respective constitutions and statutes, may proscribe state legislative appropriation of federal block grant funds, our Constitution and law does not permit us to be counted amongst them, and the Governor has neither rebutted the presumption that acts of the General Assembly are constitutional nor identified a "plain and clear" constitutional violation. *Berger*, 368 N.C. at 639, 781 S.E.2d at 252. As a result, we hold that the Block Grant Appropriations are constitutional as-applied and affirm the ruling of the trial court.

AFFIRMED.

Judges STROUD and TYSON concur.

IN RE ELDRIDGE

[268 N.C. App. 491 (2019)]

IN THE MATTER OF DAVIN ELDRIDGE, CONTEMNOR

No. COA19-370

Filed 3 December 2019

1. Judges—recusal motions—judge as witness and trier of fact—contempt of court hearing

The trial judge did not err by refusing to recuse himself from defendant's criminal contempt of court hearing concerning defendant's usage of a recording device inside the trial judge's courtroom during a prior criminal matter. A reasonable person would not doubt the trial judge's objectivity or impartiality, considering the judge's thoughtful response to the recusal motion and the lack of any facts suggesting bias or impartiality.

2. Contempt—criminal—willfulness—recording device in the courtroom

The trial court did not err by finding defendant in criminal contempt of court where defendant willfully disregarded prior warnings and the posted courtroom policy by using a recording device inside the courtroom. Among other things, defendant's willfulness was evident in a social media post stating that he was going to livestream the court proceedings and was "prepared to go to jail for this."

3. Contempt—probationary sentence—reasonably related to rehabilitation—essay about respect for court system

The trial court's sentence for defendant's criminal contempt of court (for willfully violating the prohibition against the use of recording devices inside the courtroom) accorded with the law where the trial court suspended defendant's thirty-day sentence for twelve months upon several conditions, including that defendant write an essay on the subject of respect for the court system, receive approval from the trial judge, and post it on all his social media accounts without any negative comments—and not be permitted to attend any session of court in the judicial district until he had completed the other conditions.

Judge BROOK concurring in part and dissenting in part.

Appeal by defendant from order entered 11 January 2019 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Teresa L. Townsend, for the State.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., for defendant-appellant.

BRYANT, Judge.

Where the trial court's actions would not cause a reasonable person to doubt his objectivity or impartiality, we affirm the trial court's ruling denying defendant's motion for recusal. Where defendant's actions gave rise to criminal contempt, we affirm the trial court's ruling finding him in criminal contempt. Where the trial court did not abuse its discretion by imposing specific conditions which were reasonably related to defendant's probationary sentence, we affirm the trial court's ruling.

On 29 November 2018, defendant Davin Eldridge, a frequent publisher for a Facebook page called "Trappalachia," entered the Macon County Courthouse. The officer working the metal detector saw defendant had a small tape recorder and "advised [defendant that] he [could] not record inside the courtroom. Defendant acknowledged the officer's instruction and entered a courtroom. As he did so, defendant bypassed signs posted on the entranceways stating:

> BY ORDER OF THE SENIOR RESIDENT SUPERIOR COURT JUDGE: DO NOT use or open cell phones, cameras, or any other recording devices inside the courtrooms. Violations of this order will be contempt of court, subjecting you to jail and/or a fine. Your phone may be subject to seizure and search.

While in the courtroom, defendant was observed sitting on the second row with a cell phone, holding it "shoulder-chest level" towards the front of the courtroom. The officer went over to defendant and instructed him to put his phone away. Defendant replied, "I'm not doing anything." The Honorable William H. Coward, Superior Court Judge of Macon County, was presiding over a criminal matter at that time. Judge Coward was informed that a live posting of the hearing in session was streaming from a Facebook page. Based on that information, Judge Coward interrupted the hearing to issue a reminder that recordings of courtroom proceedings were prohibited by law. At the conclusion of the hearing, Judge Coward viewed the Facebook postings by defendant, which included footage of the inside of the courtroom and the prosecutor presenting

his closing argument. The trial court ordered defendant to return to the courtroom later that day. Defendant failed to return as ordered.

On 3 December 2018, Judge Coward issued a show cause order for defendant to appear and show why he should not be held in criminal contempt. The show cause order made it clear the notice of hearing was based on defendant's usage of a recording device inside the courtroom. The hearing was scheduled for 11 January 2019. Meanwhile, the North Carolina State Bureau of Investigation (SBI) made a preservation request to Facebook to preserve all information relevant to the specific date and time period of the incident. A search warrant was issued and signed by Judge Coward. Upon execution of the warrant, the agents seized defendant's Facebook account records and several messaging threads.

On 11 January 2019, immediately prior to the criminal contempt hearing, the defendant made an oral motion under N.C.G.S. § 5A-15 for Judge Coward to recuse himself, which was denied. A contempt hearing was held, and the trial court found defendant to be guilty of criminal contempt. Defendant was sentenced to jail for thirty days. The active sentence was suspended, and defendant was placed on probation for one year with certain conditions. Defendant gave oral notice of appeal in open court.

On appeal, defendant argues the trial court erred by: (I) denying his motion for recusal at the hearing for contempt, (II) finding him in criminal contempt of court, and (III) issuing a probationary sentence that was unsupported by law.

I

[1] First, defendant argues Judge Coward erred by refusing to recuse himself from defendant's hearing. We disagree.

Disqualification and recusal of a presiding judge in plenary proceedings for contempt is governed by Canon 3 of the North Carolina Code of Judicial Conduct and, in criminal cases, section 5A-15 of the North Carolina General Statutes.

The Code of Judicial Conduct provides, in pertinent part, that a judge should recuse upon motion of any party or by the judge's own initiative if "impartiality may reasonably be questioned" including, *inter alia*, where "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." Code of Jud.Conduct, Canon 3C(1)(a) (2015).

Section 5A-15 of the North Carolina General Statues provides that "[t]he judge is the trier of facts at the show cause hearing." N.C.G.S. § 5A-15(d) (2017). "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." *Id.* § 5A-15(a).

> While [a written] motion required by N.C. Gen. Stat. § 15A-1223 must be made in a criminal proceeding where either the state or the defendant alleges bias, close familial relationship, or absence of impartiality on the part of the presiding judge, the legislature specifically codified an exception to this requirement for criminal contempt proceedings [under N.C.G.S. § 5A-15] where the acts constituting the contempt so involve the judge issuing the show cause order that his objectivity could be reasonably questioned.

In re Marshall, 191 N.C. App. 53, 60, 662 S.E.2d 5, 10 (2008). Therefore, section 5A-15(a) "imposes a duty on the judge to acknowledge that his involvement in the acts allegedly constituting the contempt could reasonably cause others to question the judge's objectivity and, in such circumstance, to return the show cause order before a different judge *ex mero motu*." *Id.* at 60–61, 662 S.E.2d at 10.

In the instant case, at the beginning of the show cause hearing, defendant orally moved to recuse Judge Coward from the contempt proceedings—arguing there was an "appearance of impropriety" because Judge Coward was "in a situation where [he was] a witness as well as a trier of fact." In response, Judge Coward reasoned as follows:

> As to this motion, the Court respects [defense counsel's] argument as zealous counsel and in questioning my objectivity, but I'm going to deny the motion because I feel that I am objective and can be objective and could not be called as a witness.
>
> I feel that, as [defense counsel] pointed out, we could have had a hearing with or without [defendant's] presence on November 29th and given him, as you said, [defense counsel], limited due process.
>
> However, out of an abundance of caution and to insure that [defendant] receives all the constitutional protections to which he's entitled, I continued the matter to

> today to allow him time to hire counsel and to prepare for this hearing.
>
> I'm prepared to go forward with it at this time.

After carefully reviewing the record and defendant's arguments for Judge Coward's recusal, we disagree with defendant's assertion that Judge Coward's actions or personal knowledge would cause a reasonable person to doubt his objectivity or impartiality. The colloquy between Judge Coward and defense counsel reflects that he considered his position as the trier of fact and determined that he was able to preside over the hearing in an objective, impartial manner. Thus, absent facts to suggest bias or impartiality toward defendant, we affirm Judge Coward's decision to deny defendant's motion for recusal.

II

[2] Next, defendant argues the trial court erred by finding him in criminal contempt. Specifically, defendant argues his actions did not establish that he was in willful violation of the statute for criminal contempt. We disagree.

"If a trial court's finding is supported by competent evidence in the record, it is binding upon an appellate court, regardless of whether there is evidence in the record to the contrary." *State v. Key*, 182 N.C. App. 624, 627, 643 S.E.2d 444, 447 (2007).

"Criminal contempt is imposed in order to preserve the court's authority and to punish disobedience of its orders. Criminal contempt is a crime, and constitutional safeguards are triggered accordingly." *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (internal citation omitted).

Section 5A-11 of the North Carolina General Statues delineates a number of acts which constitute criminal contempt, including the following:

> (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
>
> (2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
>
> (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

N.C.G.S. § 5A-11(a)(1)–(3) (2017).

Here, defendant challenges the trial court's findings of fact by arguing that his "actions did not disrupt the plea hearing in the ongoing criminal case nor were they calculated to do so." However, there is ample evidence presented at the hearing which showed that defendant knowingly carried a device and entered the courtroom with the intention of live streaming the courtroom proceedings, after being given express warnings, in violation of the court's rules.

Witness testimony from an officer established that prior to entering the courtroom on 29 November, defendant was observed walking through the metal detectors with a small tape recorder. He was issued a verbal warning by the officer not to operate recording devices inside the courtroom. The officer also testified that the day before, defendant "was [seen] sitting in the courtroom with a laptop." Another officer testified that defendant had his "cell phone in his hand and facing the courtroom," holding it at "shoulder-chest level" while court was in session. He was told by that officer inside the courtroom to put his phone away.

Defendant's assertion on appeal that "[t]he more logical inference is that [he] accidently turned his phone on and captured the video" is refuted by the evidence in the record. The messages obtained from defendant's Facebook account reveal that defendant intended to livestream courtroom proceedings, notwithstanding prior warnings and the courtroom policy on recording devices. One relevant post was as follows: "Be prepared today for Trapp's FB Live event in court. . . . I'm prepared to go to jail for this by filming;" "If you can't get in touch [with me] today[,] it's because I was put in jail."

It is evident that defendant had a clear understanding of the courtroom policy, yet he willfully disregarded prior warnings and the posted policy by recording inside the courtroom. His actions supported the trial court's finding of criminal contempt, therefore, defendant's argument is overruled.

III

[3] Lastly, defendant argues the trial court did not sentence him in accordance with the law.

"It has long been the accepted rule in North Carolina that within the limits of the sentence authorized by law, the character and the extent of the punishment imposed is within the discretion of the trial court and is subject to review only in cases of gross abuse." *State v. Goode*, 16 N.C. App. 188, 189, 191 S.E.2d 241, 241–42 (1972).

"[A]s is the case with all offenses of a criminal nature, the punishment that courts can impose therefor, either by fine or imprisonment, is circumscribed by law." *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984). Section 5A-12, indicates the trial court can censure, impose a sentence up to thirty days imprisonment, and/or a fine not to exceed $500.00. N.C.G.S. § 5A-12(a). However, "[t]he practice of suspending judgment upon terms prescribed has been sanctioned in our courts for a long time[.]" *State v. Everitt*, 164 N.C. 399, 402, 79 S.E. 274, 275 (1913).

> "[T]he [trial] courts have control of their judgments in criminal cases, so far as to suspend the execution thereof on sufficient reason appearing. And if such suspension be had upon application of defendant, it constitutes no error of which he can take advantage. The [trial] courts will be presumed to have exercised such discretion in a proper case."

Id. at 404, 79 S.E. at 276 (citation omitted).

Section 15A-1343 of the North Carolina General Statues ("Conditions of probation") allows the trial court to "impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C.G.S. § 15A-1343(a). "The [trial] court has substantial discretion in devising conditions under this section." *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). Additionally, subsection (b1) states that the trial court may require a defendant to comply with special conditions during probation including, *inter alia*, "any other conditions determined by the [trial] court to be reasonably related to [their] rehabilitation." N.C.G.S. § 15A-1343(b1)(10).

Here, the trial court sentenced defendant to be confined in the Macon County Detention Center for thirty days. Defendant's sentence was suspended for twelve months, upon six specific conditions for him to meet during his probationary sentence: 1) serve an active sentence of 96 hours; 2) pay the costs of the action; 3) pay a fine of $500.00; 4) draft a 2,000-3,000 word essay on the following subject: "Respect for the Court System is Essential to the Fair Administration of Justice," forward the essay to Judge Coward for approval, and following approval, post the essay on all social media or internet accounts that defendant owns or controls or acquires hereafter during his period of probation and attributed to defendant, without negative comment or other negative criticism by defendant or others, during said period of probation; 5) not violate any order of Court or otherwise engage in further contemptuous behavior; and, 6) not attend "any court session in Judicial District

30A unless and until his essay has been approved and posted as required herein and he has fully complied with all other provisions of this order."

Despite defendant's argument that his sentence was "contrary to law," he cites to no authority in support of that argument. We also note that defendant does not argue that the trial court abused its discretion so as to require that his sentence be set aside. Nevertheless, we acknowledge the trial court's "substantial discretion" in deciding whether special conditions reasonably fit within defendant's sentence. *See State v. Johnston*, 123 N.C. App. 292, 305, 473 S.E.2d 25, 33 (1996) (upholding a special condition prohibiting the defendant, convicted for disseminating obscene materials, from working in any retail establishment that sold sexually explicit material).

Given defendant's questionable and intentional conduct, his frequent visits to the courtroom, and his direct willingness to disobey courtroom policies, we discern no abuse of discretion in the trial court's decision to impose conditions on defendant's probationary sentence. Such conditions are reasonably related to the necessity of preventing further disruptions of the court by defendant's conduct, and the need to provide accountability without unduly infringing on his rights. Thus, because there is sufficient evidence that the trial court properly exercised its authority, we overrule defendant's argument. The trial court's order is

AFFIRMED.

Judge TYSON concurs.

Judge BROOK concurs in part, dissents in part, with separate opinion.

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

I fully join the portions of the majority opinion holding that the trial court did not abuse its discretion in denying Defendant's motion for recusal and that competent evidence supported the trial court's finding that Defendant was in criminal contempt of the court's orders against using recording devices in the courtroom. However, I respectfully dissent from the portion of the majority opinion finding no error in the sentence imposed by the trial court. The probation condition imposed by the trial court requiring Defendant to write and publish an essay about respect for the courtroom on his social media and internet accounts *and*

to delete any negative comments made by third-parties on this essay bears no reasonable relationship to Defendant's rehabilitation or to his crime and raises serious First Amendment concerns.

Generally speaking, a sentencing judge "may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(a) (2017). "In addition to the regular conditions of probation[,] . . . the court may, as a condition of probation, require that during the probation the defendant comply with one or more . . . special conditions[.]" *Id.* § 15A-1343(b1). A sentencing judge enjoys "substantial discretion" to devise and impose special conditions of probation, *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985), but these conditions must still be "reasonably related to [the defendant's] rehabilitation," N.C. Gen. Stat. § 15A-1343(b1)(10). As this Court has observed,

> [t]he extent to which a particular condition of probation is authorized by N.C. Gen. Stat. § 15A-1343(b1)(10) hinges upon 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.

State v. Allah, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013). Finally, "any condition which violates defendant's constitutional rights is *per se* unreasonable and beyond the power of the trial court to impose." *State v. Lambert*, 146 N.C. App. 360, 369, 553 S.E.2d 71, 78 (2001).

Our review of an invalid special condition of probation is preserved by statute. Under N.C. Gen. Stat. § 15A-1342(g), "[t]he failure of a defendant to object . . . at the time such a condition is imposed does not constitute [] waiver of the right to object at a later time[.]" N.C. Gen. Stat. § 15A-1342(g) (2017). Although the Supreme Court has interpreted the phrase "at a later time" in N.C. Gen. Stat. § 15A-1342(g) to "refer to the revocation hearing," rather than extending to challenges "for the first time at the appellate level," *State v. Cooper*, 304 N.C. 180, 183-84, 282 S.E.2d 436, 439 (1981),[1] our Court has held that where the defendant

1. The Supreme Court's observation in *Cooper* about the meaning of the phrase "at a later time" in N.C. Gen. Stat. § 15A-1342(g) was made in the context of an appeal from a probation revocation where the challenge to the condition was not raised at the revocation hearing but was instead being raised for the first time on appeal from the revocation hearing. *Cooper*, 304 N.C. at 183, 282 S.E.2d at 439 ("[D]efendant cannot relitigate the legality of a condition of probation unless he raises the issue no later than the hearing at which

challenges the validity of a special condition of probation on direct appeal from the ensuing judgment, prior to any revocation hearing, N.C. Gen. Stat. § 15A-1342(g) preserves the challenge, *Allah*, 231 N.C. App. at 96, 750 S.E.2d at 910.

While I agree with the majority that the sentencing judge's decision to require Defendant, who violated multiple court orders by recording and livestreaming courtroom proceedings on social media, to write an essay about respect for the courtroom and publish this essay on his social media and internet accounts bears a reasonable relationship to Defendant's criminal contempt of court, and to his rehabilitation for this crime, I do not agree that requiring Defendant to monitor comments made on this essay by third-parties and delete any comments the court might consider critical bears a reasonable relationship to Defendant's crime or to *his* rehabilitation, as N.C. Gen. Stat. § 15A-1343 requires. "[T]rial courts have the discretion to devise and impose special conditions of probation other than those specified in N.C. Gen. Stat. § 15A-1343(b1)," however, "N.C. Gen. Stat. § 15A-1343(b1)(10) 'operates as a check on the discretion available to trial judges' during that process." *Id.* at 98, 750 S.E.2d at 911 (quoting *Lambert*, 146 N.C. App. at 367, 553 S.E.2d at 77). Although the decision of a sentencing judge to impose a special condition of probation is reviewed for an abuse of discretion, *id.*, "statutory errors regarding sentencing issues . . . are questions of law, and as such, are reviewed *de novo*." *State v. Allen*, ___ N.C. App. ___, ___, 790 S.E.2d 588, 591 (2016) (internal marks and citation omitted). As noted previously, whether the reasonable relationship requirement under N.C. Gen. Stat. § 15A-1343(b1)(10) is met depends on "whether the [] condition bears a reasonable relationship to the offense[] committed . . . [or] assists in the defendant's rehabilitation." *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911.

The condition imposed by the sentencing judge requiring Defendant to monitor comments made on the essay and delete any the court might consider critical is not reasonably related to Defendant's willful violation of the court's orders against using recording devices in the courtroom, nor does it bear a reasonable relationship to his rehabilitation from his past willful disobedience of court orders. It holds Defendant responsible for what is essentially the behavior of others; and while there is some truth to the adage that we are only as good as the company

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his probation is revoked."). *Cooper* thus simply stands for the proposition that collateral attack of a special condition of probation on appeal from a violation of probation where the special condition is not challenged at the revocation hearing is not statutorily preserved by N.C. Gen. Stat. § 15A-1342(g).

we keep, the relevant community in this context is incredibly diffuse, extending through cyberspace. The lack of reasonable relationship between Defendant's crime and his rehabilitation to the requirement that he monitor comments made on the essay and delete any critical comments violates the statutory requirement contained in N.C. Gen. Stat. § 15A-1343(b1)(10). My vote therefore is to vacate this condition of his probation.

Our Court has a "settled policy" of avoiding constitutional questions "when a case can be disposed of on appeal without reaching the constitutional issue[.]" *Lambert*, 146 N.C. App. at 368, 553 S.E.2d at 77. Because I vote to vacate the condition of probation requiring Defendant to delete negative comments on the essay, I do not delve deeply into what I consider deeply troubling constitutional problems with this condition of probation. Although we generally do not review constitutional questions that have not first been raised in the trial court, *see State v. Goldsmith*, 187 N.C. App. 162, 167, 652 S.E.2d 336, 340 (2007), suffice it to say that the sentencing judge has not only compelled Defendant to speak within the meaning of the First Amendment, he has compelled Defendant to then continue speaking by censoring the viewpoints of others expressed in response to speech compelled by the court. This compelled speech silencing third-party viewpoints expressed in response to compelled speech raises serious First Amendment concerns.

Thus, while I join the portions of the majority opinion holding that there was no abuse of discretion by the trial court in denying the motion to recuse and that competent evidence supported the court's finding of criminal contempt, I vote to vacate the condition of Defendant's probation requiring him to delete negative comments made by others on social media and the internet. I otherwise find no error in the sentence imposed by the trial court.

IRONMAN MED. PROPS., LLC v. CHODRI

[268 N.C. App. 502 (2019)]

IRONMAN MEDICAL PROPERTIES, LLC AND HODGES FAMILY PRACTICE, INC., PLAINTIFFS
v.
TANVIR CHODRI, M.D. A/K/A TANVIR CHAUDHARY, PREMIER MEDICAL CENTER CONDOMINIUM ASSOCIATION, INC., RANDOLPH PULMONARY & SLEEP CLINIC, PLLC AND WHITE OAK MEDICAL PROPERTIES, LLC, DEFENDANTS
v.
BETH HODGES, M.D. AND FRANCISCO HODGES, M.D., THIRD-PARTY DEFENDANTS

No. COA18-108

Filed 3 December 2019

1. Associations—condominium—breach of fiduciary duty—suit by shareholder—standing

In a case involving potential mismanagement of condominium assessments, the owners of individual units of a condominium association had standing to bring claims for breach of fiduciary duty against the condominium association and its sole officer, despite the common rule that a shareholder cannot sue for injuries to a corporation, because the association owed a statutorily-imposed fiduciary duty to the unit owners pursuant to N.C.G.S. § 47C-3-103(a).

2. Associations—condominium—breach of fiduciary duty—claim by non-shareholders—lack of standing

In a case involving potential mismanagement of condominium assessments, a tenant in one of the condominium units and its owners (plaintiffs) lacked standing to sue the association because they were not shareholders and were owed no fiduciary duty. The trial court properly granted a directed verdict for defendants (including the condo association and its sole officer) on plaintiffs' claims for breach of fiduciary duty and constructive fraud.

3. Fiduciary Relationship—condo association—breach of duty by officer—financial mismanagement

In a case involving potential mismanagement of condominium assessments, the trial court improperly entered a directed verdict for the condominium association on a claim for breach of fiduciary duty brought by one unit owner where the unit owner presented sufficient evidence to go to the jury on that claim, including that the association's officer failed to maintain a separate bank account, billed the owner for charges unrelated to the common areas of the condominium, and refused the owner full access to the association's financial records, and that the owner suffered monetary damages as a result.

4. Fraud—constructive—intent to personally benefit—directed verdict—improper

In a case involving alleged misappropriation of condominium assessments and dues, the trial court erred by entering a directed verdict for defendant (officer of a condominium association) on plaintiff unit owner's claim for constructive fraud where evidence did not definitively resolve whether the officer intended to personally benefit from financial mismanagement or was merely negligent.

5. Damages and Remedies—punitive damages—no evidence of actual fraud—directed verdict

In a case involving potential mismanagement of condominium assessments, the trial court properly granted a directed verdict for defendants (including the condo association and its officer) on plaintiffs' claim for punitive damages where plaintiffs (a unit owner and its tenant) failed to present any evidence of actual fraud.

6. Attorney Fees—condominium assessments—N.C.G.S. § 47C-3-116—mandatory award—denial reversed

In a case involving alleged financial mismanagement of a condominium association, the trial court erred by denying a motion for costs and attorney fees filed by defendant condo association, because N.C.G.S. § 47C-3-116(e) and (g) required the award of attorney fees if the action involved enforcing assessments levied on unit owners. On remand, the trial court was directed to determine whether the condo association was the prevailing party and whether the action related to the collection of assessments and if so, to award reasonable attorney fees.

Appeal by plaintiffs and third-party defendants from judgment entered 20 December 2016 and cross-appeal by defendants from order entered 2 December 2016, both entered by Judge Eric C. Morgan in Randolph County Superior Court. Heard in the Court of Appeals 6 September 2018.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus and G. Gray Wilson; Allman Spry Davis Leggett & Crumpler, P.A., by D. Marsh Prause and Jodi D. Hildebran; and Yates, McLamb & Weyher, LLP, by Rodney E. Pettey and Brian M. Williams, for plaintiffs and third-party defendants.

Rossabi Reardon Klein Spivey PLLC, by Gavin J. Reardon and Amiel J. Rossabi, for defendant Premier Medical Center Condominium Association, Inc.

TYSON, Judge.

I. Procedural Background

Ironman Medical Properties, LLC ("Ironman") and Hodges Family Practices, Inc. ("HFP") (collectively, "Plaintiffs"), as well as Drs. Beth and Francisco Hodges (the "Hodges") as third-party defendants, appeal from a 2 December 2016 order granting a motion for a directed verdict made by Dr. Tanvir Chodri ("Dr. Chodri"), Premier Medical Center Condominium Association, Inc. ("Premier") and White Oak Medical Properties, LLC ("White Oak") (collectively, "Defendants"). These parties also appeal the 20 December 2016 judgment entered following a jury's verdict. Premier cross-appeals from a separate order denying its motion for attorney's fees and its motion to tax costs to Plaintiffs entered on 2 December 2016.

We find no error in the jury's verdict and the judgment entered thereon. We affirm the trial court's entry of directed verdict dismissing all claims asserted by the tenant, HFP, the Hodges and dismissing Ironman's punitive damage claims. We reverse and remand for trial on Ironman's claim for breach of fiduciary duty against Premier and Dr. Chodri and for the trial court to address Defendant Premier's motion for costs and attorney's fees.

II. Factual Background

Ironman and HFP are separate and distinct legal entities chartered as a North Carolina Limited Liability Company and corporation, respectively. The Hodges, as individuals, hold ownership interests in both these entities.

White Oak developed Premier Medical Center as a ten-unit condominium complex located ("Condominium") in Asheboro, North Carolina. Ironman is the record owner of one condominium unit in the Premier Medical Center. In June 2010, Ironman leased its unit to HFP.

White Oak is a North Carolina Limited Liability Company, which owns and maintains the other nine units located in Premier Medical Center. Premier is a chartered North Carolina not-for-profit condominium association corporation. Dr. Chodri serves as the sole officer of Premier and is a co-owner of White Oak. Neither White Oak, Premier, nor Dr. Chodri is a party to Ironman's lease to HFP nor have any other connection to the Hodges on these issues, except through Ironman.

The voting interests in Premier were divided twenty-six percent (26%) to Ironman and seventy-four percent (74%) to White Oak. The

common areas were allocated as twenty-one percent (21%) to Ironman and seventy-nine percent (79%) to White Oak.

White Oak was developed and initially owned by Dr. Chodri, his wife and a development partner. They managed Premier for approximately one year before their partner declared bankruptcy. Dr. Chodri had no prior experience managing investment properties or condominium associations.

Dr. Chodri practiced medicine and relied upon his medical practice office manager, Julie Trollinger ("Trollinger") to handle the financial affairs of White Oak and the Premier condominium complex. The parties agree that the office manager was "inexperienced, unsophisticated, and not particularly knowledgeable about such matters" involving managing condominium property.

Ironman quit paying its condominium dues in June 2012, despite repeated demands from Premier. On 4 December 2012, Ironman's unit's tenant, HFP, requested a breakdown of expenses for 2011 and 2012. The parties dispute whether Premier failed to timely provide the summaries of a budget and whether the budget summaries it provided were correct.

Plaintiffs alleged, despite HFP's multiple verbal and written requests, they were not furnished with income, expense, balance, or bank statements for the Condominium until after the lawsuit was filed in 2015.

Ironman also sent to Premier a written request for statements after Premier had responded to HFP's prior request by sending Ironman allegedly all financial documentation Premier had at the time. Plaintiffs were unsatisfied with these responses from Premier, claiming they were limited and entirely devoid of the requested financial information they were entitled to receive.

Plaintiffs' inquiry into Premier's finances revealed that the Condominium's assets had not been managed in accordance with the Declaration's bylaws. Under the bylaws, Premier had the authority and power to, *inter alia*, levy and to collect assessments. Assessments for the benefit of all the unit owners should have been levied in the same ratio as the percentage ownership interests.

The Declaration also provided that Premier was to treat all monies collected on its behalf as the separate property of Premier. All unit owner's assessments were to be paid monthly. The failure to enforce any right, provision, or covenant within the Declaration did not constitute a waiver of the right to seek enforcement in the future, within the applicable statute of limitations.

Premier's assets were allegedly commingled with those of White Oak and all Premier unit owners were allegedly charged an invalidly-calculated assessment fee. Improper assessments and account management allegedly allowed White Oak to underpay condominium dues to Premier by over $200,000.00 since 2010.

No annual meetings of Premier's shareholders to elect officers and directors to the Association were conducted, as is required by the bylaws. Premier sought no federal or state tax ID number until 2015, maintained no separate corporate records, and never conducted audits of its finances.

Prior to the filing of this lawsuit, Premier, as an entity, had never generated profit and loss statements or balance sheets and had never sent required notices of annual reserve balances to its unit owners. Starting in 2010 when Ironman bought its unit, dues it paid were deposited into White Oak's bank account, rather than into a separate Premier account. White Oak never paid its required unit dues to Premier.

Rather, Trollinger would collect rent from tenants of White Oak's units and deposit them into a White Oak account. She also paid Premier's operating expenses from that account. After Ironman quit paying its required dues in 2012, Dr. Chodri would move funds from his other accounts to cover Premier's expenses, if the White Oak account was close to being overdrawn.

Premier's assessments to the unit owners were invalidly calculated based upon the occupied square footage, rather than the total project square footage, as is required by the Declaration. Consequently, no separate or earmarked payments were made by White Oak to Premier for its vacant units. The improper account management allegedly caused approximately $207,345.00 in underpayment by White Oak to Premier.

HFP, as Ironman's tenant, had initially overpaid Ironman's assessments. Premier's accountant testified at the time of trial, after accounting for the withheld funds, HFP had underpaid Ironman, and consequently Ironman's unpaid obligations to Premier were $37,582.00.

Dr. Chodri also paid Premier's taxes out of the White Oak account and used funds in that account to pay down White Oak's mortgages and other non-condominium expenses. Dr. Chodri admitted receiving a benefit from improper uses of these funds.

Before HFP leased Ironman's unit, Ironman had been provided with a detailed report of Premier's expenses for 2009. The document

contained White Oak's letterhead, rather than Premier's. It also showed the inclusion of property taxes, which were not an association expense.

After reviewing this expense report, Dr. Beth Hodges responded: "Is he serious? $9000 for lawn and snow removal? What lawn? And let's not even discuss the janitorial fees. Either he is getting seriously ripped off or he is padding the bills." Nevertheless, despite these observations, HFP went forward with the lease with Ironman.

Dr. Chodri never told Plaintiffs of the improper account structures or assessment calculations. Once Defendants began attempting to sort through their accounting, Trollinger testified that she had not told the Hodges or HFP that a new bank account was being opened in Premier's name, because it was "none of their business." Further, Dr. Chodri testified that Premier had never informed Ironman or White Oak that no reserve funds were being maintained, because he thought sufficient funds were present to maintain the project. If Premier had kept reserve funds, and Ironman and White Oak had paid its required assessments and reserves, Ironman would be entitled to twenty-one percent of the reserve funds, and White Oak would be due seventy-nine percent.

Dr. Chodri testified he was unaware that White Oak was not paying its dues, that Premier's funds were being deposited into White Oak's accounts, and he had not realized the separate Premier bank account had not been set up. Dr. Chodri stated he had failed to contribute his monthly objective of $500.00 towards the reserve fund, as Premier was struggling to meet other expenses. Premier's lender was told $500.00 per month was being set aside from the reserve fund.

On 18 March 2015, Ironman filed suit against Dr. Chodri, Premier, and White Oak. The original complaint alleged claims for breach of the condominium association declaration and bylaws, breach of fiduciary duty, and constructive fraud, and sought punitive damages. Defendants filed an answer with counterclaims on 30 July 2015. Ironman's reply to Defendants' counterclaims was filed on 1 October 2015. Defendants subsequently filed an amended answer. Ironman amended its complaint, with leave of court, to add HFP as a third-party plaintiff on 9 November 2015.

Plaintiffs' complaint alleged, *inter alia*, a breach of fiduciary duty that rose to the level of constructive fraud and breach of the Declaration of Condominium ("Declaration") and sought punitive damages. Defendants counter-claimed for breach of the Declaration and sought recovery of unpaid association dues Ironman had been withholding from the association since June of 2012.

The jury trial began on 9 August 2016. At the close of Plaintiffs' evidence, the court granted Defendants' motion for a directed verdict on all claims except Ironman's breach of contract claim on the Declaration. At the close of all evidence, Plaintiffs submitted a written request for special jury instructions on their affirmative defense, which was denied by the trial court. Plaintiffs failed to object to the instructions at the time the jury was charged and have waived any challenge. *See* N.C. R. App. P. 10(a)(2).

The jury returned a verdict, which found both parties in breach of the Declaration, and awarded $1.00 in favor of Plaintiffs on their breach of contract claim and $51,472.00 in favor of Defendants on their breach of contract claim based on Ironman's unilateral suspension of payment of its dues in 2012. Plaintiffs and the Hodges timely appealed. Premier cross-appealed the trial court's denial of its motion for attorneys' fees and costs.

III. Jurisdiction

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

IV. Analysis

A. Standing

[1] Defendants initially challenge the Plaintiffs' standing to bring their claims for breach of fiduciary duty and constructive fraud. Defendants argue shareholders have no right to bring a direct claim to enforce causes of action accruing to the corporation. *See Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000). "An action alleging a wrong done by [a condominium] association must be brought against the association and not against the unit owner." N.C. Gen. Stat. § 47C-3-111(b) (2017).

> The general prohibition against individual shareholder suits is understandable, for the duties, the breaches of which constitute the ground of action, are duties to the corporation, considered as a legal entity, and not duties to any particular shareholder. Thus, any damages recovered from derivative suits flow back to the corporation, not to the individual shareholders bringing the action. Furthermore, the procedural requirements for derivative suits protect shareholders and the corporation itself by avoiding a multiplicity of lawsuits, by *limiting who should properly speak for the corporation, and by*

> *preventing self-selected advocates pursuing individual gain rather than the interests of the corporation or the shareholders as a group, from bringing costly and potentially meritless strike suits. Given these principles, a shareholder generally has no standing to bring individual actions against a corporation. Standing, which is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, generally refers to a party's right to have the merits of its dispute decided by a judicial tribunal.*
>
> Nevertheless, a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong.

Raymond James Capital Partners, L.P. v. Hayes, 248 N.C. App. 574, 578, 789 S.E.2d 695, 700 (2016) (internal citations, alterations and quotation marks omitted) (emphasis supplied).

Ironman asserts standing to sue the association as a shareholder because:

> There are two major, often overlapping, exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders.

Barger v. McCoy Hillard & Parks, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997) (citations omitted).

"The North Carolina Supreme Court has recognized as illustrative of a special duty, 'when a party violate[s] its fiduciary duty to the shareholder.' " *Corwin v. British Am. Tobacco PLC*, 251 N.C. App. 45, 66, 796 S.E.2d 324, 338 (2016), *rev'd on other grounds sub nom. Corwin as Tr. for Beatrice Corwin Living Irrevocable Tr. v. British Am. Tobacco PLC*, __ N.C. __, 821 S.E.2d 729 (2018) (quoting *Barger*, 346 N.C. at 659, 488 S.E.2d at 220).

The officers and board members of a condominium association owe a statutorily-imposed fiduciary duty to both the association and the unit holders. N.C. Gen. Stat. § 47C-3-103(a) (2017). "Subsection (a) makes members of the executive board appointed by the declarant liable as

fiduciaries of the unit owners with respect to their actions or omissions as members of the board." *Id.*, Cmt. 1. "A 'fiduciary relation' is one that 'may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Lockerman v. S. River Elec. Membership Corp.*, 250 N.C. App. 631, 635, 794 S.E.2d 346, 351 (2016) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)). "In North Carolina, a fiduciary duty can arise by operation of law (*de jure*) or based on the facts and circumstances (*de facto*)." *Id.*

"A plaintiff must present evidence that they suffered an injury peculiar or personal to themselves. An injury is peculiar or personal to the shareholder if a legal basis exists to support plaintiff's allegations of an individual loss, separate and distinct from any damage suffered by the corporation." *Corwin*, 251 N.C. App. at 66, 796 S.E.2d at 339 (citation and internal quotation marks omitted).

Our appellate courts have "equated the status of corporate shareholders and corporate directors to that existing between limited partners and general partners" when standing of a party has been challenged in this way. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 334, 525 S.E.2d 441, 443 (2000).

"Even when one person contributes a disproportionate amount of the investment and thus bears a correspondingly greater loss, such an occurrence hardly makes for an individual injury." *Green v. Freeman*, 367 N.C. 136, 144, 749 S.E.2d 262, 269 (2013) (emphasis added) (citation and internal quotation marks omitted). "[T]he question is not whether the plaintiff is in a less favorable position than the general partner, but whether the plaintiff is in a less favorable position when compared to all other limited partners." *Jackson v. Marshall*, 140 N.C. App. 504, 509, 537 S.E.2d 232, 235 (2000) (referencing *Energy Investors Fund*, 351 N.C. at 336, 525 S.E.2d at 444).

This Court in *Norman* looked to the discussion and analysis in both *Barger* and *Energy Investors* to explain when a special duty arises or a distinct injury exists. "*Norman*'s extensive discussion of the closely held nature of the company and the powerlessness of the minority shareholders offers tools for a careful examination of the particular facts of a case to determine if a special duty or distinct injury exists within the meaning of *Barger* and *Energy Investors*." *Gaskin v. J.S. Procter Co., LLC*, 196 N.C. App. 447, 453, 675 S.E.2d 115, 119 (2009) (referencing *Norman*, 140 N.C. at 405, 537 S.E.2d at 259).

In *Gaskin* and *Norman*, this Court considered the following factors to determine whether to permit a direct action against a closely held corporation: (1) the number of shareholders; (2) whether the plaintiff was a minority shareholder; (3) the degree of control the plaintiff maintains in the partnership; (4) whether individual defendants used majority stock ownership and control to divert corporate funds to themselves; and, (5) the impact of a direct lawsuit on third-party creditors. *Id.* at 454, 675 S.E.2d at 119; *Norman*, 140 N.C. at 404, 537 S.E.2d at 258.

As Premier's sole officer and executive board member, Dr. Chodri's position carries and imposes a statutory fiduciary duty that is owed to all unit owners, including Ironman and White Oak. *See* N.C. Gen. Stat. § 47C-3-103. Comment 1 to Section 47C-3-103 provides: "This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant." Ironman and White Oak have standing under the statute to assert claims for breach of fiduciary duty. *Id.* Whether Ironman or White Oak suffered individual or recoverable damages is a separate issue.

B. Directed Verdict

Plaintiffs argue that the trial court erred by granting a directed verdict that dismissed Plaintiffs' claims for breach of fiduciary duty and constructive fraud, and punitive damages. Defendant argues the trial court's directed verdict was proper because Plaintiffs failed to provide sufficient evidence to justify the claim that Dr. Chodri's alleged breach of his statutorily-imposed fiduciary duty rose to the level of constructive fraud, to survive a defense of expiration of the three year statute of limitations and to warrant application of the corresponding ten-year statute of limitations.

1. Standard of Review

The trial court's order and judgment appealed from is presumed to be correct, and the burden of showing error rests with the appellant. *London v. London*, 271 N.C. 568, 570-71, 157 S.E.2d 90, 92 (1967). "The standard of review of [a] directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

"To survive a motion for directed verdict . . ., the non-movant must present more than a scintilla of evidence to support its claim." *Morris v. Scenera Research, LLC*, 368 N.C. 857, 861, 788 S.E.2d 154, 157 (2016) (citations and internal quotation marks omitted). "Because the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed *de novo*." *Maxwell v. Michael P. Doyle, Inc.*, 164 N.C. App. 319, 323, 595 S.E.2d 759, 761 (2004).

[2] Neither HFP, as tenant, nor the Hodges, as individuals, possess standing to bring either claims because neither of them are unit owners or were owed any statutorily-created or other fiduciary duty by Premier or its officer(s), nor had privity of contract with Premier. As such, neither party can show "an injury separate and distinct from that suffered by other shareholders." *Barger*, 346 N.C. at 658, 488 S.E.2d at 219. The trial court correctly granted a directed verdict on all of HFP's and the Hodges' claims for breach of fiduciary duty and constructive fraud, as neither are shareholders of Premier.

2. *Breach of Fiduciary Duty*

[3] Ironman's claim for breach of fiduciary duty alleges that Dr. Chodri, in his representative capacity as Premier's executive board president, owed a statutorily-imposed fiduciary duty to Ironman, as a unit owner. Ironman contends that Dr. Chodri breached this statutorily-imposed fiduciary duty when he, *inter alia*, failed to maintain a separate bank account, billed Ironman for unrelated common element charges, and refused to provide full access to the books and records. Further, Ironman argues that as a result of Dr. Chodri's breach, Ironman suffered and will continue to suffer monetary damages due to Dr. Chodri's use of their payments to pay his taxes, make payments on White Oak's mortgage, and directly pay himself approximately $138,000.00. Viewed in the light most favorable to it, Ironman has provided sufficient evidence to be submitted to the jury, unless otherwise barred.

Ordinarily, breaches of fiduciary duty are governed by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(1). *Marzec v. Nye*, 203 N.C. App. 88, 93, 690 S.E.2d 537, 541 (2010). However, "[a] ten-year statute of limitations applies to breach of fiduciary duty claims *only* when they rise to the level of constructive fraud." *Orr v. Calvert*, 212 N.C. App. 254, 260, 713 S.E.2d 39, 44 (emphasis supplied), *overruled on other grounds*, 365 N.C. 320, 720 S.E.2d 387 (2011). Because Ironman filed suit more than three years after Dr. Chodri's alleged wrongdoing, its' claim for breach of statutory fiduciary duty is barred, unless the breach rose to the level of constructive fraud.

3. Constructive Fraud

[4] A constructive fraud claim requires a plaintiff to allege and show (1) that the defendant "owes the plaintiff a fiduciary duty;" (2) that the defendant "breached" that duty; and, (3) that the defendant "sought to benefit himself in the transaction." *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012) (citation omitted). "A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud[,]" and accordingly does not need to meet the Rule 9(b) pleading requirement. *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 482, 593 S.E.2d 595, 599 (2004) (citation omitted).

The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the intent and showing that the defendant benefitted from his breach of duty. *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004). This element requires a plaintiff to allege and prove that the defendant took "advantage of his position of trust to the hurt of plaintiff" and sought "his own advantage in the transaction." *Barger*, 346 N.C. at 666, 488 S.E.2d at 224 (citation omitted).

Since sufficient evidence of a statutory fiduciary relationship exists, the remaining issues to support a constructive fraud claim are whether Ironman introduced sufficient evidence showing: (1) Dr. Chodri benefitted as a result of the mismanaged funds; and, (2) if Dr. Chodri benefitted, that he intentionally took advantage of the fiduciary relationship to benefit himself.

A plaintiff must allege that the benefit sought was "more than a continued relationship with the plaintiff" or "payment of a fee to a defendant for work" it actually performed. *Sterner v. Penn*, 159 N.C. App. 626, 631-32, 583 S.E.2d 670, 674 (2003) (citation omitted). The evidence presented included Dr. Chodri allegedly misappropriating association dues in addition to assessments.

Ironman contends Dr. Chodri benefitted from his financial misconduct by making payments for taxes, mortgage, and to pay himself from the White Oak account which contained Premier's funds. Presuming, without deciding, this is sufficient evidence to show that Dr. Chodri benefitted from the alleged mismanagement, the issue remains of whether Ironman introduced sufficient evidence that Dr. Chodri mismanaged the funds with the intent to benefit himself.

