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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF CUBE YADKIN GENERATION, LLC, COMPLAINANT
v.
DUKE ENERGY PROGRESS, LLC, RESPONDENT

No. COA18-1203

Filed 17 December 2019

1. Utilities—hydroelectric facilities—Legally Enforceable Obligation —requirements—Notice of Commitment Form

The Utilities Commission did not err in determining that the new owner of a hydroelectric facility (complainant) failed to establish a Legally Enforceable Obligation (LEO)—which would have allowed it, as a Qualifying Facility, to sell energy to respondent energy utility at a higher avoided-cost rate—because complainant did not file a Notice of Commitment Form as required by the Commission's three-part test.

2. Utilities—hydroelectric facilities—Legally Enforceable Obligation —requirements—applicability—dismissal premature

In a case brought by the new owner of a hydroelectric facility (complainant) asserting that it had established a Legally Enforceable Obligation (LEO), which would allow it to sell energy, as a Qualifying Facility, to an energy utility (respondent) at a certain avoided-cost rate, the Utilities Commission improperly denied complainant's request to waive one of its requirements to establish an LEO. Where complainant raised several factual issues regarding whether it was required to file a Notice of Commitment Form, dismissal at the pleadings stage was inappropriate.

Appeal by Complainant from Order entered 16 July 2018 by the North Carolina Utilities Commission. Heard in the Court of Appeals 8 August 2019.

Kilpatrick Townsend & Stockton LLP, by Joseph S. Dowdy, Benjamin L. Snowden, and Phillip A. Harris, Jr., for complainant-appellant.

The Allen Law Offices, by Dwight W. Allen, Britton H. Allen, and Brady W. Allen, and Kendrick Fentress, Associate General Counsel of Duke Energy Corporation, for respondent-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Cube Yadkin Generation, LLC (Cube) is a limited liability company that acquires, develops, and modernizes hydroelectric facilities. The present dispute arises out of Cube's purchase of hydroelectric facilities (the Yadkin Project)[1] from Alcoa Power Generating, Inc. (Alcoa) on 1 February 2017 and Cube's efforts to sell electrical power generated by these facilities to Duke Energy Progress, LLC (Duke). In this appeal, Cube appeals from the Order Granting Motion to Dismiss (Order) entered on 16 July 2018 by the North Carolina Utilities Commission (Commission), dismissing Cube's Verified Complaint, Request for Declaratory Ruling, and Request for Arbitration (Complaint) against Duke. The Record tends to show the following:

In 1978, Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), which sought, *inter alia*, to encourage a national policy of energy conservation. *See FERC v. Mississippi*, 456 U.S. 742, 745, 72 L. Ed. 2d 532, 537-38 (1982). "Pursuant to section 210 of [PURPA], regulations of the Federal Energy Regulatory Commission (FERC) promulgated thereunder, and implementation mechanisms of the states, electric utilities are required to purchase power produced by qualifying cogeneration and small power production facilities [(collectively, Qualifying Facilities)] and are required to pay their 'avoided costs' for the power unless the rate is negotiated." *State ex rel. Utilities Comm. v. N.C. Power*, 338 N.C. 412, 416, 450 S.E.2d 896, 898 (1994); *see also* 16 U.S.C.A. § 824a-3(d) (West 2010) (defining avoided cost as "the cost to the electric utility of the electric energy which, but for the purchase from

1. The Yadkin Project consists of four hydroelectric facilities; however, the parties agree only three of these facilities are in dispute. Therefore, for ease of reading, the Yadkin Project, as used in this opinion, refers only to the three disputed facilities.

such [Qualifying Facilities], such utility would generate or purchase from another source"). Under FERC regulations, a Qualifying Facility can sell its power pursuant to a Legally Enforceable Obligation and can choose to fix the price "at the time the [Legally Enforceable Obligation] is incurred" or at the moment of delivery. 18 C.F.R. § 292.304(d)(2)(i)-(ii) (2019).