Entering summary judgment or a directed verdict on claims for breach of a fiduciary duty and constructive fraud, "is rarely proper when a state of mind such as intent or knowledge is at issue." *Valdese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986). Here, it is unclear whether Dr. Chodri intended to benefit from the improper account management or was merely negligent or omitted his duties. However, presuming that Dr. Chodri personally benefitted, the burden shifts to Dr. Chodri to prove that he dealt in an "open, fair and honest manner." *Compton v. Kirby*, 157 N.C. App. 1, 16, 577 S.E.2d 905, 915 (2003). *See also Forbis v. Neal*, 361 N.C. 519, 529, 649 S.E.2d 382, 388 (2007) (holding "[w]hen . . . the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred"). As such, we are unable to conclude as a matter of law that the trial court's entry of a directed verdict on Ironman's claims on these issues was proper.

4. Punitive Damages

[5] To recover punitive damages a claimant must prove, by "clear and convincing evidence," that "the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) fraud, (2) malice, or (3) willful or wanton conduct." N.C. Gen. Stat. § 1D-15(a)-(b) (2017). As used in Chapter 1D, "fraud" means actual fraud. *See* N.C. Gen. Stat. § 1D-5(4) (2017) (" 'Fraud' does not include constructive fraud unless an element of intent is present."). Because Plaintiffs presented no evidence of actual fraud, the trial court's entry of a directed verdict on all Plaintiffs' claims for punitive damages is affirmed.

C. Attorney Fees

[6] Defendants assert the trial court erred by denying their motion for attorneys' fees. Defendants argue an award of costs and attorneys' fees under N.C. Gen. Stat. § 47C-3-116(e) and N.C. Gen. Stat. § 47C-3-116(g) are mandatory.

1. *Standard of Review*

N.C. Gen. Stat. § 47C-3-116 provides for mandatory attorney fees. This Court "review[s] a trial court's decision whether to award mandatory attorney's fees *de novo*." *Willow Bend Homeowners Ass'n v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 578 (2008).

2. *Analysis*

As permitted by the Condominium Act and its Declaration, Premier assesses all owners condominium fees for the payment of common area expenses. Enforcement of collecting those fees is subject to N.C. Gen. Stat. § 47C-3-116. Section 116, entitled "Lien for sums due the association; enforcement," provides procedures and remedies that an association may take to collect sums due it from a unit owner. N.C. Gen. Stat. § 47C-3-116 (2017). Additionally, Section 116 includes three separate attorneys' fees provisions. *See* N.C. Gen. Stat. § 47C-3-116(e), (f)(12), (g). Here, Defendants argue that an award of attorneys' fees to Premier is mandatory under subsections (e) and (g).

Subsection 116(g) provides that any judgment in any "civil action relating to the collection of assessments shall" include an award of costs and reasonable attorneys' fees "for the prevailing party." N.C. Gen. Stat. § 47C-3-116(g). This statute's use of the word "shall" provides no element of discretion of whether reasonable fees will be awarded. *See Willow Bend*, 192 N.C. App. at 418, 665 S.E.2d at 578 (holding that attorney fees under the analogous N.C. Gen. Stat. § 47F-3-116(e) were mandatory where the statute provided that "[a] judgment, decree, or order in any action brought under this section *shall* include costs and reasonable attorneys' fees for the prevailing party").

Upon remand, the trial court must determine if Premier was: (1) the prevailing party; and, (2) in a civil action relating to the collection of condominium assessments. If so, the trial court must award Premier its "reasonable" attorney fees. The trial court's denial of Premier's motion for costs and attorney fees is reversed and remanded.

V. Conclusion

For the reasons stated above, we find no error in the judgment entered upon the jury's verdicts concerning the parties' respective breach of the Declaration. We affirm the trial court's entry of directed verdict for Defendants and against HFP and the Hodges individually on all their claims. We also affirm the trial court's entry of directed verdict against all Plaintiffs on their claims for punitive damages.

We reverse and remand that portion of the trial court's order which entered a directed verdict against Plaintiff Ironman on its claim for breach of fiduciary duty and constructive fraud against Defendants Premier and Dr. Chodri as its sole officer. We also reverse and remand the order denying Premier's claims for costs and attorney fees against

Ironman for breach of the Declaration and remand for a hearing in accordance with the statutes. *It is so ordered.*

NO ERROR IN PART, AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges INMAN and BERGER concur.

CHARITY MANGAN, PLAINTIFF
v.
JAMES S. HUNTER, DDS, JAMES S. HUNTER, DDS, P.A.,
JENNIFER WELLS, DDS, AND JENNIFER L. WELLS, DDS, P.A.
D/B/A FIRST IMPRESSIONS FAMILY DENTISTRY, DEFENDANTS

No. COA19-30

Filed 3 December 2019

Medical Malpractice—Rule 9(j)—expert's failure to review all medical records—disputed—summary judgment—improper

In a medical malpractice action against a dentist and his dental practice (defendants), the trial court erred by granting summary judgment in favor of defendants after finding it was "undisputed" that plaintiff's expert failed to review all medical records before plaintiff filed her complaint, pursuant to Civil Procedure Rule 9(j). Because of the expert's equivocal deposition testimony (she stated that she "would have" reviewed the dentist's clinical notes, but she could not say under oath whether she had), the parties disputed whether the expert reviewed all medical records pursuant to Rule 9(j), and therefore a genuine issue of material fact remained.

Appeal by Plaintiff from Order entered 23 July 2018 by Judge Beecher R. Gray in Cabarrus County Superior Court. Heard in the Court of Appeals 21 August 2019.

Lanier Law Group, P.A., by Donald S. Higley, II, and Lancaster and St. Louis, PLLC, by Hilary A. St. Louis, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Luke Sbarra, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Charity Mangan (Plaintiff) appeals from an Order entered 23 July 2018 granting summary judgment in favor of Defendants James S. Hunter, DDS (Dr. Hunter) and James S. Hunter, DDS, P.A. (collectively, Defendants) in this medical malpractice action. The Record before us on appeal tends to establish the following:

Plaintiff began visiting Dr. Hunter for dental treatment in 1986 and continued to be a regular patient until Dr. Hunter's retirement in 2013. During the twenty-seven years that Plaintiff saw Dr. Hunter for dental care, Plaintiff developed temporomandibular joint disorder, migraines, and fibromyalgia. She also developed bruxism (teeth grinding). Plaintiff's last appointment with Dr. Hunter was on 17 April 2013. At that time, Dr. Hunter reported no dental caries.[1] Dr. Hunter did recommend a crown along with continued use of Plaintiff's dental guard.

Seven months later, in November 2013, Plaintiff visited a new dentist, Dr. Sherrill Jordan, for routine dental care. Dr. Jordan reported tooth erosion on nearly all of Plaintiff's teeth and twelve cavities. Plaintiff received a second opinion from Dr. Wells, whose opinion was very similar to Dr. Jordan's. Plaintiff received treatment for thirteen cavities in December 2013 by Dr. Wells. In February 2014, Plaintiff visited another new dentist, Dr. Jason Baker, and received additional dental treatments in March 2014. Dr. Baker referred Plaintiff to Dr. Napenas in May 2014, and Dr. Napenas subsequently diagnosed her with atypical odontalgia. Dr. Napenas informed Plaintiff that "treatment [for atypical odontalgia] would include a life-long management for the pain with similar medications as what she was already taking for fibromyalgia." He prescribed Plaintiff an antidepressant for nerve pain and stress management. Plaintiff also alleged her primary care physician prescribed her blood pressure medication as a result of the stress of the situation. At the time of the filing of the Complaint, Plaintiff was still seeing Drs. Baker and Napenas for treatment.

In March 2015, Sharon Szeszycki, DDS (Dr. Szeszycki) was contacted by Plaintiff's counsel about the present action. Dr. Szeszycki, a dentist in the Chicago area, has been working as an expert witness in the area of dental malpractice since 2007. Around 10 March 2015, counsel for Plaintiff mailed a letter to Dr. Szeszycki that indicated it included

1. The transcript and Record use the terms dental caries and cavities interchangeably. *See Dental caries*, The American Heritage College Dictionary (3d ed. 1993) (defining dental caries as "[t]he formation of cavities in the teeth by the action of bacteria").

a USB drive with Plaintiff's records. On 20 March 2015, Dr. Szeszycki reported, in her Affidavit Letter to Plaintiff's counsel, "[a] reasonable and meritorious cause for action exists with respect to James Hunter DDS[.]" Dr. Szeszycki's Affidavit Letter stated, in forming her opinion, she reviewed: "Mangan timeline of events[,] Dr. Baker letter[,] Demand letter to Luke Sbarra March 2015[,] Baker treatment plan[,] Perio charting[, and] Mangan teeth pics." She continued to find "Dr. Hunter failed to document any concerns he might have had regarding the erosion issues during the Patient's time as a patient in his practice for the purposes of quantifying and analyzing the origin and progression of this disease process."

On 18 February 2016, Plaintiff filed her Complaint alleging medical malpractice against Defendants in Cabarrus County Superior Court. In accordance with Rule 9(j) of the North Carolina Rules of Civil Procedure, Plaintiff's Complaint alleged:

> [A]ll medical records pertaining to Defendants' negligence . . . have been reviewed by a person or persons reasonably expected to qualify as an expert witness under Rule 702 of the North Carolina Rules of Evidence and who is/are willing to testify that the medical care did not comply with the applicable standard of care.

Defendants accepted service on 13 April 2016 and submitted their Answer to Plaintiff's Complaint on 13 June 2016. The parties began discovery. On 27 April 2018, Plaintiff voluntarily dismissed her claims against Jennifer Wells, DDS and Jennifer Wells, DDS, P.A. d/b/a First Impressions Family Dentistry without prejudice.

On 29 August 2016, Dr. Szeszycki responded to Defendants' Rule 9(j) interrogatories. The relevant responses are as follows:

> 4. Specifically identify all documents you reviewed to form your opinion about the medical care rendered by any Defendants.
>
> **RESPONSE [Dr. Szeszycki]**
>
> **I reviewed the following materials:**
> **Mangan timeline of events**
> **Dr. Baker letter**
> **Demand letter to Luke Sbarra March 2015**
> **Baker treatment plan**

Perio charting

Mangan teeth pics

5. State with specificity the date you received the medical records regarding Plaintiff, the date you actually reviewed the medical care rendered, when and to whom you expressed your opinions regarding the medical care Defendants provided to Plaintiff, and whether you provided anyone a written, verbal, or other report regarding your conclusions.

RESPONSE

I received the materials on or about March 15, 2015 and began my review on that date. I continued my review on March 17, 2015 and then prepared a written Affidavit on March 20, 2015 expressing my opinions.

On 2 April 2018, Plaintiff designated Dr. Szeszycki as an expert witness. Plaintiff submitted "Dr. Szeszycki is expected to testify that Defendants breached the standard of care in their care and treatment of [Plaintiff]" and that "Dr. Szeszycki bases her opinions on her education and training as well as her review of [Plaintiff's] medical records."

Defendants deposed Dr. Szeszycki on 10 May 2018. Dr. Szeszycki's deposition revealed the following exchanges:

> [Counsel for Defendants:] [W]hat information do you have that you relied on that you do not have with you printed out . . . ?
>
> [Dr. Szeszycki:] Okay. There is a Baker treatment plan, Baker updated treatment plan. There was a demand letter to you. There's Dr. Baker X-ray, Dr. Baker letter. There's a file that says Gawthrop-Wells-Mangan. Another one that's Hunter-Mangan, which I think is what I have with me because that's his clinical notes, Dr. Hunter's clinical notes, and then there is a Hunter, DDS, James condensed version, which is his dep. Jordan DDS. Mangan timeline of events. . . .
>
> . . . .
>
> [Counsel for Defendants:] This is, I believe, your responses to the 9(j) discovery responses. Do you recall making these responses?

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] And in number 4, do you recall the question specifically identify all documents you reviewed to form your opinion about the medical care rendered by the Defendants?

. . . .

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] And your response was I reviewed the following materials, and you have a list of the materials that you listed -- that you reviewed?

[Dr. Szeszycki:] Yes.

[Counsel for Defendants:] That is the material you reviewed, correct?

[Dr. Szeszycki:] At the time, yes.

. . . .

[Counsel for Defendants:] And those were the only documents provided to you when you did your review in March of 2015, correct?

[Dr. Szeszycki:] Yes.

. . . .

[Counsel for Defendants:] And prior to the filing of the lawsuit, the documents that you reviewed would have been those listed on interrogatory number 4 . . . correct?

[Dr. Szeszycki:] Correct.

[Counsel for Defendants:] And no other documents, correct?

[Dr. Szeszycki:] Correct.

. . . .

[Counsel for Defendants:] And those documents mentioned in [Interrogatory] answer number 4, that's the complete universe of information you considered in March of 2015, correct?

[Dr. Szeszycki:] I'm going to say I would like to have said that I looked at Dr. Hunter's notes, so I can't answer that.

> [Counsel for Defendants:] Did you?
>
> [Dr. Szeszycki:] I'd have to look -- let's see here.
>
> [Counsel for Defendants:] It's not on the list?
>
> [Dr. Szeszycki:] It's not on the list. I know. That's a surprise to me.
>
> [Counsel for Defendants:] So because it's not on the list, can you say under oath today that you looked at his notes?
>
> [Dr. Szeszycki:] I -- because it is not on the list, I cannot say that I looked at his notes, correct. . . . I would find it unusual for me to have given an opinion without looking at the notes. . . .

When asked specifically about Defendants' alleged malpractice, Dr. Szeszycki testified that "[her] feelings about [Dr. Hunter's] shortcomings have to do with what's not contained in his note taking . . . [a]nd also what is contained in his note taking."

On examination by Plaintiff's counsel, Dr. Szeszycki stated: "I would never base my opinion on someone's report, for instance, the timeline of events that was written by the patient. I would always have looked at the records." Defendants' counsel then inquired: "Can you testify under oath in this case that you reviewed Dr. Hunter's records pertaining to the care Miss Mangan received at Dr. Hunter's office?" At that time, Dr. Szeszycki responded: "I'm going to testify under oath that I would have looked at Dr. Hunter's clinical notes in making my -- in making my decision. It is not listed on the affidavit."

At the conclusion of the deposition, Defendants revisited the question of whether Dr. Szeszycki reviewed Plaintiff's medical records.

> [Counsel for Defendants:] [Y]ou've stated two different things. You've stated under oath in your 9(j) responses that you did not have Dr. Hunter's records. . . . Now, you're stating that you have no reason to doubt you received them and that you normally would do it. So I'm asking you can you now under oath change what you previously said under oath, which is that you did not have those records. I want you to be able to tell me why under oath you can say today that you reviewed Dr. Hunter's records in March of 2015.
>
> [Dr. Szeszycki:] I'm going to make a statement here. You asked me under oath could I see, given what I wrote down

> in the affidavit, is information that's written there, did I see Dr. Hunter's notes in that list of materials? And the answer is no. Under oath, I will say no, but it is unlikely that I would not have looked at Dr. Hunter's notes in making my opinion.
>
> . . . .
>
> [Counsel for Defendants:] . . . I'm asking right now as you sit here and testify under oath, the best you can say is consistent with what you've previously said under oath is that you cannot say under oath that you reviewed Dr. Hunter's medical records prior to the time that the lawsuit was filed, correct?
>
> [Dr. Szeszycki]. I cannot say under oath and based on my affidavit letter that I saw Dr. Hunter's clinical notes. I can say – I can say that when I – in completing the file, I asked for more information . . . and when I received Dr. Hunter's notes, I went, oh, yes, I've seen these, and, yet, they're not listed here. I will agree with you. They are not listed here on my affidavit letter.

On 30 May 2018, Defendants filed a Motion for Summary Judgment pursuant to Rules 9(j) and 56 of the North Carolina Rules of Civil Procedure. Defendants' Motion for Summary Judgment alleged:

> The Rule 9(j) discovery responses of Dr. Sharon Szeszycki . . . and the deposition transcript of Dr. Sharon Szeszycki . . . disclose her failure to review the medical and dental records Rule 9(j) requires prior to Plaintiff's filing of this civil action. Consequently, in light of this Rule 9(j) failure, no genuine issue of material fact exists and Defendants are entitled to judgment as a matter of law.

In response, on 5 July 2018, Plaintiff's counsel filed an Affidavit of Attorney for Plaintiff, averring "Dr. [Szeszycki] acknowledged receipt of his records and reviewed them." Dr. Szeszycki also filed an affidavit on 5 July 2018, averring: "Since the deposition and refreshing my memory as to my notes and research, I can say that I am certain I reviewed Defendant Hunter's dental records prior to rendering my opinion in this matter and prior to the filing of this lawsuit."

On 12 July 2018, the trial court entered "Order Granting Defendant James S. Hunter, DDS and James S. Hunter, DDS, P.A. Summary

Judgment" (Order). The Order was served on Plaintiff after entry on 23 July 2018. In the Order, the trial court made what it termed "undisputed findings of fact and conclusions of law." The trial court, however, also found "[t]he totality of the evidence before the Court indicates Dr. Szeszycki failed to review all medical records pertaining to Defendants' alleged negligence that were available . . . ." Plaintiff timely appealed this Order on 15 August 2018.

Issue

The issue in this appeal is whether the trial court erred by granting summary judgment in favor of Defendants on the basis of its finding Plaintiff's expert did not review Plaintiff's medical records as required by Rule 9(j).

Analysis

I. 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) (citation and quotation marks omitted). "Since summary judgment is proper only where there is no genuine issue of material fact, summary judgment orders should not include findings of fact." *Raymond v. Raymond*, ___ N.C. App. ___, ___, 811 S.E.2d 168, 173 (2018). "We review *de novo* a trial court's dismissal of a medical malpractice complaint for substantive Rule 9(j) noncompliance." *Preston v. Movahed*, ___ N.C. App. ___, ___, 825 S.E.2d 657, 661, *disc. rev. allowed* ___ N.C. ___, 830 S.E.2d 818 (2019).

II. Summary Judgment and Rule 9(j)

Summary judgment is appropriate 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. Gen. Stat. § 1A-1, Rule 56(c) (2017). "Upon a motion for summary judgment, the moving party carries the burden of establishing the lack of any triable issue and may meet his or her burden by proving that an essential element of the opposing party's claim is nonexistent." *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 341, 770 S.E.2d 159, 162 (2015) (alterations, citations, and quotation marks omitted).

Summary judgment is a procedural way in which parties can ensure compliance with Rule 9(j) in medical malpractice actions. *See Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477, *disc. review denied*, 363 N.C. 651, 684 S.E.2d 290 (2009) ("The Rules of Civil Procedure provide other methods by which a defendant may file a motion alleging a violation of Rule 9(j). *E.g.*, N.C. Gen. Stat. § 1A-1, Rules 12, 41, and 56 (2005). Rule 9(j) itself, however, does not provide such a method."). Rule 9(j), in relevant part, requires:

> Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint[.]

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2017). In sum, Rule 9(j) requires the person a plaintiff seeks to have qualified as an expert review "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" prior to the filing of the complaint. *See id.*

Rule 9(j) was added to the North Carolina Rules of Civil Procedure in 1995. *See Vaughan v. Mashburn*, 371 N.C. 428, 434, 817 S.E.2d 370, 375 (2018). "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 818 (2012) (emphasis in original omitted) (citation omitted). "[T]he rule averts frivolous actions by precluding any filing in the first place

by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care." *Vaughan*, 371 N.C. at 435, 817 S.E.2d at 375. Thus, compliance with Rule 9(j) is determined at the time the complaint is filed. *Moore*, 366 N.C. at 31, 726 S.E.2d at 817 (citation omitted). However, "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts[.]" *Id.* (citation omitted).

A. The Trial Court's Order

Turning to the case *sub judice*, Defendants' Motion for Summary Judgment alleged Dr. Szeszycki "fail[ed] to review the medical and dental records Rule 9(j) requires prior to Plaintiff's filing of this civil action." After considering the parties' arguments, the trial court granted summary judgment in favor of Defendants. In its Order, the trial court purported to make "undisputed findings of fact and conclusions of law in connection with [the] Judgment[.]" Plaintiff contends that the trial court erred in Findings of Fact 8, 13, and 14, ultimately arguing that Dr. Szeszycki did, in fact, review Plaintiff's medical records in compliance with Rule 9(j) prior to the filing of the Complaint.

Summary judgment is proper where there "is no genuine issue as to any material fact[.]" N.C. Gen. Stat. § 1A-1, Rule 56(c). Here, necessarily, the issue of whether Dr. Szeszycki reviewed the medical records in question prior to the filing of Plaintiff's Complaint is a material fact; the answer to that question determines whether Plaintiff's lawsuit may proceed on the merits. Upon our de novo review of the Record, we conclude the trial court's Findings of Fact are not, as it claims, "undisputed" and therefore that summary judgment was improper.

The trial court's Order cites our Supreme Court's decision in *Moore v. Proper* in support of its decision to make findings of fact at the summary judgment phase.[2] *Moore* was decided by our Supreme Court in 2012 and affirmed a divided Court of Appeals decision to reverse the

2. The trial court's Order, in footnote one, stated:

> The Court makes findings of fact and conclusions of law consistent with Moore v. Proper, 366 N.C. 25, 32, 726 S.E.2d 812, 818 (2012) (stating, "when a trial court determines a Rule 9(j) certification is not supported by the facts, the Court must make written findings of facts to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and in turn, whether those conclusions support the trial court's ultimate determination.").

trial court's grant of summary judgment in favor of the defendants. 366 N.C. 25, 25, 26, 28, 726 S.E.2d 812, 815 (2012). The trial court granted the defendants' motion for summary judgment on the basis that the plaintiff's expert was not reasonably expected to qualify under North Carolina Rule of Evidence 702. *Id.* at 28, 726 S.E.2d at 815.

The Supreme Court's decision in *Moore* cautions lower courts against conflating the requirements of Rule 9(j) with those of Rule 702 of the North Carolina Rules of Evidence. *Id.* at 31, 726 S.E.2d at 817 (citing N.C. Gen. Stat. § 1A-1, Rule 9(j)(1)) ("[T]he preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert *will actually* qualify under Rule 702."). The Court emphasized that "the trial court is not generally permitted to make factual findings at the summary judgment stage[ ]" and cautioned lower courts "a finding [of fact] that reliance on a fact or inference is not reasonable will occur only in the *rare* case in which no reasonable person would so rely." *Id.* at 32, 726 S.E.2d at 818 (emphasis added) (citation omitted).

This Court has recognized that although findings of fact are not proper at summary judgment, "[i]t is not uncommon for trial judges to recite uncontested facts upon which they base their summary judgment order, however when this is done any findings should clearly be denominated as uncontested facts and not as a resolution of contested facts." *Raymond*, ___ N.C. App. at ___, 811 S.E.2d at 174 (citation and quotation marks omitted). This reasoning aligns with our Supreme Court's holding in *Moore* instructing trial courts to grant summary judgment only under the rare circumstance when there could be no other finding but that "no reasonable person would so rely" on the forecasted or disputed evidence as to whether a party reasonably expected a proffered expert to qualify under Rule 702. *Moore*, 366 N.C. at 32, 726 S.E.2d at 818.

Here, we conclude the trial court erroneously applied *Moore*'s instruction by making "undisputed findings of fact" at summary judgment in light of the evidence in the case *sub judice*. The Record reflects, in multiple instances, that the issue before the trial court is one of disputed and material fact rendering summary judgment wholly improper and, further, does not fall into the rare case described in *Moore*. *See id.* Instead, the trial court's Findings serve to resolve contested facts, inconsistent with this Court's prior opinion in *Raymond*. *See* ___ N.C. App. at ___, 811 S.E.2d at 174.

First, in Finding 8, the trial court includes select citations to portions of Dr. Szeszycki's deposition testimony supporting summary judgment

in favor of Defendants as "undisputed facts." However, Finding 8 omits important portions of Dr. Szeszycki's deposition that flag the factual question of whether she reviewed Plaintiff's medical records before the filing of the Complaint. During examination by Defendants' counsel, Dr. Szeszycki testified her answer to Interrogatory 4 included all the materials that she reviewed. She reiterated her "Affidavit Letter" similarly included the correct list of materials she reviewed. However, when asked later in the deposition if her response to Interrogatory 4 is "the complete universe of information [she] considered in March of 2015[,]" she responded: "I'm going to say I would like to have said that I looked at Dr. Hunter's notes, so I can't answer that." She continued: "I would find it unusual for me to have given an opinion without looking at the notes." The issue was revisited at the conclusion of the deposition. Dr. Szeszycki emphasized she "would never base [her] opinion on someone's report, for instance, the timeline of events that was written by the patient. [She] would always have looked at the records." Moreover, Dr. Szeszycki stated: "I'm going to testify under oath that I would have looked at Dr. Hunter's clinical notes in making my -- in making my decision. It is not listed on the affidavit." Dr. Szeszycki conceded: "You asked me under oath could I see, given what I wrote down in the affidavit, . . . did I see Dr. Hunter's notes in that list of materials? And the answer is no. Under oath, I will say no[.]" However, she continued, "but it is unlikely that I would not have looked at Dr. Hunter's notes in making my opinion."

Defendants contend that it is clear from Dr. Szeszycki's deposition that she did not review Plaintiff's medical records as required by Rule 9(j); we disagree. During a line of questioning, Defendants' counsel inquired: "And your feelings about [Dr. Hunter's] shortcomings have to do with what's not contained in his note taking, correct?", to which Dr. Szeszycki responded, "[a]nd also what is contained in his note taking." At another point, Defendants' counsel asked Dr. Szeszycki: "there's no clinical evidence that you are aware of indicating that decay existed as of April 2013, correct?" Dr. Szeszycki answered, "Correct. According to Dr. Hunter's notes, there is no indication." In both instances, it appears from our review of the deposition that Dr. Szeszycki was testifying that a portion of the opinions she formed were based on the contents of Dr. Hunter's notes.

In short, the gist of Dr. Szeszycki's deposition testimony is apparent. Even though the list of materials she provided did not state that it included Plaintiff's medical records, Dr. Szeszycki believed she reviewed the records prior to rendering her opinion on the matter. Whether her

belief is accurate or not, however, is a genuine issue of material fact to be resolved.

Second, in Finding 13, the trial court purported to find "[t]he totality of the evidence before the Court indicates Dr. Szeszycki failed to review all medical records . . ." Finding 13 indicates the trial court engaged in weighing "[t]he totality of the evidence" before it. Similarly, in Finding 14, the trial court stated "the Affidavits do not satisfy the Court[.]" These Findings, weighing the evidence, are inconsistent with our summary judgment standard. Thus, we conclude it was error for the trial court to make "undisputed findings of fact" at summary judgment in this case because the trial court's Findings actually resolved a genuine issue of material fact as to whether Dr. Szeszycki reviewed Plaintiff's medical records prior to the filing of Plaintiff's Complaint.

Our own review of the Record reveals additional facts further supporting our conclusion there are factual questions present that are not "undisputed," as the trial court found. In her initial Affidavit Letter to Plaintiff's counsel, Dr. Szeszycki found "Dr. Hunter failed to *document* any concerns he might have had regarding the erosion issues during the Patient's time as a patient in his practice for the purposes of quantifying and analyzing the origin and progress of this disease process [,]" signaling Dr. Szeszycki may have reviewed records or clinical notes not listed in the "Materials Reviewed" section. Although counsel for Plaintiff concedes that Dr. Szeszycki's response to Interrogatory 4 omits Plaintiff's medical records, counsel has repeatedly averred it was purely a typographical omission. Moreover, Dr. Szeszycki's response to Interrogatory 5 raises a factual question of whether or not she reviewed the medical records. Specifically, Interrogatory 5 asked for the date Dr. Szeszycki "received the medical records" and "the date [she] actually reviewed the medical care rendered[.]" Thus, when asked when she received and reviewed the records, Dr. Szeszycki answered that she received and reviewed "the materials" on 15 March 2015. As such, we conclude the trial court erred in granting summary judgment in favor of Defendants.

B. The Crocker *Framework*

Although Rule 9(j) compliance is a conclusion of law reviewed de novo, *Preston*, ___ N.C. App. at ___, 825 S.E.2d at 661, we are unable to review the trial court's conclusion Plaintiff failed to comply with Rule 9(j) when a genuine issue of material fact persists. We further recognize, in preliminary matters such as 9(j) compliance, it is not practical for the jury to be the ultimate fact finder. As such, when factual questions like the one before us arise, we are guided by our Supreme Court's decision

in *Crocker v. Roethling*, which this Court followed in *Barringer*. *See Crocker v. Roethling*, 363 N.C. 140, 140, 675 S.E.2d 625, 625 (2009); *Barringer*, 197 N.C. App. at 250-51, 677 S.E.2d at 474.

In *Crocker*, our Supreme Court reversed and remanded this Court's affirmation of the trial court's grant of summary judgment in a medical malpractice action. 363 N.C. at 142, 675 S.E.2d at 628. The majority held "that in a medical malpractice case: [ ] gaps in the testimony of the plaintiff's expert during the defendant's discovery deposition may not properly form the basis of summary judgment for the defendant[.]" *Id.* at 149, 675 S.E.2d at 632. Justice (later Chief Justice) Martin, in his concurrence, elaborated on the way in which trial courts could properly exercise their discretion. He ultimately concluded the trial court should consider conducting voir dire on proffered experts in cases where "the admissibility decision may be outcome-determinative[.]" *Id.* at 152, 675 S.E.2d at 634 (Martin, J., concurring). He emphasized "the expense of voir dire examination and its possible inconvenience to the parties and the expert are justified in order to ensure a fair and just adjudication."[3] *Id.* We agree.

"[T]he voir dire procedure provides a more reliable assessment mechanism than discovery depositions or conclusory affidavits, protecting the jury from unreliable expert testimony yet preserving the jury's role in weighing the credibility of expert testimony when appropriate." *Id.* at 153, 675 S.E.2d at 634-35. By conducting voir dire in close cases, the trial court is provided with "an informed basis to guide the exercise of its discretion" *Id.* at 152, 675 S.E.2d at 634.

Indeed, in *Barringer*, this Court reversed and remanded the trial court's grant of summary judgment in favor of the defendant on the question of whether the plaintiff's expert was "sufficiently familiar with the applicable standard of care." 197 N.C. App. at 247, 261, 677 S.E.2d at 472, 474. In *Barringer*, it was unclear from the proffered expert's affidavit and subsequent deposition testimony whether he applied a national or local standard of care in forming his opinion. *Id.* at 250, 677 S.E.2d at 474. This Court, in looking at the expert's initial affidavit and subsequent deposition testimony, concluded it "present[ed] a close question" and was "undeveloped." *Id.* at 247, 250, 677 S.E.2d at 472, 474 (citing *Crocker*,

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3. Justice Martin's concurrence in *Crocker* is the controlling opinion. *See id.* at 154 n. 1, 675 S.E.2d at 635 n. 1 (Newby, J., dissenting); *see also Barringer*, 197 N.C. App. at 251 n. 4, 677 S.E.2d at 474 n. 4 ("Justice Martin's concurring opinion, having the narrower directive, is the controlling opinion . . . and requires the trial court to conduct a voir dire examination of the proffered expert witness." (citations and quotation marks omitted)).

363 N.C. at 147, 675 S.E.2d at 631). Therefore, this Court remanded the case to the trial court "with instructions to conduct a voir dire examination of [the expert] in order to 'determine the admissibility of the proposed expert testimony.' " *Id.* at 251, 677 S.E.2d at 474 (citing *Crocker*, 363 N.C. at 153, 675 S.E.2d at 634 (Martin, J., concurring)). Defendants cite *Barringer* in support of their argument for summary judgment. However, this Court concluded there "the [expert's] affidavit is plainly inconsistent with [the expert in question's] prior sworn testimony and does not create a genuine issue of fact . . . ." *Id.* at 257-58, 677 S.E.2d at 478. We conclude, in the case *sub judice*, there is a genuine issue of material fact, notwithstanding the existence of an allegedly inconsistent subsequent affidavit.

Here, the trial court granted Defendants' Motion for Summary Judgment, finding it was "undisputed" Plaintiff's expert "failed to review all medical records pertaining to Defendants' alleged negligence that were available to Plaintiff after reasonable inquiry prior to Plaintiffs' [sic] filing of her civil action." As we have noted, however, that fact is disputed by the parties and, further, the resolution of that fact is outcome determinative. Dr. Szeszycki's deposition testimony does not unequivocally establish she did or did not review Plaintiff's medical records as Defendants contend. Therefore, we conclude, as this Court did in *Barringer*, it is a "close call" whether the Record and evidence to date shows Dr. Szeszycki did or did not review Plaintiff's medical records prior to the filing of the Complaint, rendering summary judgment improper. Thus, we hold, consistent with *Crocker* and *Barringer*, the trial court should conduct a voir dire of Plaintiff's expert to "provide[ ] a more reliable assessment mechanism than discovery depositions or conclusory affidavits[.]" *Crocker*, 363 N.C. at 153, 675 S.E.2d at 634-35.

Conclusion

Based on the foregoing reasons, we vacate the trial court's 23 July 2018 Order and remand this matter to the trial court to hold a voir dire examination of Dr. Szeszycki to resolve the issue of whether Dr. Szeszycki reviewed Plaintiff's medical records in compliance with Rule 9(j) prior to the filing of the Complaint.

VACATED and REMANDED.

Judges INMAN and BROOK concur.

STATE OF NORTH CAROLINA, EX REL. ROY COOPER, ATTORNEY GENERAL, PLAINTIFF
v.
KINSTON CHARTER ACADEMY, A NORTH CAROLINA NON-PROFIT CORPORATION; OZIE L. HALL, JR., INDIVIDUALLY AND AS CHIEF EXECUTIVE OFFICER OF KINSTON CHARTER ACADEMY; AND DEMYRA MCDONALD HALL, INDIVIDUALLY AND AS BOARD CHAIR OF KINSTON CHARTER ACADEMY, DEFENDANTS

No. COA18-688

Filed 3 December 2019

1. Appeal and Error—interlocutory appeal—N.C. False Claims Act—sovereign immunity raised—substantial right

In a case brought by the State against a charter school and its CEO (defendants) for violation of the N.C. False Claims Act, defendants' interlocutory appeal from orders denying its motions to dismiss affected a substantial right where defendants raised issues of sovereign immunity. However, the appeal was limited to the denial of motions to dismiss under Rule 12(b)(6) and did not include review of the denial of a motion to dismiss under Rule 12(b)(1).

2. Immunity—sovereign—N.C. False Claims Act—charter school—extension of state

In a case brought by the State against a charter school for violation of the N.C. False Claims Act (NCFCA), sovereign immunity protected the charter school from suit because it was a public school, and therefore an extension of the state, and there was no indication that the legislature intended to waive immunity for public schools for purposes of liability under the Act. Even assuming charter schools were not categorically entitled to immunity under the NCFCA, the charter school was not a "person" subject to liability under the Act where it operated as an arm of the state in furtherance of the state constitution's mandate to provide education.

3. Immunity—public official—N.C. False Claims Act—CEO of charter school—insufficient evidence

In a case brought by the State against a charter school and its CEO for violation of the N.C. False Claims Act, the trial court properly denied the CEO's motion to dismiss under Rule 12(b)(6) where there was insufficient information in the record at the pleadings stage to determine whether public official immunity protected the CEO from suit.

4. Appeal and Error—interlocutory appeal—petition for writ of certiorari—additional issues

The Court of Appeals declined to issue a writ of certiorari to review additional issues regarding sufficiency of pleadings in an interlocutory appeal involving liability of a charter school and its officer under the N.C. False Claims Act.

Appeal by defendants Kinston Charter Academy and Ozie L. Hall, Jr. from orders entered 21 March 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 16 January 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Ozie L. Hall, Jr., pro se, defendant-appellant.

Ragsdale Liggett PLLC, by Mary M. Webb, Edward E. Coleman, III, and Amie C. Sivon, for defendant-appellant Kinston Charter Academy.

BERGER, Judge.

Plaintiff filed an action against Defendants Kinston Charter Academy ("Kinston Charter") and Ozie L. Hall ("Hall") for, among other things, violations of North Carolina's False Claims Act. On March 21, 2018, the trial court denied motions to dismiss filed by Kinston Charter and Hall (collectively, "Appellants"). Appellants now appeal the interlocutory orders denying their respective motions to dismiss. In addition, Appellants have filed petitions for writs of certiorari seeking review of the sufficiency of the State's pleadings under Rule 9 of the North Carolina Rules of Civil Procedure. For the reasons discussed below, we reverse the trial court's order denying dismissal for Kinston Charter, affirm the trial court's order denying dismissal for Hall, and deny Appellants' petitions for certiorari review.

Factual and Procedural Background

Kinston Charter is a non-profit corporation located in Kinston, North Carolina. From January 2004 to September 2013, Kinston Charter operated a public school pursuant to a charter from the North Carolina State Board of Education as provided for by Section 115C-238.29 of the North Carolina General Statutes.[1] Hall served as Kinston Charter's CEO from

1. At the relevant time herein, North Carolina charter schools were governed by Section 115C-238.29. Effective September 23, 2015, charter school governance was recodified at Section 115C-218.

2007 until 2013. Demyra McDonald-Hall served as the chairwoman of Kinston Charter's board of directors for roughly the same period of time.

In North Carolina, charter schools receive operating funds from the State on a per pupil basis. In the spring of each year, a charter school is required to provide an estimate to the Department of Public Instruction ("DPI") of its anticipated average daily membership ("ADM") for the upcoming school year. This estimate is determined by the school's current ADM plus or minus any estimated losses or increases in the student population for the upcoming year ("Estimated ADM"). During the time period relevant to this case, charter schools were permitted to submit estimated growth in student enrollment of up to twenty percent in their Estimated ADM without prior approval from the State; an increase of more than twenty percent in any given year required approval from the State Board of Education.[2] N.C. Gen. Stat. § 115C-238.29D(f)(1) (2013).

After the school year begins, charter schools must provide an average total enrollment from the first and twentieth days of the school year ("Actual ADM"). If the Estimated ADM does not align with the Actual ADM, the charter school's funding allotment is adjusted to recapture the excess funds paid to the charter school at the beginning of the school year based on its Estimated ADM.

On April 26, 2013, Hall reported to DPI an estimated enrollment for Kinston Charter of 366 students for the 2013-2014 school year. This estimate was within the statutory twenty percent growth range and did not require prior approval from the State Board of Education. However, when Kinston Charter opened for the 2013-2014 school year, the school only had 189 students in attendance—177 students less than the estimate provided by Hall, despite efforts by the school to advertise and attract additional students.

On September 4, 2013, Kinston Charter surrendered its charter to the State Board of Education. Due to the timing of the surrender, excess operating funds provided to Kinston Charter as a result of the difference between the school's Estimated ADM and Actual ADM were not recaptured by the State.

On April 26, 2016, the State of North Carolina, by and through then-Attorney General Roy Cooper, initiated this action against Kinston Charter, Hall, and McDonald-Hall. The complaint alleged violations of

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2. As of 2017, a charter school not identified as "low-performing" may now provide an Estimated ADM of up to thirty percent higher than its current ADM without seeking prior approval from the State Board of Education. N.C. Gen. Stat. § 115C-218.7(b) (2017).

the North Carolina False Claims Act ("NCFCA"), Chapter 55A of the North Carolina General Statutes ("Chapter 55A"), and the Unfair and Deceptive Trade Practices Act ("UDTPA"). Pursuant to Rule 2.1 of the General Rules of Practice for Superior and District Courts, the case was designated "exceptional."

On July 3, 2017, the trial court heard arguments on Hall and McDonald-Hall's motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On August 9, 2017, the trial court granted dismissal of the Chapter 55A and UDTPA claims against Hall in his individual capacity and denied dismissal of the NCFCA claim. The court granted dismissal of all claims against McDonald-Hall in her individual capacity.

On March 19, 2018, the trial court heard Kinston Charter's motion to dismiss pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6). The trial court also heard arguments on Hall and McDonald-Hall's 12(b)(6) motions to dismiss all charges against them in their official capacities. Additionally, the trial court heard arguments on Hall's 12(b)(1) motion to dismiss the NCFCA claim against him in his individual capacity.

On March 21, 2018, the court granted dismissal of the Chapter 55A and UDTPA claims against Kinston Charter and denied dismissal of the NCFCA claim. The court granted dismissal of all claims against Hall and McDonald-Hall in their official capacities. Additionally, the trial court denied Hall's 12(b)(1) motion to dismiss the NCFCA claim against him in his individual capacity.

Appellants now seek interlocutory review, arguing that the trial court erred in denying their motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). In addition, Appellants have filed petitions for writs of certiorari seeking interlocutory review regarding the sufficiency of the State's pleadings under Rule 9 of the North Carolina Rules of Civil Procedure. For the reasons set forth herein, we reverse the trial court's order denying dismissal for Kinston Charter, affirm the trial court's order denying dismissal for Hall, and deny Appellants' petitions for certiorari.

Scope of Review

[1] As an initial matter, we must address the scope of this Court's jurisdiction over Appellants' interlocutory appeals.

> An order is either interlocutory or the final determination of the rights of the parties . . . . An appeal is interlocutory when noticed from an order entered during the pendency

> of an action, which does not dispose of the entire case and where the trial court must take further action in order to finally determine the rights of all parties involved in the controversy.

Beroth Oil Co. v. N.C. Dep't of Transp., 256 N.C. App. 401, 410, 808 S.E.2d 488, 496 (2017) (citations and quotation marks omitted).

Ordinarily, an interlocutory order is not immediately appealable. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). However, a party may seek immediate appellate review when an interlocutory order affects a substantial right. N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a) (2017). "[T]he appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

An appeal from an interlocutory order raising issues of sovereign immunity affects a substantial right sufficient to warrant immediate review. *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209, 753 S.E.2d 822, 826 (2014). "However, this only applies for denial of a motion to dismiss under Rules 12(b)(2), 12(b)(6), and 12(c), or a motion for summary judgment under Rule 56. We cannot review a trial court's order denying a motion to dismiss under Rule 12(b)(1)." *Id.* at 209, 753 S.E.2d at 826 (citation and quotation marks omitted). Accordingly, only Appellants' challenges to the trial court's denial of their motions to dismiss under Rule 12(b)(6) based on sovereign immunity are properly before this Court.

Standard of Review

We review a trial court's denial of a motion to dismiss under Rule 12(b)(6) *de novo*. *Wray v. City of Greensboro*, 370 N.C. 41, 46, 802 S.E.2d 894, 898 (2017). "Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint fails to state a claim upon which relief can be granted." *Id.* at 46, 802 S.E.2d at 898 (*purgandum*). When ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are deemed admitted for purposes of the motion. *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015). A complaint should only be dismissed where it affirmatively appears that the plaintiff is not entitled to relief under any set of facts presented in support of the claim. *Wray*, 370 N.C. at 46, 802 S.E.2d at 898.

Analysis

Appellants contend that the trial court erred by denying their motions to dismiss under Rule 12(b)(6) because they are entitled to immunity from liability, and neither falls within the contemplated meaning of the term "person" under the NCFCA. We agree that Kinston Charter is entitled to sovereign immunity, and it is not a "person" subject to liability under the Act. However, while Hall qualifies as a "person" under the NCFCA, the record is insufficient to determine, at this stage, whether Hall is entitled to immunity in his individual capacity. Therefore, we affirm in part and reverse in part.

The North Carolina False Claims Act provides that any "person" who violates the statute by making or presenting a false claim for payment to the State "shall be liable to the State for three times the amount of damages that the State sustains because of the act of that person." N.C. Gen. Stat. § 1-607(a) (2017). The NCFCA was enacted "to deter persons from knowingly causing or assisting in causing the State to pay claims that are false or fraudulent and to provide remedies in the form of treble damages and civil penalties when money is obtained from the State by reason of a false or fraudulent claim." N.C. Gen. Stat. § 1-605(b) (2017). However, the NCFCA does not define the term "person." *See* N.C. Gen. Stat. § 1-606 (2017).

The NCFCA instructs that it should be interpreted consistently with the federal False Claims Act ("FFCA").[3] N.C. Gen. Stat. § 1-616(c) (2017). Interpreting the FFCA, the Supreme Court of the United States has stated that "the False Claims Act does not subject a State (or state agency) to liability." *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 787-88 (2000). In reaching this conclusion, the Court applied the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780. According to the Court, this presumption can only be overcome by an "affirmative showing of statutory intent to the contrary." *Id.* at 781.

I. Liability for Kinston Charter under the NCFCA

[2] Kinston Charter argues that the trial court erred when it denied its motion to dismiss under Rule 12(b)(6) because it is immune from liability under the NCFCA. We agree with Kinston Charter that, as an extension of the sovereign, it is entitled to exercise the State's sovereign immunity. Moreover, the State has failed to make any showing that

3. Notably, the FFCA also fails to define the term "person." *See* 31 U.S.C. § 3729(b) (2017).

the General Assembly intended to waive Kinston Charter's immunity so as to include public schools within the term "person" for purposes of the NCFCA. Accordingly, we reverse the trial court's denial of Kinston Charter's motion to dismiss.

In North Carolina, "[e]ducation is a governmental function so fundamental in this state that our constitution contains a separate article entitled 'Education.' " *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 10, 418 S.E.2d 648, 655 (1992). The North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. CONST. art. I, § 15. To that end, the State is required to provide "a general and uniform system of free public schools." N.C. CONST. art. IX, § 2(1). Under our Constitution, the State Board of Education is tasked with supervising and administering the free public school system. N.C. CONST. art. IX, § 5. Interpreting these provisions, our State Supreme Court has concluded "the State . . . is solely responsible for guarding and preserving the right of every child in North Carolina to receive a sound basic education." *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 856, 821 S.E.2d 755, 756 (2018).

Under Section 115C-238.29E of the North Carolina General Statutes, "[a] charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located." N.C. Gen. Stat. § 115C-238.29E(a) (2013). By the plain meaning of the statute, charter schools are public schools.

In North Carolina, public schools directly exercise the power of the State. *Bridges v. City of Charlotte*, 221 N.C. 472, 478, 20 S.E.2d 825, 830 (1942). As our Supreme Court has recognized,

> The public school system, including all its units, is under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable. When functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government, so general as to require appropriate limitations on their exercise; they express the immediate power of the State, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution, and under its direct delegation.

Id. at 478, 20 S.E.2d at 830.

Charter schools, as public schools in the State of North Carolina, exercise the power of the State and are an extension of the State itself. Therefore, as an extension of the sovereign, charter schools are entitled to exercise the State's sovereign immunity. This presumption of immunity may only be overcome by an affirmative showing that the General Assembly intended to waive sovereign immunity for all public schools so as to include them within the term "person" for purposes of the NCFCA.

Overcoming this presumption as it applies to our system of public schools presents an especially difficult burden. North Carolina public schools perform a core constitutional function of the highest order with the benefit of State appropriated funds. As previously noted, a person who violates the NCFCA is liable for treble damages. N.C. Gen. Stat. § 1-607(a). Moreover, where a private person brings a *qui tam* action under the NCFCA, he or she is eligible to receive up to thirty percent of the proceeds or settlement of the action to be paid out of the proceeds. N.C. Gen. Stat. § 1-610(e) (2017). Such a potential diversion of the State's educational funding from the public schools could detrimentally impact the ability of our schools to perform their constitutionally mandated mission. Thus, we will not lightly impart on the General Assembly an intent that goes beyond recapturing public school funding put to a wrongful purpose but also creates potentially massive payouts for private persons from funds originally earmarked for the benefit of our State's schoolchildren.

Here, the State has failed to make an affirmative showing that the General Assembly intended to waive sovereign immunity for Kinston Charter so as to include public schools, and by extension charter schools, within the term "person" for purposes of the NCFCA.

The State argues that this Court should follow *Wells v. One2One Learning Found.*, 39 Cal. 4th 1164, 141 P.3d 225 (2006), a decision from the Supreme Court of California, which concluded charter schools are not "persons" under the California False Claims Act. Bearing in mind that we are required by Section 1-616(c) to interpret the NCFCA consistently with the FFCA, we find the State's reliance on the California Supreme Court's decision unpersuasive.

In *Wells*, the Supreme Court of California held that California charter schools are "persons" within the context of the California False Claims Act. *Id.* at 1164, 141 P.3d 225. The California Supreme Court emphatically stated that its analysis was limited to the interpretation of California law. *Id.* at 1197, 141 P.3d at 241. Importantly, California's False Claims Act provides a definition for the term "person" which includes

"any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust." *Id.* at 1187, 141 P.3d at 234. The Supreme Court of California concluded that its analysis was "not affected by . . . United States Supreme Court decisions construing the federal false claims statute" because those cases applied "federal principles of statutory construction that differ from those used in [California]" to interpret a statute "distinct from its California counterpart." *Id.* at 1197, 141 P.3d at 241.

Moreover, nothing in *Wells* indicates that the California Constitution, like the North Carolina Constitution, imposes on the State itself, rather than its local subdivisions, the responsibility to provide every child with a sound basic education. In other words, under our State Constitution, every public school in North Carolina—whether traditional or chartered—*is* the State. Thus, the California Court's use of California law to interpret a California statute is decidedly unhelpful to our analysis, especially in light of the direction by the General Assembly to interpret the NCFCA consistently with federal law. *See* N.C. Gen. Stat. § 1-616(c) (2017).

Because Kinston Charter, as a public school, was engaged in a constitutionally mandated function reserved to the State, we conclude Kinston Charter is entitled to the State's sovereign immunity. Moreover, the State has failed to carry its burden of showing that the General Assembly intended to waive Kinston Charter's immunity so as to include it within the term "person" for purposes of the Act. Accordingly, the trial court erred in denying Kinston Charter's 12(b)(6) motion, and we reverse.

Even assuming, *arguendo*, that charter schools are not categorically entitled to claim sovereign immunity from the NCFCA, Kinston Charter would still not be subject to suit under an arm-of-the-state analysis applicable to entities performing State functions.

Although charter schools are considered by North Carolina law to be public schools engaged in a core governmental function mandated by our State Constitution, they are also required by statute to "be operated by a private nonprofit corporation." N.C. Gen. Stat. § 115C-238.29E(b) (2013). As previously noted, the Supreme Court of the United States has indicated that the State and its agencies are presumptively not "persons" under the FFCA. *Vt. Agency of Nat. Res.*, 529 U.S. at 782. However, in contrast, corporations "are presumptively *covered* by the term." *Id.* at 782.

In determining whether a corporation or other entity should be considered a "person" for purposes of the FFCA, the Court has noted the "virtual coincidence of scope" between this statutory inquiry and

the constitutional inquiry for determining sovereign immunity under the Eleventh Amendment. *Id.* at 779-80. As such, federal courts employ the Eleventh Amendment arm-of-the-state analysis in determining whether an entity is a "person" under the FFCA. *See United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014); *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579-80 (4th Cir. 2012); *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1121-22 (9th Cir. 2007); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006); *United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 401-02 (5th Cir. 2004). If a corporation or other entity functions as an arm of the state, then it is not a "person" for purposes of the FFCA and cannot be subject to liability under the Act. *Ky. Higher Educ.*, 681 F.3d at 580. The critical inquiry of this analysis is to determine whether the entity is "truly subject to sufficient state control to render [it] a part of the state . . . and not a 'person.' " *Id.* at 579.

The United States Court of Appeals for the Fourth Circuit has set forth a nonexclusive, four-factor review to determine whether a corporation or other entity is a "person" under the FFCA. *Id.* at 580. Under this analysis, courts must determine:

> (1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State;
>
> (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions;
>
> (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and
>
> (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.

Id. at 580 (*purgandum*). Although no single factor is determinative, the Supreme Court of the United States has found the first factor to be the most significant consideration of the arm-of-the-state analysis under the FFCA. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994). Importantly, whether a corporation or other entity is a "person" under the FFCA is a question of balance as opposed to one of math. *Pa. Higher Educ.*, 804 F.3d at 676.

Here, under the arm-of-the-state inquiry, we must first look to whether the State would likely be held responsible for any judgments obtained against Kinston Charter. *Ky. Higher Educ.*, 681 F.3d at 580.

Charter schools are funded, at least in part, by taxpayer money flowing through the State. These schools are expressly prohibited from raising private funds by charging tuition fees. N.C. Gen. Stat. § 115C-238.29F(b) (2013). As a result, any funds paid by a charter school in satisfaction of a judgment would almost certainly require the use and depletion of State funds. However, the liability of both charter schools and the State for civil judgments obtained against a charter school is limited by statute. N.C. Gen. Stat. § 115C-218.20 (2017).

Under Section 115C-218.20(a), the board of directors of a North Carolina charter school must be required by their charter to obtain a reasonable amount of liability insurance. N.C. Gen. Stat. § 115C-218.20(a). Moreover, under the statute, "*[a]ny sovereign immunity of the charter school . . . is waived to the extent of indemnification by insurance.*" N.C. Gen. Stat. § 115C-218.20(a) (emphasis added). Section 115C-218.20(b) goes on to instruct that "[n]o civil liability shall attach to the State Board of Education, the Superintendent of Public Instruction, or to any of their members or employees, individually or collectively, for any acts or omissions of the charter school." N.C. Gen. Stat. § 115C-218.20(b).

"It is a well settled principle of statutory construction that words of a statute are not to be deemed merely redundant if they can reasonably be construed so as to add something to the statute which is in harmony with its purpose." *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 7 (1968). When possible, our courts must construe the separate parts or sections of a statute as a cohesive and connected whole, thereby giving effect to the intention of the General Assembly. *Jones v. Bd. of Educ.*, 185 N.C. 303, 307, 117 S.E. 37, 39 (1923).

Reading Section 115C-218.20(b) alone, the State argues that the first factor of the arm-of-the-state analysis weighs against Kinston Charter because the State is not responsible for civil judgments against the charter school. However, this argument ignores the legislative intent of Section 115C-218.20 by only giving effect to subsection (b). When Section 115C-218.20 is read in its entirety, as a cohesive and connected whole, it is apparent that the General Assembly intended to shield North Carolina charter schools, the State Board of Education, and the Superintendent of Public Instruction from civil liability absent waiver.

As originally enacted in 1996, the section of the Charter Schools Act detailing civil liability and insurance requirements for North Carolina

charter schools made no mention of charter school immunity from civil liability. *See* N.C. Gen. Stat. § 115C-238.29F(c) (Cum. Supp. 1996). Rather, the section only discussed waiver of immunity by the State Board of Education to the extent of indemnification by insurance and operation of the Torts Claims Act under specified circumstances. N.C. Gen. Stat. § 115C-238.29F(c)(2) (Cum. Supp. 1996).

In 1997, the section was amended to include the language, "Any sovereign immunity of the charter school, of the organization that operates the charter school, or its members, officers, or directors, or of the employees of the charter school or the organization that operates the charter school, is waived to the extent of indemnification by insurance." N.C. Gen. Stat. § 115C-238.29F(c)(1) (1997). The General Assembly also deleted the language discussing waiver of immunity by the State Board of Education. *See* N.C. Gen. Stat. § 115C-238.29F(c) (1997). Following the amendment, Subsection (c)(2) read in its entirety, "No civil liability shall attach to any chartering entity, to the State Board of Education, or to any of their members or employees, individually or collectively, for any acts or omissions of the charter school." N.C. Gen. Stat. § 115C-238.29F(c)(2) (1997).

Assuming that the 1997 amendment was intended by the General Assembly to contribute to the operation of the statute, rather than serve as a mere redundancy, Section 115C-238.29F(c)(1), as revised, was designed to acknowledge that North Carolina charter schools enjoy the State's sovereign immunity, but waived charter school immunity to the extent of indemnification by insurance. This construction of the section permits subsections (a) and (b) of the modern-day Section 115C-218.20 to be read as a cohesive and connected whole, thereby giving effect to the intention of the General Assembly.

Thus, while the State is correct that no liability for civil judgments obtained against a charter school attaches directly to the State Board of Education or the Superintendent of Public Instruction, it is similarly true that no liability attaches to charter schools themselves, beyond the extent of indemnification by insurance, absent waiver. N.C. Gen. Stat. § 115C-218.20; *see also* § 115C-218.105(b) (eliminating State liability for charter school contractual indebtedness); *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976) (explaining that exercise of the State's sovereign immunity is implicitly waived by entering into a valid contract).

Turning to the second factor, we must examine the degree of autonomy exercised by Kinston Charter. *Ky. Higher Educ.*, 681 F.3d at 580.

North Carolina charter schools are operated by private, nonprofit corporations. N.C. Gen. Stat. § 115C-238.29E(b). Additionally, a

charter school's board of directors, and not the State, is empowered to decide those matters "related to the operation of the school, including budgeting, curriculum, and operating procedures." N.C. Gen. Stat. § 115C-238.29E(d).

Charter schools are funded by the State Public School Fund and a per pupil share of the local current expense fund. *Sugar Creek Charter Sch., Inc. v. State*, 214 N.C. App. 1, 10-11, 712 S.E.2d 730, 736 (2011). The autonomy of charter schools in North Carolina is limited by regulatory and reporting requirements mandated by the General Assembly. A charter school is required to apply for a charter with the State Board of Education, must seek approval of material revisions to its charter with the Board, and must have its original board of directors approved by the Board. N.C. Gen. Stat. §§ 115C-238.29B(a), 115C-238.29D(e). Charter schools are prohibited from affiliating with religious institutions. N.C. Gen. Stat. § 115C-238.29F(b). Charter schools must also abide by State-mandated health and safety standards, instructional guidelines, and admission requirements. N.C. Gen. Stat. § 115C-238.29F(a), (d), (g). Additionally, charter schools are required to meet certain educational proficiency standards established by the State. N.C. Gen. Stat. § 115C-238.29F(d1). Charter schools are also subjected to regular financial auditing requirements adopted by the State Board of Education and must report audit results to the Board at least annually. N.C. Gen. Stat. § 115C-238.29F(f).

For failure to meet the conditions, standards, or procedures set forth in its charter or those additional requirements set forth in Section 115C-238.29F, the State Board of Education is empowered to "terminate, not renew, or seek applicants to assume [a school's] charter." N.C. Gen. Stat. § 115C-238.29G(a) (2013). Accordingly, a charter school's autonomy only extends as far as its compliance with its Board-approved charter and oversight by DPI.

Under the third factor, we must decide whether Kinston Charter is involved with state concerns as distinct from non-state or local concerns. *Ky. Higher Educ.*, 681 F.3d at 580. As previously noted, the Supreme Court of the United States has deemed the first factor of this analysis to be most significant within the context of the FFCA. *Port Auth. Trans-Hudson Corp.*, 513 U.S. at 48. However, as it concerns interpretation of the NCFCA, we are compelled by the educational mandate of our State Constitution to attach special significance to this factor of the analysis.

As discussed at length above, the North Carolina Constitution requires that the "right to the privilege of education" be zealously guarded

and maintained by the State. N.C. CONST. art. I, § 15. The constitutional right to education culminates in the State's obligation to provide for "a general and uniform system of free public schools." N.C. CONST. art. IX, § 2. As our Supreme Court has explained, our Constitution makes the State solely responsible for ensuring "the right of every child in North Carolina to receive a sound basic education." *Silver*, 371 N.C. at 856, 821 S.E.2d at 756.

Finally, we must examine the relationship between Kinston Charter and the State as established by state law. *Ky. Higher Educ.*, 681 F.3d at 580.

The General Assembly authorized the creation of charter schools to "provide opportunities for teachers, parents, pupils, and community members" to further the State's constitutionally mandated educational mission. N.C. Gen. Stat. § 115C-238.39A(a). Under Section 115C-238.29E, "[a] charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located." N.C. Gen. Stat. § 115C-238.29E(a). As previously discussed, in North Carolina, public schools directly exercise the power of the State. *Bridges*, 221 N.C. at 478, 20 S.E.2d at 830. As a unit of the public school system, charter schools are "under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable." *Id.* at 478, 20 S.E.2d at 830. Moreover, when functioning within this sphere, charter schools "do not exercise derived powers . . . so general as to require appropriate limitations on their exercise; they express the immediate power of the State." *Id.* at 478, 20 S.E.2d at 830.

Thus, even if we were not persuaded, as a matter of law, that charter schools are categorically entitled to claim sovereign immunity from the NCFCA, after considering and balancing all of the applicable factors of the arm-of-the-state inquiry, and despite the presumption for inclusion of corporate entities under the Act, we conclude that charter schools are not "persons" for purposes of the NCFCA. Therefore, because the General Assembly has not waived Kinston Charter's entitlement to the State's sovereign immunity under the NCFCA, the trial court erred by denying Kinston Charter's motion to dismiss under Rule 12(b)(6).

II. Liability for Hall under the NCFCA

[3] Hall similarly argues that the trial court erred when it denied his motion to dismiss under Rule 12(b)(6) because he is immune from liability under the NCFCA in his individual capacity. Specifically, Hall contends that he should not be considered a "person" for purposes of

the Act because he is a public official and is entitled to public official immunity. At this stage of the proceedings, viewing the material allegations of the State's complaint as admitted for purposes of the motion to dismiss, we conclude that there is insufficient information in the record to determine if he is entitled to public official immunity to defeat the State's claim.

As previously noted, when ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are deemed admitted for purposes of the motion. *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 7. A complaint should only be dismissed where it affirmatively appears that the plaintiff is not entitled to relief under any set of facts presented in support of its claim. *Wray*, 370 N.C. at 46, 802 S.E.2d at 898.

In North Carolina, a public official may be entitled to assert immunity even as to claims against the official in his individual capacity. *Isenhour v. Hutto*, 350 N.C. 601, 609-10, 517 S.E.2d 121, 127 (1999). Under the doctrine of public official immunity, "a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Id.* at 609, 517 S.E.2d at 127. "Negligence" simply amounts to "the lack of reasonable care." *Bashford v. N.C. Licensing Bd. for Gen. Contr'rs*, 107 N.C. App. 462, 466, 420 S.E.2d 466, 469 (1992). Our courts allow for this immunity because "it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be held personally liable for acts or omissions involved in the exercise of discretion and sound judgment." *Miller v. Jones*, 224 N.C. 783, 787, 32 S.E.2d 594, 597 (1945).

However, public official immunity is not limitless. A public official is liable for actions taken while engaged in the performance of governmental duties if those actions were corrupt, malicious, or outside the scope of his duties. *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). Additionally, public official immunity does not extend to public employees. *Miller*, 224 N.C. at 787, 32 S.E.2d at 597. A public employee can be held "individually liable for negligence in the performance of his duties, notwithstanding the immunity of his employer." *Id.* at 787, 32 S.E.2d at 597. In distinguishing between a public official and public employee, "[o]ur courts have recognized several basic distinctions . . . including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127.

While the doctrine of public official immunity protects a public official from liability for acts of negligence, under the NCFCA, liability only attaches where a person "knowingly" commits one of the acts listed under Section 1-607(a). N.C. Gen. Stat. § 1-607(a). "Knowledge" involves an awareness or understanding of the surrounding circumstances. *Knowledge*, BLACK'S LAW DICTIONARY (8th ed. 2004). To act "knowingly" requires more than the culpable carelessness inherent to mere negligence. *See Bashford*, 107 N.C. App. at 466, 420 S.E.2d at 469.

Here, the State alleged in the complaint that Hall knowingly made "false or fraudulent statements in connection with receiving state funds" in violation of the NCFCA. Therefore, at this early stage of the proceedings, viewing the material allegations of the State's complaint as admitted for purposes of Hall's motion to dismiss, Hall has not yet raised sufficient evidence of his entitlement to public official immunity to defeat the State's claim.

This is not to say that a charter school official cannot enjoy immunity in his or her individual capacity, nor that a charter school official cannot assert public official immunity to defeat a claim brought under the NCFCA where the record indicates his or her actions amount only to negligence. We merely conclude that, at the pleadings stage, the record contains insufficient evidence to determine whether Hall is entitled to assert public official immunity and, if so, whether Hall's actions amounted only to negligence. Thus, the trial court did not err by denying Hall's motion to dismiss under Rule 12(b)(6).

III. Appellants' Requests for Certiorari Review

[4] Finally, Appellants seek certiorari review of the sufficiency of the State's pleadings under Rule 9 of the North Carolina Rules of Civil Procedure. Having determined that Kinston Charter is immune from liability under the NCFCA and that there is insufficient evidence in the record to determine whether Hall is entitled to assert immunity, in our discretion, we decline to grant Appellants' petitions for writs of certiorari.

Rule 21 of the North Carolina Rules of Appellate Procedure authorizes this Court to issue a writ of certiorari: (1) when the right to prosecute an appeal has been lost by failure to take timely action; (2) when no right of appeal from an interlocutory order exists; or (3) to review a trial court's ruling on a motion for appropriate relief. N.C.R. App. P. 21(a)(1). However, given this Court's general policy against piecemeal appellate review, in our discretion, we decline to issue a writ of certiorari on

Appellants' remaining claims. *See Harbour Point Homeowners' Ass'n v. DJF Enters.*, 206 N.C. App. 152, 165, 697 S.E.2d 439, 448 (2010).

Conclusion

For the reasons set forth herein, we reverse the trial court's order denying dismissal for Kinston Charter, affirm the trial court's order denying dismissal for Hall, and decline Appellants' petitions for writs of certiorari.

AFFIRMED IN PART AND REVERSED IN PART.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
JEFFERY WADE DOSS, DEFENDANT

No. COA19-284

Filed 3 December 2019

Appeal and Error—interlocutory appeal—prayer for judgment continued—motion for final judgment

Where defendant, a West Virginia resident, became ineligible for a concealed carry permit in West Virginia because a North Carolina trial court had previously entered a prayer for judgment continued (PJC) after finding defendant guilty of assault on a female, defendant could not appeal the denial of his motion for a final judgment on the assault charge. Defendant's appeal was interlocutory and, therefore, required dismissal because he failed to file a petition for a writ of certiorari. Moreover, because defendant had consented to the PJC by paying court costs (as a condition of the PJC), he had already waived his right of appeal in the case.

Appeal by Defendant from order entered 4 January 2019 by Judge Lawrence J. Fine in Forsyth County District Court. Heard in the Court of Appeals 2 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tammera S. Hill, for the State.

Law Offices of J. Scott Smith, by J. Scott Smith, for Defendant-Appellant.

DILLON, Judge.

Twenty years ago, in 1999, Defendant Jeffery Wade Doss was found guilty of assault on a female in Forsyth County District Court. The trial court entered a prayer for judgment continued (PJC) on that charge. Two years ago, in 2017, Defendant, now residing in West Virginia, was informed that he was ineligible for a concealed carry permit due to the 1999 matter. A year later, in 2018, Defendant moved the Forsyth County District Court to enter a final judgment on his 1999 matter, presumably so that he could (1) appeal the matter to superior court in hopes that the State would then be forced to dismiss the charge due to the staleness of the matter and (2) he could then regain his concealed carry permit in West Virginia. However, by order entered 4 January 2019, the district court denied Defendant's motion. Defendant appeals from that order.

I. Background

In May of 1999, Defendant was charged with and found guilty of assault on a female in district court. The record contains a 2018 correspondence from the Clerk of Court in Forsyth County certifying that all of its records concerning the 1999 matter have been destroyed/purged "in accordance with the retention period established by the History Department of Cultural Resources and endorsed by our Administrative Office of the Court."

The record, though, also contains a printout of information concerning Defendant's 1999 matter contained on the Automatic Criminal/Infraction System (ACIS) maintained by our judicial branch. The ACIS printout records that (1) Defendant pleaded "not guilty" of assault on a female, (2) the trial court found him "guilty," (3) rather than imposing judgment, such as a fine or term of imprisonment, the trial court entered a PJC, and (4) the trial court ordered Defendant to pay, and Defendant in fact did pay, $86.00 in court costs.

Almost two decades later, Defendant applied in West Virginia to have his concealed carry permit renewed. However, on 21 February 2017, upon learning of the 1999 matter, West Virginia sent Defendant a letter revoking his permit because (1) his 1999 Forsyth County case resulted in a conviction for a crime involving "domestic violence,"[1] and (2)

1. The record shows that West Virginia based its belief that Defendant had been convicted of a "domestic violence" offense based on a letter received from the Forsyth

Defendant had misstated on his renewal application that he had "never been convicted of an act of violence or an act of Domestic Violence[.]"[2]

In August 2018, Defendant filed a Motion to Enter Judgment in his 1999 case in district court. Defendant's apparent reason for filing the motion was as follows: (1) he wanted a final judgment to be entered (2) so that he could appeal that judgment to the superior court for a trial *de novo* (3) whereupon his case would most likely be dismissed by the State, as it would be all but impossible for the State to retrieve any evidence of the 1999 incident and (4) with the 1999 charge dismissed, he would be most likely eligible under West Virginia law for a concealed carry permit. Defendant's Motion, however, was denied by the district court, reasoning that it did "not have statutory authority" to grant the motion.

Defendant appeals.

II. Jurisdiction

To be properly before this Court, there must be a conviction or a guilty plea amounting to a final judgment in a criminal case. *See State v. Pledger*, 257 N.C. 634, 638, 127 S.E.2d 337, 340 (1962) ("A defendant is entitled to appeal only from a final judgment."). A PJC, by definition, places the entry of a potential final judgment on hold until the court is ready to address the matter, or in some cases, the matter is postponed indefinitely. *See State v. Southern*, 71 N.C. App. 563, 566-67, 322 S.E.2d

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County Office of District Attorney that Defendant's 1999 assault on a female case "was in fact a domestic violence case [as] the victim in the case has the same last name, same home address as the [D]efendant."

We note, though, that the ACIS record conflicts with the representation made in the letter from the Forsyth County DA to West Virginia. Specifically, the ACIS record indicates that the trial court found Defendant's 1999 assault on a female did *not* involve an act of "domestic violence." On the ACIS record, the letter "N" (meaning "No") is shown in the field next to the letters "DV CV," (meaning "Domestic Violence Convicted"). The ACIS record of the 1999 matter does not indicate the name or address of the victim. There is a "Complainant" listed on the ACIS record; however, that person named is the arresting officer.

2. It could be argued that Defendant's representation on his concealed carry application, that he had not been "convicted" of a violent crime, was not a misrepresentation. That is, it could be argued that the question is ambiguous and that Defendant, in good faith, believed that the PJC meant that he never had to represent that he had been "convicted" of the charge. Indeed, while there are cases that indicate that a PJC constitutes a "conviction" in some circumstances, *see, e.g.*, *Britt v. N.C. Sheriffs' Educ.*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998), there are others holding that a PJC is *not* a "final conviction" in other circumstances, *see, e.g.*, *Walters v. Cooper*, 226 N.C. App. 166, 170, 739 S.E.2d 185, 188, *aff'd per curiam* 367 N.C. 117, 748 S.E.2d 144 (2013).

617, 619-20 (1984), *affirmed*, 314 N.C. 110, 331 S.E.2d 688 (1985).[3] Thus, PJCs are interlocutory orders by nature.

Defense counsel, here, argues that the interlocutory appeal may be heard because Defendant has substantial rights that have been interfered with by the inability to obtain a concealed carry permit. However, the authority he uses to support this argument is N.C. Gen. Stat. § 7A-27(b). This statute, though, only applies to interlocutory orders in *civil* cases. Interlocutory criminal appeals are reviewable by our Court in the event that the defendant files a petition for writ of *certiorari*, where we can use our discretion to hear the merits of an otherwise barred case. *See* N.C. Gen. Stat. § 15A-1444(d) (2018). However, Defendant has not filed a petition for writ of *certiorari*.

Therefore, this appeal before our Court is interlocutory, and Defendant has no right of appeal.

We note that if there was a right to appeal, it would generally lie in the superior court. N.C. Gen. Stat. § 15A-1431.

In any event, we note that Defendant could petition the superior court for a writ of *certiorari* to review the matter pursuant to N.C. R. Super. & Dist. Cts. Rule 19. *See State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832 (1993) (holding that a superior court's authority to issue a writ of *certiorari* to review matters from the district court pursuant to Rule 19 of the General Rules of Practice are analogous to our Court's right to issue such writs pursuant to Section 7A-32(c)).

For our part, we are not inclined to treat Defendant's brief as a petition for a writ of *certiorari* to aid in our jurisdiction. In his 1999 case, Defendant consented to the entry of the PJC, as he agreed to pay, and did pay, costs as a condition. That is, though the requirement to pay costs is not a condition which would convert a PJC to a final judgment, a trial court may not require a defendant to pay costs as a condition of a PJC without the defendant's consent. And where a defendant has consented

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3. We note that a PJC may convert into a final judgment where the trial court imposes conditions "amounting to a punishment," that is any condition beyond the payment of court costs or a requirement that the defendant obey the law. *See State v. Griffin*, 246 N.C. 680, 683, 100 S.E.2d 49, 51 (1957) (stating that a PJC converts to a final judgment in certain situations); *see also State v. Crook*, 115 N.C. 760, 764, 20 S.E. 513, 515 (1894) (holding that the payment of costs is not considered a punishment in criminal prosecutions); *see also State v. Brown*, 110 N.C. App. 658, 659-60, 430 S.E.2d 433, 434 (1993) (stating that a PJC does not convert to a final judgment where the trial court only imposes court costs or a condition to obey the law). In this case, the record shows that the trial court only ordered Defendant to pay costs; therefore, his 1999 PJC did not convert into a final judgment.

to the PJC, he "waives or abandons his right to appeal." *Griffin*, 246 N.C. at 682, 100 S.E.2d at 51.

It is apparent, here, that Defendant accepted a deal in 1999 to avoid criminal punishment (fine or imprisonment) by paying costs. It would seem unfair to the State to allow Defendant to renege on the deal twenty years later and be allowed to appeal to the superior court for a trial *de novo*, which would most certainly result in a dismissal of his charges altogether.[4]

III. Conclusion

We hold that this appeal is not properly before our Court and dismiss it accordingly.

DISMISSED.

Judges STROUD and YOUNG concur.

4. The General Assembly has authorized *the State* to move for appropriate relief to enter a final judgment where a PJC had been previously granted. N.C. Gen. Stat. § 15A-1416 (b)(1). However, the General Assembly has not granted a defendant this same right. It seems that the State is granted this right as an enforcement mechanism to address situations where a defendant who has received a PJC has not satisfied the conditions imposed by the court in exchange for the PJC.

STATE OF NORTH CAROLINA
v.
DEJAUN EVANS, DEFENDANT

No. COA19-330

Filed 3 December 2019

1. Criminal Law—procedure—extension of session of court

The Court of Appeals rejected defendant's argument that the trial court violated the rule against judgments entered out of session by failing to extend the session of court in which his trial began. Pursuant to N.C.G.S. § 15-167, which allows a trial judge to extend a session of court if a felony trial is in progress on the last Friday of that session, the trial court properly announced a weekend recess in open court, and there was no objection from either party. The trial judge's reference to her subsequent commission in declining to make findings in support of the extension of session was not a refusal to extend the session.

2. Jury—question from the jury—request for clarification by trial court—delivered by bailiff—prejudice analysis

Even assuming that the trial court erred by responding to a question from the jury by having the bailiff read to the jury the court's written request for clarification, defendant failed to demonstrate prejudice. The trial court's instructions to the bailiff were clear and unambiguous, there was no objection from defendant, and the message did not relate to defendant's guilt or innocence.

Appeal by Defendant from judgements entered 21 August 2018 by Judge Athena F. Brooks in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for Defendant-Appellant.

INMAN, Judge.

Dejaun Evans ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of robbery with a dangerous weapon,

conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. On appeal, Defendant contends that the trial court erred by: (1) failing to extend the session of court in which his trial began, resulting in entry of judgment out of session and without jurisdiction; and (2) responding to a question from the jury with a written request for clarification read to the jury by the bailiff, in violation of criminal procedure statutes. After careful review, we hold that Defendant has failed to demonstrate reversible error.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant was arrested on 29 April 2016 by the Charlotte-Mecklenburg Police Department in connection with a robbery after being identified in a photo lineup by the victim. Defendant was indicted for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon on 9 May 2016. He was initially tried on these charges in September of 2017; that trial ended in a mistrial after the jury was unable to reach a unanimous verdict.

Defendant's second trial began on 15 August 2018 in Mecklenburg County, and included an additional charge for possession of a firearm by a felon. Special Superior Court Judge Athena Brooks presided over the trial pursuant to a commission "begin[ning] August 15, 2018 and continu[ing] Three Days or until business is completed." Judge Brooks was also assigned by separate commission to hold court in Mecklenburg County for the following week beginning 20 August 2018.[1]

On 17 Friday 2018, at the conclusion of the third day of trial, Judge Brooks called a weekend recess. Following the jury's departure from the courtroom, the prosecutor asked if "it would be appropriate at this time to make findings why we're holding this session to next week[.]" Judge Brooks replied, "I have the commission next week is—I have on the road commission." The prosecutor concluded the exchange by responding "Understood. I didn't know if that had to be on the record." The trial resumed the following Monday, 20 August 2018, in a different courtroom without any further comment on the weekend recess by the court or counsel.

The State and Defendant rested their cases later that day and court recessed for the evening. The next morning, Judge Brooks instructed

1. We take judicial notice of these commissions, which were included in an appendix to Defendant's brief and are relied upon by both parties in their arguments before this Court. *See Baker v. Varser*, 239 N.C. 180, 186, 79 S.E.2d 757, 762-63 (1954) (taking judicial notice of a superior court judge's commission).

the jury on the pertinent law, which included the following instruction on photographic lineup evidence consistent with the Eyewitness Identification Reform Act, N.C. Gen. Stat. §§ 15A-284.50 *et seq*. (2019):

> THE COURT: . . . A photo lineup conducted by a local law enforcement agency is required to meet all of the following requirements:
>
> . . . .
>
> The photograph of the suspect shall be contemporaneous and, to the extent practicable, shall resemble the suspect's appearance at the time of the offense.

Once Judge Brooks completed the instructions, the jury left the courtroom to begin its deliberations in a jury room.

Later the same day, the jury sent a written note to the trial court requesting: (1) an opportunity to review a tape recording that had been entered into evidence; (2) instruction on whether the jury was required to find Defendant guilty of all charges, or if it could find Defendant not guilty as to some; (3) instruction on "[h]ow . . . 'contemporary photo' [is] defined by the court[;]" and (4) a copy of the jury instructions. The trial court read each request aloud, and engaged in the following discussion with the parties:

> THE COURT: All right. Number 3, I don't understand. It says how is contemporary photo defined by the Court. I don't know if that's my accent that came out as contemporary or if the words got confused by the jury. I simply will need more information to answer that. Any position for the state?
>
> [THE PROSECUTOR]: The state would agree.
>
> THE COURT: Anything for the defendant?
>
> [DEFENDANT'S COUNSEL]: In the Eyewitness Identification Reform Act, it says contemporary photo.
>
> . . . .
>
> THE COURT: I just want to make sure it's not my accent or my using the jury instruction. I just don't know.
>
> . . . .
>
> [THE PROSECUTOR]: . . . I would say that based on the question, it could be what [Defendant's counsel] is saying,

> it could be some other things, I would simply tell the jury that we're unclear what their question is, if they could define it further and we could readdress it.
>
> THE COURT: Just to make sure that that's what they're talking about.
>
> [DEFENDANT'S COUNSEL]: Doesn't the jury instruction say a contemporaneous photo album?
>
> . . . .
>
> THE COURT: Okay. It says contemporary.
>
> . . . .
>
> How is contemporary photo defined, I'm going to ask for a little more clarification as to that. I guess basically just ask them is it contemporary photo in regard to the lineup or something else just so I'll know where the words come from. I mean, I don't know how to get to that point other than flat out asking.
>
> [DEFENDANT'S COUNSEL]: Yeah. I think that's the only—the word contemporary, I think, in this trial has only been used at any point one time, and that was during jury instruction. No one has said contemporary other than jury instruction, and that word only appears in the eyewitness identification.
>
> THE COURT: And if it comes back to that's what it is, I'm going to tell them to use their normal understanding of the word.
>
> [DEFENDANT'S COUNSEL]: And could you ask them to rely on the evidence that was given at the trial?
>
> THE COURT: Yes, sir. I always do that.

The trial court also engaged in the following discussion concerning the request for a copy of the jury instructions:

> THE COURT: . . . As opposed to giving them all of these [instructions], because there's a lot of notes and stuff, I would ask them to say which one specifically are you requesting so that we can sanitize it out of the law that's always in the footnotes and stuff before we give it to them. I don't have a problem giving it to them, but . . . I'd rather

> give them one which conforms to the several that they're specifically asking about.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: I would ask what—if they do want specific ones, and then ask—or do they want all of them, because they may want all of them.
>
> THE COURT: If they want all of them, I'm giving it.
>
> . . . .
>
> I'm going to ask them specifically which instruction or all.

Having resolved to ask the jury to clarify these two questions, counsel and the court turned their discussion to how to convey the request for clarification to the jurors. Judge Brooks asked the bailiff to deliver the request by reading the jury a written note, at which time the prosecutor asked for a bench conference. That conference was held off the record. The recorded proceedings resumed as follows:

> THE COURT: I'm going to send this [written note[2]] back. And this will be part of the file. And you could ask these two questions in regard to three and four. Don't engage in a colloquy back and forth. Just say the judge has these questions, I need an answer to these questions.
>
> THE DEPUTY: Got you.
>
> THE COURT: And read them only as they're asked so we have them in the record what we're reading.
>
> . . . .
>
> THE DEPUTY: Right.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: Your Honor should the question be presented to them in court on the record as opposed to –
>
> THE COURT: The problem is, is if I ask them the question in court, then they may have to communicate, and we can't

2. Judge Brooks's note is included in the record, and reads: "(3) Contemporary photo as to line up request or other. (4) Which instruction or all?"

> be a part of their understanding. That's why I was going to go ahead in the jury room, because they may have to have some conversation about which instruction, et cetera, and I don't want to be a part of that.
>
> [DEFENDANT'S COUNSEL]: Can a deputy?
>
> THE COURT: He is sworn since he's with the jury. If they start having colloquy, he knows to step out.
>
> [DEFENDANT'S COUNSEL]: Well, that's my understanding.
>
> THE COURT: And I don't want him to be standing there staring at them while they're talking. If they have a conversation, he'll step out. It may be the answer is very quick, it may be they need to communicate. If you'll just radio and remind them –
>
> THE DEPUTY: Your Honor, the procedure is if you send a note back, we'll advise the judge wants you to answer these questions, they'll answer them and come back.
>
> . . . .
>
> We would never ever listen to deliberations. Once this starts, we're out. I tell them we want to get out.

The jury returned written answers to the court's inquiry, apparently on the same note they originally sent to the court, informing Judge Brooks that the jury was requesting: (1) a definition of "contemporary photo . . . [a]s to line up requirements[;]" and (2) "[i]nstructions for how a line up should be complied [sic] and the seven elements of 'Robbery with a firearm.' " With the clarifications in hand, and outside the presence of the jury, Judge Brooks suggested proposed responses to each request—neither counsel for the State nor Defendant objected. Judge Brooks called the jury back into the courtroom and provided the additional instructions.

The jury ultimately found Defendant guilty on all charges. The trial court consolidated Defendant's convictions for conspiracy and armed robbery and sentenced him to 70 to 96 months imprisonment. The trial court imposed a second, consecutive sentence of 12 to 24 months imprisonment for possession of a firearm by a felon. In addition, the trial court assessed court costs and restitution in the total amount of $1,738.99. Defendant entered written notice of appeal.

II. ANALYSIS

A. Standard of Review

Defendant's assertion that the trial court failed to properly extend the session in which the trial began implicates the trial court's jurisdiction, a question we review *de novo*. *State v. Lewis*, 243 N.C. App. 757, 761, 779 S.E.2d 147, 149 (2015). We apply that same standard to Defendant's argument that the trial court committed statutory error in seeking clarification from the jury through a written note delivered by the bailiff. *See State v. Mackey*, 209 NC App 116, 120, 708 S.E.2d 719, 721 (2011) ("Alleged statutory errors are questions of law, and as such, are reviewed *de novo*." (citations omitted)).[3]

B. Session of Court

[1] Defendant first contends that the trial court failed to extend the session of court in which his trial began, violating the rule against judgments entered out of session. *See State v. Boone*, 310 N.C. 284, 288, 311 S.E.2d 552, 555 (1984) (holding an order entered out of session was "null and void and of no legal effect" (citation omitted)), *superseded on other grounds as recognized by State v. Oates*, 366 N.C. 264, 267, 732 S.E.2d 571, 574 (2012). We disagree.

N.C. Gen. Stat. § 15-167 (2019) allows a trial judge to extend a session if a felony trial is in progress on the last Friday of that session. Such an extension is validly accomplished when the trial court announces a weekend recess in open court without objection from the parties. *State v. Locklear*, 174 N.C. App. 547, 551, 621 S.E.2d 254, 257 (2005).

Judge Brooks announced the weekend recess without objection by the parties and, consistent with *Locklear*, validly extended the session pursuant to N.C. Gen. Stat. § 15-167. Although she was asked and declined to make explicit findings on the record in support of that extension, her decision not to make those findings because she would already be present in Mecklenburg County under a subsequent commission does not constitute an "express[] refus[al] . . . to extend the session," as argued by Defendant. A decision not to make findings in support of a

3. Defendant assigns error only to the method by which the trial court's clarifying request was delivered to the jury; he does not contend that the contents of the request or the decision to seek clarification were erroneous. Those issues would potentially be subject to different standards of review, depending on the nature of the arguments presented. *See, e.g.*, *State v. Edwards*, 239 N.C. App. 391, 392-93, 768 S.E.2d 619, 620-21 (2015) (recognizing that some jury instruction challenges are subject to the abuse of discretion standard while others are reviewed *de novo*).

ruling is distinct from a decision on the ruling itself. "Unless the contrary appears, it is presumed that judicial acts and duties have been duly and regularly performed[,]" *Hamlin v. Hamlin*, 302 N.C. 478, 486, 276 S.E.2d 381, 387 (1981) (citations omitted), and we will not read the trial judge's reference to her subsequent commission in declining to make findings to support an extension of the session as an explicit refusal to extend the session.

C. Note to the Jury

[2] Defendant next contends that the trial court, in seeking clarification on a jury request through a message delivered by the bailiff, violated: (1) N.C. Gen. Stat. § 15A-1234(a) (2019), which permits a judge to "[r]espond to an inquiry of the jury made in open court" with further instruction; (2) N.C. Gen. Stat. § 15A-1234(d) (2019), which requires that "[a]ll additional instructions . . . be given in open court[;]" and (3) N.C. Gen. Stat. § 15A-1236(c) (2019), which provides that "[i]f the jurors are committed to the charge of an officer, he must . . . not . . . permit any person to speak or otherwise communicate with them on any subject connected with the trial nor . . . do so himself[.]" Mere violation of these statutes is not enough for Defendant to prevail on appeal, however, as he must also demonstrate prejudice. *See, e.g.*, *State v. Thibodeaux*, 341 N.C. 53, 62, 459 S.E.2d 501, 507 (1995) (requiring a defendant to show prejudice to prevail on appeal for violation of N.C. Gen. Stat. § 15A-1236); *State v. Robinson*, 160 N.C. App. 564, 568-69, 586 S.E.2d 534, 537 (2003) (applying the prejudicial error standard to a violation of N.C. Gen. Stat. § 15A-1234).

Assuming, *arguendo*, that Judge Brooks committed statutory error, Defendant has failed to show prejudice. Defendant seeks to analogize his appeal to cases in which the trial judge communicated to the jury only through the jury foreperson; in those instances, our appellate courts have identified prejudice in the risk that the foreperson would inaccurately recount the communication with the judge to the rest of the jury. *State v. Ashe*, 314 N.C. 28, 37-38, 331 S.E.2d 652, 657-58 (1985); *Robinson*, 160 N.C. App. at 569, 586 S.E.2d at 537. Under our caselaw, however, no prejudice results from messages relayed from the court to the jury by a bailiff where: (1) "the record 'affirmatively reveals exactly what the trial court intended to say to the . . . jurors' [through the bailiff] and there was 'no indication that anything to the contrary occurred[;]' " (2) there was "no objection from defendant[;]" and (3) "the communications '[did] not relate to defendant's guilt or innocence[,] . . . nor would defendant's presence have been useful to his defense[,]' " and thus were not " 'an instruction as to the law' outside the presence of a . . . defendant."