Prior to 2016, the Commission applied a two-part test for determining the establishment of a Legally Enforceable Obligation. *See* N.C. Utils. Comm'n, *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 140, at *52 (Dec. 17, 2015) [hereinafter *Sub 140 Order*]. The Commission required a Qualifying Facility to (1) obtain a Certificate of Public Convenience and Necessity (CPCN)[2] and (2) indicate to the utility that it was "seeking to commit itself to sell its output[.]" N.C. Utils. Comm'n, *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 136, at *37 (Feb. 21, 2014) [hereinafter *Sub 136 Order*]; *see also* N.C. Gen. Stat. § 62-110.1(a) (2017) (requiring a CPCN from the Commission before "construction of any . . . facility for the generation of electricity"). However, because this second prong was vague and difficult to establish, the Commission later created the Notice of Commitment (NOC) Form, demonstrating a Qualifying Facility's commitment to sell its output. *Sub 140 Order*, at *51-52. Effective 26 January 2016, the Commission thus revised its Legally-Enforceable-Obligation test, ordering that for a Qualifying Facility to establish a Legally Enforceable Obligation, the developer of the Qualifying Facility was required to: "(1) have self-certified with the FERC as a [Qualifying Facility]; (2) have made a commitment to sell the facility's output to a utility pursuant to PURPA via the use of [the NOC Form;] and (3) have received a CPCN for the construction of the facility." *Sub 140 Order*, at *52. Indeed, relevant to this appeal, Section Three of the NOC Form specifically requires a Qualifying Facility to indicate whether it has applied for or received a CPCN from the Commission.

According to Cube's Complaint, the Yadkin Project facilities have been in operation since at least 1958. In 2000, Alcoa acquired the Yadkin Project, and on 22 September 2016, FERC issued a new long-term license to Alcoa for the Yadkin Project, allowing for the operation and maintenance of the Yadkin Project until 31 March 2055. On 30 June 2016, Cube signed a contract with Alcoa to acquire the Yadkin

2. If the Qualifying Facility was under 2 megawatts, the Qualifying Facility filed a Report of Proposed Construction instead of a CPCN; however, none of Cube's Qualifying Facilities were under 2 megawatts.

Project, and approximately a month later, Cube submitted an application to FERC seeking approval of the transfer of Alcoa's Yadkin Project license. FERC approved the transfer on 13 December 2016. Cube "formally consummated its agreement to purchase the Yadkin Project" on 1 February 2017. Prior to this transfer, Alcoa self-certified the Yadkin Project as Qualifying Facilities by filing Form 566s with FERC on 28 September 2016, and on 16 March 2017, Cube filed Form 566s with FERC, self-recertifying the Yadkin Project as Qualifying Facilities.

In March 2016, Cube, as part of its due diligence process, contacted Duke to introduce itself and begin inquiries about entering into a Power Purchase Agreement (PPA) with Duke. The parties subsequently held an in-person meeting to discuss entering into "a potential long-term PPA for the [Yadkin Project Qualifying Facilities]." Cube and Duke continued discussions, and by letter dated 21 September 2016, Duke stated:

> You [(a representative for Cube)] informed me that [Cube] does not currently own or operate the Yadkin [Project] system, but anticipates that it will close on the transaction to own and operate the facilities around November 1, 2016. As I communicated to you previously, Duke does not have any current needs for energy or capacity . . . . You further informed me that [Cube] is considering certifying the [Yadkin Project] as [Q]ualifying [F]acilities under [PURPA]. In that regard, I informed you that to the extent [Cube] approached Duke under PURPA, that under PURPA's requirements, Duke would likely have no obligation to purchase any output of energy or capacity from the Yadkin [Project] system units that may be certified as [Q]ualifying [F]acilities.

On or about 11 October 2016, Cube sent Duke a letter in response, indicating Alcoa had self-certified the Yadkin Project, stating PURPA "require[s] electric utilities, including Duke, to purchase energy and capacity made available from [Qualifying Facilities,]" and requesting the parties meet "to discuss the process for making sales from [the Yadkin Project] to Duke pursuant to PURPA." Countering Cube's assertions, Duke replied by letter dated 14 October 2016, stating because Cube "neither owns nor is a [Q]ualifying [F]acility with respect to the Yadkin [Project,]" Cube had no rights to exert under PURPA. Duke further asserted its position that even if Cube eventually acquired the Yadkin Project and rights under PURPA, Duke would be exempted from any purchase obligation under PURPA.