State v. Badgett, 361 N.C. 234, 254, 644 S.E.2d 206, 218 (2007) (quoting *State v. Gay*, 334 N.C. 467, 482, 434 S.E.2d 840, 848 (1993)). Although *Badgett* and *Gay* did not expressly analyze messages to jurors from bailiffs under the statutes at issue in this appeal, we have relied on them to determine whether reversible error arose in alleged violations of N.C. Gen. Stat. §§ 15A-1234 and -1236. *See State v. Corum*, 176 N.C. App. 150, 157-58, 625 S.E.2d 889, 894 (2006) (holding, based on *Gay*, that the defendant failed to show reversible error for violations of N.C. Gen. Stat. §§ 15A-1234 and -1236 when the trial court communicated an instruction to the jury through a bailiff); *State v. Lewis*, 214 N.C. App. 195, 714 S.E.2d 530, 2011 WL 3298882, *8-*9 (2011) (unpublished) (relying on *Gay*, *Badgett*, and *Corum* to hold that a defendant failed to demonstrate prejudicial error for violation of N.C. Gen. Stat. § 15A-1234(d) when the trial judge conveyed an instruction to the jury via a bailiff).

Here, the trial judge's instructions to the bailiff were clear and unambiguous. The bailiff confirmed that he understood the judge's directions on the record multiple times, and explained that he would only step into the jury room, convey the message, and then immediately leave prior to any colloquy. Defendant's counsel did ask whether the judge needed to call the jurors in and whether a deputy could deliver the court's request, but did not object to the procedure:

> [DEFENDANT'S COUNSEL]: Can a deputy?
>
> [THE COURT]: He is sworn since he's with the jury. If they start having a colloquy, he knows to step out.
>
> [DEFENDANT'S COUNSEL]: Well, that's my understanding.

Indeed, this exchange could be fairly read as confirming Defendant's counsel's "understanding" that the deputy could deliver the message but must avoid being present during any colloquy.

It further appears that the judge's message was neither related to Defendant's guilt or innocence nor did it amount to an instruction on the law such that prejudice arose, as it simply sought to clarify the questions asked by the jury. *Cf. Corum*, 176 N.C. App. at 158, 625 S.E.2d at 894 (holding trial court did not commit reversible error in having a bailiff deliver a written instruction to the jury that they "must rely on [their] own recollection as to what the evidence showed."). Defendant assigns prejudice to "a risk that the jury believed the information they were requesting was 'unimportant or not worthy of further consideration[,]' " quoting *Ashe*, 314 N.C. at 38-39, 331 S.E.2d at 659, and argues that "we [cannot] know how [the questions were] communicated to the jury and

how the jury might have interpreted the judge's request." However, absent evidence to the contrary, we presume that both the bailiff and the jury understood and followed the judge's straightforward instructions. *See Gay*, 334 N.C. at 482, 434 S.E.2d at 848 (presuming the bailiff accurately delivered the judge's message to the jurors where there was no evidence to the contrary); *Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 134, 140, 468 S.E.2d 69, 73 (1996) ("The jury . . . is presumed to understand and comply with the instructions of the court." (citation omitted)). It appears from the record that the bailiff and the jury did exactly that; the judge received the jury's clarified requests and subsequently provided instructions, to which neither party objected, in response thereto. The jury reached its verdict without asking additional questions of the court. In short, to the extent that the trial court erred by this procedure, we hold that Defendant has failed to demonstrate prejudice warranting reversal.

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate reversible error.

NO ERROR.

Judges DIETZ and YOUNG concur.

STATE OF NORTH CAROLINA
v.
BENJAMIN FIELDS

No. COA19-38

Filed 3 December 2019

1. Jurisdiction—trial court—authority to enter written order—after notice of appeal given—criminal case

In a prosecution for driving while impaired, the trial court had jurisdiction to enter a written order granting defendant's motion to suppress after the State had already given oral notice of appeal, because the order—rather than affecting the merits of the case—merely chronicled the findings and conclusions that the trial court had already announced from the bench.

2. Motor Vehicles—driving while impaired—probable cause to arrest—findings of fact—sufficiency of evidence

In a prosecution for driving while impaired, where one officer arrested defendant at another officer's request based on reports of a green pickup truck driving erratically and attempting to hit people, the trial court properly granted defendant's motion to suppress where the contested findings of fact were supported by competent evidence and where the trial court properly determined the weight and credibility of any contradictory evidence. The findings noted a lack of evidence connecting the pickup truck to defendant (whom neither officer saw driving any vehicle) and thus supported the conclusion that the officers lacked probable cause to arrest defendant.

3. Motor Vehicles—driving while impaired—probable cause to arrest—based on other officer's request

In a prosecution for driving while impaired, where a second officer arrested defendant at the first officer's request based on reports of a green pickup truck driving erratically and attempting to hit people, the trial court properly granted defendant's motion to suppress on grounds that the second officer lacked probable cause—both independently and through the first officer—to arrest defendant. The court's unchallenged findings of fact showed that the first officer failed to follow the green pickup truck after identifying it and neither officer saw defendant drive, park, or get out of the truck (or any other vehicle).

Appeal by the State from order entered 12 September 2018 by Judge Keith Gregory in Durham County Superior Court. Heard in the Court of Appeals 9 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, and Durham County Assistant District Attorney, by Adam Williamson, for the State-Appellant.

Office of the Appellate Defender, by Assistant Appellate Defender Sterling P. Rozear, for the Defendant-Appellee.

COLLINS, Judge.

The State appeals from an order granting Defendant's motion to suppress, heard at a pretrial hearing on Defendant's charge of driving while impaired. On appeal, the State's overarching argument is that the trial court erred in allowing the motion because the State had probable cause

to arrest Defendant. We find no merit in the State's arguments and affirm the trial court's order.

I. Procedural History

On 24 February 2017, Defendant was issued a North Carolina Uniform Citation for, *inter alia*, driving while impaired. On 18 April 2018, following a bench trial in district court, Defendant was found guilty of driving while impaired. The trial court entered judgment and sentenced Defendant to 36 months' imprisonment. Defendant appealed to superior court.

On 5 June 2018, Defendant filed a motion to suppress evidence derived from his arrest, arguing there was no probable cause to support the arrest. At a hearing on 20 August 2018, the trial court orally allowed Defendant's motion. The State immediately gave oral notice of appeal in open court. The trial court entered a written order on 12 September 2018 reflecting its ruling from the bench. The State filed written notice of appeal from the 12 September 2018 order on 3 October 2018.[1]

II. Factual Background

On 24 February 2017, Officer Daryl Macaluso of the Durham Police Department responded to a disturbance call near the 800 block of Briggs Avenue. The caller reported a green pickup truck driving erratically and "attempting to hit people."

Macaluso's Testimony

Macaluso testified that as he approached the area, he was flagged down by an "extremely intoxicated" man who was telling him about the vehicle trying to run people over. Macaluso further testified, "I saw a vehicle that fit the description passing me . . . . And that vehicle was driven by the defendant. I clearly took a look at him while he was driving by." The intoxicated man did not react to the green pickup truck, nor did he "make references to the vehicle passing" them. The green pickup truck was not driving erratically or committing any traffic violations, and Macaluso did not follow the truck.

Macaluso drove his car around the block. Upon his return to the Briggs Avenue area, he was approached by "a lot more intoxicated people" who attempted to explain what had occurred. About two minutes later, as Macaluso was speaking with the group, Defendant approached

1. We note that while the Notice of Appeal was signed and served on 3 October 2018, the clerk of court's file stamp indicates 3 September 2018.

on foot from about a half-block away. Macaluso noticed that Defendant was unsteady on his feet and slurred his speech. Defendant appeared angry and complained that he had been sold "fake crack." Macaluso asked Defendant to wait in the back of the patrol car while he investigated, and eventually called for backup in conducting an impaired driving investigation.

Munter's Testimony

Investigator Gabriel Munter responded to the call to investigate. When he arrived at the scene, he found Defendant sitting in the backseat of Macaluso's patrol car. Because Munter had not seen Defendant drive, Munter told Macaluso, "I would need you to put him behind the wheel." Munter testified, "I'm not going to pick up an impaired driving investigation unless that's been established by another officer because I wasn't there and I didn't see the driving. So if [Macaluso] can put him behind the wheel, yes, I'll pick up the investigation from that point." Munter testified that Macaluso "said that he saw [Defendant] driving. [Macaluso] said, He passed me, I believe were his words."

Munter proceeded to investigate a green pickup truck parked at the Big Apple Mini-mart. Munter found an empty liquor container in the back of the truck, but testified that it appeared to have been there a while. Munter did not check the temperature of the truck, exhaust pipe, or hood while he conducted his investigation. Munter returned to the Briggs Avenue area, where he conducted various field sobriety tests on Defendant, including a horizontal gaze nystagmus test. Defendant showed six out of six clues of impairment on the horizontal gaze nystagmus test. Munter arrested Defendant and charged him with driving while impaired.

Body Camera Video

Munter's body camera captured video of the events on that day, and Munter narrated the video while the jury watched it. At the beginning of the video, Munter walked up to Macaluso and asked questions about the original phone call tip regarding an erratic driver trying to hit people. The video then captured Macaluso telling Munter, "I didn't know that was [Defendant's] car until someone else pointed it out."

Mini-mart Video

Macaluso testified that he "continued to control the crowd" until Munter arrested Defendant and left the scene. Following Munter's departure, Macaluso went to the Big Apple Mini-mart to see if they had video of the area. Macaluso obtained video which "showed [Defendant]

coming out of the truck and [he] got the video on a flash drive." However, Macaluso testified that the flash drive containing the video was lost when Macaluso brought his patrol car in for repairs. Macaluso testified, "The flash drive is gone. There's no video." The State did not present the video at the hearing.

III. Discussion

The State argues on appeal that the trial court erred by granting Defendant's motion to suppress because (1) the trial court lacked jurisdiction to enter the written order after notice of appeal to this Court had been given, (2) the trial court's findings are not supported by the evidence, and (3) the trial court erred in finding no probable cause to arrest Defendant. We address each argument in turn.

1. Trial Court's Jurisdiction

[1] The State first argues that the trial court lacked jurisdiction to enter the written order on 12 September 2018 because the State had given oral notice of appeal immediately after the trial court announced its ruling from the bench on 20 August 2018. The State claims that once it gave notice of appeal, the trial court was without jurisdiction to enter any additional findings of fact or orders. The State's argument is meritless.

This Court reviews jurisdictional issues de novo. *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012). Generally, when appeal entries are noted, the appeal becomes effective immediately, and the trial court is without authority to enter orders affecting the merits of the case. *State v. Grundler*, 251 N.C. 177, 185, 111 S.E.2d 1, 7 (1959) (citation omitted). However, the trial court maintains jurisdiction to enter a written order after notice of appeal has been given where the order does not "*affect*[] *the merits*, but, rather, is a chronicle of the findings and conclusions" decided at a prior hearing. *State v. Walker*, 255 N.C. App. 828, 830, 806 S.E.2d 326, 329 (2017) (emphasis in original) (citation omitted).

In this case, the trial court announced from the bench that Defendant's motion was allowed. In response to the State's request for "findings of the facts[,]" the trial court announced:

> I'll reserve the right to find appropriate findings of fact. I've already indicated in open court that the State cannot make the nexus between the person that the officer saw driving, there were no traffic or Chapter 20 violations[,] to the person that came up two minutes later. I reserve the right to find further findings of fact. [Counsel for Defendant], you will prepare that order.

The State then gave notice of appeal. The written order contains 21 findings of fact, including the following:

> Throughout the duration of the hearing the State's evidence did not establish a nexus between the driver of the green pickup truck observed by Officer Macaluso, which was not observed violating any Chapter 20 offense, and the individual who later walked upon the raucous scene on Briggs Avenue.

The written order thus concludes "that the State did not meet their statutory burden that of probable cause to arrest [Defendant] on February 24, 2017 for the offense of driving while impaired." The written order does not "*affect*[] *the merits*, but, rather, is a chronicle of the findings and conclusions" decided at the motion to suppress hearing, and thus, the written order is "not a new order *affecting the merits* of the case." *Walker*, 255 N.C. App. at 830, 806 S.E.2d at 329 (emphasis in original) (citation omitted). Accordingly, the trial court had jurisdiction to enter the written order, and we reject the State's contention to the contrary. *See State v. Smith*, 320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987) (the trial court had jurisdiction to enter a written order out of term denying defendant's motion to suppress where the order was "simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress") (quotation marks omitted); *State v. Franklin*, 224 N.C. App. 337, 345, 736 S.E.2d 218, 223 (2012) (the trial court had jurisdiction to enter its written order denying defendant's motion to suppress after defendant had given notice of appeal as the written order "merely reduced its oral ruling to writing") (internal quotation marks, brackets, and citation omitted).

2. Contested Findings of Fact

[2] The State next argues that the trial court's findings of fact 9, 19, and 21 are not supported by the evidence.

This Court's role in reviewing a trial court's order on a motion to suppress "is simply to determine whether the trial court's findings of fact are supported by the evidence and whether those findings support the court's conclusions of law." *State v. Campbell*, 188 N.C. App. 701, 706, 656 S.E.2d 721, 725 (2008). "Our review is limited to those facts found by the trial court and the conclusions reached in reliance on those facts . . . ." *State v. Derbyshire*, 228 N.C. App. 670, 679, 745 S.E.2d 886, 893 (2013). Unchallenged findings are deemed supported by competent evidence and are binding on appeal. *State v. Biber*, 365 N.C. 162, 167, 712 S.E.2d

874, 878 (2011). Conclusions of law are reviewed de novo. *Id.* at 168, 712 S.E.2d at 878.

Finding 9

Finding 9 states, "Officer Macaluso testified as to not seeing the green pickup truck park or any individual get in or out of the vehicle."

At the hearing, the following exchange took place:

> [Defense Counsel]: And since this individual didn't react to the car, you never pulled behind it?
>
> [Macaluso]: No.
>
> [Defense Counsel]: You never followed it down the road?
>
> [Macaluso]: I did not.
>
> [Defense Counsel]: You never mentioned in your report seeing it park?
>
> [Macaluso]: No. I pulled around Holloway Street and it was parked at a Big Apple.
>
> [Defense Counsel]: You never mentioned seeing the car park – sorry. The pick-up truck park?
>
> [Macaluso]: I did not mention seeing it park.
>
> [Defense Counsel]: In your report you didn't put down seeing the pick-up truck park?
>
> [Macaluso]: Correct. I didn't write that on my report.
>
> [Defense Counsel]: And in your report you never mentioned seeing anyone get in or out of this truck?
>
> [Macaluso]: Correct.

This exchange supports the challenged finding of fact. The State argues this finding is not supported by the evidence because "Macaluso testified he observed a video at the mini-mart which showed Defendant getting out of his green pickup truck."[2] Macaluso did testify that after Munter left with Defendant, Macaluso "went to the Big Apple Mini-Mart to view a video" and "got the video on flash drive." However, Macaluso also testified that "[t]he video was lost" because he left the flash drive in

2. The State makes no further legal argument regarding the sufficiency of this finding.

his patrol car when he brought the car to the mechanic. The State did not introduce the video into evidence at the hearing. It is well-settled that the trial court determines the credibility of the witnesses, the weight to be given to the testimony, and "the reasonable inferences to be drawn therefrom." *State v. Icard*, 363 N.C. 303, 312, 677 S.E.2d 822, 828 (2009). If different inferences may be drawn from the evidence, the trial court determines which inferences shall be drawn and which shall be rejected. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). The trial court was free to give no weight to Macaluso's testimony regarding viewing the Mini-mart video.

Moreover, Macaluso further testified that he observed the Mini-mart video only after Defendant had been arrested. Whether probable cause exists is analyzed at the moment of arrest, and "whether *at that moment* the facts and circumstances within" an officer's knowledge are sufficient to warrant arrest. *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (brackets and citation omitted). As Macaluso had not yet viewed the video showing Defendant exit the truck, any discrepancy in the evidence supporting this finding was irrelevant as the video could not have contributed to any probable cause to arrest Defendant.

Finding 19

Finding 19 states, "Defendant submitted a single sample of breath on the Preliminary Breath Test (PBT) before refusing to submit a second sample." Video recorded by Munter's body camera and Munter's narration of that video during the hearing established that Defendant submitted a sample of breath. This evidence supports the challenged finding.

The State's sole argument is that "Officer Munter testified that when he attempted to get a breath sample, Defendant barked and bit at him. (T p. 42) No evidence supports the finding that Defendant submitted a breath sample." The State misrepresents the evidence presented at the hearing and makes no legal argument concerning the sample submitted.

Finding 21

Finding 21 states, "Throughout the duration of the hearing the State's evidence did not establish a nexus between the driver of the green pickup truck observed by Officer Macaluso, which was not observed violating any Chapter 20 offense, and the individual who later walked upon the raucous scene on Briggs Avenue." Macaluso testified that he did not follow the green truck that passed him; instead, he drove his car around the block and returned to the Briggs Avenue area. About two minutes later, Defendant approached on foot from about a half-block away. Macaluso

also testified that he did not see the green pickup truck park or any individual get in or out of the truck. Moreover, Munter's body camera video captured Macaluso telling Munter, "I didn't know that was [Defendant's] car until someone else pointed it out." This evidence supports the challenged finding.

While the State argues that Macaluso's testimony established that Defendant was the driver of the green pickup truck, the trial court "determines the reasonable inferences to be drawn" from the evidence. *Knutton*, 273 N.C. at 359, 160 S.E.2d at 33 (internal citations omitted). The trial court appropriately considered the credibility of Macaluso's testimony and the weight to afford that testimony when making its findings of fact. The trial court was not compelled to "accept uncritically" the testimony of Macaluso. *State v. Salinas*, 214 N.C. App. 408, 416-17, 715 S.E.2d 262, 267-68 (2011). Thus, finding 21 is supported by evidence "even though there is evidence in the record to support a contrary finding." *State v. Phillips*, 151 N.C. App. 185, 190, 565 S.E.2d 697, 701 (2002).

3. No Probable Cause to Arrest

[3] The State finally argues that the trial court erred in concluding that there was no probable cause to arrest Defendant.

This Court reviews conclusions of law de novo. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. "To be lawful, a warrantless arrest must be supported by probable cause." *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984). "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *Streeter*, 283 N.C. at 207, 195 S.E.2d at 505 (internal quotation marks and citation omitted). Whether probable cause exists at the time of arrest depends on "whether *at that moment* the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Id.* (emphasis added) (brackets and citation omitted).

A second officer who lacks probable cause to effectuate an arrest may justifiably arrest a defendant based on a first officer's request only when the first officer has probable cause to arrest the defendant. *State v. Tilley*, 44 N.C. App. 313, 317, 260 S.E.2d 794, 797 (1979). "A person commits the offense of impaired driving if he drives any vehicle . . . [w]hile under the influence of an impairing substance[,] or [a]fter having consumed sufficient alcohol that he has, at any relevant time after

the driving, an alcohol concentration of 0.08 or more." N.C. Gen. Stat. § 20-138.1(a) (2018).

In addition to findings 9, 19, and 21, which were supported by competent evidence, the trial court made the following unchallenged findings of fact:

> 2. Officer Macaluso was responding to a call for "a vehicle driving erratic and attempting to hit people." The vehicle was described as a green pickup truck.
>
> 3. Officer Macaluso was then flagged down by an unknown individual as he approached Briggs Ave. This individual was described as very intoxicated by Officer Macaluso.
>
> 4. While speaking with the unknown intoxicated individual Officer Macaluso observed a green pickup truck going west on Holloway Street.
>
> 5. Neither the individual who flagged down Officer Macaluso, nor Officer Macaluso reacted to the green pickup truck.
>
> 6. Officer Macaluso did not observe the green pickup truck engage in any erratic driving or violate any Chapter 20 offense. The truck was never observed attempting to hit or swerve at anyone.
>
> 7. Officer Macaluso was in the driver's seat of his patrol car throughout the entirety of his conversation with the unknown intoxicated individual.
>
> 8. Officer Macaluso never pulled behind the green pickup truck or engage[d] in a traffic stop of the vehicle.
>
> . . . .
>
> 10. Officer Macaluso then circled the block to locate the vehicle and returned to 810 Briggs Avenue to speak with the same unknown individual.
>
> 11. Upon arrival at 810 Briggs Avenue Officer Macaluso encountered several drunken individuals at the location talking loudly and trying to explain their situation.
>
> 12. Officer Macaluso then testified that at a later time several individuals in the crowd became agitated as Defendant walked over to Briggs Avenue.

13. He also testified that the Defendant was unsteady on his feet, leaning on things as he was walking, had slurred words, appeared angry, and admitted that he bought "fake crack."

14. Officer Macaluso then placed Defendant into the back of his patrol car to investigate further.

15. At that time Officer Macaluso called for "T7" to assist in his impaired driving investigation.

16. Shortly thereafter Officer Munter of the Durham Police Department arrived and began to interview Defendant in the back of Officer Macaluso's vehicle. Officer Munter did not observe any driving.

17. Officer Munter then drove up to the green truck matching the description given to him by Officer Macaluso, ran the truck's license plate through a law enforcement database, and discovered that the truck was registered to the Defendant.

18. Officer Munter then performed the Horizontal Gaze Nystagmus test and observed six out of six clues of impairment.

. . . .

20. Officer Munter formed the opinion that the Defendant was appreciably impaired and placed him under arrest for committing the offense of Driving While Impaired.

These unchallenged findings are presumed to be supported by competent evidence and are binding on appeal. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878. Findings 8, 10, and 11 establish that Macaluso: did not pull behind or stop the green pickup truck; did not maintain visibility of the green pickup truck but instead circled the block and returned to Briggs Avenue; and witnessed Defendant walk up to him on foot. Finding 16 establishes in relevant part, "Officer Munter did not observe any driving." These unchallenged findings establish that Macaluso did not observe Defendant driving and support the trial court's conclusion of law that Macaluso lacked probable cause to arrest Defendant. *Id.* at 168, 712 S.E.2d at 878. In addition, Finding 21 establishes that there was no probable cause to arrest Defendant, because the State failed to establish a connection between the driver of the green pickup truck and Defendant, who later walked up to Macaluso on Briggs Avenue;

this finding supports that Macaluso did not observe Defendant drive and thus did not have probable cause to arrest Defendant for driving while impaired.

The findings also establish that Munter did not have independent probable cause to arrest Defendant for driving while impaired. As neither Macaluso nor Munter observed Defendant drive, park, or get out of the truck, Munter lacked the requisite probable cause to arrest Defendant for driving while impaired. *See Tilley*, 44 N.C. App. at 317, 260 S.E.2d at 797 (explaining that a second officer who lacks probable cause may justifiably arrest a defendant based on a first officer's request only when the first officer has probable cause to arrest the defendant).

IV. Conclusion

For the reasons stated above, we conclude that the trial court did not err by granting Defendant's motion to suppress and we affirm the trial court's order.

AFFIRMED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
CASHAUN K. HARVIN, DEFENDANT

No. COA18-1240

Filed 3 December 2019

Constitutional Law—right to counsel—forfeiture—standby counsel—request to replace or activate as primary counsel

In a prosecution for murder and other charges arising from a robbery, where the trial court denied a pro se defendant's requests to either activate standby counsel as his primary attorney or replace standby counsel, the court deprived defendant of his right to counsel by erroneously finding he had forfeited that right. The record did not show defendant trying to obstruct or delay the trial, and defendant repeatedly expressed a desire to waive his right to proceed pro se rather than waive his right to counsel. Moreover, the trial court had previously assured defendant that he could request to activate standby counsel as his primary attorney but did not warn him that

such requests—when made close to trial—could result in him forfeiting his right to counsel.

Judge DILLON dissenting.

Appeal by Defendant from judgments entered 8 May 2018 by Judge Phyllis M. Gorham in New Hanover County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Ryan F. Haigh, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for the Defendant.

BROOK, Judge.

Cashaun K. Harvin ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. We hold that the trial court deprived Defendant of his right to counsel. Defendant is therefore entitled to a new trial.

I. Background

In this case, "[b]ecause the issue dispositive of [the] appeal does not relate to the facts surrounding the alleged crimes, a detailed recitation of the facts is unnecessary." *State v. Dunlap*, 318 N.C. 384, 385, 348 S.E.2d 801, 802 (1986). The charges of which Defendant was found guilty arise from a robbery arranged on the pretext of a marijuana sale by Robert Scott, Jr., to Tyler Greenfield and a shooting that took place during this robbery. Mr. Scott and his then-girlfriend sustained gunshot wounds during the event. Mr. Scott died from his wounds immediately afterwards. Defendant was seventeen years old at the time of the robbery.

On 26 May 2015, Defendant was indicted for first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, and AWDWIKISI. A superseding indictment for the same charges was issued on 31 October 2016. On 20 March 2017, following the conclusion of Mr. Greenfield's trial for charges stemming from his involvement in the robbery and killing, an additional superseding

indictment was issued, adding the charges of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon.[1]

On 23 April 2018, in New Hanover County Superior Court, the Honorable Phyllis M. Gorham heard evidence and argument related to Defendant's competency to stand trial and whether Defendant had waived or forfeited his right to counsel. The following colloquy transpired:

> THE COURT: Mr. Harvin, good morning.
>
> MR. HARVIN: Good morning, Your Honor. There are some things that I would like to address before the Court today before we proceed with, you know, the trial motions and stuff. I would like to address the situation of ineffective assistance of counsel, Your Honor.
>
> THE COURT: Let me stop you right there. You don't have an attorney so there is no ineffective assistance of counsel claim that you can raise.
>
> MR. HARVIN: But having – have I not – is he not by stand [sic] counsel to provide me with assistance in things that I do not understand?
>
> THE COURT: He is standby counsel but he is not your attorney. You have waived your right to all counsel.
>
> MR. HARVIN: Yes, ma'am.
>
> THE COURT: So Mr. Mediratta[, your standby counsel,] is not your attorney, so what is your question?
>
> MR. HARVIN: So if it was the decision that he was able to replace me or take over the case, like, that's what I was told by Judge Watts [sic]. He said if I wanted to, that he could take over my case at any time if I had decided.
>
> THE COURT: If you decide that you no longer wish to represent yourself –

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1. Mr. Greenfield was found guilty of first-degree murder based on the felony murder rule, second-degree murder, and two counts of AWDWIKISI. *State v. Greenfield*, ___ N.C. App. ___, ___, 822 S.E.2d 477, 480 (2018). On 4 December 2018, a divided panel of this Court vacated the judgments entered upon these verdicts and remanded the case for a new trial on one of the convictions for AWDWIKISI. *Id.* at ___, 822 S.E.2d at 486. The dissenting judge would have reversed and granted Mr. Greenfield a new trial on all the charges. *Id.* at ___, 822 S.E.2d at 489 (Stroud, J., dissenting). The case is currently pending before the Supreme Court. *See State v. Greenfield*, ___ N.C. ___, 828 S.E.2d 20 (2019).

MR. HARVIN: Yes, ma'am.

THE COURT: – and you wish for counsel, that the Court has assigned a standby counsel to take over and try your case, that is correct.

MR. HARVIN: Yes, ma'am.

THE COURT: But until that happens, standby counsel is not your attorney.

. . .

MR. HARVIN: Your Honor, what I'm asking for is that if I am allowed – if I'm going to continue to proceed and, you know, go to trial and stuff like that, instead of, you know, waivering [sic] my rights and pleading out, I would ask that I be provided with effective assistance of counsel even if he not – you know, he's not actually, you know, representing me but, you know, if I come to him for advice that he provide me with substantial knowledge accordingly to the law, it's been times to where I ask him something specifically and he tells me that he don't know what I'm talking about or it doesn't exist but, you know, I have it, being provided with the statutory book, I can open it up and show him and then he has said, oh, I forgot this. Well, you know, right then and there it shows me that you're incompetent to, you know, provide me with assistance because if this is something that I can find, I can go in here and find it myself and you are not able to do it or you are not willing to help me, then that means that you are not willing to provide me with assistance.

THE COURT: Okay, all right, my question is what are you asking for?

MR. HARVIN: I'm asking for basically someone to replace him as standby counsel to provide me with assistance, someone adequate.

THE COURT: Now you represent yourself.

MR. HARVIN: Yes, ma'am.

THE COURT: And the Court doesn't have to provide you with standby counsel at all.

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that?

MR. HARVIN: Yes, ma'am.

. . .

THE COURT: All right, let me ask you, Mr. Harvin, do you still wish to represent yourself at this trial?

MR. HARVIN: If it –

THE COURT: Let me ask you some questions.

MR. HARVIN: Yes, ma'am.

THE COURT: Are you able to hear and understand me?

MR. HARVIN: Yes, ma'am.

THE COURT: Are you now under the influence of any alcohol, narcotics, drugs, medicines, pills, or any other substance?

MR. HARVIN: No, ma'am.

THE COURT: How old are you?

MR. HARVIN: 21 at this time.

THE COURT: What is the highest grade you completed in school?

MR. HARVIN: The 10th grade, Your Honor.

THE COURT: And what grade level can you read and write?

MR. HARVIN: I would believe the 10th grade, Your Honor.

THE COURT: Do you presently suffer from any mental – suffer from any mental or physical disabilities?

MR. HARVIN: Your Honor, actually there were points to where –

THE COURT: I just need you to answer that question as of this day, this moment, yes or no.

MR. HARVIN: Yes, ma'am.

THE COURT: What do you say are those disabilities?

MR. HARVIN: I believe that I have attention deficit disorder, like I believe that has to be accommodated by, you know, medicine because I can only focus for a certain period of time, like I have a learning disability. I learn slower than others, like I'm not retarded, I'm intelligent, but it's that, you know, it takes me – it's difficult for me to, you know, grasp certain things. Like for a person to read something, it would take like just a page or two or something like that and actually grasp the concept of it, it would take them maybe 20 or 10 minutes, it would take me at least an hour, because I – like I could be focused on this and my thoughts would trail off.

THE COURT: Let me ask you a question.

When were you diagnosed with attention deficit disorder?

MR. HARVIN: I believe in like maybe about the fifth grade or something like that.

THE COURT: And you were taking medications?

MR. HARVIN: Yes, ma'am.

THE COURT: And when did you stop taking medications?

MR. HARVIN: When my mom – I can't remember exactly, but when my father had got locked up, my mom took it away because of our religious beliefs.

THE COURT: So you were still in school?

MR. HARVIN: Yes, ma'am.

THE COURT: And you say that you think you might suffer from learning disabilities. What is your learning disability?

MR. HARVIN: What is my learning disability?

THE COURT: Yes.

MR. HARVIN: At this point, it's something that I can't really tell you because I'm not a psychiatrist, Your Honor.

THE COURT: So you've never been diagnosed with a learning disability?

MR. HARVIN: Yes, ma'am.

THE COURT: When were you diagnosed?

MR. HARVIN: I believe I said the fifth grade.

THE COURT: So you had attention deficit disorder?

MR. HARVIN: Yes, ma'am.

THE COURT: And another specific learning disability?

MR. HARVIN: ADHD.

THE COURT: So just attention deficit disorder?

MR. HARVIN: Yes, ma'am.

THE COURT: All right.

MR. HARVIN: And a learning disability. I don't know if that's two different things but I know that –

THE COURT: All right, now do you understand that you have the right to be represented by an attorney?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that you may request a lawyer be appointed for you if you are unable to hire a lawyer?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that if you decide to represent yourself, you must follow the same rules of evidence and procedure that a lawyer here in this court must follow?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that if you decide to represent yourself, the Court will not give you legal advice concerning the defenses, jury instructions or other legal issues that may be raised in the trial?

MR. HARVIN: Does that also continue to standby counsel, they can't give me advice?

THE COURT: The Court cannot – the Court cannot give you any legal advice concerning the jury instructions or the legal issues.

MR. HARVIN: Can I ask Your Honor, when you say "Court" are you pertaining to –

THE COURT: I said the Court, I am the Court.

MR. HARVIN: Okay.

THE COURT: Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that as the Judge, I am an impartial judge in this case and that I would not be offering you any legal advice, and that I must treat you just as I would treat an attorney?

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that you are charged with first-degree murder punishable by life in prison without parole, attempted first-degree murder – what class is that?

[PROSECUTOR]: B2, Judge.

THE COURT: Punishable by up to life. B2 is punishable by – that is off the chart. It's more than 393 months minimum.

MR. HARVIN: Yes, ma'am.

THE COURT: Attempted robbery with a dangerous weapon, and that's – attempt is an E. There actually would be a D in this case, 204 months; assault with a deadly weapon with intent to kill inflicting serious injury, punishable by up to 231 months.

Robbery with a dangerous weapon punishable by up to 204 months; conspiracy to commit robbery with a dangerous weapon, punishable by up to 88 months.

Do you understand that's what you're charged with?

MR. HARVIN: Could you reread that again for me, please? I apologize. There are certain things that I didn't catch.

THE COURT: Well, you understand you are charged with all of those charges; first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon. Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: All right, with all of these in mind, what you're charged with, what potential punishment for each crime is, do you still now wish – do you now wish to ask me any questions?

MR. HARVIN: Yes, Your Honor. Before you make your ruling, Your Honor, I want you to also take into consideration that, you know –

THE COURT: I'm just asking you questions about your representation, about whether or not you want to continue to represent yourself.

MR. HARVIN: And what are, like, if I decide to proceed –

THE COURT: No, I just need to know, do you have any questions about what I just said to you about that?

MR. HARVIN: Can you read the last part, please?

THE COURT: I'm going the read the next question to you. Do you still wish to waive your right to the assistance of an attorney and do you voluntarily and intelligently decide to represent yourself in this case?

MR. HARVIN: No, ma'am.

THE COURT: You do not wish to represent yourself?

MR. HARVIN: No, ma'am.

THE COURT: So what are you asking the Court for today?

MR. HARVIN: Your Honor, what I was asking for initially was asking was that, like I said, I be provided with adequate by stand [sic] counsel and I was asking for more sufficient time to prepare my own defense. And what I was going to address was that I don't feel like I should relinquish my rights as counsel, I just need more time to prepare and understand the law.

THE COURT: Now, Mr. Harvin, I am treating you as an attorney.

MR. HARVIN: Yes, ma'am.

THE COURT: The question I have for you today: Are you going to continue to represent yourself in your case?

MR. HARVIN: No, ma'am.

THE COURT: What are you asking for?

MR. HARVIN: I'm asking for effective assistance of counsel.

THE COURT: You are asking to be represented by an attorney?

MR. HARVIN: Yes, ma'am.

THE COURT: And you are asking this court to once again appoint an attorney to represent you in your case?

MR. HARVIN: Yes, ma'am.

THE COURT: Mr. Harvin, you understand that if I choose to appoint an attorney to represent you –

MR. HARVIN: Yes, ma'am.

THE COURT: – that it will be over from that point? You can't come back in here and say you don't like that particular attorney.

MR. HARVIN: Yes, ma'am.

THE COURT: Because by law, you will have forfeited your right to have any attorney to represent you.

Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: And you will be back in the same position that you are now.

Do you understand that?

MR. HARVIN: Yes, ma'am. Your Honor?

THE COURT: Yes, sir.

MR. HARVIN: I just have a reasonable question.

THE COURT: I hope it's a reasonable question.

MR. HARVIN: I just – I just take it as this is ineffective assistance of counsel.

THE COURT: What is ineffective assistance of counsel?

MR. HARVIN: I was about to state the reasons.

THE COURT: Well what is – I don't understand because you have to understand, you don't have an attorney.

MR. HARVIN: I'm talking about now, I'm talking about, you know, prior situations.

THE COURT: I don't want to talk about prior situations.

MR. HARVIN: Okay, ma'am.

THE COURT: You've had some excellent attorneys, I want you to understand, excellent attorneys.

MR. HARVIN: Your Honor, I've been down here for three years with no bond. I'm charged with a charge that according to the North Carolina statute doesn't exist. First-degree attempted murder doesn't even exist. Your Honor, I have – there was a illegally obtained evidence and they didn't even address the situation so how can –

THE COURT: Listen.

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that if you have an attorney appointed to represent you, it is your attorney who will try your case and not you?

MR. HARVIN: But it's my right.

THE COURT: Listen to me.

MR. HARVIN: Yes, ma'am.

THE COURT: If an attorney is appointed to represent you, your attorney tries your case, you don't try your case. Are you willing to give up that right?

MR. HARVIN: Yes, ma'am.

THE COURT: Because you have a right to represent yourself.

MR. HARVIN: Yes, ma'am.

THE COURT: Do you understand that?

MR. HARVIN: Yes, ma'am.

THE COURT: And you still choose to give up that right today?

MR. HARVIN: Yes, ma'am.

THE COURT: How soon can this case be set for trial?

[PROSECUTOR]: I wish to be heard. First and foremost, he's had four attorneys appointed to him. The last two he fired, said they didn't get along with him, irreconcilable differences. He was appointed Mr. Mediratta as standby counsel. We went through a whole soliloquy in December and we set April 23rd as the trial date so Mr. Mediratta and Mr. Harvin could be ready.

We're now here, Judge, and the defendant now wants an attorney. If he gets an attorney, he's not going to like his attorney, he doesn't like any attorneys. Two months from now, we're in the same position, he's going to fire an attorney and he's going to come back and he's going to want an attorney. This defendant is playing games with the system.

It's time. It's been over three years, Judge. The issue with any continuances for the State, Judge, is the fact that our cooperating witness got a year and a half probation back in December. We scheduled this trial three times during his probation term, during one of his probation terms he was to testify against the defendant. The defendant then is getting rewarded if he continues the case past the end of his probation in June, Judge. That's not fair to the State. The State has prepped this case for trial multiple times, flying in witnesses. We have two witnesses flying in across the country in the matter today, Judge.

It's not a fair trial to the State for this defendant to get another trial represented by another attorney that he again doesn't like. I think at this point the State would ask that he represent himself, use Mr. Mediratta who is standby counsel, or he forfeit his right to an attorney, Judge, because again he can't – he's going to fire his attorney, he's going to want a continuance and want to go back and forth and the State is prejudiced by any continuance at this point because of the June 8th date for Mr. Sampson, Judge.

That's the State's position regarding that, Judge.

THE COURT: Mr. Mediratta are you ready for this case?

> MR. MEDIRATTA: I am not. Your Honor, I'm appearing as standby counsel. He has not been communicating, he is not willing to work with me. Even with the discovery, we've had serious communication problems. I am not prepared to take this case to trial today, Your Honor.

The court then took a brief recess and after returning and continuing the hearing, heard testimony from the attorneys that had previously been appointed to represent Defendant but had been allowed to withdraw.

After this evidentiary hearing, the following colloquy transpired:

> [PROSECUTOR]: Judge, a few issues obviously we would ask the Court to consider in this case regarding the continued issues Mr. Harvin raises. I think obviously Mr. Harvin at this point is moving to get an attorney and he previously waived that counsel, so I think one of the questions the Court has to consider is whether he has forfeited that counsel by law and a lot of cases regarding forfeiture in North Carolina deal with erratic behavior by the defendant in the courtroom. That's not really at play here, Judge, but what case law has said is that in State v. Boyd, being the most prevalent case on point, 200 N.C. App. 97, that any willful actions on the part of the defendant that result in the absence of Defense Counsel constitutes a forfeiture of the right to counsel.
>
> In addition, the defendant may lose his constitutional right to be represented by counsel of his choice when a right to counsel is perverted for the purpose of obstructing and delaying a trial.
>
> Judge, I would argue in this case, the Boyd case, there's no erratic actions by the defendant, there's no hysteria in the courtroom or rude interjections of the defendant. But basically we have a similar fact pattern in which the defendant involved fired two different attorneys and was actually told on the day of trial that he was to represent himself.
>
> . . .
>
> I think it's clear that [Mr. Harvin's] actions in this case are to obstruct and delay the trial by asking for an attorney at this time. Again, this defendant, for the record, in

November was given the opportunity to have counsel. Mr. Evans withdrew, he denied that with Mr. Watson and then, Your Honor, on December 27th of last year, this defendant exercised on the record through colloquial questions that he wants to represent himself.

. . .

And now we're in the eve of trial and he makes this motion, Judge. I think it's clearly based on the timetable and timeline of those actions. This defendant is making those and asking to represent himself, obstructing and delaying the trial and, as a result, he has forfeited counsel and we ask you to deny the motion at this time and proceed to trial, Judge.

. . .

I would also argue that because this defendant on December 28th of 2017, waived his right to all counsel and elected to represent himself, that the Court did go through all the necessary questions with him, clearly advised him of his right to an attorney, clearly advised him of what he is being charged with and the nature and consequences of a conviction, what he could face. And that the defendant did elect to represent himself, signed a waiver, that waiver was signed knowingly and voluntary.

Judge, I would argue that in order to withdraw that waiver, there needs to be a showing by the defendant of good cause.

. . .

So I think clearly the timing is very, very suspect given the facts that all his other motions were denied, given the fact that he asked for you to be recused, you denied that and the motion to continue which was denied. And, Judge, I think on the record earlier today before, you know, we addressed the issue of, you know, going through the whole process, asking him about can you hear and understand me, I mean, it's my understanding that he said I would like an attorney so I would have more time to prepare my case. So I think that in and of itself and all these factors show that this is clearly a tactic to delay and frustrate the

orderly process of the trial court.

THE COURT: Mr. Harvin.

MR. HARVIN: Your Honor, no way I'm trying to frustrate the Court. Your Honor, all that I ask of the Court is that I was provided a reasonable time period to adequately prepare for my case. I actually didn't want to relinquish my spot as counsel, but at this point I feel compelled because, Your Honor, I ask that you take into consideration that I am not – I am not a counsel. I mean, I am not an attorney. I never went to school to become an attorney. I have been provided with the proper issues like essential like basic statutory law book, but, Your Honor, you also have to consider the experience. Experience is an important factor and I don't believe that this statutory provision would be sufficient enough to meet the threshold, you know, of adequate representation because it only provides you with certain things but it doesn't provide you with things that's accordingly to court rules and stuff like that.

As you can observe like, you know, even me questioning witnesses and stuff, I struggle with that because, you know, I kind of have a difficult time understanding the difference between, you know, direct examination, cross-examination and this is stuff that I'm learning as I'm proceeding. Like everything that I'm doing is that – everything I'm doing is a learning process while I'm proceeding to be prosecuted for life sentencing charges.

So I ask that you consider the severity of my charges and also the timeframe that I was presented to, you know, create a defense on my behalf. Your Honor, I believe like now it's a difficult time like. And, Your Honor, in all honesty, like I said, it's not something to delay or, you know, frustrate the Court but I don't believe that, you know, I'm adequately prepared, like I came in here today, Your Honor, you know, this notebook – I apologize but, you know, you can see like there's nothing on here. You feel what I'm saying? And if you decide to make your ruling accordingly to what the prosecution is stating, I'm at y'all's mercy, like, there's nothing on there for me to defend myself. I'm going through life and that's what I plan on doing.

I believe I am entitled to certain rights, that's required by law, statutory provision and also you know the Constitution of the United States and the Constitution of North Carolina, it doesn't specify certain things but I believe in your discretion, in the integrity of the Court, that you are supposed to, you know, be fair and take into consideration, like I presented to Your Honor, I have a –

THE COURT: I don't want to hear – I don't want you to repeat anything because I've already heard all of your previous arguments, so if you've got anything else that you want to add, I want to hear it, but don't repeat yourself.

MR. HARVIN: Okay, yes, ma'am.

. . .

I really believe, I don't believe that I can provide, you know, the representation that's required by law.

THE COURT: All right. You may have a seat. We'll first deal with the issue of capacity to proceed. The defendant stated earlier in these hearings that he had a disability, attention deficit disorder; that he had the inability to comprehend what he was reading. The Court has had an opportunity to observe the defendant for several hearings, that the defendant has been able to read, explain statutes, and case law to the Court, does not appear there has been a lack of understanding from this Court's observation.

The Court has heard from the testimony of the attorneys who previously represented the defendant: Attorneys Bruce Mason, Alex Nicely, Merritt Wagoner and Shawn Robert Evans. Each was asked whether or not there was any issue with the defendant's capacity to proceed to trial and each stated that in their opinion there was no issue as to the defendant's competency; that the defendant understands the nature of and the object of the proceedings, all the charges that he is charged with, and that he comprehends the situation in reference to these proceedings. And that he has at that point, up to this point, been representing himself in a rational and reasonable manner.

Now as to the defendant's request on the day of trial for an attorney, that on February 9, 2015, the Court appointed

Bruce Mason through the Public Defender who requested Mr. Mason to represent the defendant. Mr. Mason represented the defendant from February of 2015 to July 25th of 2016. Mr. Mason testified that he had to withdraw because he had other matters that were pressing, and that Mr. Nicely substituted to represent the defendant on or about July 25, 2016. . . .

Mr. Nicely testified and the record reflects that he was appointed on or about July 25, 2016, until May 12, 2017, when Merritt Wagoner was appointed by the Court to represent the defendant. Mr. Nicely testified that he represented him up until the time that he went to work in the Brunswick County District Attorney's Office. . . .

On or about May 12, 2017, the Court appointed Merritt Wagoner to represent the defendant and he represented the defendant until on or about September 28, 2017. Mr. Wagoner testified that he filed a motion to withdraw from the defendant's case at the defendant's request and was allowed to withdraw from the case on September 28, 2017. . . .

That on or about September 28, 2017, the Court allowed Mr. Wagoner to withdraw. The Court appointed Shawn Robert Evans to represent the defendant. Mr. Evans represented the defendant until he was removed from the case December 12, 2017.

. . .

That on December 12, 2017, Mr. Evans filed a motion to withdraw as counsel for the defendant at the Defendant's request. On December 12, 2017, the defendant at that time informed the Court that he wished to represent himself. Judge Watson at that time – the defendant at that time signed a waiver of his right to all counsel. Judge Watson at that time appointed Paul Mediratta as standby counsel.

That on December 28, 2017, this defendant was in front of this judge. At that time, he still intended to waive his right to counsel. This court advised defendant of his waiver of counsel. At that time he still intended to represent himself and he signed a waiver of his right to counsel.

At that time he did not wish to have an attorney, he wished to represent himself. That the defendant has had multiple

> opportunities to ask the Court for an attorney to represent him on his cases. That on January 28, 2018, the defendant was before this Court and at that time if he wished to have an attorney to represent him, he had the opportunity to ask the Court for an attorney and he did not.
>
> On March 26, 2018, he was before Judge Willey and at that time he had an opportunity to inform the Court of his – to ask the Court for an attorney. He did not.
>
> On April 3, 2018, the defendant was again before this Court. At that time, he had an opportunity to ask the Court for an attorney, he did not.
>
> The Court finds that he had no good cause as of today, the day of trial, to ask this Court for an attorney to represent him. That in fact this Court believes that based upon the defendant's actions from the time that Mr. Merritt Wagoner was appointed to represent him on May 12, 2017; Mr. Shawn Evans was appointed to represent him on September 28, 2017, the defendant requesting that both of these attorneys withdraw from representing him, finds that the defendant has forfeited his right to have an attorney to represent him at this trial; that his actions have been willful and that he has obstructed and delayed these court proceedings.
>
> Therefore the Court finds that the defendant has forfeited his right to have an attorney represent him at this trial. The State shall proceed to trial in this case this week. It is in my discretion as to whether or not the defendant will have an attorney as standby counsel. I'm going to keep Mr. Mediratta as standby counsel. If you choose to use him, you may but you do not have to.

Judge Gorham then heard pre-trial motions. Two days of jury selection followed. The trial lasted eight days.

On the eighth day of trial the jury returned verdicts of guilty on all of the offenses charged. The trial court sentenced Defendant to life in prison with the possibility of parole for the murder conviction. For the remaining convictions, however, the trial court determined Defendant to be a prior record level I offender and sentenced him to 200 to 254 months for attempted murder, 60 to 84 months for attempted robbery with a dangerous weapon, 60 to 84 months for AWDWIKISI, 60 to 84

months for robbery with a dangerous weapon, and 25 to 42 months for conspiracy to commit robbery with a dangerous weapon, ordering that the sentences run consecutively. Defendant entered notice of appeal in open court.

II. Analysis

The dispositive issue presented by this appeal is whether the trial court erred by concluding that Defendant had forfeited his right to counsel. We hold that it did, depriving Defendant of his right to counsel. Defendant is therefore entitled to a new trial. *See Dunlap*, 318 N.C. at 388-89, 348 S.E.2d at 804-05.

Individuals accused of serious crimes are guaranteed the right to counsel by the Sixth Amendment to the U.S. Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963)). This includes the right of indigent defendants to be represented by appointed counsel. *State v. Holloman*, 231 N.C. App. 426, 429, 751 S.E.2d 638, 641 (2013). This Court has recently reiterated, "[t]he right to counsel is one of the most closely guarded of all trial rights." *State v. Schumann*, ___ N.C. App. ___, ___, 810 S.E.2d 379, 386 (2018) (internal marks and citation omitted).

Whether there has been a deprivation of the right to counsel involves two related issues: (1) voluntary waiver of the right to counsel; and (2) forfeiture of the right to counsel. *State v. Blakeney*, 245 N.C. App. 452, 459-61, 782 S.E.2d 88, 93-94 (2016). "Although the loss of counsel due to defendant's own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture." *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). We review *de novo* the question of whether a defendant has forfeited the right to counsel. *State v. Pena*, ___ N.C. App. ___, ___, 809 S.E.2d 1, 5 (2017).

A. Voluntary Waiver

"First, a defendant may voluntarily waive the right to be represented by counsel[.]" *Blakeney*, 245 N.C. App. at 459, 782 S.E.2d at 93. This category of voluntary waiver includes (1) waiver of the right to appointed counsel and (2) waiver of the right to counsel and the decision to proceed *pro se*. *State v. Curlee*, ___ N.C. App. ___, ___, 795 S.E.2d 266, 269-70 (2016). This is because the right to counsel includes "the right of an indigent defendant to appointed counsel," *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 68, the right of a defendant who can afford to retain counsel to "private counsel . . . of his choosing," *id.*, and the "right

[of a defendant] to handle his own case without interference by, or the assistance of, counsel," *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992) (citation omitted).

A circumstance that "arises with some frequency . . . is that of the defendant who waives the appointment of counsel and whose case is continued in order to allow him time to obtain funds with which to retain counsel." *Curlee*, ___ N.C. App. at ___, 795 S.E.2d at 270. In this situation,

> [b]y the time such a defendant realizes that he cannot afford to hire an attorney, his case may have been continued several times. At that point, judges and prosecutors are understandably reluctant to agree to further delay of the proceedings, or may suspect that the defendant knew that he would be unable to hire a lawyer and was simply trying to delay the trial.

Id. Our Court has indicated that a voluntary waiver of the right to counsel is still possible in this situation:

> the trial court [may] inform the defendant that, if he does not want to be represented by appointed counsel and is unable to hire an attorney by the scheduled trial date, he will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C. Gen. Stat. § 15A-1242.

Id. (emphasis in original).

B. Forfeiture

There is also a circumstance in which "a criminal defendant may no longer have the right to be represented by counsel"; that is, where the "defendant engages in such serious misconduct that he forfeits his constitutional right to counsel." *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (citation omitted). As this Court observed in *Blakeney*, although

> [t]here is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel[,] . . . forfeiture has generally been limited to

> situations involving "severe misconduct" and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

245 N.C. App. at 461-62, 782 S.E.2d at 94.

Despite the fact-specific nature of the inquiry, warnings by the trial court that a defendant may lose the right to counsel through dilatory conduct, *see Curlee*, ___ N.C. App. at ___, 795 S.E.2d at 271-73, or observations by the trial court that the defendant has engaged or is engaging in dilatory conduct, *see State v. Simpkins*, ___ N.C. App. ___, ___, 826 S.E.2d 845, 850-51 (2019), are relevant to determining whether a defendant has forfeited the right to counsel. Relatedly, our Court has held that where the defendant had never indicated a desire to proceed *pro se*, a "defendant's request for a continuance in order to hire a different attorney, even if motivated by a wish to postpone [] trial, [is] nowhere close to the 'serious misconduct' that has previously been held to constitute forfeiture of counsel." *Blakeney*, 245 N.C. App. at 463-64, 782 S.E.2d at 95.

C. Colloquy Required to Implement Constitutional Right to Counsel

Unless the defendant "engage[s] in such serious misconduct as to warrant forfeiture of the right to counsel[,] the trial court [is] required to comply with the mandate of North Carolina General Statute § 15A-1242." *Simpkins*, ___ N.C. App. at ___, 826 S.E.2d at 852 (internal marks and citation omitted). 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 (2017). The purpose of the colloquy required by N.C. Gen. Stat. § 15A-1242 is to comply with the constitutional requirement that a waiver of the right to counsel be made "knowingly, intelligently, and voluntarily[.]" *Blakeney*, 245 N.C. App. at 459-60, 782 S.E.2d at 93. The Supreme Court has held that this waiver "must be expressed clearly and unequivocally." *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475 (internal marks and citation omitted). And failure to comply with N.C. Gen. Stat. § 15A-1242 constitutes prejudicial error. *Id.* at 674, 417 S.E.2d at 476.

D. The Right to Proceed *Pro Se*

However, "[a] defendant has only two choices—'to appear *in propria persona* or, in the alternative, by counsel. There is no right to appear both *in propria persona* and by counsel." *Id.* at 677, 417 S.E.2d at 477 (internal marks and citation omitted). "The duties of standby counsel are limited . . . to assisting the defendant when called upon and to bringing to the judge's attention matters favorable to the defendant upon which the judge should rule upon his own motion." *Id.* at 677, 417 S.E.2d at 478 (internal marks and citation omitted). The Supreme Court has therefore held that a waiver of the right to counsel is ineffective where the defendant clearly misunderstands the role of standby counsel and seeks "to proceed to trial as lead counsel of a defense team . . . includ[ing] licensed, appointed attorneys." *Id.* at 675, 417 S.E.2d at 476.

E. The Trial Court's Erroneous Forfeiture Conclusion

In the present case, the trial court attempted to complete the colloquy required by N.C. Gen. Stat. § 15A-1242 after Defendant requested replacement of his standby counsel, but instead of waiving his right to counsel, Defendant invoked it, and requested that counsel be appointed. Prior to concluding that Defendant had forfeited his right to counsel, during the hearings that took place over the years that Defendant was in jail awaiting trial, the trial court had not made any note of dilatory tactics in which Defendant had engaged, nor did the court warn Defendant that requesting new standby counsel or activating his standby counsel on the day set for trial could result in a finding that he had forfeited his right to counsel. Quite the contrary, in fact: on 12 December 2017, when Mr. Mediratta was appointed as Defendant's standby counsel, the court assured Defendant that Mr. Mediratta could be activated as primary counsel in the event that Defendant did not wish to continue to proceed *pro se*. Specifically, the following colloquy transpired:

> [MR HARVIN]: I would like to represent myself, but I would like assistance, perhaps.

> THE COURT: Okay. You have that option, of course. The court, in its discretion, can determine that you're entitled to standby counsel, which means that you can represent yourself, but standby counsel can be there to assist you if you have legal questions or process questions that you might need to refer to. You can do that through standby counsel.
>
> Of course, at any point in time, if you chose to then request standby counsel to be made first chair, then that would put you in the position to have to speak to another judge about that at the appropriate time.
>
> What I would like to do is observe your right to counsel. And that is, if you do wish to represent yourself, you always have that right. But you can't do it while you have an attorney already assigned if they are first chair in the case. Do you understand that?
>
> You would like to proceed representing yourself, but you would still like the assistance of counsel; is that correct?
>
> [MR. HARVIN]: Yes, sir.[2]

Over the State's objection, the trial court ruled on 12 December 2017 that it "[did] not find at this point in time that Mr. Harvin has vacated his right to request counsel, nor that any of his actions have forfeited his opportunity to have assigned counsel." The trial court thus not only did not warn Defendant that his subsequent decision to activate his standby counsel or request replacement standby counsel could result in forfeiture of his right to counsel—instead ruling that nothing Defendant had done supported a forfeiture conclusion as of 12 December 2017—the court did not inform Defendant that, if he did not wish to continue to

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2. As noted above, Defendant makes reference to his understanding of this 12 December 2017 exchange in his 23 April 2018 colloquy with Judge Gorham. Specifically, discussing standby counsel Defendant stated as follows: "So if it was the decision that he was able to replace me or take over the case, like, that's what I was told by Judge Watts [sic]. He said if I wanted to, that he could take over my case at any time if I had decided." This, in no uncertain terms, rebuts the dissent's assertion that "Defendant did not say anything during the 3 April 2018 pre-trial hearing or any other pre-trial hearing to indicate that he made his decision to represent himself in reliance on a representation that he could always call up his stand-by counsel into service." *Harvin*, *infra* at _____ (Dillon, J., dissenting); *see also State v. Blankenship*, 337 N.C. 543, 552, 447 S.E.2d 727, 732-33 (1994) (rejecting defendant's request for a new trial because there was "*no* showing in the record or transcript that defendant relied on anything the trial court said [regarding stand-by counsel] in choosing to represent himself.") (emphasis added).

proceed *pro se*, "he [would] be required to proceed to trial without the assistance of counsel[.]" *Curlee*, ___ N.C. App. at ___, 795 S.E.2d at 270.

The record of the hearing before Judge Gorham on 23 April 2018 offers no support for the court's conclusion that Defendant had forfeited his right to counsel. During the hearing, as well as the two days of jury selection and eight days of trial that followed, Defendant comported himself with courtesy. The State conceded as much at the 23 April 2018 hearing, twice. Although the most recent attorney allowed to withdraw as counsel of record for Defendant was the fifth attorney appointed to represent him, the record of the 23 April 2018 hearing demonstrates that only two of the attorneys appointed to represent Defendant withdrew for reasons related to their relationship with Defendant. Neither of the two attorneys who requested to withdraw because of their relationship with Defendant appeared to have requested to withdraw because Defendant was refusing to *participate* in preparing a defense, or question the legitimacy of the proceeding against him, but instead due to differences related to the *preparation* of Defendant's defense.[3] Defendant's inquiry of the trial court during that hearing indicated that he did not understand the difference between the role of standby counsel and primary counsel, suggesting that he may have wished to lead a defense team as lead counsel consisting of himself and a licensed attorney, as in *Thomas*, although the record is not entirely clear on this point.

What is clear is that when Judge Gorham did not grant Defendant's request to activate his standby counsel on 23 April 2018, Defendant twice requested appointment of substitute standby counsel. When the court did not grant any of these requests and instead began to attempt to complete the colloquy required by N.C. Gen. Stat. § 15A-1242, Defendant clearly and unequivocally stated that he wished to waive his right to represent himself at trial rather than waive his right to counsel, stating no fewer than *five* times that he did not wish to represent himself at trial. As the record of that hearing reflects, however, Defendant's requests fell on deaf ears.[4]

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3. This case is therefore distinguishable from *State v. Boyd*, 200 N.C. App. 97, 102-03, 682 S.E.2d 463, 467 (2009), cited by the State in support of its forfeiture argument on 23 April 2018, in which the defendant repeatedly told his attorney that the case would not go to trial, refused to cooperate with multiple counsel, and obstructed and delayed the trial proceedings.

4. We note that the unequivocal statement by standby counsel at this hearing that he was not prepared to be activated as primary counsel on the date set for trial counseled by itself against proceeding with the trial of a self-represented defendant as scheduled; however, this unequivocal statement by Defendant's standby counsel strongly counseled against proceeding with the trial on 23 April when Defendant had politely and repeatedly

This Court's description of the defendant's conduct in *Simpkins*, in which the defendant was granted a new trial because of the trial court's deprivation of his right to counsel, aptly describes Defendant's conduct in the present case:

> [D]efendant was not combative or rude. There is no indication defendant had ever previously requested the case to be continued, so [D]efendant did not intentionally delay the process by repeatedly asking for continuances to retain counsel and then failing to do so. As a whole [D]efendant's arguments did not appear to be designed to delay or obstruct but overall reflected his lack of knowledge or understanding of the legal process.

___ N.C. App. at ___, 826 S.E.2d at 851. As in *Blakeney*, Defendant "did not object to any of the prosecutor's questions," and the trial court did not *sua sponte* sustain any objections to the introduction of hearsay evidence by the State at trial, despite sustaining numerous objections by the State to Defendant's attempts to elicit hearsay testimony. 245 N.C. App. at 458, 782 S.E.2d at 92. Although the record reflects that Defendant "did eventually state that he would represent himself," as in *Pena*, "it was not an outright request[,] but was [instead] the decision he ultimately made when faced with no other option[.]" ___ N.C. App. at ___, 809 S.E.2d at 6. We hold that Defendant did not forfeit his right to counsel. The trial court's conclusion to the contrary was error, depriving Defendant of his right to counsel. Accordingly, a new trial is required.

III. Conclusion

The trial court deprived Defendant of his constitutional right to counsel by concluding that he had forfeited this right. This conclusion was error. Defendant is entitled to a new trial.

NEW TRIAL.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

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requested that a lawyer be appointed to represent him as primary counsel and, failing that request, that his standby counsel be activated. Assuming, *arguendo*, the trial court's forfeiture conclusion was not error, granting a continuance and appointing substitute standby counsel would have been advisable under the circumstances.

DILLON, Judge, dissenting.

This matter was called for trial on 23 April 2018 with Judge Gorham presiding. Defendant appeared *pro se*, having formally waived his right to counsel four months earlier. However, instead of indicating that he was ready to proceed, Defendant requested that Judge Gorham appoint his stand-by counsel to represent him, a request that would have required a continuance. Judge Gorham denied the request, and the matter proceeded to trial, resulting in several guilty verdicts.

On appeal, Defendant, now represented by appellate counsel, argues that (1) Judge Gorham erred in denying him appointed counsel and (2) Judge Gorham plainly erred in instructing the jury on an "acting in concert" theory of guilt.

The majority concludes that Defendant is entitled to a new trial based on Judge Gorham's decision not to appoint Defendant new counsel and allow the matter to be continued, never reaching the jury instruction issue. For the reasons stated below, I conclude that Judge Gorham did not commit reversible error regarding either issue raised by Defendant. Accordingly, I respectfully dissent.

I. No Error in Denying Defendant Counsel on Day of Trial

This issue on appeal involves the intersection of three legal concepts: (1) the right of a defendant to withdraw a previous waiver of counsel; (2) the authority of a trial court to deny a defendant's request for a continuance of the trial; and (3) the authority of a trial judge to declare that a defendant has forfeited his right to counsel. Admittedly, there are some inconsistencies in our case law. But, based on any view of our Court's jurisprudence and based on our Supreme Court's expressed concern of a defendant's effort to delay a trial by asserting a right to counsel at the last minute, I conclude Judge Gorham acted within her authority and discretion.

In my view, a defendant who has waived his right to an attorney should generally be able to withdraw his waiver by simply informing the trial court that he now wants to be represented.[1] That is, a judge

1. *See State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999) (stating that a waiver of counsel is good "until the defendant makes known to the court that he desires to withdraw the waiver and have counsel assigned to him"); *see also State v. Sexton*, 141 N.C. App. 344, 348, 539 S.E.2d 675, 677 (2000) (ordering a new probation hearing where defendant, who had previously waived his right to counsel, clearly stated on the day of his revocation hearing that he wanted counsel appointed).

generally should not deny a *pro se* defendant's request to be represented (for instance, by stand-by counsel), even if made on the day of trial, if the request does not require any delay. But where the request, if granted, would require that the trial judge continue the trial to another term, our case law suggests that the defendant must generally show "good cause."[2]

Admittedly, some of our cases do suggest that a trial judge may only deny an 11th hour request if she determines that the defendant has "forfeited" his right to an attorney through some misconduct on his part.[3] However, other cases use the language that a trial judge may deny the request on a mere failure by the defendant to show "good cause."[4]

Our Supreme Court has quoted from one of our Court's "good cause" cases in stating that a defendant's *timing* in making last-minute request for counsel may be considered in deciding whether to grant the request:

> "[A] defendant wait[ing] until [the] day trial began to withdraw waiver and seek appointment of counsel [is] a tactic which, if 'employed successfully, [would permit] defendants . . . to control the course of litigation and sidetrack the trial[.]' "

State v. Blankenship, 337 N.C. 543, 553, 447 S.E.2d 727, 733 (1994) (quoting *State v. Smith*, 27 N.C. App. 379, 381, 219 S.E.2d 277, 279 (1975)).[5]

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2. Our General Assembly has instructed that a trial judge may ordinarily deny a request for a continuance unless the party seeking the continuance can show "good cause[.]" N.C. Gen. Stat. § 15A-952(g)(4) (2018).

See, e.g., *State v. Hoover*, 174 N.C. App. 596, 598, 621 S.E.2d 303, 305 (2005) (stating that a defendant must show "good cause" to withdraw his waiver of counsel); *State v. Atkinson*, 51 N.C. App. 683, 685, 277 S.E.2d 464, 465 (1981) (holding that defendant "did not meet his burden of showing sufficient facts entitling him to a withdrawal of the waiver of right to counsel" made on the day of trial where he had previously indicated on multiple occasions that he was waiving his right to counsel).

3. *See State v. Blakeney*, 245 N.C. App. 452, 463, 782 S.E.2d 88, 95 (2016) (holding that a trial court should have granted a defendant's motion to continue in order to hire an attorney, "even if motivated by a wish to postpone his trial," where there was no showing that defendant had "forfeited" his right to counsel through "serious misconduct").

4. *See State v. Rogers*, 194 N.C. App. 131, 139-40, 669 S.E.2d 77, 83 (2008) (holding that the judge did not err in denying defendant's 11th hour request based on defendant's failure to show "good cause," even though defendant may not have otherwise "forfeited" his right to counsel).

5. *Blankenship* was overruled in part on other grounds in *State v. Barnes*, 345 N.C. 184, 230, 481 S.E.2d 44, 69 (1997). However, the right to counsel section of that opinion has not been overruled.

Indeed, our Supreme Court has expressed its concern about defendants delaying on invoking rights as a means of delay:

> We wish to make it abundantly clear that we do not approve of tactics by counsel or client which tend to delay the trial of cases" and that "an accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial.

State v. McFadden, 292 N.C. 609, 616, 234 S.E.2d 742, 747 (1977).

In any event, the concern raised by our Supreme Court in *Blankenship* and *McFadden* seems to be in line with the "forfeiture" standard articulated by our Court: namely, that a forfeiture "results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine to justify a forfeiture of defendant's right to counsel." *State v. Cureton*, 223 N.C. App. 274, 288, 734 S.E.2d 572, 583 (2012).

Accordingly, it seems that the "good cause" standard and the "forfeiture" standard are generally treated similarly. That is, a *pro se* defendant's desire to be represented by counsel, in and of itself, generally constitutes "good cause" to justify a continuance. But the additional fact that defendant has been dilatory in making his request may support a finding that the defendant has failed to show "good cause" for a delay or otherwise has "forfeited" his right to his right to counsel where the invocation of the right would require a delay.

In either case, it is clear under our case law that a trial judge may deny a defendant's request to continue a trial to another term so that the defendant can be appointed counsel to represent him when the trial judge determines that the defendant has been dilatory in making the request. This is clear under either a failure to show "good cause" standard or a "forfeiture" standard. Perhaps our Supreme Court needs to clarify the ambiguity in our case law. But in *this* case, Judge Gorham articulated *both* standards to support her decision, her decision is supported by her findings, and her findings are supported by the evidence that was before her. Therefore, we should affirm her decision.

Specifically, in denying Defendant's request, Judge Gorham "found that [Defendant] had no *good cause* as of today, the day of trial, to ask this Court for an attorney to represent him" and that "based upon his actions from the time [his third attorney] was appointed to represent him [eleven months earlier] . . . [D]efendant has *forfeited* his right to

have an attorney to represent him at this trial, [finding] that **his actions have been willful and that he has obstructed and delayed these court proceedings**." (Emphasis added.) As the trial court judge, these are *her* findings to make,[6] and there is ample evidence to support her findings.

Judge Gorham's findings were supported by the record before her which demonstrated that Defendant had twice fired his appointed counsel during the previous nine months and knew that waiting until the last minute to request his stand-by counsel be pressed into action, if granted, would require a further delay which would greatly prejudice the State's ability to prove its case. Specifically, the evidence before Judge Gorham showed as follows:

> In December 2016, the State agreed to a sentence of probation for a cooperating witness, in exchange for that witness's testimony in Defendant's trial. The term of that probation was for eighteen (18) months, to expire in June 2018;
>
> In May 2017, Defendant was appointed counsel. At some point, it appeared likely that the trial would take place in the Fall of 2017;
>
> Four months later, in September 2017, Defendant fired his appointed counsel, new counsel was appointed, and the trial date was set for January 2018;
>
> Three months later, in December 2017, at a pre-trial hearing one month before the scheduled trial, Defendant fired his new counsel and formally waived his right to counsel. The trial court on its own appointed stand-by counsel, and the trial court granted Defendant's request for a continuance to 23 April 2018;
>
> On 28 January 2018 and on 26 March 2018, Defendant attended pre-trial hearings. He did not indicate at either hearing any change of heart regarding his decision to represent himself;
>
> On 3 April 2018, three weeks before the scheduled trial, Defendant attended a pre-trial hearing. At the hearing, he asked for another continuance. Judge Gorham denied his motion. Defendant's stand-by counsel then indicated that he would need several weeks to prepare if he was asked to take over full representation. Judge Gorham stated that Defendant was not making any such request, and that she would only deal with such request if it was made. For his part,

6. *State v. Morgan*, 359 N.C. 131, 143, 604 S.E.2d 886, 894 (2004). *See also State v. Siler*, 292 N.C. 543, 555, 234 S.E.2d 733, 741 (1977) ("The determinations of good cause [to continue a pre-trial hearing] and extraordinary cause are for the trial court.").

Defendant never gave any indication that he had a change of heart regarding his decision to represent himself or of any reliance on his ability to change his mind at the last minute;

On 23 April 2018, the matter was called for trial.

--Defendant asked for new stand-by counsel, a request that was denied.

--Defendant then again asked for a continuance.

--But when it became obvious that his request would again be denied, Defendant asked that the stand-by counsel be appointed to represent him, knowing that his request, if granted, would accomplish his goal of delaying the trial again. Indeed, Defendant admitted to Judge Gorham during the hearing that he was making the request, not out of a desire to have stand-by counsel represent him, but because he was not prepared to proceed and wanted to delay the proceeding.

--Before making her decision, Judge Gorham heard from the four attorneys who had been appointed in the past to represent Defendant in the matter. Their testimonies tended to show that Defendant was well-acquainted with the discovery and that he essentially fired his last two appointed attorneys.

--Judge Gorham was also made aware that the probation period for the State's cooperating witness was set to expire and that the State had procured the attendance of other witnesses for the 23 April 2018 term of court.

--Judge Gorham then made her ruling, denying Defendant's request.

I conclude that Judge Gorham's decision was not erroneous;[7] she acted within her authority to deny Defendant's attempt to delay the trial.

I note Defendant's argument that he was somehow misled by Judge Gorham's statements at the 3 April 2018 hearing, three weeks before trial; that is, he relied on a representation by Judge Gorham that she

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7. Though the denial of a motion to continue is ordinarily reviewed for an abuse of discretion, our Supreme Court instructs that when a motion to continue "raises a constitutional issue [such as the right to the assistance of counsel], the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances presented by the record on appeal of each case[,]" *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982), but that "[t]he denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial *only upon a showing* by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *Id.* (emphasis added). In this case, given the findings made by Judge Gorham, findings which are supported by the record, Judge Gorham did not legally err by denying Defendant's request.

would allow stand-by counsel to represent him whenever he requested it. Specifically, at that hearing, after Judge Gorham denied a motion by Defendant to delay the trial, which was set to start in three weeks, stand-by counsel expressed his concern that he was only preparing to act as stand-by counsel and would not be prepared to step in and represent Defendant if called to do so. Judge Gorham responded, stating that she was not going to address counsel's concern because Defendant had not made any such request that he do so:

> My understanding from him today is that he still intends to represent himself. So, unless he says that to me, that he does not want to represent himself anymore, then at that point I can appoint you, but that not what [he] has said.

Our Supreme Court rejected this identical "reliance" argument in *Blankenship*.

In *Blankenship*, the trial judge told the defendant at a pre-trial hearing that "[w]hen you tell me you want [stand-by counsel] for your lawyer, I will reinstate him as your lawyer." *Blankenship*, 337 N.C. at 552, 447 S.E.2d at 733. But on the day of trial, the trial judge denied the defendant's request to appoint stand-by counsel to represent him. *Id.* On appeal, our Supreme Court rejected the contention that defendant should be entitled to a new trial based on his alleged reliance, in part, because there was "no showing in the record or transcript that defendant relied on anything the trial court said in choosing to represent himself." *Id.* at 552, 447 S.E.2d at 732-33.

Similarly, here, Defendant did not say anything during the 3 April 2018 pre-trial hearing or any other pre-trial hearing to indicate that he made his decision to represent himself in reliance on a representation that he could always call up his stand-by counsel into service. Rather, the record shows that on the day of trial, 23 April 2018, Defendant admitted that he was only asking for his stand-by counsel to represent him as a way to delay the trial, as he made the request only moments after his request that his appointed stand-by counsel *be replaced* was denied and his subsequent motion to continue was denied. *See State v. Jordan*, 2019 N.C. App. LEXIS 404, *8-12 (N.C. Ct. App. May 7, 2019) (following *Blankenship* in finding no error where the defendant was denied a request made during trial that his stand-by counsel be appointed as his counsel, reasoning that the defendant was unable to show that he had relied on a statement of the trial court that he would appoint stand-by counsel as counsel).

II. No Plain Error in Jury Instructions

In his second argument, Defendant argues that Judge Gorham plainly erred by instructing the jury that Defendant could be found guilty on a theory of acting in concert. I have reviewed the record and conclude that the instruction was supported by the evidence. But assuming that the instruction was error in that regard, I conclude that such error did not rise to the level of plain error.

STATE OF NORTH CAROLINA
v.
DATREL K'CHAUN LYONS, DEFENDANT

No. COA19-364

Filed 3 December 2019

1. Homicide—attempted first-degree murder—conspiracy to commit—cognizable offense

Considering an issue of first impression, the Court of Appeals held that conspiracy to commit attempted first-degree murder is a cognizable offense, and the offense does not require the State to prove that the defendant intended to fail to commit the attempted crime itself.

2. Homicide—attempted first-degree murder—sufficiency of the evidence—gun shot at law enforcement officer in vehicle

There was sufficient evidence to convict defendant of attempted first-degree murder where a law enforcement officer testified that defendant pointed a gun at her face from the window of his vehicle and that she heard a gunshot after she ducked behind the dashboard of her vehicle.

3. Sentencing—appeal—request to invoke Appellate Rule 2—sentences within presumptive range and overlapping with aggravated range

The Court of Appeals declined to invoke Appellate Rule 2 to consider defendant's arguments concerning his criminal sentences where the sentences fell at the top of the presumptive range and overlapped with the bottom of the aggravated range.

Judge BERGER concurring in separate opinion.

Appeal by Defendant from judgments entered 24 September 2018 by Judge Imelda Pate in Johnston County Superior Court. Heard in the Court of Appeals 29 October 2019.

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

James R. Parish for Defendant-Appellant.

INMAN, Judge.

Datrel K'Chaun Lyons ("Defendant") appeals from judgments entered following a jury's verdict finding him guilty of attempted first degree murder and conspiracy to commit attempted first degree murder. Defendant argues that: (1) the conspiracy charge as set forth in the indictment is invalid, as it alleges a non-existent crime; (2) the trial court erred in denying his motion to dismiss both charges for insufficiency of the evidence; and (3) the trial court erred in finding duplicative aggravating circumstances at sentencing. After careful review, we hold that the indictment for conspiracy is valid and the trial court did not commit error in denying Defendant's motion to dismiss. We dismiss the portion of Defendant's appeal pertaining to his sentencing for lack of jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence presented at trial tended to show the following:

On 24 October 2016, at approximately 9:30 p.m., two men robbed a Hardee's restaurant in Princeton, North Carolina as the employees were cleaning up and closing for the night. Ms. Ricks, the manager, was in her office doing bookkeeping for the day when she heard the alarm go off; suddenly, an unknown man appeared beside her, pointed a gun at her, and demanded she give him money. Ms. Ricks complied with his demand.

Ms. Ricks also observed a second man demanding that one of the cashiers open a cash drawer. Ms. Ricks explained to the robbers that the cashier could not open the cash drawer, but that she could. She then walked over and opened the drawer for them. Inside the drawer were rolls of coins and a burgundy BB&T bank cash bag containing approximately $500. One man took the BB&T bag and several rolls of coins and threw them into a "bookbag." The men then left the Hardee's and drove away in a Chevrolet Sonic vehicle. Ms. Ricks locked the doors and called the police.

At the time of the robbery, Johnston County Sheriff's Deputy Adriane Stone was driving a patrol car throughout the county. Sometime after the armed robbery was reported, Deputy Stone was driving on Cleveland Road when a car careened toward her at 78 to 79 miles per hour in a 55 mile per hour zone. Deputy Stone slowed to a stop and turned her emergency lights on, hopeful that the other car would slow down or stop. When the speeding car did not stop, Deputy Stone turned her vehicle around to give chase. Deputy Stone called dispatch and provided the license plate number of the vehicle, later identified as a Chevrolet Sonic, and reported she was making a traffic stop. She had no idea at that time that the vehicle was connected with the armed robbery at the Hardee's.

At one point during the pursuit, the Sonic slowed down suddenly and pulled over onto the shoulder of the road. Deputy Stone rolled to a stop behind the Sonic and exited her vehicle. After she did so, the Sonic sped away. Deputy Stone resumed the chase and called on the radio for back up. As the pursuit continued, the Sonic made a sudden stop a second time. Deputy Stone again stopped close behind.

After she had stopped, Deputy Stone observed a man, later identified as Defendant, lean his torso out of the back window of the Sonic and point a gun directly at her face. Deputy Stone immediately ducked behind her dashboard, heard a gunshot, and shifted her car into reverse. The driver of the Sonic then fled the scene. Deputy Stone, meanwhile, called dispatch to report shots fired, gathered her resolve, and resumed the chase.

Deputy Stone caught up to the fleeing Sonic and watched as it came to a stop at the end of a cul-de-sac. She parked her patrol car behind the Sonic, drawing her service pistol as she stepped out of the vehicle. The driver of the Sonic then turned around and drove the vehicle towards her. Deputy Stone fired 3-5 shots, striking the car. After the Sonic passed, Deputy Stone got back into her vehicle and heard another officer, Deputy Michael Savage, announce over the radio that the Sonic had crashed.

Deputy Savage arrived on the scene shortly after Deputy Stone had discharged her weapon, and observed that the Sonic had crashed into a mailbox off the side of the road. He saw three men jump out of the car and run into nearby woods. He called for help and Deputy Stone arrived a short time later. The two officers discussed what to do next and began to search inside the Sonic for firearms. They discovered a pellet gun in the backseat and a black Berretta pistol on the floorboard of the front passenger seat.

Clayton Police K-9 Officer Justin Vause arrived at the crash site. As he was approaching the site, he observed a man running into the woods. Officer Vause exited his vehicle and loudly warned the fleeing man that he was preparing to release his dog, Major, to find and subdue him. That man, later identified as Defendant, replied, "I'm over here, sir[,]" and surrendered, at which time Officer Vause arrested him. Officer Vause and Major then began to track a scent from the crashed Sonic, which eventually led them back to the woods where Defendant was arrested. Major searched the area and discovered a brown BB&T bank bag filled with money.

Believing the remaining suspects were in the nearby wooded area, law enforcement officers established a perimeter and deployed another tracking canine and a thermal imaging camera. They soon located another suspect, later identified as Gerald Holmes. Mr. Holmes did not initially cooperate with the police, but was quickly subdued by Major. Law enforcement later identified Antonio Pratt as the third suspect and arrested him several weeks after the chase.

Defendant was indicted on 7 November 2016 on charges of attempted first degree murder and conspiracy to commit attempted first degree murder.

At trial, Deputy Stone, Deputy Savage, Officer Vause, and Mr. Pratt testified to the events of the evening in detail. Describing the police chase, Mr. Pratt testified that when he first saw Deputy Stone's car, he began to panic because he was speeding and did not have a driver's license. He further testified that, at one point during the chase, Mr. Holmes told him to pull over; when he did, he heard Mr. Holmes yell to Defendant, "Shoot, bro. Shoot." Mr. Pratt testified that he then heard a loud boom, which he identified as a gunshot.

At the close of the State's evidence, Defendant moved to dismiss all claims for insufficiency of the evidence. That motion was denied. Defendant offered no evidence, and the jury found Defendant guilty on both charges. After the verdict was announced, Defendant admitted to the existence of three aggravating factors as part of a plea bargain. The trial court sentenced Defendant to 157 to 201 months imprisonment for attempted first degree murder and a consecutive sentence of 73 to 100 months imprisonment for conspiracy to commit attempted first degree murder. Both sentences fell at the top of the presumptive range and overlapped with the bottom of the aggravated range. Defendant gave notice of appeal in open court.

II. ANALYSIS

A. Standard of Review

We review challenges to the validity of indictments *de novo*. *State v. Billinger*, 213 N.C. App. 249, 255, 714 S.E.2d 201, 206 (2011). To be valid, "an indictment must allege every essential element of the criminal offense it purports to charge." *State v. Courtney*, 248 N.C. 447, 451, 103 S.E.2d 861, 864 (1958). An indictment that falls short of this standard fails to confer subject-matter jurisdiction on the trial court. *Billinger*, 213 N.C. App. at 255, 714 S.E.2d at 206.

The *de novo* standard also applies to our review of a trial court's denial of a motion to dismiss for insufficiency of the evidence. *Id.* at 253, 714 S.E.2d at 205. We "determine whether the State has presented substantial evidence (1) of each essential element of the offense, and (2) of the defendant's being the perpetrator." *Id.* at 252-53, 714 S.E.2d at 204-05 (citations omitted). We view the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).[1]

B. Conspiracy to Commit Attempted Murder

[1] Defendant contends that the indictment charging him with conspiracy "to commit the felony of Attempted First Degree Murder, [N.C. Gen. Stat. §] 14-17 against Adriane Stone" is invalid, as it alleges he conspired to commit a crime that does not exist. Whether conspiracy to commit attempted first degree murder is a crime is an issue of first impression for this Court, and presents, Defendant argues, "an illogical impossibility and a legal absurdity[,]" insofar as it would criminalize agreements *not* to commit murder. Though this argument does appear convincing at first blush, a full examination of the common law surrounding both conspiracy and attempted first degree murder lead us to hold that the indictment is valid.

At the outset, we note that the indictment alleges the elements of criminal conspiracy as a technical matter. "A criminal conspiracy is an agreement between two or more persons to do an unlawful act

1. At oral argument, Defendant conceded that he could not appeal his sentence as a matter of right under N.C. Gen. Stat. § 15A-1444(a1) (2019), and requested instead that we invoke Rule 2 of the North Carolina Rules of Appellate Procedure, treat his appeal as a petition for writ of certiorari, grant that petition, and reach the issue on the merits. We decline to invoke Rule 2 and dismiss that portion of his appeal.

or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citations omitted). Attempted first degree murder is most certainly a crime. *State v. Collins*, 334 N.C. 54, 59, 431 S.E.2d 188, 191 (1993). Thus, from a purely formulaic perspective, the indictment alleges both elements of conspiracy: (1) an agreement between Mr. Holmes and Defendant; (2) to commit an unlawful act, *i.e.*, attempted first degree murder. *Cf. United States v. Clay*, 495 F.2d 700, 710 (7th Cir. 1974) (holding an indictment alleging conspiracy to attempt to break into a bank was valid because the general federal criminal conspiracy statute required "the object alleged . . . be an offense against the United States" and a specific criminal statute recognized attempted bank robbery as just such an offense).

To ultimately convict a defendant of conspiracy, however, "the State must prove there was an agreement to perform every element of the underlying offense[,]" *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010) (citation omitted), and the "elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Melton*, ___ N.C. ___, ___, 821 S.E.2d 424, 428 (2018).[2] The phrase "conspiracy to commit attempted first degree murder" sounds discordant to the lawyerly ear because it suggests the conspirators must have intended to fail to commit a crime. While two or more people who collude to "make an attempt on" another's life or agree to "try" and kill someone have engaged in a criminal conspiracy, an indictment alleging a conspiracy "to commit the felony of Attempted First Degree Murder" strikes a less natural tone.

The State argues intent to fail is not in actuality an essential element of conspiracy to commit attempted first degree murder, contending that if the implication of an intent to fail is removed, so too is any disharmony in the indictment.

Crucially, conspiracy is a common law crime in North Carolina, *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 830 (1991), as is attempted first degree murder. *Collins*, 334 N.C. at 59, 431 S.E.2d at 191 (recognizing, apparently for the first time outside of *dicta*, the existence of the

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2. We note that decisions by our Supreme Court do not consistently identify failure as a discrete third element of attempt. *See, e.g.*, *State v. Powell*, 277 N.C. 672, 678, 178 S.E.2d 417, 421 (1971) ("The *two* elements of an attempt to commit a crime are: (1) An intent to commit it, and (2) an overt act done for that purpose, going beyond mere preparation, but falling short of the completed offense." (emphasis added) (citations omitted)).

crime). We may hold failure is not an essential element of conspiracy to commit attempted first degree murder—as a species of the common law crime of conspiracy—if our Supreme Court's precedents so indicate. *Cf. State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981) (holding the Supreme Court "possesses the authority to alter judicially created common law when it deems it necessary"); *State v. Lane*, 115 N.C. App. 25, 30, 444 S.E.2d 233, 237 (1994) (observing that this Court lacks the authority to modify or abandon the accepted common law).

Numerous decisions from our Supreme Court support the conclusion that failure is not strictly necessary to complete the crime of attempt.[3] In *State v. Baker*, 369 N.C. 586, 799 S.E.2d 816 (2017), a defendant was tried and convicted of attempted rape, even though the substantial evidence introduced at trial showed that the rape was completed. 369 N.C. at 592-93, 799 S.E.2d at 820. This Court held that the trial court erred in denying the defendant's motion to dismiss that charge, reasoning that "while there may have been substantial evidence for the jury to find defendant guilty of rape . . . there was insufficient evidence to support his conviction for attempted rape." *State v. Baker*, 245 N.C. App. 94, 99, 781 S.E.2d 851, 855 (2016). Our Supreme Court reversed that decision and held that "evidence of a completed rape is sufficient to support an attempted rape conviction." *Baker*, 369 N.C. at 597, 799 S.E.2d at 823.

Although the Supreme Court recited the elements of attempt as including failure, it also favorably cited *State v. Primus*, 227 N.C. App. 428, 430-32, 742 S.E.2d 310, 312-13 (2013), in which we "rejected the defendant's argument that guilt of the crime of attempted larceny requires that the defendant's act supporting the attempt charge fall short of the competed offense in order to be sufficient to support an attempt conviction, a conclusion that accords with the modern view concerning criminal liability for attempt." *Baker*, 369 N.C. at 596-97, 799 S.E.2d at 823 (citing 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.5, at 230 (2d ed. 2003)).

It also favorably quoted this Court's statement in *State v. Canup*, 117 N.C. App. 424, 451 S.E.2d 9 (1994), that " 'nothing in the philosophy of juridicial [sic] science requires that an attempt must fail in order to receive recognition.' " *Baker*, 369 N.C. at 596, 799 S.E.2d at 822 (quoting *Canup*, 117 N.C. App. at 428, 451 S.E.2d at 11). Thus, *Baker* suggests

3. Stated differently, the cases discussed *infra* suggest that a successful premeditated killing of a human being is a necessary element of first degree murder, but not for attempted first degree murder.

that while failure precludes a conviction for a completed crime, it is not *necessary* to support a conviction for criminal attempt of that same crime.