Duke, however, did represent to Cube "it would enter into good faith negotiations . . . concerning the purchase of the output of the Yadkin [Project] facilities on a non-PURPA basis."[3] These discussions began in November 2016 and continued until 10 August 2017; however, the parties never reached a non-PURPA agreement. According to Cube, "Duke's conduct since the beginning of the discussions between the parties appears to have been designed to discourage [Cube] from pursuing its rights under PURPA." Importantly, on 15 November 2016, Duke filed its "2016 Avoided Cost Proposal" with the Commission, which, Cube claimed, "would have the impact of dramatically reducing the utilities' avoided costs, and, therefore, rates offered to [Qualifying Facilities under PURPA]."

On 29 March 2018, Cube filed its Complaint against Duke, seeking to enforce its right under PURPA to sell the energy from the Yadkin Project to Duke at the avoided-cost rates as of the date it first established its Legally Enforceable Obligation. Cube asserted the Yadkin Project was self-certified as Qualifying Facilities by Alcoa on 28 September 2016, which certification "attach[ed] to the facility[.]" Cube also asserted it was not required to file the NOC Form because Cube was not required to obtain a CPCN and thus could not make this certification on the NOC Form. Specifically, Cube's position was the CPCN requirement was not applicable because the statute creating the CPCN requirement was enacted *after* the Yadkin Project had already been constructed and in operation. Cube therefore contended its communications with Duke in September and October established its "commitment to sell the output of the [Yadkin Project] facilities to Duke."

Thus, Cube contended it established a Legally Enforceable Obligation, at the latest, by 11 October 2016, thereby entitling it to the higher avoided-cost PURPA rates effective on that date rather than the lower avoided-cost rates established by Duke's 15 November 2016 Avoided Cost Proposal. Although Cube asserted the Commission's three-part test was inapplicable because of Cube's unique situation, Cube nevertheless argued it had "substantially complied with the substance of the requirement[s]" and requested the Commission waive the three-part test. In addition, Cube alleged Duke acted in bad faith during negotiations by claiming it was exempt from its PURPA requirements to buy Cube's energy, which Cube contended further supported a waiver of the three-part test.

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3. According to FERC regulations, utilities and Qualifying Facilities are free to enter into negotiations for non-PURPA rates. *See* 18 C.F.R. 292.301(b)(1) (2019).

On 7 May 2018, Duke filed its Joint Answer and Motion to Dismiss Complaint of Cube Yadkin Generation, LLC (Motion to Dismiss). In its Motion to Dismiss, Duke disagreed with Cube's contentions and asserted Cube failed to establish a Legally Enforceable Obligation prior to the change in its avoided-cost rates because of Cube's noncompliance with the Commission's three-part test. Therefore, Duke sought dismissal of Cube's Complaint for failure to state a claim upon which relief could be granted.

On 16 July 2018, the Commission issued its Order granting Duke's Motion to Dismiss. The Commission concluded Cube did not establish a Legally Enforceable Obligation prior to 15 November 2016—the date Duke's avoided-cost rates changed—because "[t]he undisputed facts demonstrate that [Cube] did not transmit the [NOC] Form . . . to make a commitment to sell the output of the [Yadkin Project facilities] to [Duke]."[4] Regarding Cube's waiver request, the Commission then addressed the "novel issue" of whether Cube, "as the owner of [Qualifying Facilities] that were constructed prior to the enactment of [the statute requiring a CPCN], should be relieved from the required use of the [NOC] Form in demonstrating a commitment to sell the output of the [Yadkin Project facilities] to [Duke]." After "weigh[ing] equitable considerations, state policy, and considerations of judicial economy in determining whether [Cube] should be granted a waiver of the required use of the [NOC] Form[,]" the Commission denied Cube's request to waive the NOC Form requirement.[5] Cube filed timely Notice of Appeal from the Commission's Order. *See* N.C. Gen. Stat. § 62-90(a), (d) (2017) (allowing a party to appeal as of right any final order of the Commission and directing that "[t]he appeal shall lie to the appellate division . . . as provided in" Section 7A-29 of our General Statutes); *see also* N.C. Gen. Stat. § 7A-29(a) (2017) (directing in non-general-rate cases, "appeal as of right lies directly to the Court of Appeals").