Such an understanding is consistent with the common law's treatment of attempted first degree murder as a lesser included offense of first degree murder. *See Collins*, 334 N.C. at 59, 431 S.E.2d at 191 (recognizing attempted murder as a lesser included offense of murder). Our Supreme Court has long employed "a definitional test for determining whether one crime is a lesser included offense of another crime." *State v. Nickerson*, 365 N.C. 279, 281, 715 S.E.2d 845, 846 (2011) (citing *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 377 (1982)). "[T]he test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser crime is not a lesser included offense." *Nickerson*, 365 N.C. at 282, 715 S.E.2d at 847. "In other words, *all* of the essential elements of the lesser crime must also be essential elements included in the greater crime." *Weaver*, 306 N.C. at 635, 295 S.E.2d at 379 (emphasis added), *overruled in part on other grounds by Collins*, 334 N.C. at 61, 431 S.E.2d at 193.

Thus, a conclusion that failure to kill is an essential and necessary element of attempted first degree murder cannot be squared with the definition of a lesser included offense, as failure is most certainly not an element of the greater offense of a completed first degree murder. *Cf. State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000) (reciting the elements of both first degree murder and the lesser included offense of attempted first degree murder).

Other states have held conspiracy to commit an attempted crime is a cognizable offense where the common law crime of attempt does not require failure as an essential element. As pointed out by Defendant,[4] Maryland recognizes the existence of the crime of conspiracy to attempt first degree murder. *Stevenson v. State*, 423 Md. 42, 52 (2011) (" '[C]onspiracy to attempt a first degree murder' is a cognizable offense." (citing *Townes v. State*, 314 Md. 71 (1988)). In *Townes*, Maryland's highest appellate court reviewed an indictment for "conspiracy to attempt to

4. Defendant cites to an unpublished decision of Maryland's intermediate appellate court, *Knuckles v. State*, 2018 WL 2113969 (Md. Ct. Spec. App. May 8, 2018), for this proposition. *Knuckles*, however, relied exclusively on published cases from Maryland's highest court. Our discussion, therefore, focuses on those published cases rather than on *Knuckles* itself.

commit the crime of obtaining money by false pretenses[,]" which it held charged a valid crime. 314 Md. at 75. The court in *Townes* first recognized that the indictment was technically sufficient to allege conspiracy:

> If we mechanically assemble the building blocks of the crime of conspiracy in the context of this case, it would seem that the crime of conspiracy to attempt to commit the crime of obtaining money by false pretenses fits the established mold. Obtaining money by false pretenses is a crime. Attempting to obtain money by false pretenses is a separate, self-standing crime. Accordingly, if a criminal conspiracy consists of an agreement to commit a crime, and an attempt to obtain money by false pretenses is a crime, it follows that the crime of conspiracy to attempt to obtain money by false pretenses fits the legal definition of conspiracy.

Id. at 75-76 (citations omitted). The court in *Townes* then went on to address and reject as inapplicable the argument—also presented in this case—that one cannot criminally intend not to complete a crime:

> Townes' argument fails to take into consideration an established principle of Maryland law. In this State, unlike a minority of other states, failure to consummate the intended crime is *not* an essential element of an attempt.
>
> . . . .
>
> The logical inconsistency postulated by Townes simply does not exist in this State. A person intending to commit a crime intends also to attempt to commit that crime. The intent to attempt is viewed as correlative to and included within the intent to consummate. Accordingly, one who conspires to commit a crime concurrently conspires to attempt to commit that crime.

Id. at 76-77 (citations omitted).

Our Supreme Court's decisions recounted *supra* align with the reasoning espoused in *Townes*. *Cf. Baker*, 369 N.C. at 596, 799 S.E.2d at 822 (holding evidence of a completed rape is sufficient to support a conviction for attempted rape in part because " '[t]he completed commission of a crime must of necessity include an attempt to commit the crime' " (quoting *Canup*, 117 N.C. App. at 428, 451 S.E.2d at 11) (alteration in original)).

Although Defendant relies on several decisions by other courts that have reached the opposite result, those decisions all arose in jurisdictions where either the crimes in question were statutorily delineated or failure was considered by the deciding court to be a necessary element of conspiracy to attempt. *See, e.g.*, *People v. Iniguez*, 96 Cal. App. 4th 75, 79 (2002) (holding conspiracy to commit attempted murder was not a crime where the attempt statute provided " '[e]very person who attempts to commit any crime, but fails, . . .' is guilty of a crime" (citation omitted)); *Wilhoite v. State*, 7 N.E.3d 350, 353 (Ind. Ct. App. 2014) (relying on *Iniguez* to hold that conspiracy to commit attempted robbery was not a cognizable crime because "colloquially speaking, to 'attempt' a crime is to 'try' without actually completing the crime" (citation omitted)); *United States v. Meacham*, 626 F.2d 503, 509 n.7 (5th Cir. 1980) (distinguishing *Clay*, holding that Congress did not intend to create a crime of conspiracy to attempt to commit federal drug crimes under 21 U.S.C. §§ 846 & 963, and observing that conspiracy to attempt to fail is "the height of absurdity").

In short, given that failure need not actually be shown or proven to convict a defendant of attempt, *Baker*, 369 N.C. at 596, 799 S.E.2d at 822, and that attempted first degree murder is a lesser included offense of first degree murder, *Collins*, 334 N.C. at 59, 431 S.E.2d at 191, the charge of conspiracy to commit attempted first degree murder does not require the state to prove defendant intended to fail to commit the attempted crime itself. As a result, we hold that conspiracy to commit attempted first degree murder is a cognizable offense and, with all other elements of conspiracy appearing in the indictment, was adequately charged in this case.

C. Motion to Dismiss

[2] Defendant next argues that the trial court erred in denying his motion to dismiss all charges for insufficiency of the evidence, contending that the evidence shows only that he fired a pellet gun in an attempt to scare Deputy Stone away. Such evidence, Defendant contends, defeats every element of attempted first degree murder. Defendant also applies that same argument to the conspiracy charge and reasserts that the State was required to—and could not—prove an intent to fail.

Defendant is incorrect in his claim that the evidence shows only that he fired a pellet gun with an intent to scare off Deputy Stone. Deputy Stone testified that she saw Defendant point a gun at her face and that she heard a gunshot after ducking behind her dashboard. Though it is true that she did not directly observe where the gun was pointed at the

time it was fired, she further testified that this series of events happened "fast[,]" and testified on cross-examination that "once I saw the gun at my face, I yelled out, 'Oh, s–t,' and I started to go down. . . . [A]s I'm going down, I hear the gunshot."

While it is possible that the gun was not pointed at Deputy Stone when Defendant pulled the trigger, the jury could draw a reasonable inference from Deputy Stone's testimony to find the gun remained pointed at her when she heard it seconds later. Contrary to Defendant's argument, such an inference is no less reasonable because Deputy Stone took quick evasive action in the interest of self-preservation. Mr. Pratt, who was the getaway driver during the chase, also provided the following testimony indicating that Defendant discharged a firearm rather than a pellet gun: "I heard [Mr. Holmes] say 'Shoot, bro. Shoot.' . . . He had to be talking to [Defendant]. . . . I just looked at Holmes. I heard [a] boom. . . . I want to say [Defendant] fired the shot."

Further, Mr. Pratt was unequivocal in his testimony that Mr. Holmes did not have a gun in his hand when the shot rang out. Our standard of review on a motion to dismiss compels us to adopt the reasonable inference most favorable to the State from this evidence, *Rose*, 339 N.C. at 192, 451 S.E.2d at 223, which, in this case, is an inference that Defendant aimed and fired a gun at Deputy Stone following instruction from Mr. Holmes. Defendant's argument is overruled.

We likewise hold that the trial court did not err in denying the motion to dismiss as to the conspiracy charge. The jury could reasonably infer Defendant, in a conspiracy with Mr. Holmes, attempted to kill Deputy Stone by firing a gun at her. Because intentional failure is not necessary to a charge of conspiracy to commit attempted murder, as explained *supra*, the State was not required to demonstrate Defendant intended to fail in his attempt to take Deputy Stone's life. Defendant's argument on this point is likewise overruled.

D. Sentencing

[3] At oral argument, Defendant conceded that he could not appeal his sentences as a matter of right under N.C. Gen. Stat. § 15A-1444(a1) (2019), and requested instead that we invoke Rule 2 of the North Carolina Rules of Appellate Procedure, treat his appeal as a petition for writ of certiorari, grant that petition, and reach the issue on the merits. We decline to invoke Rule 2 and dismiss that portion of his appeal. *See State v. Daniels*, 203 N.C. App. 350, 354-55, 691 S.E.2d 78, 81-82 (2010) (dismissing a defendant's appeal from sentencing under N.C. Gen. Stat.

§ 15A-1444(a1) when defendant's sentence in the presumptive range nonetheless overlapped with the aggravated range).

III. CONCLUSION

We hold the indictment in this case validly charged Defendant with a criminal conspiracy. The evidence introduced at trial was sufficient to submit both charges of attempted murder and conspiracy to the jury. Defendant's appeal from sentencing is dismissed for want of jurisdiction. We find no error in the jury's verdicts or in the judgments entered thereon.

DISMISSED IN PART; NO ERROR IN PART.

Judge TYSON concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority. However, I write separately because I would reach the same result through different reasoning.

"[T]he primary purpose of an indictment is to enable the accused to prepare for trial." *State v. Silas*, 360 N.C. 377, 382, 627 S.E.2d 604, 607 (2006) (citation and quotation marks omitted). "The indictment must also enable the court to know what judgment to pronounce in case of conviction." *State v. Nicholson*, 78 N.C. App. 398, 401, 337 S.E.2d 654, 657 (1985) (citation and quotation marks omitted). It is well-settled in North Carolina that any allegations in an indictment beyond those essential to the crime sought to be charged "are irrelevant and may be treated as mere surplusage." *State v. Bowens*, 140 N.C. App. 217, 224, 535 S.E.2d 870, 875 (2000). So long as surplusage contained within an indictment does not prejudice the defendant, such language can properly be ignored. *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 745-46 (1985).

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means." *State v. Lamb*, 342 N.C. 151, 155, 463 S.E.2d 189, 191 (1995). Notably, "a conspiracy indictment need not describe the subject crime with legal and technical accuracy because the charge is the crime of conspiracy and not a charge of committing the subject crime." *Nicholson*, 78 N.C. App. at 401, 337 S.E.2d at 657. To convict a defendant of conspiracy, the State

must prove beyond a reasonable doubt that the defendant was member to an agreement to perform every element of the underlying offense. *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010).

The offense of first-degree murder is established and defined by Section 14-17 of the North Carolina General Statutes. N.C. Gen. Stat. § 14-17 (2017). In the present case, Defendant was indicted for "conspir[ing] with Gerald Holmes to commit the felony of Attempted First Degree Murder, N.C.G.S. 14-17." Accordingly, the indictment was sufficient to allow Defendant to prepare for trial because it contained the two essential elements of the crime of conspiracy: (1) an agreement with Gerald Holmes, and (2) to commit the unlawful act of first-degree murder pursuant to Section 14-17. The inclusion of the word "attempted" is irrelevant to the indictment and may be treated as surplusage. Moreover, so long as the inclusion of the word "attempted" in the indictment did not prejudice Defendant at trial, which it did not, this surplusage can properly be ignored.

For a defendant to be found guilty of the common law offense of attempted first-degree murder, the State must prove the following elements beyond a reasonable doubt "(1) the intent to commit [first-degree murder], and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018) (citation and quotation marks omitted). At trial, following the conclusion of the State's case-in-chief, Defendant did not present any evidence in his own defense. Relying on the charging indictment, the trial court subsequently instructed the jury on felonious conspiracy to attempt first-degree murder.

As noted by the majority, the State presented sufficient evidence by which a reasonable juror could conclude that Defendant satisfied the first element of conspiracy to commit attempted first-degree murder. For Defendant to satisfy this first element, the jury was required to find, beyond a reasonable doubt, that Defendant was member to an agreement with "the intent to commit first-degree murder." By necessity, then, the jury must also have found, beyond a reasonable doubt, that Defendant participated in an agreement with the intent to perform every element of first-degree murder. Therefore, the State satisfied its burden of proving that Defendant was member to a conspiracy to commit first-degree murder.

As a result of Defendant being found guilty of conspiracy to commit attempted first-degree murder, he was sentenced for a Class C felony

instead of a B2 felony. N.C. Gen. Stat. §§ 14-2.4; 14-2.5; 14-7 (2017). Thus, Defendant is not entitled to relief on appeal based upon the inclusion of the word "attempted" in his indictment because the word's inclusion did not prejudice Defendant at trial. Any error stemming from this surplusage in the indictment was in Defendant's favor.

STATE OF NORTH CAROLINA
v.
ALI AWNI SAID MARZOUQ, DEFENDANT

No. COA19-471

Filed 3 December 2019

Constitutional Law—effective assistance of counsel—failure to advise—immigration consequences of guilty plea—prejudice —N.C.G.S. § 15A-1022(a)

Where defendant, an immigrant, pleaded guilty to possession of a controlled substance and possession with intent to sell heroin, which presumptively subjected him to deportation under a federal statute, his lawyer's advice that he "may" be deported if he pleaded guilty constituted ineffective assistance of counsel. Nevertheless, the case was remanded to determine if defendant was prejudiced, because it was unclear whether the trial court concluded he was already deportable on other grounds (or that the court had all the facts before it to make that conclusion). Additionally, the Court of Appeals emphasized that, although defendant asserted U.S. citizenship at trial, N.C.G.S. § 15A-1022(a) still required the trial court to warn defendant of any deportation risk before accepting his guilty plea.

Appeal by defendant from order entered 28 December 2018 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 31 October 2019.

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

Tin Fulton Walker & Owen, PLLC, by Jim Melo, Esq., for defendant-appellant.

North Carolina Advocates for Justice, by Helen L. Parsonage, and North Carolina Justice Center, by Raul A. Pinto, amici curiae.

YOUNG, Judge.

Where defendant's guilty plea presumptively subjected him to deportation, trial counsel's advice that defendant "may" be deported constituted ineffective assistance of counsel. However, where the record does not affirmatively show whether the trial court considered defendant's prior convictions to determine prejudice, we must remand for further findings. We affirm in part, but remand in part.

I. Factual and Procedural Background

On 3 August 2015, Ali Awni Said Marzouq (defendant) was indicted by the Nash County Grand Jury for possession with intent to sell and deliver heroin, and possession of a Schedule II controlled substance. At some point he was also charged with maintaining a vehicle or dwelling place for the keeping or selling of controlled substances. Defendant pleaded guilty to the charges of possession of heroin and maintaining a vehicle or dwelling place, and the trial court entered judgment, namely a two-year suspended sentence. On the transcript of plea, next to Question 8, which asks whether the defendant understands that a guilty plea may result in deportation, defendant wrote "Permanent resident."

On 12 July 2018, defendant filed a motion for appropriate relief (MAR), seeking to withdraw his guilty plea. Defendant, an immigrant, alleged that roughly one year into his two-year suspended sentence, he was seized by Immigration and Customs Enforcement and placed into detention and removal proceedings. He argued that, had he known the plea would impact his immigration status and result in deportation, he would not have taken it. On 10 September 2018, the trial court entered an order, finding that defendant's indication of "Permanent resident" in response to Question 8 on the transcript of plea indicated an affirmative response. The court therefore denied defendant's MAR.

On 8 November 2018, this Court granted certiorari. In an order, this Court required the trial court to review "whether petitioner's Alford plea was induced by misadvice of counsel regarding the immigration consequences of the plea and whether any misadvice resulted in prejudice to petitioner." The matter was remanded to the trial court for review, and on 28 December 2018, the trial court entered another order. The court found that defendant had been advised that if he pleaded guilty, he might be deported; that defendant had further been advised to speak to an immigration attorney; that defendant asserted to the trial court that he was a citizen, not a permanent resident, of the United States; and that this assertion "precluded any further inquiry into his immigration status

and thwarted both the Court and the State's ability to cure any misadvice the defendant may have received." The court therefore found that counsel's advice did not constitute ineffective assistance of counsel, and that defendant failed to show prejudice. The trial court once more denied defendant's MAR.

On 11 March 2019, this Court granted certiorari to review the trial court's 28 December 2018 order denying defendant's MAR.

II. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "When a trial court's findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court's conclusions are fully reviewable on appeal." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citations omitted).

III. Ineffective Assistance of Counsel

In his first argument, defendant contends that the trial court erred in finding that defense counsel's conduct was not ineffective assistance of counsel. We agree.

In his MAR, defendant alleged that counsel informed him that his plea "may affect his immigration status or . . . that it would not affect his immigration status in any manner." Defendant attached to his MAR three affidavits. In one, his own, defendant averred that his attorney "specifically told me not to worry about Immigration." In another, his fiancée Shannon Pitt averred that defense counsel "said that [defendant] would not have anything to worry about with his immigration status." Defendant, citing the case of *Padilla v. Kentucky*, 559 U.S. 356, 176 L. Ed. 2d 284 (2010), noted that counsel is "constitutionally ineffective if he fails to advise – or misadvises – his client about the immigration consequences of a guilty plea." Defendant therefore argued in his MAR, and argues now on appeal, that he received ineffective assistance of counsel as a result of his attorney's misadvice.

This Court has held that "*Padilla* mandates that when the consequence of deportation is truly clear, it is not sufficient for the attorney to

advise the client only that there is a risk of deportation." *State v. Nkiam*, 243 N.C. App. 777, 786, 778 S.E.2d 863, 869 (2015). In the instant case, defendant's plea concerned possession of heroin and maintaining a dwelling place, two drug-related offenses. Federal law requires an alien or permanent resident to be deported who "has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana[.]" 8 U.S.C. § 1227(a)(2)(B)(i). This statute provides an explicit mandate – such an alien "shall" be removed if he or she falls within this or other categories.

We hold that where federal statute mandates removal, there is a presumption that deportation will happen. As such, pursuant to *Padilla* and *Nkiam*, it is not sufficient for counsel to suggest that deportation "may" happen or is possible. It is incumbent upon counsel, in a situation like this where deportation is presumed where a defendant pleads or is found guilty, to specify that deportation is probable, or presumptive. Waffling language suggesting a mere possibility of deportation does not adequately inform the client of the risk before him or her, and does not permit a defendant to make a reasoned and informed decision.

In the instant case, the evidence is somewhat inconsistent. Defendant contends that counsel did not inform him whatsoever of the consequences of his plea, while counsel avers that he informed him there may be consequences. At most, however, the evidence would permit the trial court to find that counsel only offered the possibility of deportation – "may" language, instead of "presumptive" language. As we have held, such language is insufficient when a defendant is facing presumptive deportation. Accordingly, we hold that defendant received ineffective assistance of counsel, and the trial court erred in finding otherwise.

We note, however, that a showing of ineffective assistance of counsel is insufficient to grant defendant the relief he seeks; he must also show prejudice. For this reason, we continue to examine defendant's arguments.

IV. Prejudice

In his second argument, defendant contends that the trial court erred in finding that defendant was not prejudiced by defense counsel's conduct. We disagree.

Defendant argues that the decision to reject the plea bargain and go to trial would have been a rational one, had he known of the immigration consequences of his decision. As a result, he contends that this guilty

plea subjected him to prejudice, namely deportation, where he otherwise might not have been subject.

"Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted).

The State, in its brief, cites to numerous federal cases which suggest that a defendant who is facing deportation on other grounds cannot show prejudice. *See*, *e.g.*, *United States v. Batamula*, 823 F.3d 237, 242 (5th Cir. 2016) (holding that, where a defendant was "already deportable for having overstayed his visa[,]" he "failed to show prejudice"). We agree with the State, in principle. A showing of prejudice requires a showing that, absent the allegedly erroneous action, a different outcome would have resulted. If a defendant was facing deportation for a separate charge, then regardless of whether he pleaded or went to trial on the instant charge, deportation would still result. As such, we hold that a defendant already facing deportation could not show prejudice, notwithstanding the otherwise ineffective assistance of trial counsel.

The problem that confronts us, however, is the insufficiency of the record. The State notes that "the Department of Homeland Security has taken the position that Defendant is subject to removal on the basis of two convictions: (1) his 30 June 2016 conviction for possession of drug paraphernalia, and (2) his 2 March 2017 conviction for possession of heroin." Moreover, defendant's trial counsel acknowledged his prior conviction for possession of drug paraphernalia. However, it is not clear to this Court that the trial court had the complete factual background, including the position of the Department of Homeland Security, before it.

The State concedes, and we so hold, that a conviction for possession of drug paraphernalia, as opposed to a conviction more directly relating to a controlled substance, does not render a noncitizen presumptively removable. *See*, *e.g.*, *Madrigal-Barcenas v. Lynch*, 797 F.3d 643, 645 (9th Cir. 2015) (holding that a conviction for possession of drug paraphernalia is "not categorically for violation of a law relating to a controlled substance").

In the instant case, the trial court's order noted a number of defendant's pending charges in other cases. It did not, however, contain any findings as to other *convictions*, nor as to whether these convictions made defendant eligible for deportation. Rather, the trial court, upon finding and concluding that defendant did not receive ineffective

assistance of counsel, somewhat summarily found and concluded that defendant was not prejudiced by same.

It is true that, in a case such as this, where the trial court's findings are supported by competent evidence, they are binding upon this Court. And it is true that defendant's counsel conceded the existence of his prior conviction for possession of drug paraphernalia. However, such a conviction does not render defendant presumptively removable, and it is not clear that the trial court had the position of Homeland Security before it to support that determination. As such, it is not clear to this Court that there was, in fact, competent evidence to support the trial court's finding that there was no prejudice. We therefore remand this issue to the trial court for the entry of findings consistent with this opinion. On remand, the trial court shall consider whether defendant was prejudiced based on the ineffective assistance of counsel, and shall specifically consider whether defendant is subject to deportation on other charges.

V. Assertion of Citizenship

In his third argument, defendant contends that the trial court erred in finding that defendant's assertion of United States citizenship rendered his MAR moot. While we need not address this issue, as we have remanded this matter for further proceedings, we feel we nonetheless must clarify a matter of trial procedure.

In its order denying defendant's MAR, the trial court found:

> 23. When questioned by the Court during the plea colloquy on March 2, 2017, defendant told the Court that he was a citizen of the United States.
>
> 24. Defendant subsequently admitted that he told the Court he was a citizen of the United States.
>
> 25. Defendant's presentation to the Court that he was in fact a citizen of the United States precluded any further inquiry into his immigration status and thwarted both the Court and the State's ability to cure any misadvice the defendant may have received.

As a result, the trial court concluded that "[t]he defendant's assertion to the Court that he was a citizen renders this MAR moot." Defendant contends that this conclusion was erroneous.

Simply put, the trial court's analysis was in error. Pursuant to our General Statutes:

> Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:
>
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
>
> (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge; and
>
> (7) Informing him that if he is not a citizen of the United States of America, a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.

N.C. Gen. Stat. § 15A-1022(a) (2017). No provision is made that permits the trial court to bypass one of these questions. Indeed, all are mandatory. It was therefore error for the trial court to determine that, where defendant asserted his citizenship, it was not necessary for the trial court to inform him of the risk of deportation.

However, the trial court was nonetheless correct, but for a different reason. Our General Statutes also provide that "[n]oncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired." N.C. Gen. Stat. § 15A-1027 (2017). In other words, despite the trial court's failure to engage in proper colloquy with defendant, in violation of N.C. Gen. Stat. § 15A-1022, that failure ceased to be grounds for review when the time for appeal had passed. Defendant's MAR was filed in 2018, long after the

appeal period had passed, and as such, any argument concerning the trial court's failure to comply with statute was indeed rendered moot.

We nonetheless feel the need to reinforce the importance of following this procedure. The requirements outlined in N.C. Gen. Stat. § 15A-1022 are mandatory, regardless of what a defendant might say, and we advise the courts of this State to comply with them.

AFFIRMED IN PART, REMANDED IN PART.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA
v.
ANTONIO MORQUETT PHILLIPS

No. COA19-372

Filed 3 December 2019

1. Appeal and Error—preservation of issues—timeliness of objection—at time evidence is introduced—interruption by voir dire hearing

Defendant's objection was timely where he objected to certain testimony and was overruled in the presence of the jury (when the witness stated that she could answer the State's questions only if "made to do so"), the trial court then excused the jury and conducted a voir dire hearing on the issue and announced that defendant's objection would "continue to be overruled," and after voir dire the witness gave the challenged testimony without further objection by defendant. The issue was preserved for appellate review.

2. Evidence—expert testimony—sufficient facts or data—product of reliable principles and methods—DNA evidence—inconclusive sample

In a statutory rape prosecution, the trial court violated Evidence Rule 702(a) by admitting the testimony of an expert witness, who performed the DNA analysis in the case, regarding the minor contributor's alleles on the victim's external genitalia swab. The testimony comparing an inconclusive unknown sample with a known sample was based on insufficient facts or data because the witness herself testified that the minor contributor's DNA profile was not

of sufficient quality and quantity for comparison purposes. Further, the testimony could not reasonably be considered the product of reliable principles and methods because the witness repeatedly stated that the comparison the State asked her to perform would be against the policy of any lab in the country.

3. Evidence—expert testimony—DNA evidence—prejudice analysis

In a statutory rape prosecution, expert testimony concerning DNA comparison admitted in violation of Evidence Rule 702(a) was more than mere corroboration of the State's other evidence because it discredited evidence that corroborated defendant's theory of the case—that another person transferred defendant's DNA to the prosecuting witness. There was a reasonable possibility that, had the error not been committed, a different result would have been reached at trial.

Judge DILLON dissenting.

Appeal by defendant from judgment entered 31 August 2018 by Judge William A. Wood II in Catawba County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein and Chief Deputy Attorney General Alexander M. Peters for the State.

The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.

TYSON, Judge.

Antonio Morquett Phillips ("Defendant") appeals from the jury's conviction of statutory rape of C.C., a 13-year-old female. *See* N.C. R. App. P. 42(b)(3) (initials are used instead of a minor's name in appeals filed under N.C. Gen. Stat. § 7A-27 involving sexual offenses committed against a minor). We find prejudicial error, and reverse and remand for a new trial.

I. Background

C.C., then 13 years old, and her friend Justine Eckard, then 21 years old, were at Defendant's apartment on the evening of 8 December 2013. The first trial resulting from the events of that evening ended in an acquittal on some charges and a mistrial on this charge. At a second

trial, C.C., Eckard, and Defendant each testified to different versions of how the three individuals arrived at Defendant's apartment, how they left, and what happened while all three were there and afterwards.

A. C.C.'s Testimony

C.C. testified she and Eckard walked to a McDonald's restaurant to access the restaurant's wireless internet. They encountered Defendant there and he invited them back to his apartment. Eckard knew Defendant and told C.C. "it was a good idea." C.C. had previously met Defendant once before, and she trusted Eckard. Defendant drove both of them to his apartment. They entered through the back door. Defendant and C.C. smoked marijuana, while the three of them talked.

C.C. smoked "too much" marijuana, which caused her to "get really relaxed" and "take down [her] guard." Eckard had to leave the apartment around 9:00 p.m., Defendant called her a cab, and she left. C.C. was interested in staying with Defendant and smoking more marijuana. C.C. relied upon Eckard and "knew she wouldn't leave me in a situation that I wouldn't be okay in."

Defendant told C.C. that "he wanted to treat [her] like a real man." He bent her over and initiated sexual contact with her after Eckard had left. C.C. told Defendant she "was not comfortable with things that he did to [her]." Defendant penetrated C.C. anally, orally, and vaginally. C.C. did not remember if Defendant ejaculated, but she assumed he did when he finished.

Defendant then gave C.C. a black tank top he owned, called a cab for C.C., and she left. C.C. told her mother she had been raped when she arrived home. Her mother called the police, who responded. Paramedics also arrived and transported C.C. to Frye Regional Medical Center. C.C. testified she had no sexual contact with Eckard or any other person other than Defendant while at his apartment.

B. Eckard's Testimony

Eckard testified she and C.C. had walked to McDonald's "trying to find something to do." C.C. had Defendant's phone number and had the idea to contact him. Eckard agreed they should send Defendant a text message and go to his apartment. Defendant picked them up and drove them to his apartment. They entered through the front door. Eckard played a game on her phone and listened to music, while C.C. and Defendant smoked marijuana. Eckard wanted to leave and get home to comply with her mother's curfew. She left Defendant's apartment around 9:30 or 10:00 p.m. in a cab he had called for her. Although Eckard

testified she had "begged" C.C. to leave with her, C.C. chose to stay behind. Eckard also testified she had no sexual contact with Defendant or with C.C. that night.

C. Defendant's Testimony

Defendant, age 36 at the time of the incident, testified he first saw C.C. and Eckard walking up the sidewalk from his front porch. He had neither seen them at McDonald's, nor picked them up, and had not driven them to his apartment. Defendant had not received a text message from them "because neither one of them [had] my number." On Defendant's porch, he and C.C. smoked marijuana while Eckard "play[ed] a little game on her phone."

Eckard repeatedly asked Defendant for money, which irritated him, until he asked her what she was going to do for the money. She said she would make it "worth [his] while." Eckard and Defendant walked into the apartment, leaving C.C. outside on the porch. Eckard then performed oral sex on Defendant. Defendant ejaculated during his contact with Eckard and went into the restroom to take a shower. When he left the restroom, he found both Eckard and C.C. laying on his bed. Defendant saw Eckard's face and hands between C.C.'s legs, with Eckard's finger "inside [C.C.]"

Defendant "snapped" and asked them what they were doing. Eckard asked for her money, which Defendant gave her. He told them to get their stuff together and leave. Eckard and C.C. left together. Defendant then saw C.C. walking back up the street by herself. When Defendant asked her what she was doing, she said she needed a ride home. Defendant called her a cab and she left. Defendant denied any sexual acts or contact with C.C.

Defendant's testimony at trial conflicted with previous statements he had made to police during the investigation. During an interview with an investigator, Defendant initially claimed he did not know "whether [C.C.] was legal or not," but at trial he admitted he knew C.C. was thirteen years old. He initially claimed neither C.C. nor Eckard had entered into his apartment that night but had entered only the building. When his DNA sample was taken, he insisted investigators would "absolutely not" find his DNA in C.C.'s rape kit.

D. DNA Evidence

C.C. presented at the hospital in the same condition as she had arrived home, because her mother did not allow her to change clothes, shower, wash, or use the bathroom. A sexual assault nurse examiner

collected a rape kit and examined C.C. "head to toe." She took oral, vaginal, and anal swabs from C.C., and gathered all of C.C.'s clothing.

Dr. Melinda Wilson, a forensic biologist with the North Carolina State Crime Lab, qualified as an expert witness in the area of DNA analysis, and testified at trial. She received DNA profiles from C.C., Defendant, and Eckard, and tested C.C.'s clothes and swabs for DNA.

The DNA testing process takes multiple steps. Dr. Wilson testified she extracted DNA from very small samples of the evidence, quantified how much DNA was potentially present in each sample, made "billions and billions and billions of copies" of each sample to improve visibility, and then created a graphical electropherogram ("graph") of each unknown donor sample to compare with the known donor samples. Because DNA is microscopic and not visible to the human eye, the graphs represent between fifteen and twenty-seven locations on the DNA molecule in each person's DNA, "kind of like an address." At each location on the graph, Dr. Wilson sees a number representing an "allele," which she testified "is a result that I would see as part of a DNA profile." Each graph is representative of a DNA profile that comes either from an unknown sample of evidence or a known sample profile.

Dr. Wilson testified a DNA "match" occurs when the alleles at every location on an unknown sample are the same as all twenty-seven of the locations she views on a known sample. If every location is not tested, there cannot be a "match." If not all the locations are tested, but all tested locations are the same, the unknown sample is "consistent with" the known sample, which Dr. Wilson testified "is not an exclusion." An "exclusion" is the result when the unknown sample evidence "could not come from the known standard" in the comparison.

A DNA profile is "conclusive" when it is of sufficient quality and quantity for comparison purposes, and "inconclusive" when it is not. Dr. Wilson testified, when a component is inconclusive, "you cannot include someone as a possible source of DNA and you also cannot exclude them as a possible source of DNA."

One of the five samples Dr. Wilson tested, C.C.'s external genitalia swab, contained a "mixture of three contributors": two "major" contributors and one "minor." Dr. Wilson presumed C.C. was one of the major contributors as the donor of the sample and determined Defendant's DNA profile was consistent with the other major contributor. The minor contributor's profile was "inconclusive due to complexity and/or insufficient quality of recovered DNA."

The prosecutor then asked Dr. Wilson if she was "able to see anything" about that minor contributor's profile. Dr. Wilson answered:

> No. So when a profile is inconclusive, we are not allowed by policy to make a comparison, period. So I can't look at it and say, well, this alleles that are there, or results that are there in that profile, look like it's this other person. You can't do that. So it's just is what it is. It's inconclusive and we don't make comparisons to it and don't make statements about it.

After a few questions about alleles, the prosecutor continued to ask Dr. Wilson to make statements about the inconclusive minor contribution:

> Q: Okay. And were you able to see any alleles in that minor profile?
>
> A: I did see alleles.
>
> Q: How many did you see?
>
> A: Six.
>
> Q: Six alleles?
>
> A: Uh-huh (Affirmative).
>
> Q: Okay.
>
> A: Yes.
>
> Q: And looking at those six alleles, were you able to look at Justine Eckard's alleles at those same markers and determine if she happened to have any of those same alleles as those same markers?
>
> A: No; because that's against policy because it's inconclusive.
>
> Q: Okay. If I asked you to look at those, are you able to do it here?
>
> A: If made to do so, yes.

Defendant's counsel objected, but was overruled.

The prosecutor continued:

> Q: Unfortunately, Ms. Wilson, I'm making you do that.
>
> A: Okay.

> Q: If you could tell me at those same markers if any of those alleles are the same or different.
>
> A: Okay. I'm going to do this and I'm going to preface this with this is not scientifically accurate, so what I'm about to do, we do not do at the State Crime Lab, the FBI does not do it. No lab in this country, I'm assuming most labs in the world, do not do this because it's inconclusive. So you cannot make a conclusion on an inconclusive component regardless of whether the alleles are the same, that's not a match; if they're different, it's not an exclusion.

After Dr. Wilson's preface, the court excused the jury *sua sponte*. The trial court asked Defendant's counsel: "you objected and I overruled your objection. Would you like to be heard?" Defendant's counsel argued, *inter alia*:

> [Dr. Wilson] stated that this is not procedure; this is not anything that anyone can follow; that it's not anything that anyone would use, but he can make her make this comparison.
>
> So I don't know. Absent at least an offer of proof as to what's going to come forward, Your Honor, and then you make your ruling because I don't know what's about to come on this. . . . [T]his is new science and this is not accepted science so to me, I don't understand -- I mean, I don't think that it's going to -- it doesn't meet the standards.

The prosecutor responded, *inter alia*:

> What I'm about to do is . . . because the sample is not, for lack of a better term, not a good sample, they're not able to make any conclusions whether it is or isn't somebody. But just because it's not a good sample doesn't mean they can't see certain things, and what they're seeing is scientif -- is what they're seeing. It is reliable. It's based on science.
>
> So when she says she sees these alleles, she sees those alleles. But because the sample is so . . . minimal or not a good sample or not scientifically a good sample, they don't want to render an opinion. She's not going to render an opinion as to whether this is or is not someone. But what she can do is look to see if the alleles there do or do not match the alleles for any individual I ask her to do it.

> The reason why I asked her to do it with Justine Eckard is you know in the last trial [Defendant's counsel] argued with the samples that were inconclusive that this could possibly be Justine Eckard. Justine Eckard's saliva, that's what that is, ladies and gentlemen.
>
> I think I have a right, knowing that that happened in the other trial, to somehow try to show that that's unlikely. And I think it's up to the jurors to determine, based on the caveats that Ms. Wilson will give, as to whether or not it's possible. And Ms. Wilson will say she's not giving any opinion, so if there is a possibility -- but we look and what we see are three of those alleles are not, are not, Justine Eckard. And Justine Eckard has been excluded from almost every other place.
>
> That's information I think they need to know. If I'm not able to present that, then that allows her to argue that that could be Justine Eckard without me arguing no, I don't think it is because what we see on there, even though it's not the most scientific thing, what we're able to see, my argument is, doesn't show that it's Justine Eckard.
>
> And I just think that's fair.

The trial court then asked the witness for a proffer of the contested testimony. The prosecutor asked Dr. Wilson to clarify if any of what he had just said was inaccurate. Dr. Wilson answered:

> The samples -- all I can say about the samples . . . is, you see results that don't match someone. I don't know that because I don't make the comparison because per policy I'm not allowed to, period.
>
> So we have to be very careful in doing this, so I have to preface to the jury, this is not something -- I would be in big trouble if I did that in the Lab. I'm not allowed to do this. So I don't want them to think that just because three alleles are not the same that it's an exclusion because it's not.
>
> I know like it sounds like it would be and it's a hard concept to understand, but it's not an exclusion and it's also not inclusion.

The court requested Dr. Wilson's proffer be taken as *voir dire*. In response to a question about "seeing" the minor contributor's alleles, Dr. Wilson again explained:

> Yes. So it's real DNA. It's not that it's not real DNA. It's absolutely real DNA. . . . It's a person but we don't know who it is. You can't include; you can't exclude.
>
> . . .
>
> I hate to keep beating a dead horse, but the scientific community does not do this. We do not do it. It's not just our Lab. The FBI doesn't do it. The forensic community as a whole cannot make comparisons because it's not that they're unreliable or that it's inaccurate information, it's just some may be missing, and with sampling, meaning if I run this sample several times, the three results that don't match could pop up and match.
>
> So every time you run the sample you get a different answer, and in validation studies that we do, developmentally at the company that creates the kits we use and also in-house at the Lab, has shown over and over and time and time again, you cannot include or exclude from these.

The prosecutor stated he would not ask Dr. Wilson to render an opinion, "but you can look at those six alleles and determine if any of those alleles match any profile that you have on file; is that correct?" Dr. Wilson replied: "I can if you ask me to, yes. But that's why I prefaced it with I want them to understand this is not a match; it is not an exclusion. It is not anything. It is real DNA that's there and I can't say a thing about it."

The prosecutor led Dr. Wilson through the comparison of the six alleles of the minor contributor with Eckard's profile. Dr. Wilson testified that three of the alleles were the same as Eckard's profile, and three were different. The prosecutor reiterated that Dr. Wilson was not rendering any opinion and was just stating facts about the alleles.

Defendant's counsel restated Dr. Wilson's testimony and asked one question emphasizing an analogy Dr. Wilson had used, that the evidence was like seeing two people clearly standing under a street light and a third dimly in the shadows: "there are three people on that street corner?" Dr. Wilson answered, "That's correct." Defendant's counsel asked no further questions.

The prosecutor asserted:

> Your Honor, the State is asking her to say what is there. We're not asking her to do anything different; we're not preventing her from saying any caveats. We're being candid with this jury of what this is. But I think the jury has a right to know fully everything what is there; what can we see from that. That's all I'm doing.

After discussion of discovery materials provided on this issue, the court asked Defendant's counsel if she wished to be heard any further on the minor contributor's alleles. Defendant's counsel replied, "No, Your Honor, not as far as that. I mean, that I have a fairly good understanding of." After further *voir dire* of another issue, the trial court issued its ruling: "With regard to the defendant's objection to the testimony about the alleles being present or absent from the mixture that the witness was observing, that will continue to be overruled."

The jury returned and Dr. Wilson's testimony resumed. Dr. Wilson testified, without further objection by Defendant's counsel, "three of the six total alleles that I see in the minor component of the external genitalia swabs, Justine Eckard shares three of them and three she does not have." The prosecutor, "in all fairness," asked Dr. Wilson to confirm, "[what] we're talking about with the six is an inconclusive [component]?" Dr. Wilson answered, "That's correct. Yes."

The jury returned a verdict finding Defendant guilty of statutory rape of a 13-year-old. The court sentenced Defendant to a term of imprisonment of 420 to 564 months. Defendant gave notice of appeal in open court and also in a timely filing.

II. Jurisdiction

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

III. Issues

Defendant argues the trial court erred by requiring Dr. Wilson to compare and contrast the DNA profile of the minor contributor with Eckard's DNA profile. Defendant argues this testimony was inadmissible under N.C. R. Evid. 702(a) and N.C. R. Evid. 403. Alternatively, Defendant argues the trial court committed plain error by allowing this testimony.

Defendant also argues the testimony was misleading and had a material impact on the verdict. Lastly, Defendant argues the State deprived him of due process by presenting misleading testimony.

IV. Preservation

[1] The State argues Defendant waived the issues presented on appeal by not objecting to the challenged testimony in either a timely or specific manner when it was presented to the jury. "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).

> Generally speaking, the appellate courts of this state will not review a trial court's decision to admit evidence unless there has been a timely objection. To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial. It is insufficient to object only to the presenting party's forecast of the evidence.

State v. Ray, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (citations and internal quotation marks omitted).

In *Ray*, the defendant objected "only during a hearing out of the jury's presence. In other words, [the] defendant objected to the State's forecast of the evidence, but did not then subsequently object when the evidence was actually introduced at trial." *Id.* (citation omitted). Our Supreme Court held such an objection was not timely and failed to preserve for appellate review the trial court's decision to admit the contested evidence. *Id.*

The State's reliance upon *Ray* and other similar cases is misplaced. Defendant's first objection was made in the jury's presence. Defendant's counsel objected after Dr. Wilson testified she could only answer the State's questions about the comparison of the minor contributor to Eckard's profile "[i]f made to do so." This objection was made and overruled on the record and in the presence of the jury.

After Dr. Wilson's subsequent, extensive preface quoted above, the trial court paused the line of questioning, excused the jury *sua sponte*, and asked Defendant's counsel if she would like to be heard on the overruled objection. After extensive discussion and further objections by Defendant during the *voir dire*, the trial court held Defendant's objection would "continue to be overruled," confirming the discussion and ruling related back to the first objection. Defendant's objection was timely made, renewed and preserved for appellate review.

The State also argues Defendant's counsel did not state the specific grounds for the objection, as is required by Rule 10. The Rules only

require specific grounds if "not apparent from the context." N.C. R. App. P. 10(a)(1). At the end of the discussion out of the jury's presence, the trial court specifically stated it was ruling on Defendant's "objection to the testimony about the alleles being present or absent from the mixture that the witness was observing." These specific grounds were apparent from the context. Defendant's counsel's argument during the *voir dire* discussion that the proffered testimony would not "meet the standards" of "accepted science" further specifies the grounds for the objection.

Defendant's objection to Dr. Wilson's testimony about the minor contributor's alleles was timely made and the specific grounds were apparent from the context. The Rule 702 objection is preserved. At oral argument, Defendant's counsel conceded both the Rule 403 and constitutional due process issues were not objected to at trial and were not preserved for appellate review, even for plain error or harmless error.

V. Standard of Review

A trial court's ruling on Rule 702(a) is reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986) (citations omitted).

When the issue is whether "the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *State v. Parks*, __ N.C. App. __, __, 828 S.E.2d 719, 725 (2019) (citation omitted).

VI. Analysis

Defendant argues Dr. Wilson's testimony concerning the minor contributor's alleles violated Rule 702(a). The State argues Dr. Wilson's testimony was not improper scientific expert opinion testimony and was beyond the scope of Rule 702(a). Alternatively, the State argues the trial court did not abuse its discretion by admitting the testimony because any error to Defendant was not prejudicial.

A. Scope of Rule 702(a)

[2] Rule 702(a) allows for testimony by qualified experts "in the form of an opinion, or otherwise" if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017). "In order to assist the trier of fact, expert testimony must provide insight

beyond the conclusions that jurors can readily draw from their ordinary experience." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8 (citation and internal quotation marks omitted).

By contrast, lay testimony is "rationally based on the perception of the witness." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). Lay witnesses may state "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, *derived from observation of a variety of facts presented to the senses at one and the same time*." *State v. Broyhill*, 254 N.C. App. 478, 485, 803 S.E.2d 832, 838 (2017) (emphasis original) (quoting *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911)).

"[W]hen an expert witness moves beyond reporting what he saw or experienced through [her] senses, and turns to interpretation or assessment to assist the jury based on his specialized knowledge, [she] is rendering an expert opinion." *State v. Davis*, 368 N.C. 794, 798, 785 S.E.2d 312, 315 (2016) (citation and internal quotation marks omitted). "[D]etermining what constitutes expert opinion testimony requires a case-by-case inquiry in which the trial court (or a reviewing court) must look at the testimony as a whole and in context." *Id.*

The State argues Dr. Wilson's testimony concerning the objected-to testimony was not expert opinion testimony, because she was not asked to render an opinion, but only to state what alleles she could "see" in the minor contribution. We disagree. Although Dr. Wilson testified to the alleles she "saw," she made clear in her testimony that DNA is invisible to the human eye. The alleles she "saw" were numbers on the graphs she had prepared, using her expertise and experience as a forensic scientist. Her testimony moved beyond reporting what she had seen through her senses and turned to assessment and analysis based on her specialized knowledge. Despite the State's careful framing, and the State's argument otherwise, she was asked and rendered expert opinion testimony and interpretations subject to the requirements of Rule 702(a).

B. Requirements of Rule 702(a)

Under Rule 702(a), expert opinion testimony must be "based upon sufficient facts or data[,] the product of reliable principles and methods," and the expert witness must "appl[y] the principles and methods reliably to the facts of the case." N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3). Dr. Wilson's testimony regarding the minor contributor's alleles was neither based upon sufficient facts or data nor was the product of reliable principles and methods. As an admitted expert witness, she even testified to this absence or omission of reliability herself.

Dr. Wilson testified the minor contributor's profile was "inconclusive due to the complexity and/or insufficient quality of recovered DNA." She also testified an "inconclusive" profile is not of sufficient quality and quantity for comparison purposes. By repeatedly asking Dr. Wilson to break with the State Lab's policy and established scientific procedures and testify to the alleles she could see in the minor contributor's graph, the State asked Dr. Wilson to give expert opinion testimony based upon admittedly insufficient facts or data in violation of the first prong of Rule 702(a).

The testimony also violated the second prong of Rule 702(a). Dr. Wilson further disclaimed, repeatedly, that the testimony she was required to give was "not scientifically accurate." The State's request was not something done by the State Crime Lab, the FBI, any "lab in the country," or "most labs in the world." Given her strenuous preface, this testimony cannot reasonably be considered the product of reliable principles or methods. *Id.*; *see also McGrady*, 368 N.C. at 884, 787 S.E.2d at 5 (the 2011 amendments to N.C. R. Evid. 702(a) adopted the federal standards articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) and other cases).

The challenged testimony, describing the alleles of the minor contributor, was neither "based upon sufficient facts or data" nor "the product of reliable principles and methods." N.C. R. Evid. 702(a)(1)-(2). The trial court erred in allowing and admitting this testimony over Defendant's objection.

C. Prejudice to Defendant

[3] [E]videntiary error does not necessitate a new trial unless the erroneous admission was prejudicial. A defendant is prejudiced by evidentiary error when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

State v. Wilkerson, 363 N.C. 382, 415, 683 S.E.2d 174, 194 (2009) (citations and internal quotation marks omitted), *cert. denied*, 569 U.S. 1074, 176 L. Ed. 2d 73 (2010). Prejudicial error will not be found if the other unchallenged and properly admitted evidence presented by the State against Defendant is overwhelming, or the evidence erroneously admitted is of "relative insignificance." *Id.*

The State argues the other unchallenged and properly admitted evidence in this case overwhelmingly proves Defendant's guilt to overcome

any prejudice. The State notes Defendant did not challenge Dr. Wilson's testimony regarding her analysis of the other DNA samples. A review of that testimony shows Dr. Wilson reported her analysis of five samples:

1. In the rectal swab, she found two fractions of DNA: one was a sperm fraction, with a mixture of two contributors. Dr. Wilson presumed C.C. was one of the sources, as the known donor of the sample. After removing her contribution, the "derived component" was consistent with Defendant's profile. The non-sperm fraction was consistent with a mixture of two contributors. Dr. Wilson was able to match C.C. with the predominant contributor to that fraction, but could make no conclusion regarding its minor contributor "due to insufficient quality and/or quantity." Eckard's profile did not match the conclusive contributors to either of these fractions.

2. The internal vaginal swab contained two fractions as well. The sperm fraction matched Defendant. The non-sperm fraction was consistent with a mixture of two contributors. Dr. Wilson matched C.C. with the predominant contributor, but again could make no conclusion regarding its minor contributor "due to insufficient quality and/or quantity." Eckard's profile did not match either of these fractions.

3. A cutting from C.C.'s underpants was tested and, again, the results found sperm and non-sperm fractions. The sperm fraction was consistent with a mixture of two contributors. The predominant contributor matched Defendant, and the other contributor was consistent with C.C. The non-sperm fraction matched C.C.

4. The tank top Defendant gave to C.C. was tested and also found to contain sperm and non-sperm fractions. The sperm fraction matched Defendant. The non-sperm fraction was consistent with a mixture of two contributors. The predominant contributor matched Defendant, but no conclusion could be made regarding the minor contributor "due to insufficient quality and/or quantity."

5. The external genitalia swab, which is at issue in this appeal, contained no sperm and was interpreted as a mixture of three contributors. Dr. Wilson presumed C.C. was one of the major contributors, and the other major contributor was consistent with Defendant. The minor contributor profile to this mixture was

inconclusive, but Dr. Wilson was erroneously instructed at trial to compare the specific alleles between it and Eckard's profile.

Dr. Wilson was able to compare Eckard's profile with each of the conclusive contributors' in each sample and it did not match any.

In summary: Dr. Wilson analyzed five DNA samples, four of which contain mixtures of two contributors and one which contains a mixture of three. Defendant is matched to or consistent with at least one contribution in each of the five samples. C.C. is matched or consistent with at least one contribution in each, except for the tank top. Eckard did not match any of the conclusive contributor profiles. Only one sample, the underpants, does not contain an inconclusive contributor; the other four all have an inconclusive contributor in at least one fraction.

The State argues Defendant's theory of the case does not match the other four samples and other physical evidence and asserts his testimony does not explain how his DNA ended up in the rectal swab. Defendant's testimony was merely that he saw Eckard's "face and her hands" between C.C.'s legs, and that he observed Eckard's "finger inside" C.C. Although nothing about this testimony explicitly implicates the vaginal or rectal swabs, nothing about this testimony precludes them either.

We also note several inconsistencies in evidence between Defendant's initial interview with investigators and his subsequent trial testimony. Defendant's initial version of the events barely resembles his trial testimony. In addition to his initial denials that C.C. and Eckard were inside his apartment or that he knew C.C. was a minor, Defendant also made no mention whatsoever of any sexual contact between any of the three individuals and told the investigator he would "absolutely not" find his DNA in C.C.'s rape kit. Defendant's testimony at trial changed from his initial interview after learning his DNA was present.

However, these inconsistencies in Defendant's versions of events, as well as the inconsistencies between all three witnesses' statements and testimonies, speak to the witnesses' credibility, issues that solely rest within the province of the jury. "The 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) (citations omitted).

While these inconsistencies are relevant for our review of potential prejudice to Defendant, we cannot conclude the witnesses' testimony in this case is overwhelming evidence of guilt to exclude the reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.

The State also points to other, uncontroverted and properly admitted physical evidence, namely that C.C. immediately presented at the hospital with red and painful inner thighs, when she was examined after the events in question. Undoubtedly, something occurred that night at Defendant's apartment, which C.C. reported immediately to her mother upon returning home. The uncontroverted and admitted physical evidence in this case shows that C.C. had bruised and red thighs following the events in question, that DNA matching or consistent with Defendant's profile was present in several internal swabs taken from C.C., and that at least one of those DNA swabs showed the presence of a third person other than Defendant or C.C.

The State's likely, and also admitted, objective in presenting the challenged testimony regarding the presence and identity of the minor contributor's alleles during its case-in-chief was to anticipate and undercut a key fact in Defendant's defense of the case. A third DNA contributor present in the external genitalia swab raises the possibility that Eckard was the means by which his DNA was transferred to and found on the swabs taken from C.C.'s body. The prosecutor admitted his purpose to the trial court in the *voir dire*: "you know in the last trial [Defendant's counsel] argued with the samples that were inconclusive that this could possibly be Justine Eckard." If the State had not insisted on preemptively forcing Dr. Wilson to state the unscientific and reluctant testimony that allowed the jury to more easily infer Eckard could not have been the minor contributor, a reasonable possibility existed a jury would have reached a different result at trial.

The prosecutor's stated objective demonstrates this reasonable possibility. At the first trial, Defendant argued the evidence of a third, inconclusive DNA contributor. The previous jury acquitted Defendant on numerous related charges and could not reach a unanimous verdict to convict Defendant on this charge. A different result was reasonably possible without the erroneous admission of this testimony.

The State's cases cited to argue the error was not prejudicial are unpersuasive. The issues in *State v. Williams*, 190 N.C. App. 173, 660 S.E.2d 200 (2008), also dealt with rape kit DNA analysis, but in the context of improper closing arguments, rather than improper admission of prejudicial expert testimony. *Id.* at 175, 660 S.E.2d at 202. Two other cases the State cites dealt with challenges to the admission of expert testimony. *State v. Trogdon*, 216 N.C. App. 15, 715 S.E.2d 635 (2011) (challenge to bite mark analysis); *State v. Berry*, 143 N.C. App. 187, 546 S.E.2d 145 (2001) (challenge to barefoot impression analysis). In both cases this Court held the "error was harmless where the testimony was merely

corroborative of other evidence." *Id.* at 206, 546 S.E.2d at 158; *see also Trogdon*, 216 N.C. App. at 24–25, 715 S.E.2d at 641.

Here, the challenged and improper testimony is not "merely corroborative of other evidence"; it potentially discredits evidence that supports Defendant's defense and theory of the case. While the State presented other evidence tending to show Defendant's guilt than just this DNA evidence, the testimony regarding the minor contributor's alleles was more than merely corroborative of the State's other evidence.

This evidence called into question the very inference that Eckard purportedly transferred Defendant's DNA to C.C., which Defendant's defense reasonably relied upon. Although *Trogdon*, *Berry*, and other cases show how errors in the admission of expert testimony can be nonprejudicial, where there is additional inculpatory evidence, the facts and testimony here deals instead with the erroneous admission of expert testimony that both purposefully anticipates and undercuts potentially-exculpatory evidence.

Our Supreme Court has recognized "the heightened credence juries tend to give scientific evidence" in the specific context of erroneous admissions of expert testimony. *State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998). This "heightened credence" may be especially true concerning testimony where the expert herself repeatedly warns of jury confusion if presented. *Id.*

Dr. Wilson went to great lengths to emphasize she did not "want [the jury] to think that just because three [of the six] alleles are not the same that it's an exclusion [of Eckard] because it's not. I know like it sounds like it would be and it's a hard concept to understand, but it's not an exclusion and it's also not inclusion." She further explained, "with sampling, meaning if I run this sample several times, the three results that don't match could pop up and match."

The erroneously-admitted evidence was insisted upon by the State to allow the jury to make an inference that these results discredited Defendant's theory of the case. Dr. Wilson's testimony also suggests the evidence itself was of such insufficient quality that the specific alleles the prosecutor wanted the jury to hear, that were not attributable to Eckard, could have been different had the quality of the sample been sufficient for analysis.

"The evidence presented at trial was clearly sufficient to send the case to the jury and to support a jury finding of guilty . . . . However, that is not the question before us. The question is not one of sufficiency of

the evidence to support the jury verdict." *Helms*, 348 N.C. at 583, 504 S.E.2d at 296. The question on prejudicial error is whether, "had the error in question not been committed, a reasonable possibility exists that a different result would have been reached at trial." *Id.* We conclude such a reasonable possibility of a different result does exist in this case. Defendant was prejudiced by the erroneous admission of the challenged testimony. This prejudice is not overcome by the State's other evidence tending to show Defendant's guilt.

VII. Conclusion

Defendant's objection before the jury to the admission of Dr. Wilson's testimony regarding the alleles of the minor contributor was properly preserved. This testimony consisted of expert opinion testimony that is within the scope and requirements of Rule 702(a). The challenged testimony was neither based upon sufficient facts or data nor is the product of reliable scientific principles and methods. We all agree the trial court erred in allowing and admitting this testimony which prejudiced Defendant. The majority of us agree this admission also violates Rule 702(a).

The erroneous admission of the testimony was more than mere corroboration of the State's other evidence. It anticipated, pre-empted, and potentially discredited evidence that corroborated Defendant's anticipated theory of the case. It was not offered in rebuttal.

A reasonable possibility exists that, had the erroneous testimony not been admitted, a different result would have been reached at trial. Defendant was prejudiced by the erroneous admission of this testimony. We reverse and remand for a new trial. *It is so ordered.*

NEW TRIAL.

Judge COLLINS concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

For each of the reasons stated below, I conclude that Defendant received a fair trial, free from reversible error. Accordingly, I respectfully dissent.

I. Factual Background

Defendant was convicted of statutory rape of C.C., a 13-year old girl.

The State's evidence at trial tended to show that Defendant had C.C. and a 21-year old named Justine over to his apartment to smoke marijuana. After a while, Justine left, and C.C. stayed to smoke more marijuana. Defendant then engaged in multiple sex acts with C.C. C.C. left and reported the assault to her mother. Defendant told an investigator that he did see C.C. and Justine on the night in question, but that they never entered his apartment. Defendant's DNA was found inside C.C.'s vagina and anus as well as on her body.

In his defense, Defendant testified at trial, contradicting much of what he had told the investigator. He explained how his DNA came to be found inside of and on C.C. He admitted that C.C. and Justine did come back to his apartment but that he engaged in a sexual act only with Justine, with her consent, an act which caused him to ejaculate. He then went into his bathroom. When he came back out, he saw Justine performing a sex act on C.C., during which his DNA wound up on and inside of C.C.

II. Testimony Challenged on Appeal

On appeal, Defendant challenges certain testimony from the State's DNA expert, which he claims was inadmissible but likely was construed by the jury as an attack on his version of the events.

A. DNA Expert's Preliminary Testimony

During the trial, the DNA expert testified concerning: (1) the methodology in matching DNA found on a victim against the DNA of a suspect and (2) her conclusions about the DNA found on the swabs taken from C.C.'s body.

Each swab taken from C.C. contained samples from more than one DNA profile; that is, each swab contained DNA from more than one contributor.

Whether a DNA profile contained on a swab can be matched against the DNA of a known person depends on the completeness of the sample. If the sample is complete enough, then enough "markers" from the sample can be compared with the DNA of a known person to determine whether or not there is a match. However, if the sample is not complete enough, that is, if there are not enough markers detectable from the sample, then there is no attempt to try and match the sample with the DNA of a known person, as any such attempt would be scientifically unreliable.

The swabs from inside C.C.'s vaginal and rectal areas and from the exterior of C.C.'s genital area all contained sufficient amounts of DNA from two different profiles to test for a match. One DNA profile found

on all the swabs matched a sample of C.C.'s own DNA. The other DNA profile found on all the swabs matched Defendant's DNA.

A sample from a *third* DNA profile, that is, the DNA from a third source, was found on a swab taken from outside C.C.'s genital area, though this DNA profile was not found on the swabs taken from inside C.C.'s vaginal or rectal areas. This third profile sample, however, was not complete enough such that it could be scientifically determined whether or not the DNA matched that of Justine or anyone else. Specifically, this sample only contained six markers which could be compared with markers from the DNA of a known person, not enough to be able to determine someone as a match.

The State's DNA expert explained that she did not try to match the third DNA profile with that of Justine, because, with only six markers, the sample was simply too small to make any scientifically reliable determination. She explained that she *could*, if compelled, try to match the six markers with that of Justine, but the potential matches would be scientifically insignificant since the sample was not large enough.

B. Defendant's Objection

The State asked the DNA expert if she could state *how many* of the six markers from the third DNA profile matched the six markers taken from Justine's known sample. It seems that the State wanted its expert to say that not all of the markers were a match so as to cast doubt on Defendant's theory that the third DNA profile *could possibly be* that of Justine.

Defendant's counsel objected, not knowing exactly what information the State was trying to elicit. The trial court sent the jury out and allowed a *voir dire* of the DNA expert to be conducted. After conducting the *voir dire*, it became evident that the DNA expert would state that three markers matched that of Justine, and three did not, but that these results were scientifically insignificant. The State did not ask the DNA expert for her opinion regarding whether or not she thought the profile matched that of Justine.

In any event, the trial judge ruled that the testimony was admissible. The jury was called back in; the State elicited the testimony that three of the six markers taken from C.C.'s body matched three of the six markers taken from Justine's DNA, but that there was no match as to the other three markers. The DNA expert also testified that the sample was too small for an opinion to be given as to whether Justine could be included or excluded as the contributor of the third DNA profile sample.

Defendant's attorney never objected after the jury came back in following the *voir dire*.

III. Argument

I agree with the majority that the DNA expert's testimony was improperly admitted. However, I conclude that the error in admitting the testimony did not constitute reversible error. I so conclude for three independent reasons, each stated below.

A. Defendant's Failure to Object on the Right Grounds-No Plain Error

Defendant concedes that he objected based on Rule 702, that the DNA's expert was not scientifically reliable, but *not* based on Rule 402, that the evidence was irrelevant, or on Rule 403, that the evidence was unduly prejudicial.

I conclude that the testimony *actually elicited* did not violate Rule 702, as it was scientifically accurate. North Carolina is now a *Daubert* state. *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). As such, Rule 702 prohibits expert testimony unless the testimony satisfies all three prongs of Rule 702(a), that:

> (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.

Id. at 887, 787 S.E.2d at 7 (quoting N.C. Gen. Stat. § 8C-1, Rule 702(a) (2011)). An expert may testify "in the form of an opinion, or otherwise" if "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" *Id.*

Significantly, here, the DNA expert was never asked to provide an opinion about whether the third DNA profile matched that of Justine. Had she done so, she would have violated Rule 702, as she admitted that it is widely accepted that a match cannot be made based on such a small sample.

Rather, she was only asked whether any of the six markers from the sample matched the six markers from Justine's DNA. There is no indication that she did not have the expertise to compare the markers that she had in front of her or that her answers were not scientifically reliable *on this narrow point*. And, she further explained that these results were

variable, as another sample from Justine's DNA could produce different results and as the sample from the swab was simply too small to make any reliable conclusions. I am confident that her answers, opinions, and explanation were scientifically accurate.

However, though her testimony was scientifically accurate, her testimony on this point was irrelevant. What difference does it make how many markers matched? Any answer would not tend to prove or disprove whether the DNA on the swab matched that of Justine. Therefore, it should not have been allowed under Rule 402.

Further, though her testimony was scientifically accurate, it was unduly prejudicial. That is, though she explained the unreliability of three markers not matching Justine's DNA, it is possible that the jury took that to mean that the DNA *must not* have belonged to Justine. Creating this impression was the reason the State wanted the testimony admitted. Therefore, the testimony should not have been allowed under Rule 403.

However, since Defendant did not base his objection on Rule 402 or 403, but only on Rule 702, his objection is not preserved. We, therefore, only review for plain error. And, here, because there was substantial evidence of Defendant's guilt; e.g., his DNA found inside of C.C. and C.C.'s testimony, any error by allowing the expert's testimony did not rise to the level of plain error.

B. Defendant's Failure to Object After *Voir Dire*-No Plain Error

Even if Defendant's objection based on Rule 702 was proper, he failed to preserve his objection when he failed to object at the time the testimony was actually elicited.

It is well-settled that a defendant who objects during *voir dire*, outside the presence of the jury, waives his objection if he fails to object when the evidence is actually introduced to the jury. *See State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010). Here, though, Defendant admittedly did lodge an objection in the presence of the jury when the State started questioning its DNA expert generally about whether she *could* match the markers. It is a close question as to whether this objection "counts." Defendant admitted when making the objection that he did not know exactly where the State was going with its questioning, and the State had yet to ask the DNA expert about whether the six markers matched. Thus, Defendant needed to object after the *voir dire*, when the State "actually introduced" its expert testimony about her comparisons of the six markers. *Id.*

C. No Prejudicial Error

Even if Defendant's Rule 702 objection was properly preserved, I do not believe that, based on the overwhelming evidence in this case of Defendant's guilt, the error was prejudicial. I do not think it is reasonably possible that the jury reached its verdict based on the expert's testimony concerning certain DNA found on a swab from *outside* C.C.'s genital area. I believe that the jury convicted Defendant because of its view of the other evidence. Defendant's explanation of how his DNA was found on *and inside* of C.C. is simply incredible, given that the DNA from the third source was found only on a swab taken from the external area of C.C.'s genitals and that Defendant changed his story between the time he spoke with investigators and the time of trial.

STATE OF NORTH CAROLINA
v.
DAVID WILLIAM WARDEN II

No. COA19-335

Filed 3 December 2019

Evidence—sexual abuse of a minor—no physical evidence—improper vouching—plain error analysis

The admission of testimony from a child protective services investigator vouching for the truthfulness of a minor's allegations of sexual abuse by defendant (that her office had "substantiated" defendant as the perpetrator and believed the victim's allegations to be true) amounted to plain error where there was no physical or other contemporaneous incriminating evidence and the victim's credibility was the central issue to be decided by the jury.

Judge YOUNG dissenting.

Appeal by defendant from judgment entered 12 September 2018 by Judge Gregory R. Hayes in Rockingham County Superior Court. Heard in the Court of Appeals 13 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Margaret A. Force, for the State.

Mark Montgomery for defendant-appellant.

TYSON, Judge.

David William Warden II ("Defendant") appeals from jury convictions of sexual offense with a child by an adult, child abuse by a sexual act, and taking indecent liberties with a child, "Virginia." *See* N.C. R. App. P. 42(b)(3) (pseudonyms used in appeals filed under N.C. Gen. Stat. § 7A-27 involving sexual offenses committed against a minor). We reverse and remand for a new trial.

I. Background

Virginia is Defendant's biological daughter. Defendant and Virginia's mother were married for ten years and had two children: Virginia and her brother. Defendant and Virginia's mother separated in 2011. After their parents separated, Virginia and her brother frequently visited with their father.

Virginia was 15 years old in June 2017. Members of the family argued about where to spend Father's Day. The disagreement concerned whether Virginia and her brother would ride back from a campsite with their grandfather, Defendant's father, instead of riding with Defendant. The children's grandfather thought they should ride with Defendant. He was upset by the suggestion the children apparently preferred to ride with him.

While their grandfather was speaking to Virginia over the phone about the issue, he asked her, "Why don't you want to ride back with him? It's not like he molested y'all or anything." Virginia "got quiet" and "didn't say anything" in response.

After this phone call, Virginia told her mother that Defendant had made her perform fellatio on him when she was nine years old. Virginia's mother and maternal grandmother took her to the Rockingham County Sheriff's Department the next day. A sheriff's deputy interviewed Virginia and the Department opened an investigation. As part of this investigation, a detective contacted DSS and Help, Incorporated to set up a forensic interview with Virginia.

At trial, Virginia testified to this alleged initial incident and two other similar incidents with Defendant, which allegedly occurred three years later when Virginia was 12 years old. No one else witnessed any of these incidents, nor was there any contemporaneous corroborating or physical evidence presented. The trial court issued the jury a limiting instruction that Virginia's testimony about those two later alleged incidents was being admitted solely for the purpose of showing identity of Defendant,

a common scheme or purpose, or other permissible reasons under Rule 404(b). N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017).

Also, solely for the limited purposes of Rule 404(b), Defendant's sister testified that Defendant had molested her multiple times when she was between the ages of 7 or 8 and 12 years old. Virginia's mother, maternal grandmother, and paternal grandfather testified to corroborate only the events surrounding Virginia's first reporting of her allegations and changes in her behavior growing up. No other witnesses with direct knowledge of the allegations at the time they had allegedly occurred, or any other witness to whom she had contemporaneously "disclosed" these allegations corroborated Virginia's allegations. No physical evidence arising from or supporting any of the allegations was presented.

DSS Child Protective Services Investigator Melissa McClary testified, without objection by Defendant, that DSS believed Virginia's allegations against Defendant to be true:

> Q. [D]oes your office either substantiate or un-substantiate a claim?
>
> A. Yes. . . . [P]art of our role is to determine whether or not we believe allegations to be true or not true. If we believe those allegations to be true, we will substantiate a case. If we believe them to be not true or we don't have enough evidence to suggest that they are true, we would un-substantiate a case.
>
> . . .
>
> Q. And what was the case decision that DSS or CPS decided on?
>
> A. We substantiated sexual abuse naming David Warden as the perpetrator.

Peg Stephenson, of Help, Incorporated, qualified and testified as an expert witness in the area of child sexual abuse and forensic interviewing. She explained the concept of a "delayed disclosure" and stated, in her professional opinion, Virginia's allegations in this case were "definitely a delayed disclosure." Defendant's counsel failed to object to any of the testimony now at issue on appeal.

Defendant testified on his own behalf. He denied molesting Virginia. He also denied molesting his sister. On cross-examination, Defendant repeatedly denied the allegations, saying, "I didn't do what my daughter's

saying I did." Defendant's testimony was the entirety of his defense case-in-chief.

The jury returned a verdict and found Defendant guilty as charged of the three offenses. The trial court entered judgment for all three charges and sentenced Defendant to consecutive, active sentences: 300 to 369 months for the sexual offense with a child by an adult; 29 to 44 months for the child abuse by a sexual act; and, 19 to 32 months for the indecent liberties with a child. Defendant gave notice of appeal in open court.

II. Jurisdiction

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

III. Issues

Defendant argues the trial court committed plain error by allowing two witnesses to improperly vouch for or bolster Virginia's credibility. Alternatively, Defendant argues he was denied effective assistance of counsel by his counsel's failure to object to the improper testimony.

IV. Standard of Review

Defendant concedes his trial counsel failed to object to the challenged testimony and the issue is not preserved on appeal. Unpreserved issues are reviewed for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

> [Plain error] is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings[.]

Id. (emphasis original) (citations and internal quotation marks omitted).

V. Analysis

Defendant challenges the admissibility of testimony from two of the State's expert witnesses, McCrary and Stephenson, on the grounds they improperly vouched for the truthfulness of Virginia's accusations and bolstered her credibility. As regards McCrary's testimony, we agree.

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 (2010). "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." *State v. Dixon*, 150 N.C. App. 46, 53, 563 S.E.2d 594, 599 (2002) (citation omitted). This prohibition against vouching for the credibility of the complainant or another witness applies to the testimony of a lay witness as well as an expert witness. *See, e.g.*, *State v. Coble*, 63 N.C. App. 537, 541, 306 S.E.2d 120, 122 (1983).

Our Supreme Court has held, "[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Chandler*, 364 N.C. 313, 318, 697 S.E.2d 327, 331 (2010) (citations omitted).

In *State v. Giddens*, this Court held plain error occurred when a DSS child protective services investigator testified the defendant in that case "was substantiated as the perpetrator." *Giddens*, 199 N.C. App. at 118, 681 S.E.2d at 506. That investigator testified "substantiated" meant "the examiners found evidence throughout the course of [their] investigation to believe that the alleged abuse and neglect did occur." *Id.*

> Kent's testimony that DSS had "substantiated" Defendant as the perpetrator, and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the children did occur, amounted to a statement that a State agency had concluded Defendant was guilty. DSS is charged with the responsibility of conducting the investigation and gathering evidence to present the allegation of abuse to the court. Although Kent was not qualified as an

> expert witness, Kent is a child protective services investigator for DSS, and the jury most likely gave her opinion more weight than a lay opinion. Thus, it was error to admit Kent's testimony regarding the conclusion reached by DSS.

Id. at 121-22, 681 S.E.2d at 508.

Like the witness, Kent, in *Giddens*, McClary is a child protective services investigator for DSS. McClary's testimony in this case, that her office "determine[s] whether or not we believe allegations to be true or not true" and then "substantiated sexual abuse naming David Warden as the perpetrator," is indistinguishable from the erroneously admitted testimony in *Giddens*. The trial court erred by allowing McClary to vouch for the credibility of Virginia's allegations against Defendant by testifying to the conclusion reached by DSS based upon those allegations. We review whether the Defendant has shown the error was so prejudicial to amount to plain error.

Plain error occurs when, absent the testimony admitted in error, "the jury would have been left with only the children's testimony and the evidence corroborating their testimony," *Giddens*, 199 N.C. App. at 123, 681 S.E.2d at 509, or where "the central issue to be decided by the jury was the credibility of the victim." *State v. Couser*, 163 N.C. App. 727, 731, 594 S.E.2d 420, 423 (2004). "[I]t is not plain error for an expert witness to vouch for the credibility of a child sexual abuse victim where the case does not rest solely on the child's credibility." *State v. Davis*, 191 N.C. App. 535, 541, 664 S.E.2d 21, 25 (2008) (citation omitted).

In this case, we need not speculate upon what evidence the State's case rested or whether the credibility of the victim was the central, if not sole, issue to be decided. The prosecutor succinctly summarized the State's case in the closing argument:

> What this case comes down to is whether or not you believe [Virginia]. If you believe [Virginia], there's no reasonable doubt. It really doesn't matter if you fully believe [Virginia's mother], or if you fully believe [Defendant's sister], or if you fully believe the Defendant's father. Those are extra. Those are corroborating evidence. What matters is if you believe [Virginia]. If you believe what she says, then it happened.

The only direct witnesses to the alleged incidents in this case were Virginia and Defendant, both of whom testified. As the State itself

highlighted in closing, for the State to carry its burden of proof, the sole question for the jury was to weigh and accept the credibility of the victim in the absence of any physical or other contemporaneous incriminating evidence. *See id.* We hold the admission of McClary's testimony that DSS "substantiated" Virginia's claim to be true and that Defendant "[w]as the perpetrator" to be plain error.

Because we find plain error and prejudice to Defendant is shown in the admission of McClary's testimony, we need not reach Defendant's other issues raised on appeal.

VI. Conclusion

The trial court committed plain error in admitting witness testimony that DSS had "substantiated" the victim's claim of sexual abuse, naming Defendant "as the perpetrator." This testimony improperly bolstered or vouched for the victim's credibility. Where, as argued by the State in closing argument, the credibility of the complainant was the central, if not the only, issue to be decided by the jury, this plain error of admitting vouching or bolstering testimony by the State was prejudicial to Defendant to mandate a new trial. *It is so ordered.*

NEW TRIAL.

Judge COLLINS concurs.

Judge YOUNG dissents with separate opinion.

YOUNG, Judge, dissenting.

The majority has held that, because the State's case rested upon Virginia's credibility, and McClary improperly reinforced that credibility, the admission of McClary's testimony was prejudicial and plain error. For the following reasons, I respectfully dissent.

I agree with the majority that McClary's testimony was improper and erroneously admitted. However, even acknowledging that this testimony was admitted in error, Defendant has the burden, on plain error review, to show that it was prejudicial. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (holding that, on plain error review, "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"). I acknowledge that, had the only evidence been Defendant's testimony, Virginia's testimony, and the testimony of McClary and Stephenson, the

admission of the experts' improper bolstering of Virginia's testimony may well have been prejudicial. *See Giddens*, 199 N.C. App. at 123, 681 S.E2d at 509 (holding that, where the jury "would have been left with" only the testimony of the victim and the defendant, the introduction of corroborating testimony was plain error). However, as the majority notes, this Court has also held that "it is not plain error for an expert witness to vouch for the credibility of a child sexual abuse victim where the case does not rest solely on the child's credibility." *Davis*, 191 N.C. App. at 541, 664 S.E.2d at 25 (citation omitted).

Indeed, even setting aside the testimony of McClary and Stephenson, Defendant and Virginia were not the only ones to testify at trial. Defendant's sister testified as to how Defendant molested her multiple times in her childhood, corroborating Virginia's description of events. And Virginia's grandmother and grandfather testified as to Virginia's change in behavior and personality after the alleged events occurred. Given this evidence, as well as Virginia's testimony, the recording of her interview with Stephenson, and Virginia's police report, I cannot agree with the majority that, absent McClary and Stephenson improperly bolstering Virginia's credibility, "the jury probably would have reached a different result." I would instead hold that Defendant has not shown prejudice and, accordingly, that the trial court did not commit plain error in admitting the challenged testimony.

In an alternative argument, which the majority, having found plain error, declined to consider, Defendant contended that trial counsel's failure to object to the testimony constituted ineffective assistance of counsel. However, as I believe Defendant failed to show prejudice with respect to plain error, Defendant would likewise be unable to show prejudice with respect to any acts or omissions of counsel. As such, I would similarly hold that Defendant did not receive ineffective assistance of counsel.

STEVENS v. HELLER

[268 N.C. App. 654 (2019)]

THOMAS A. STEVENS, ELLEN M. STEVENS, AND MARYLYNN STEVENS, PLAINTIFFS
v.
SHANDA HELLER, JOHN BOSTON HELLER, AND BFD PROPERTIES INC.
D/B/A RE/MAX UNITED, DEFENDANTS

No. COA19-344

Filed 3 December 2019

1. Appeal and Error—untimely submission of appellate brief—two days late—non-jurisdictional violation—no dismissal

Plaintiff's failure to request an extension of the time to file an appellate brief until two days after the deadline was a non-jurisdictional violation of the appellate rules (Rule 13(a)) and did not justify the extreme sanction of dismissal where the non-compliance did not impair appellate review or frustrate the adversarial process.

2. Real Property—failure to conduct reasonable diligence—no inspections—notice of potential problems

Plaintiff-buyers' failure to conduct any inspection during the due diligence period or prior to closing on real property—even after they received a written report from defendant-sellers in the form of invoices from an HVAC contractor, signaling potential problems with the HVAC system—was a failure to conduct reasonable diligence under the circumstances, so defendants were entitled to summary judgment on plaintiffs' claims regarding the defective HVAC system.

3. Real Property—seller a licensed real estate broker—duty of disclosure—same as ordinary seller

The Court of Appeals rejected the assertion that a licensed real estate broker selling her own property owed plaintiffs a heightened duty of disclosure compared to any ordinary seller of real property.

Appeal by Plaintiffs from order entered 11 October 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 3 October 2019.

Thomas A. Stevens, pro se.

Manning Fulton & Skinner P.A., *by William C. Smith, Jr.*, *for the Defendants.*

BROOK, Judge.

Thomas A. Stevens, Ellen M. Stevens, and MaryLynn Stevens ("Plaintiffs") appeal the trial court's order granting summary judgment in favor of Shanda Heller, John Boston Heller, and BFD Properties, Inc. d/b/a RE/MAX United ("Defendants") and denying their partial cross-motion for summary judgment. We affirm.

I. Background

Thomas Stevens is a lawyer who lives in Delaware with his wife, Ellen Stevens. Shanda Heller and John Boston Heller are married and live in North Carolina. The Hellers own BFD Properties, Inc. ("BFD Properties"), a real estate agency located in Cary, North Carolina that does business as RE/MAX United. Ms. Heller is a real estate broker and an independent contractor and agent of BFD Properties.

On 29 June 2017 a real estate broker engaged by Mr. Stevens presented an offer to Ms. Heller to purchase real property located at 1431 Collegiate Circle in Raleigh, North Carolina. Ms. Heller counter-offered the following day. In her counter-offer Ms. Heller explained that she and her husband owned the property as an investment but had decided to sell it because their son was leaving home for college, presenting the Hellers with the opportunity to obtain housing for their son for his college years through a tax-deferred exchange. Attaching residential property disclosures to her counter-offer, Ms. Heller noted:

> I have checked a few items as "No Representation" because we've never lived in the property and I am not 100% sure (i.e. type of plumbing, age of roof) of ages or types of systems. To our knowledge everything is in good working order. I can try to verify when roof was replaced and plumbing with management company . . . .

Mr. Stevens and his broker both electronically confirmed receipt of the disclosures and Mr. Stevens and Ms. Heller then executed a purchase agreement for the property that same day, on 30 June 2017. The purchase agreement set 14 July 2017 as the settlement date for the transaction. It stipulated that Mr. Stevens's due diligence period began on 30 June 2017, the date of the purchase agreement, and concluded at 5:00 p.m. on 13 July 2017, the day before the date set for settlement.

On 14 July 2017, the date set for settlement and the day after the expiration of the due diligence period, a contractor performed maintenance on the HVAC system in the property, damaging the system in the process. The contractor informed the Hellers of the damage and that the damage had been repaired and Ms. Heller conveyed this information

to Mr. Stevens, providing Mr. Stevens with copies of invoices for the work. The transaction then closed three days later on 17 July 2017. Ultimately, no inspection of the property was conducted by Mr. Stevens or anyone acting on his behalf prior to the closing of the transaction.[1]

Plaintiffs thereafter initiated the present action in Wake County Superior Court. In their first amended complaint, Plaintiffs asserted claims for breach of contract, fraud, fraud in the inducement, negligent misrepresentation, and unfair and deceptive practices, alleging essentially that the HVAC system in the property needed to be completely replaced and that Defendants knew or should have known about this defect but failed to disclose it to Mr. Stevens prior to the closing of the transaction. Throughout their complaint, Plaintiffs advanced the theory that the duty of Ms. Heller to disclose information about latent defects of which she was or should have been aware was heightened because she was both an owner of the property and a licensed real estate broker.

On 23 July 2018 Defendants filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 13 September 2018 Plaintiffs filed a partial cross-motion for summary judgment on liability only. The motions came on for hearing on 24 September 2018 before the Honorable A. Graham Shirley, II. In an order entered on 11 October 2018, Judge Shirley granted Defendants' motion and denied Plaintiffs' motion. Plaintiffs entered timely written notice of appeal on 8 November 2018.

II. Analysis

Mr. Stevens makes several arguments on appeal, which we address after resolving a pending motion to dismiss the appeal.

A. Motion to Dismiss

[1] While Plaintiffs' notice of appeal was timely, Mr. Stevens's appellate brief was not timely filed.

On 10 May 2019, Mr. Stevens filed a motion requesting an extension of the time to file an appellate brief. This Court allowed the motion in a

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1. In reply to a congratulatory e-mail from his broker sent over the weekend following the execution of the purchase agreement, Mr. Stevens related that because of the "tight closing schedule," he was disinclined to conduct an inspection of the property prior to closing, unless his broker advised otherwise. His broker inquired in response: "Are you 100% sure you don't want an inspection? Just want to make sure[.]" Mr. Stevens replied by stating that it was "up to ML," meaning MaryLynn Stevens, his daughter. However, no inspection was conducted by either Mr. Stevens or his daughter or anyone acting on their behalf before the transaction closed.

14 May 2019 order, setting a new deadline of 20 May 2019 for filing and service of Mr. Stevens's appellate brief.

By 20 May 2019, however, Mr. Stevens did not file and serve his appellate brief, as ordered on 14 May 2019, nor did he request a second extension prior to the new deadline set on 14 May 2019 expiring.

On 22 May 2019, two days after the deadline set on 14 May 2019 had expired, Mr. Stevens filed a second motion requesting an extension of time to file an appellate brief. This Court allowed the motion in a 23 May 2019 order, setting a new deadline of 24 May 2019 for filing and service of Mr. Stevens's appellate brief.

That same day, Defendants filed a motion requesting that the Court reconsider or vacate its 23 May 2019 order allowing Mr. Stevens an additional extension to file and serve his appellate brief because of his failure to file or request an extension of the time to file his appellate brief by 20 May 2019. This Court denied the motion on 24 May 2019.

Mr. Stevens finally filed and served his appellate brief on 24 May 2019.

Defendants therefore move that this appeal be dismissed for non-compliance with Rule 13(a) of the North Carolina Rules of Appellate Procedure based on Mr. Stevens's failure to file and serve his appellate brief or request an extension of the time to file and serve his appellate brief by 20 May 2019. *See* N.C. R. App. P. 13(a) ("Within thirty days after the record on appeal has been filed . . . , the appellant shall file a brief . . . and serve copies thereof upon all other parties").

Mr. Stevens's two-day period of non-compliance with Rule 13(a) constitutes a non-jurisdictional violation of the appellate rules. *See Dogwood Dev. and Mgmt. v. White Oak Transp.*, 362 N.C. 191, 197-98, 657 S.E.2d 361, 364-65 (2008) (observing that jurisdictional rule violations consist of failures to comply with the rules "necessary to vest jurisdiction in the appellate court," such as Rule 3 and Rule 4(a)(2)). "[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. We hold that Mr. Stevens's non-compliance with Rule 13(a) does not rise to the level of a "substantial failure or gross violation" justifying the "extreme sanction" of dismissal because in the present case the non-compliance has not impaired our "task of review[,] and . . . review on the merits would [not] frustrate the adversarial process." *Id.* at 200, 657 S.E.2d at 366-67. Defendants' motion to dismiss the appeal is therefore denied.

B. Motions for Summary Judgment

Mr. Stevens argues that the trial court erred by granting summary judgment in favor of Defendants and denying Plaintiffs' partial cross-motion for summary judgment on liability only because there were genuine issues of material fact regarding Defendants' alleged misrepresentations and Ms. Heller owed him a heightened duty of disclosure as both an owner of the real property and a licensed real estate broker. We disagree.

1. Introduction and Standard of Review

Under Rule 56 of the North Carolina Rules of Civil Procedure, 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 (2017). "[A]n issue is genuine if it is supported by substantial evidence[.]" *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal marks and citation omitted). "[A]n issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action[.]" *Id.* (internal marks and citation omitted). "Substantial evidence is . . . evidence [] a reasonable mind might accept as adequate to support a conclusion[.]" *Id.* (internal marks and citation omitted).

However, when ruling on a motion for summary judgment or reviewing such a ruling on appeal, "[a]ll facts asserted by the adverse party are taken as true . . . and their inferences must be viewed in the light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal marks and citation omitted). "The Court must look at the evidence in the light most favorable to the non-moving party and with the benefit of all reasonable inferences." *Jenkins v. Lake Montonia Club*, 125 N.C. App. 102, 104, 479 S.E.2d 259, 261 (1997) (citation omitted). "The party moving for summary judgment bears the burden of establishing the lack of a triable issue of fact." *Purcell v. Downey*, 162 N.C. App. 529, 531-32, 591 S.E.2d 556, 558 (2004).

The standard of review in an appeal from an order granting a motion for summary judgment and denying a partial cross-motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the

trial court." *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 32, 732 S.E.2d 614, 618 (2012) (citation omitted).

2. Buyer's and Seller's Duties

In North Carolina, the Residential Property Disclosure Act ("the Act") applies to sales of "residential real property consisting of not less than one nor more than four dwelling units, whether or not the transaction is with the assistance of a licensed real estate broker or salesman[.]" N.C. Gen. Stat. § 47E-4(a)(1) (2017). The Act in relevant part requires that "the owner of real property [] furnish to a purchaser a residential property disclosure statement," including information about the "characteristics and conditions of the . . . plumbing, electrical, heating, cooling, and other mechanical systems[.]" *Id.* § 47E-4(b)(3). However, unless an owner of real property chooses to make no representation with respect to a "characteristic or condition" about which N.C. Gen. Stat. § 47E-4(b) requires disclosure, the Act does not affect "[t]he rights of the parties to a real estate contract as to conditions of the property of which the owner ha[s] no actual knowledge[.]" *Id.* § 47E-6. The Act additionally provides as follows:

> the owner may discharge the duty to disclose . . . by providing a written report attached to the residential property disclosure statement by a public agency or by an attorney, engineer, land surveyor, geologist, pest control operator, contractor, home inspector or other expert, dealing with matters within the scope of the public agency's functions or the expert's license or expertise. The owner shall not be liable for any error, inaccuracy, or omission of any information delivered pursuant to this section if the error, inaccuracy, or omission was made in reasonable reliance upon the information provided by the public agency or expert and the owner was not grossly negligent in obtaining the information or transmitting it.

Id. § 47E-7.