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4. The Commission did not address whether either of the two additional requirements of the three-part test were satisfied; rather, the Commission assumed, without deciding, Cube met these requirements and rested its decision solely on Cube's failure to submit the NOC Form.

5. Two Commissioners wrote separate dissents arguing the Commission erred in dismissing the Complaint because Cube had stated a claim upon which relief could be granted and that "a material issue of fact, among others, remains, *i.e.*, whether a legally enforceable obligation (LEO) was established in 2016 by each of [Cube's Qualifying Facilities] that are the subject of the Complaint[.]" According to these two dissents, the failure to submit the NOC Form was not fatal, and the Commission had discretion to decide whether to waive this requirement. Further, both dissenting Commissioners agreed the Commission's rejection of Cube's waiver argument was particularly inappropriate at such an early stage in the proceedings, based solely on the pleadings.

Issues

The dispositive issues on appeal are whether: (I) the Commission erred in ruling Cube failed to establish a Legally Enforceable Obligation by not submitting the NOC Form and (II) the Commission erred in determining, at the motion-to-dismiss stage in the litigation, Cube was not entitled to a waiver of the NOC Form requirement.

Standard of Review

As our Supreme Court has recognized, "[t]he decision of the Commission will be upheld on appeal unless it is assailable on one of the statutory grounds enumerated in [N.C. Gen. Stat. §] 62-94(b)." *State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n*, 348 N.C. 452, 459, 500 S.E.2d 693, 699 (1998) (citation omitted). Subsection 62-94(b) provides:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (2017). "Under [Section 62-94], the essential test to be applied is whether the Commission's order is affected by errors of law or is unsupported by competent, material, and substantial evidence in view of the entire record as submitted." *State ex rel. Utilities Comm. v. Village of Pinehurst*, 99 N.C. App. 224, 226, 393 S.E.2d

111, 113 (1990) (citations omitted), *aff'd per curiam*, 331 N.C. 278, 415 S.E.2d 199 (1992). Yet, "any . . . finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable." N.C. Gen. Stat. § 62-94(e).

Analysis

Duke's Motion to Dismiss requested the Commission "dismiss the Complaint with prejudice because . . . [Cube] has failed to state a claim upon which relief can be granted." When the Commission issues an order, it is acting in a judicial capacity and "shall render its decisions upon questions of law and of fact in the same manner as a court of record." N.C. Gen. Stat. § 62-60 (2017). However, "[o]rdinarily, the procedure before the Commission is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules[.]" *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 569, 126 S.E.2d 325, 332 (1962). In proceedings before the Commission, "[g]reat liberality is indulged in pleadings[,]" and "substance and not form is controlling." *Id.*

Moreover, under the North Carolina Rules of Civil Procedure, a motion to dismiss "tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). "The function of a motion to dismiss is to test the law of a claim, not the facts which support it. Resolution of evidentiary conflicts is thus not within the scope of the Rule." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979) (citation and quotation marks omitted). A motion to dismiss under Rule 12(b)(6) should not be granted "*unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970) (citation and quotation marks omitted).

I. NOC Form Requirement

[1] Cube first argues the Commission erred by concluding Cube had not established a Legally Enforceable Obligation. Specifically, Cube asserts "the facts alleged in the Complaint, if proved, are sufficient to establish that [Cube] had substantially complied with all of the prerequisites for establishing a [Legally Enforceable Obligation] prior to 15 November 2016." Essentially, Cube contends the Commission acted "contrary to law" by enforcing the NOC Form requirement. We disagree.