However, while a seller of real property is entitled to reasonable reliance on the opinions and information provided by professionals when discharging the duties of disclosure imposed by N.C. Gen. Stat. § 47E-4(b), *see id.*, "a purchaser [] [who] has the opportunity to exercise reasonable diligence and fails to do so . . . has no action for fraud," *MacFadden v. Louf*, 182 N.C. App. 745, 748, 643 S.E.2d 432, 434 (2007) (citation omitted). This Court has held:

> [w]ith respect to the purchase of property, reliance is not reasonable if a plaintiff fails to make any independent investigation unless the plaintiff can demonstrate: (1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations.

RD&J Props. v. Lauralea-Dilton Enters., 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (internal marks and citation omitted). A buyer of real property is therefore not entitled to rely solely on the property disclosure statement prepared by the seller and conduct no independent due diligence and then subsequently maintain an action against the seller for failure to disclose a latent defect unless the buyer can show that the seller's misrepresentations caused the lack of reasonable diligence. *See Folmar v. Kesiah*, 235 N.C. App. 20, 26-27, 760 S.E.2d 365, 369-70 (2014) (affirming summary judgment on claim by buyer based on content of disclosure statement where buyer's inspection report notified buyer of defects before closing but buyer chose to consummate sale anyway); *MacFadden*, 182 N.C. App. at 748-49, 643 S.E.2d at 434-35 (same); *Swain v. Preston Falls East*, 156 N.C. App. 357, 361-62, 576 S.E.2d 699, 702-03 (2003) (affirming summary judgment on claim by buyer notified in addendum to purchase contract about potential exterior coating defect, noting language from disclosure statement encouraging buyer to obtain independent inspection prior to closing).

3. Mr. Stevens's Failure to Conduct Reasonable Diligence

[2] In the present case, the purchase agreement entered into by Mr. Stevens and the Hellers provided in relevant part as follows:

> 4. BUYER'S DUE DILIGENCE PROCESS:
>
> . . .
>
> During the Due Diligence Period, Buyer or Buyer's agents or representatives, at Buyer's expense, shall be entitled to conduct all desired tests, surveys, appraisals, investigations, examinations and inspections of the Property as Buyer deems appropriate, including but NOT limited to the following:
>
> (i) Inspections: Inspections to determine the condition of any improvements on the Property, the presence of unusual drainage conditions or evidence of excessive

> moisture adversely affecting any improvements on the Property, the presence of asbestos or existing environmental contamination, evidence of wood-destroying insects or damage therefrom, and the presence and level of radon gas on the Property.
>
> . . .
>
> Buyer acknowledges and understands that unless the parties agree otherwise, THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION. Buyer and Seller acknowledge and understand that they may, but are not required to, engage in negotiations for repairs/improvements to the Property. Buyer is advised to make any repair/improvement requests in sufficient time to allow repair/improvement negotiations to be concluded prior to the expiration of the Due Diligence Period.

(Emphasis in original.) The purchase agreement also required the Hellers to provide Mr. Stevens with "reasonable access to the Property (including working, existing utilities) the earlier of Closing or possession by Buyer, including, but not limited to, allowing Buyer an opportunity to conduct a final walk-through inspection of the Property."

As required by N.C. Gen. Stat. § 47E-4(b), the residential property disclosure statement prepared by Ms. Heller stated as follows:

> 2. You must respond to each of the questions on the following pages of this form by filling in the requested information or by placing a check [] in the appropriate box. In responding to the questions, you are only obligated to disclose information about which you have actual knowledge.
>
> a. If you check "Yes" for any question, you must explain your answer and either describe any problem or attach a report from an attorney, engineer, contractor, pest control operator or other expert or public agency describing it. If you attach a report, you will not be liable for any inaccurate or incomplete information contained in it so long as you were not grossly negligent in obtaining or transmitting the information.
>
> b. If you check "No," you are stating that you have no actual knowledge of any problem. If you check "No" and you know there is a problem, you may be liable for making an intentional misstatement.

> c. If you check "No Representation," you are choosing not to disclose the conditions or characteristics of the property, even if you have actual knowledge of them or should have known of them.
>
> d. If you check "Yes" or "No" and something happens to the property to make your Disclosure Statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly give the purchaser a corrected Disclosure Statement or correct the problem.

The first page of the disclosure statement additionally noted that it was "not a substitute for any inspections [the purchasers] may wish to obtain," stating further that "[p]urchasers are strongly encouraged to obtain their own inspections from a licensed home inspector[.]"

The second page of the disclosure statement went on to specify that the representations it contained only concerned characteristics or conditions of the property about which the owners had "actual knowledge," consistent with N.C. Gen. Stat. § 47E-6. Question nine on the following page of the disclosure statement asked:

> 9. Is there any problem, malfunction or defect with the dwelling's heating and/or air conditioning?

Ms. Heller checked the box indicating that the answer to this question was "No," representing that she had no actual knowledge of any defects with the HVAC system as of 30 June 2017, the date Ms. Heller executed the disclosure and Mr. Stevens acknowledged it.

Ms. Heller supplemented her response to question nine of the disclosure statement by providing Mr. Stevens with "written report[s]" within the meaning of N.C. Gen. Stat. § 47E-7 on 14 July 2017 in the form of invoices from the HVAC contractor that performed the maintenance and repair work on the system. By this point, Mr. Stevens had chosen not to conduct an inspection during the due diligence period, and Mr. Stevens did not investigate the issues with the HVAC system prior to the closing of the transaction on 17 July 2017. There is no record evidence supporting an inference that the Hellers' disclosures on 30 July 2017 in the residential disclosure statement were knowing misrepresentations or that the Hellers were grossly negligent in their choice of HVAC contractor. Viewing the evidence in the light most favorable to Plaintiffs and giving Plaintiffs the benefit of every *reasonable* inference, as we are required to do, we hold that the failure of Mr. Stevens to conduct any inspection of the property during the due diligence period or prior to closing,

after being notified of potential problems with the HVAC system, constituted a failure by Mr. Stevens to conduct reasonable diligence under the circumstances. Accordingly, with respect to Defendants' motion, we affirm the trial court's decision to grant summary judgment in favor of Defendants; likewise, we therefore affirm the trial court's decision to deny Plaintiffs' partial cross-motion on liability only, as our determination that Defendants were entitled to judgment as a matter of law entails.

4. Duty of Sellers Who Are Licensed Real Estate Brokers

[3] As noted previously, throughout the amended complaint and the appellate brief filed by Mr. Stevens, Mr. Stevens repeatedly asserts that Ms. Heller owed him a heightened duty of disclosure compared to an ordinary seller of real property because she was a licensed real estate broker and an owner of the property, not an ordinary seller. Mr. Stevens repeats this assertion often but offers no authority to support it.[2] We are not aware of any either. We therefore decline to endorse the viewpoint advocated by Mr. Stevens that licensed real estate brokers owe buyers they do not represent as agents any heightened duty of disclosure when they also own the property they are selling; that is, we expressly reject the argument that owners of real property who sell that property while also acting in the capacity of a licensed real estate broker with respect to such sales are transformed into buyer's agents or dual agents by operation of law. Accordingly, we reiterate our holding that the trial court correctly concluded that Plaintiffs were not entitled to judgment as a matter of law on liability only.

III. Conclusion

The trial court correctly concluded that Defendants were entitled to judgment as a matter of law where there is no genuine issue of material fact that Mr. Stevens failed to exercise reasonable diligence prior

2. The best Mr. Stevens does to support this proposition is to cite provisions of Chapter 93A of the General Statutes, which sets out the regulatory requirements applicable to licensed real estate brokers, such as the prohibition in N.C. Gen. Stat. § 93A-6(a)(1) against "willful or negligent misrepresentation or any willful or negligent omission of material fact." N.C. Gen. Stat. § 93A-6(a)(1) (2017). This provision sets out an instance of conduct that is subject to discipline by the North Carolina Real Estate Commission, the body tasked with enforcing the regulatory requirements applicable to real estate brokers in North Carolina; it does not support the proposition that real estate brokers who own property they are also engaged in selling in their capacity as brokers owe a heightened duty to the *buyers* of such property. Licensed real estate brokers who are selling property they own do not become the buyers' fiduciaries simply by virtue of being both brokers and self-represented sellers in the transaction.

to consummating the purchase from the Hellers. Additionally, despite being a licensed real estate broker, Ms. Heller owed Mr. Stevens no duty to him greater than that owed by an ordinary seller to an ordinary buyer of real property. We therefore affirm the order of the trial court.

AFFIRMED.

Judges DIETZ and INMAN concur.

CHERYL JERNIGAN WICKER, PLAINTIFF
v.
GILLES ANDRE WICKER, DEFENDANT

No. COA18-1212

Filed 3 December 2019

Attorneys—motion to withdraw—after case settled—ongoing obligations—conditions of withdrawal—lack of basis

In a post-divorce action concerning the breach of a property settlement agreement, the trial court erred by denying an attorney's motion to withdraw after the parties settled their claims by consent order. Although there were no indications that withdrawal would prejudice the client, delay ongoing proceedings, or disrupt the orderly administration of justice, the trial court not only denied the motion but also impermissibly set forth conditions which needed to be met before the request to withdraw could be reconsidered—based on the opposing party's argument that the unrepresented person would be difficult to reach since he frequently moved between various out-of-state locations—all of which were premised on future noncompliance with the consent order but none of which were required to carry out the obligations contained in the consent order. On remand, the trial court was directed to allow the motion, but it could still consider whether to hold further proceedings or to enter additional orders to address noncompliance concerns.

Appeal by defendant's counsel from order entered 26 June 2018 by Judge Joseph Buckner in Orange County District Court. Heard in the Court of Appeals 10 September 2019.

Collins Family Law Group, by Rebecca K. Watts, for appellant Melissa Averett.

The Jernigan Law Firm, by Leonard T. Jernigan, Jr., and Epting & Hackney, by Joe Hackney, for plaintiff-appellee.

DIETZ, Judge.

After a successful mediation, the trial court in this family law dispute entered a consent order that, among other things, required Defendant regularly to provide certain financial information to the Plaintiff, and required the parties to communicate with each other solely through their attorneys or agents.

Defendant's counsel, Melissa Averett, later sought to withdraw on the ground that her representation of Defendant had ended and that she and her client had not agreed on new terms of engagement. Plaintiff opposed the motion, primarily on the basis that Defendant lived in many locations—some overseas—throughout the year and that Defendant would be difficult to locate if Averett withdrew.

The trial court entered an order denying Averett's motion to withdraw "at this time" but stated in the order that the court would allow the motion if Defendant retained a new attorney, appointed a registered agent for service of process, or posted a security bond.

We reverse that order. As explained below, the record on appeal does not contain any evidence that would support these conditions—all of which appear aimed at Defendant's future noncompliance with the consent order. The trial court properly could require Defendant to identify a suitable attorney or agent for communication when Averett withdraws, as that is necessary to effectuate portions of the consent order. Likewise, with appropriate evidence, the trial court could impose additional conditions on Defendant, like those in the challenged order, to prevent Defendant from evading his obligations under the consent order. But the record before us does not contain that evidence.

We therefore reverse the court's order and remand for entry of an order permitting Averett to withdraw. We leave it to the trial court's sound discretion on remand whether to conduct further proceedings or enter any additional orders to ensure Defendant's compliance with the consent order.

Facts and Procedural History

Plaintiff and Defendant divorced in 2006. In 2016, Plaintiff filed a complaint alleging that Defendant was in breach of a property separation agreement that the couple entered into before their divorce. That

contract dispute largely involved two businesses in which Defendant is a stakeholder and from which Defendant derives significant disbursements of some kind. Defendant retained Melissa Averett to represent him in the North Carolina proceeding.

The parties mediated their contract dispute and reached a settlement. On 31 October 2017, the trial court entered a consent order, resolving all claims between the parties. Among other things, the order requires Defendant to execute authorization to allow the businesses in which he is a stakeholder to send his future distributions to a CPA and to authorize the CPA to remit portions of those distributions to Plaintiff. It also requires Defendant to provide certain financial reporting information about the businesses to Plaintiff. Finally, the order provides that the parties cannot communicate directly and instead must communicate through their attorneys or designated agents.

Six months later, Averett filed a motion to withdraw as Defendant's counsel. Plaintiff opposed Averett's motion. Plaintiff asserted that Averett needed to remain as counsel of record because Defendant was not a resident of North Carolina and lives in various locations throughout the year, both in the United States and overseas. Thus, Plaintiff asserted, if Defendant violated the consent order, "service under Rules 4 and 5 of the Rules of Civil Procedure . . . may become effectively impossible." Plaintiff also asserted that the consent order requires the parties to communicate through attorneys or agents and, other than Averett, Defendant had no attorney or agent through whom Plaintiff could communicate.

After a non-evidentiary hearing, the trial court entered a written order denying Averett's motion to withdraw "at this time." The order stated that Averett's motion would be allowed if Defendant retained another attorney, designated a registered agent for service of process, or posted a surety bond. Averett appealed the trial court's order.

Analysis

Averett argues that the trial court abused its discretion by denying her motion to withdraw as counsel. Because the trial court's order imposes conditions on Averett's withdrawal that are unsupported either by findings or by the record on appeal, we reverse the court's order.

"The determination of counsel's motion to withdraw is within the discretion of the trial court, and thus we can reverse the trial court's decision only for abuse of discretion." *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990). "An attorney may withdraw from an action after making an appearance if there is (1) justifiable cause, (2)

reasonable notice to his clients, and (3) permission of the court." *Lamb v. Groce*, 95 N.C. App. 220, 221, 382 S.E.2d 234, 235 (1989). "Whether an attorney is justified in withdrawing from a case will depend upon the particular circumstances, and no all-embracing rule can be formularized." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965).

Here, many of the typical reasons justifying withdrawal are present. Both Averett and her client want to end the representation. There is no evidence that Averett's withdrawal would prejudice her client in any way. Likewise, there is no ongoing litigation or work to be done before the trial court in this case. The parties settled their dispute and the court entered a consent order. All that remains is ongoing compliance with that order, whose terms continue indefinitely. And there is no evidence that Averett's client has failed to comply with that consent order or that future litigation concerning the order is imminent.

In short, this was not a case where withdrawal could prejudice the client, delay ongoing proceedings, or disrupt the orderly administration of justice. *Benton*, 97 N.C. App. at 587, 389 S.E.2d at 413. Instead, Plaintiff opposed Averett's motion to withdraw on the ground that Defendant lives in several homes throughout the year in locations around the world, making his location at any given time difficult to ascertain. Plaintiff also pointed to an earlier agreement between the parties that prohibits them from speaking directly and requires them to communicate through attorneys or agents.

Based on these arguments, the trial court entered an order providing that Averett's motion to withdraw is "denied at this time." The order then states that Averett's motion "shall be reconsidered and allowed" if one of three conditions is met:

> Provided, such Motion shall be reconsidered and allowed if one of the following conditions is met:
>
> 1. A general appearance is made in the action by substitute counsel for Defendant, an attorney licensed to practice law in North Carolina
>
> 2. A registered agent for Defendant submits a properly executed registration with the North Carolina Secretary of State.
>
> 3. A surety bond, satisfactory to the Court, is executed and placed in the custody of an agreed upon fiduciary.

We are mindful that trial courts should be given broad discretion to assess whether withdrawal is appropriate. *Benton*, 97 N.C. App. at

587, 389 S.E.2d at 412. But here, the trial court's conditions put Averett and her client in an unjust position. Nothing in the record on appeal indicates that Defendant's compliance with the consent order requires the ongoing assistance of legal counsel. Moreover, nothing in the record indicates that Defendant likely will not comply with the terms of the agreement.

Nevertheless, the terms of withdrawal imposed by the court are directed at future noncompliance. They require Defendant to either retain a new attorney, retain a registered agent for service of process, or post a security bond. All of these conditions are designed to assist Plaintiff in the event that Defendant violates the terms of the order and further court proceedings are necessary. Yet we find no evidence in the record on appeal that indicates a likelihood that Defendant will violate the court's order. As a result, the court's order forces both Defendant and Averett to continue in a legal representation neither wants, or forces Defendant to take actions that, so long as he complies with the order, are both costly and entirely unnecessary. Thus, on the record before this Court, the conditions imposed in the trial court's order are unsupported by evidence, would impose an unfair burden on Defendant in order for Averett to withdraw, and are thus outside the court's discretion.

Our holding should not be read as a requirement that trial courts must conduct an evidentiary hearing, or make any specific fact findings, when ruling on a motion to withdraw. The challenged order is atypical—it conditioned withdrawal that both the attorney and client desired, in a case without any ongoing court proceedings, on the client taking steps to assist the opposing party in the event of a future violation of a final court order. To support the sort of conditions imposed in this order, the trial court's discretionary decision must be based on "facts disclosed by the record." *Smith*, 264 N.C. at 211, 141 S.E.2d at 306.

To be sure, there is a portion of the court's consent order that is complicated by Averett's proposed withdrawal. The consent order prohibits the parties from communicating directly and requires them to communicate with each other through attorneys or agents. Moreover, the order requires the parties to regularly communicate—specifically, Defendant must provide Plaintiff with financial reports on businesses in which he is a stakeholder. Thus, the trial court properly could require, in connection with Averett's withdrawal, that Defendant identify an attorney or agent through which the parties can communicate.

But the trial court's order denying Averett's motion to withdraw does not do so. As explained above, it is aimed at remedies for future

noncompliance and resulting court proceedings. It requires Defendant to either retain another attorney, retain a registered agent for service of process, or post a security bond. None of these steps is necessary to comply with the consent order. That consent order, to which both parties assented, could have required Defendant always to retain a licensed North Carolina attorney; it did not. It permits Defendant to designate an agent through whom Plaintiff may communicate, and that agent need not reside in North Carolina. Thus, although the trial court would be well within its sound discretion to order Defendant to identify an attorney or agent for communication upon Averett's withdrawal, the challenged order does not do so.

We therefore reverse the trial court's order and remand with instructions to allow Averett's motion to withdraw. But we note that, although we find no evidence in the record on appeal concerning Defendant's likelihood of noncompliance with the consent order, there are unverified allegations from Plaintiff that Defendant willfully and deliberately violated past orders and may seek to use corporate laws or rules of another state as a basis to refuse to comply in the future.

Our holding does not prevent the trial court, in the court's discretion, from conducting further proceedings or entering additional orders to ensure compliance with the consent order. This could include an order requiring Defendant to identify an attorney or agent for communications under the consent order and, with appropriate evidence, an order requiring Defendant to take other actions that would prevent him from evading the terms of the consent order. We hold only that, on the record before us, there was justifiable cause to permit Averett's withdrawal and insufficient evidence to support the conditions imposed on that withdrawal in the challenged order. We therefore reverse the trial court's order and remand for entry of an order allowing Melissa Averett to withdraw as counsel.

Conclusion

We reverse the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

Judges MURPHY and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 DECEMBER 2019)

HOWARD v. COLL. OF THE ALBEMARLE No. 18-1131	N.C. Industrial Commission (TA-25672)	Dismissed
IN RE A.H. No. 19-57	Guilford (16JT71) (16JT72)	Vacated and Remanded
IN RE B.T. No. 19-153	Davie (16JT25) (16JT26) (16JT27)	Affirmed
IN RE D.A.I.P. No. 18-1093	Rockingham (15JT68) (16JT123)	Affirmed
IN RE D.D.H. No. 19-155	Rowan (16JT100)	Affirmed
IN RE L.M. No. 18-790	Johnston (17JB205)	Affirmed in part, remanded in part
JORDAN v. ALBERS No. 19-389	Cabarrus (15CVD3917)	Affirmed in part, Reversed and Remanded in Part
LEQUIRE v. SE. CONSTR. & EQUIP. CO., INC. No. 19-603	N.C. Industrial Commission (16-744994)	Affirmed
LITTLE WILLIE CTR. CMTY. DEV. CORP. v. CITY OF GREENVILLE No. 19-357	Pitt (18CVS1548)	Affirmed
PITT CNTY. EX REL. LABRECQUE v. WORTHINGTON No. 19-177	Pitt (11CVD318)	Vacated and Remanded
PITT CNTY. EX REL. McLAMB v. WORTHINGTON No. 19-178	Pitt (15CVD2450)	Vacated and Remanded
SHORT v. PNC BANK, N.A. No. 19-198	Wake (18CVS9470)	Affirmed in part; dismissed in part.
STATE v. AUSTIN No. 19-148	New Hanover (17CRS59354)	Affirmed

STATE v. BAREFOOT No. 19-336	Nash (17CRS54867)	No error in part, dismissed in part.
STATE v. BENFIELD No. 18-1193	Forsyth (17CRS490)	Dismissed
STATE v. ELLIOTT No. 19-116	Union (16CRS53852) (17CRS55496-97)	Affirmed
STATE v. EVANS No. 19-91	New Hanover (17CRS61032) (18CRS50125-26)	Dismissed
STATE v. GILLARD No. 18-1250	Wake (16CRS211605)	Affirmed in part and remanded in part
STATE v. GROOMS No. 18-1211	Warren (15CRS50470-72)	No Error
STATE v. HOLLOMAN No. 19-5	Wayne (15CRS52352)	No Error
STATE v. HUNTER No. 18-1029	Columbus (13CRS53110-11) (13CRS946-47)	No Error
STATE v. JOHNSON No. 18-1218	Rowan (13CRS54510)	No Prejudicial Error
STATE v. KELLY No. 19-136	Johnston (16CRS57114-16)	Dismissed in part; vacated in part and remanded.
STATE v. LOCKLEAR No. 19-447	Robeson (17CRS53313)	Vacated and Remanded
STATE v. McPHAIL No. 19-144	New Hanover (18CRS1359) (18CRS50187)	Affirmed
STATE v. NANCE No. 18-1273	Alamance (16CRS51226) (16CRS51227)	No Error
STATE v. NESBITT No. 19-286	Davie (17CRS50165) (17CRS50170-71) (17CRS50219)	Affirmed

STATE v. QUINN No. 19-251	Mecklenburg (16CRS222461-62) (16CRS222465-66) (16CRS222469) (16CRS222471) (17CRS7406)	NO PREJUDICIAL ERROR
STATE v. RANGEL No. 19-131	Mecklenburg (15CRS207225-27)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. RHODES No. 19-127	Sampson (14CRS52905) (15CRS202)	No Error

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Dependency—present ability to care for child—evidentiary support—past substance abuse—The trial court erred by concluding that a juvenile was dependent where there was no support for the conclusion that his mother, who had previous substance abuse issues, was presently incapable of taking care of the child. While there was some evidence that the mother had experienced short-term memory loss, more recently the mother was meeting regularly with the department of social services, was receiving services for substance abuse, and had provided numerous negative drug screens. **In re F.S., 34.**

Dispositional order—services ordered—relation to reason for removal—discretion of trial court—The trial court did not abuse its discretion by ordering respondent parents to undergo mental health and substance abuse assessments and random drug screens where their children were removed from the home based on the physical abuse of one child, since those services had the potential to resolve possible underlying causes of the abuse that occurred. Likewise, the court's requirement that respondents obtain safe and stable housing, even though housing was not an issue in the adjudication phase, was a proper exercise of its authority pursuant to N.C.G.S. § 7B-904(d1)(3), particularly where respondents attempted to conceal their living arrangements from the social services agency and had moved multiple times. **In re S.G., 360.**

Dispositional order—visitation schedule—abuse of discretion—After adjudicating three children neglected and one of them abused, the trial court's determination that it was in the children's best interests to have visits with their parents only once a month was not an abuse of discretion, but the matter was remanded for the court to establish the minimum duration of the visits as required by N.C.G.S. § 7B-905.1(c). The court's directive that contact between respondent-father and the oldest child, who was not his biological child, be in accordance with recommendations by the child's therapist was not an improper delegation of authority because the court was not required to award any visitation between them. **In re S.G., 360.**

Grounds for termination—willful abandonment—sufficiency of findings—The trial court did not err by concluding that respondent-father had willfully abandoned his infant child in an order terminating the father's parental rights where, during the six-month determinative period, the father stated that he was going to let his sister handle the child's care and placement, he moved to California without informing the county department of social services (which had custody of the child), he failed to attend hearings regarding the child, and he did not request any visits with the child. **In re E.B., 23.**

Neglect—risk of future harm—abuse of another child in household—The trial court properly adjudicated two children as neglected after adjudicating a third sibling as abused—where its findings that the parents refused to acknowledge responsibility for the abuse and that the mother opted to stay with the father (the alleged perpetrator of the abuse) rather than care for the children supported a determination that the children were at risk of future harm if they remained in their parents' care. **In re S.G., 360.**

Neglect—risk of future neglect—evidentiary support—past substance abuse—The trial court erred by concluding that a juvenile was neglected where there was no support for the trial court's conclusion that there existed a substantial risk of physical, mental, or emotional impairment if the child returned to his mother's custody. There was no evidence that the mother's numerous prior hospital stays for alcohol, substance abuse, and withdrawal harmed the child, and, at the time of the hearing,

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Permanency planning—waiver of review hearings—section 7B-906.1(n)—"period of at least one year"—In a permanency planning matter, the Court of Appeals interpreted the provision in N.C.G.S. § 7B-906.1(n) that further review hearings may be waived where a child "has resided in the placement for a period of at least one year" to mean a placement of at least twelve months that is continuous and uninterrupted. In this case, where the children's placement with grandparents was periodic and sporadic, that requirement was not met. **In re J.T.S., 61.**

Record on appeal—lacking copies of juvenile petitions—dismissal—writ of certiorari—Respondent-parents' appeal from an order adjudicating their children neglected was dismissed as to two of the children because the record on appeal lacked copies of the juvenile petitions for those two children and thus was silent as to the trial court's subject matter jurisdiction. However, the Court of Appeals elected to consider the merits of the parents' appeal by writ of certiorari (N.C.G.S. § 7A-32(c)). **In re J.C.M.J.C., 47.**

Subject matter jurisdiction—no juvenile petition—permanency planning orders—void—The trial court lacked subject matter jurisdiction to conduct review hearings and enter permanency planning orders regarding an infant who was in a county department of social services' custody where no juvenile petition was filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). For this reason, the Court of Appeals disregarded any facts related to respondent-father's failure to comply with the permanency planning orders in reviewing the order to terminate his parental rights. **In re E.B., 23.**

CHILD CUSTODY AND SUPPORT

Best interests of the child—resolution of the evidence—remand—A custody order was remanded for adjudication and resolution of the evidence where the order made many findings regarding issues such as the mother's move with the children to a new county, the work schedules of the parents, and the family and friends available to help where the mother and father lived—but failed to make any findings regarding the effect of these issues upon the children and why it was in the children's best interests for their father to be awarded primary physical custody. **Hinson v. Hinson, 187.**

Child support amount—modification—calculation—deviation from guidelines—effective date—Where the trial court modified a father's child support obligation and granted him a credit for past support payments, the court did not abuse its discretion by deviating from the N.C. Child Support Guidelines when calculating the new amount of child support, because competent evidence showed that the parties' combined monthly gross income exceeded the maximum amount to which the Guidelines' support schedule applied. Furthermore, the decision to make the modification effective from the date on which the father filed his motion to modify fell squarely within the trial court's discretion. **Hart v. Hart, 172.**

Child support order—from another state—Uniform Interstate Family Support Act—jurisdiction to enforce and modify—In a child support case originating in Washington, where a trial court in that state entered the initial support order and two more orders correcting the first, a North Carolina trial court had jurisdiction under the Uniform Interstate Family Support Act (UIFSA) to enforce and modify the father's child support obligation because both parents and their children resided in North Carolina when the father filed his motion to modify child support. Furthermore, where UIFSA requires an out-of-state order to be registered in North

CHILD CUSTODY AND SUPPORT—Continued

Carolina before a North Carolina court can modify it, the mother substantially complied with this requirement by registering the original support order and one of the corrected orders. **Hart v. Hart, 172.**

Child support—arrearages—contempt—relief for fraud—The Court of Appeals rejected a father's argument that he was entitled to relief pursuant to Civil Procedure Rule 60(b)(3) from orders holding him in contempt for past violations of an earlier child support order where the claim was time-barred by the one-year statute of limitations in Rule 60(b). **Unger v. Unger, 142.**

Child support—arrearages—contempt—relief for void orders—The Court of Appeals rejected a father's argument that he was entitled to relief pursuant to Civil Procedure Rule 60(b)(4) from orders holding him in contempt for past violations of an earlier child support order. The orders were not void because the trial court had jurisdiction and the authority to sentence the father to the suspended 30-day sentence. **Unger v. Unger, 142.**

Child support—modification—substantial change in circumstances—new custodial arrangement—In a child support case originating in another state, where the father relocated to North Carolina shortly after the mother moved there with the parties' three children, a North Carolina trial court did not abuse its discretion in modifying the father's child support obligation where the evidence revealed a substantial change in circumstances affecting the children's welfare. Specifically, the amount of time the children spent with the father increased significantly once they all lived in the same state and after the parties changed their custodial arrangement to one of shared custody. **Hart v. Hart, 172.**

CIVIL PROCEDURE

Default judgment—set aside—appearance—by implication—The trial court did not err by setting aside a default judgment against defendant LLC, where defendant made an appearance pursuant to Civil Procedure Rule 55(b)(1) when the attorney of a managing member of defendant requested and accepted an informal extension of time from plaintiffs and also engaged in discussions with plaintiffs' counsel regarding the case. **Equity Tr. Co. v. S&R Grandview, LLC, 345.**

Rule 51—special jury instruction—highlighting particular evidence—dram shop claim—In a negligence action where employees at defendant corporation's restaurant served too much alcohol to a customer, who then got into a car crash injuring plaintiff, the trial court properly denied plaintiff's request for a special jury instruction on his dram shop claim, which asked the jury to consider evidence regarding whether the restaurant employees followed defendant's internal policies for preventing customer drunkenness. The proposed instruction violated Civil Procedure Rule 51(a) by requiring the court to emphasize a particular aspect of plaintiff's evidence rather than give "equal stress" to both parties' evidence and contentions. **Trang v. L J Wings, Inc., 136.**

Two-dismissal rule—same transaction or occurrence—confession of judgment—In a case involving a series of business transactions and lawsuits, where plaintiffs had voluntarily dismissed a prior action for breach of contract (the first dismissal) and then dismissed an action instituted by a confession of judgment (the second dismissal), plaintiffs' next complaint violated the two-dismissal rule (Civil Procedure Rule 41(a)(1)) and the trial court did not err by granting summary judgment for defendant. The actions were based upon the same transaction or occurrence—an alleged

DIVORCE

Alimony—dependency—access to substantial unearned income—In a divorce action, the wife was not entitled to alimony because she was not a dependent spouse where, although the husband was the sole breadwinner during the marriage, the wife had access to over one million dollars of proceeds from her previous husband's life insurance policy. Further, because the trial court found the wife would be able to earn substantial income after her recent job search, the court did not improperly disqualify her from receiving alimony based solely on her ability to support herself through estate depletion. **Crago v. Crago, 154.**

Equitable distribution—distributive award—sufficiency of funds—findings of fact—In a divorce action, the trial court did not abuse its discretion by ordering the wife to make a distributive award of $120,000 to the husband where the court found the wife had sufficient funds for the award in her bank account that, as of the parties' separation, contained $841,784 worth of proceeds she had received under her previous spouse's life insurance policy. Although two years had passed since the parties separated (as of the trial date), it was reasonable for the trial court to conclude from the evidence that at least $200,000 remained in the account. **Crago v. Crago, 154.**

Equitable distribution—legal title to marital property by third party—jurisdiction—In a divorce action, the trial court had jurisdiction to distribute a car and a bank trust account at equitable distribution where there was no evidence supporting defendant's claim that a third party held legal title to both items. **Crago v. Crago, 154.**

Equitable distribution—property classification—income tax debt—In a divorce action, the trial court properly classified certain income tax debt as marital at equitable distribution where competent evidence showed that, during the last six years of the parties' marriage, they accrued over $60,000 of federal income tax debt and only part of it was the husband's separate debt. **Crago v. Crago, 154.**

Equitable distribution—property classification—mechanistic approach—proceeds from former spouse's life insurance policy—In a divorce action, where defendant's prior husband named her the beneficiary of his million-dollar life insurance policy, the trial court did not abuse its discretion by using the mechanistic approach (rather than the analytic approach) to determine that the life insurance proceeds were marital property subject to equitable distribution. Under the mechanistic approach, which courts routinely apply in the insurance context, the trial court properly classified the insurance proceeds as marital property where defendant paid the insurance premiums in part with marital funds, where her prior husband's death and her claim for benefits under the policy arose before she and plaintiff separated, and where she also received the proceeds before the date of separation. **Crago v. Crago, 154.**

Equitable distribution—property classification—source of funds—proceeds from former spouse's life insurance policy—In a divorce action, where defendant's prior husband named her the beneficiary of his life insurance policy, the trial court did not abuse its discretion in classifying the insurance proceeds as marital property subject to equitable distribution under the "source of funds" rule. Competent evidence showed that defendant paid the insurance premiums with funds from a bank account she opened during her marriage to plaintiff, which included her personal income and money from the parties' joint account. Defendant offered no evidence showing she acquired any of those funds either before the marriage or during the marriage by gift or inheritance, and therefore the trial court properly found that she paid the life insurance premiums with marital property. **Crago v. Crago, 154.**

EVIDENCE—Continued

facts or data because the witness herself testified that the minor contributor's DNA profile was not of sufficient quality and quantity for comparison purposes. Further, the testimony could not reasonably be considered the product of reliable principles and methods because the witness repeatedly stated that the comparison the State asked her to perform would be against the policy of any lab in the country. **State v. Phillips, 623.**

Expert witness—credibility vouching—sex offense with child—plain error analysis—In a prosecution for statutory sexual offense, the admission of testimony from two expert witnesses did not amount to plain error where certain statements—including that the child victim "disclose[d]" her allegations and that she related her story consistently and "gave excellent detail"—did not constitute impermissible vouching of the victim's credibility. A statement that children generally do not make up stories about sexual abuse was permissible because it reflected characteristics of abused children learned through professional experience. Finally, although one expert's subjective belief of the victim's truthfulness—expressed through the statements that she believed the victim and that the victim needed extra support "because of the sexual abuse that she experienced"—did constitute improper vouching, a different verdict was not probable in light of medical evidence and the victim's extensive testimony. **State v. Worley, 300.**

Hearsay—exceptions—residual—required findings—neglect and dependency petition—In an adjudicatory hearing on a juvenile petition alleging neglect and dependency, the trial court erred by admitting testimony, pursuant to the residual hearsay exception (Evidence Rule 803(24)), by one of respondent-DSS's witnesses as to statements the child purportedly made to another social worker and a therapist, based on notes taken by the social worker. The trial court failed to address the child's or the other declarants' availability, whether the hearsay statements would be more probative than having the child testify, or whether the statements were trustworthy. The error was prejudicial because there was otherwise no evidence to demonstrate harm or risk of harm in the child returning to his mother's care. **In re F.S., 34.**

Hearsay—recorded phone calls—while defendant was in jail—lack of prejudice—In a murder trial, defendant failed to show the admission of phone calls—recorded between himself and other people while he was in jail—was prejudicial in light of the overwhelming evidence that he was the perpetrator of a drive-by shooting that resulted in one death. **State v. Roberts, 272.**

Impaired driving—medical records—right to confront witnesses—hearsay—prejudice—In a habitual impaired driving case, where defendant was hospitalized for extreme intoxication on the day of his arrest, the admission of defendant's medical records at trial—including a blood alcohol test conducted by the hospital—did not violate his confrontation rights under the Sixth Amendment because the records were not testimonial and they were admissible under the business records exception to the hearsay rule. Furthermore, testimony by an expert on blood alcohol testing did not violate defendant's confrontation rights because the expert gave an independent opinion about defendant's test results, and defendant was able to cross-examine him. Finally, admission of defendant's medical records was not prejudicial because the State presented ample alternative evidence that defendant had been driving while impaired. **State v. Romano, 440.**

Other crimes, wrongs, or acts—prior violent incident—not formally charged—substantially similar—The trial court did not err by admitting evidence

FIREARMS AND OTHER WEAPONS—Continued

provision of N.C.G.S. § 14-415.12(a)(3)), the COA did not reach substantive arguments about a second ground for denial of the permit due to the lack of a transcript, but directed the trial court on remand to use and apply the definition of "addict" contained in 21 U.S.C. § 802, incorporated into section 14-415.12(b)(5) (the substance abuse subsection), before determining the applicant was disqualified under that provision. **In re Duvall, 14.**

FRAUD

Constructive—intent to personally benefit—directed verdict—improper—In a case involving alleged misappropriation of condominium assessments and dues, the trial court erred by entering a directed verdict for defendant (officer of a condominium association) on plaintiff unit owner's claim for constructive fraud where evidence did not definitively resolve whether the officer intended to personally benefit from financial mismanagement or was merely negligent. **Ironman Med. Props., LLC v. Chodri, 502.**

Constructive—taking advantage of a position of trust—accounting and record-keeping—failure to disclose document—The trial court erred by entering judgment notwithstanding the verdict (JNOV) in favor of defendant trucking company where there was sufficient evidence that defendant committed constructive fraud—that defendant took advantage of a position of trust with plaintiff to benefit itself. In the light most favorable to plaintiff, plaintiff paid defendant to provide accounting and record-keeping services, and defendant failed to disclose the existence of a document that was in defendant's possession and was referenced in a lease contract, which stated that plaintiff had the option to purchase the trucks it leased from defendant for 20% of the original cost ($220,000), rather than the amount invoiced by defendant ($620,000). **Long Brothers of Summerfield, Inc. v. Hilco Transp., Inc., 377.**

GAMBLING

Electronic sweepstakes—section 14-306.4—"entertaining display"—The trial court erred by concluding that plaintiffs' game kiosks did not violate N.C.G.S. § 14-306.4, and by entering an injunction preventing the State from enforcing that law against plaintiffs. Plaintiffs' game was conducted using a visual display that met the definition of "entertaining display" in the statute. However, the Court of Appeals panel was split on whether the determination of illegality was dependent on the distinction between games of skill or chance—the two concurring judges stated that games would violate the entertaining display prohibition only if they relied on chance, and concluded that the game at issue in this case was dominated by chance and not skill or dexterity. **Gift Surplus, LLC v. State of N.C. ex rel. Cooper, 1.**

HOMICIDE

Attempted first-degree murder—conspiracy to commit—cognizable offense —Considering an issue of first impression, the Court of Appeals held that conspiracy to commit attempted first-degree murder is a cognizable offense, and the offense does not require the State to prove that the defendant intended to fail to commit the attempted crime itself. **State v. Lyons, 603.**

Attempted first-degree murder—sufficiency of the evidence—gun shot at law enforcement officer in vehicle—There was sufficient evidence to convict

MOTOR VEHICLES—Continued

Felony serious injury by motor vehicle—guilty plea—factual basis—sufficiency—Where defendant crashed his car into a tree while a woman and her baby rode as passengers, the prosecutor's statements to the trial court provided a sufficient factual basis for defendant's guilty plea to felony serious injury by vehicle. Specifically, where the prosecutor described how, after all three individuals were hospitalized, the infant needed to be flown to a different hospital for care, it was reasonably inferable that the infant sustained a serious injury. Additionally, where the prosecutor stated that defendant's bloodwork from the hospital came back positive for narcotics, it was reasonably inferable that defendant was driving under the influence during the crash. **State v. Alston, 208.**

Habitual impaired driving—suppression of blood test by law enforcement—motion to suppress blood test by hospital—no written order—In a habitual impaired driving case, where both the Court of Appeals and the Supreme Court upheld a pretrial order granting defendant's motion to suppress an alcohol blood test conducted by law enforcement, the trial court on remand properly denied defendant's supplemental motion to suppress his medical records, which contained a separate blood alcohol test from the hospital that treated him on the day of his arrest. Although both tests came from the same blood draw, the order granting defendant's first suppression motion did not encompass all records related to that blood draw, and the Supreme Court only upheld the suppression of the blood test by law enforcement. Moreover, the trial court was not required to enter a written order denying defendant's second suppression motion because there were no material conflicts in the evidence and the court explained its rationale for the ruling from the bench. **State v. Romano, 440.**

NEGLIGENCE

Elements—failure to delete erroneous entry in medical records—sufficiency of pleading—In a lawsuit against a healthcare system and a hospital, where a doctor mistakenly entered a gonorrhea diagnosis into plaintiff's medical records, wrote "cancelled" and "entered in error" next to the entry, and sent the entry to the U.S. Department of Labor as part of plaintiff's medical evaluation for disability benefits, the trial court improperly dismissed plaintiff's negligence claim pursuant to Civil Procedure Rule 12(b)(6). Plaintiff's complaint (by notifying defendants that plaintiff intended to base the standard of care on HIPAA and defendants' own privacy policy) adequately pled defendants' duty to delete the erroneous entry, and that the breach of this duty proximately caused her to suffer reputational harm, loss of consortium, and severe economic, physical, and emotional distress. **DeMarco v. Charlotte-Mecklenburg Hosp. Auth., 334.**

Negligent supervision—directed verdict—prior verdict on dram shop claim—no prejudice—In a negligence action where employees at defendant corporation's restaurant served too much alcohol to a customer, who then got into a car crash injuring plaintiff, the trial court did not commit prejudicial error by entering a directed verdict in favor of defendant on plaintiff's negligent supervision claim. By returning a verdict finding defendant not liable on plaintiff's dram shop claim, the jury had already determined that the employees had not been negligent, and therefore plaintiff failed to meet his evidentiary burden on the negligent supervision claim. **Trang v. L J Wings, Inc., 136.**

PUBLIC RECORDS—Continued

MOU and the Public Records Act was supported by the evidence and the court's findings. The state agency produced over 13,000 pages of responsive records to plaintiff and provided detailed information on the methodology it used to ensure compliance with its obligations under the MOU as well as sworn affidavits attesting to its efforts. Plaintiff did not provide specific reasons, other than speculation, that would support his argument that the agency did not actually conduct the required searches or that additional documents existed that were not produced, and the trial court's actions demonstrated sufficient oversight of the case. **Ochsner v. N.C. Dep't of Revenue, 391.**

REAL PROPERTY

Failure to conduct reasonable diligence—no inspections—notice of potential problems—Plaintiff-buyers' failure to conduct any inspection during the due diligence period or prior to closing on real property—even after they received a written report from defendant-sellers in the form of invoices from an HVAC contractor, signaling potential problems with the HVAC system—was a failure to conduct reasonable diligence under the circumstances, so defendants were entitled to summary judgment on plaintiffs' claims regarding the defective HVAC system. **Stevens v. Heller, 654.**

Seller a licensed real estate broker—duty of disclosure—same as ordinary seller—The Court of Appeals rejected the assertion that a licensed real estate broker selling her own property owed plaintiffs a heightened duty of disclosure compared to any ordinary seller of real property. **Stevens v. Heller, 654.**

SEARCH AND SEIZURE

Attenuation doctrine—cell phone location data—intervening circumstances—flagrancy—The trial court properly denied a first-degree murder defendant's motion to suppress where law enforcement officers' use of cell phone location data to find defendant in another state was too attenuated from the discovery of evidence in the house where defendant was staying. Assuming the search of defendant's cell phone location data was unconstitutional, the intervening circumstances (defendant shooting a rifle at officers after the homeowner consented to a search of the home) and the lack of flagrancy in the unconstitutional search (the officers obtaining the information pursuant to a N.C. law that was valid at the time) rendered the evidence seized in the home admissible under the attenuation doctrine. **State v. Thomas, 121.**

Motion to suppress—consent to search—voluntariness—conflicting evidence—sufficiency of finding—In a prosecution for possession of heroin and drug paraphernalia, the trial court properly denied defendant's motion to suppress where the court found that defendant voluntarily consented to a warrantless search of her purse, and therefore the search did not violate the Fourth and Fourteenth Amendments. Competent evidence supported this finding where the officer who performed the search testified that he asked defendant for permission first and she replied, "Sure." Although other evidence conflicted with the officer's testimony, it was the proper role of the trial court to weigh all the evidence and resolve any conflict therein. **State v. Hall, 425.**

SENTENCING

Appeal—request to invoke Appellate Rule 2—sentences within presumptive range and overlapping with aggravated range—The Court of Appeals declined

SENTENCING—Continued

SEXUAL OFFENSES

UNFAIR TRADE PRACTICES