As previously mentioned, PURPA requires electric utilities to purchase power from Qualifying Facilities and directs FERC to enact rules to encourage these purchases. *See N.C. Power*, 338 N.C. at 417, 450 S.E.2d at 899; *see also* 16 U.S.C.A. § 824a-3(a). PURPA also directs state regulatory agencies, such as the Commission, to implement PURPA and FERC regulations. 16 U.S.C.A. § 824a-3(f)(1). The United States Supreme Court has explained a state may comply with this obligation "by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *FERC v. Mississippi*, 456 U.S. at 751, 72 L. Ed. 2d at 542.

Pursuant to its authority under PURPA, FERC established a Qualifying Facility can sell power to a utility via a Legally Enforceable Obligation; however, FERC did not define what constitutes a Legally Enforceable Obligation. *See* 18 C.F.R. § 292.304(d)(2). Rather, whether a Legally Enforceable Obligation has been established is a determination left to state regulatory agencies through their implementation of PURPA. *See*, *e.g.*, *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, 119 FERC ¶ 61,305, at ¶ 128 (June 22, 2007) (codified at 18 C.F.R. pt. 292). In accordance with *FERC v. Mississippi*, the Commission has established several tests for determining the establishment of a Legally Enforceable Obligation. *See* 456 U.S. at 751, 72 L. Ed. 2d at 542 (allowing a state agency to implement PURPA and FERC regulations "by issuing [its own] regulations"); *see also Sub 140 Order*, at *51-52.

Here, the Commission prescribed its three-part test for determining when a Legally Enforceable Obligation has been established—the developer of the Qualifying Facility is required to: "(1) have self-certified with the FERC as a [Qualifying Facility]; (2) have made a commitment to sell the facility's output to a utility pursuant to PURPA via the use of [the NOC Form;] and (3) have received a CPCN for the construction of the facility." *Sub 140 Order*, at *52. When it created this test, the Commission provided the following justification for the NOC Form:

> [U]se of a simple form clearly establishing a [Qualifying Facility's] commitment to sell its electric output to a utility to establish the notice of commitment to sell prong for creation of [a Legally Enforceable Obligation] would provide clarity both to [Qualifying Facilities] and the Utilities and would, therefore, reduce the number of disputes between the parties and the number of complaints brought before

> the Commission for adjudication as to when [a Legally Enforceable Obligation] was established.

Sub 140 Order, at *51.

The Commission, as the state regulatory agency tasked with implementing PURPA and FERC regulations, had the authority to create its three-part test for the establishment of a Legally Enforceable Obligation. *See* 16 U.S.C. § 824a-3(a); *see also FERC v. Mississippi*, 456 U.S. at 751, 72 L. Ed. 2d at 542. Further, as the Commission concluded, "use of a simple form . . . to establish the notice of commitment to sell prong for creation of [a Legally Enforceable Obligation] would provide clarity both to [Qualifying Facilities] and the Utilities[,]" and this requirement does not unreasonably interfere with a Qualifying Facility's right to a Legally Enforceable Obligation. *Cf. Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at *17 (Mar. 15, 2013) (concluding the Idaho Commission's requirement that a Qualifying Facility file a meritorious complaint to the Idaho Commission before obtaining a Legally Enforceable Obligation "would . . . unreasonably interfere with a [Qualifying Facility's] right to a [Legally Enforceable Obligation]").

Because the Commission acted within its authority in creating this requirement, the Commission did not err in concluding Cube failed to establish a Legally Enforceable Obligation by not submitting the NOC Form. In its Complaint, Cube admitted it did not submit the NOC Form, arguing instead that it was inapplicable. However, the Commission correctly noted the *Sub 140 Order* "requires all [Qualifying Facilities] to use the [NOC] Form to make a commitment to sell the output of the facility to a utility." Therefore, the Commission did not err in concluding Cube's failure to tender the NOC Form meant that Cube was not entitled to a Legally Enforceable Obligation under a strict application of its three-part test.

II. Waiver

[2] Cube further contends, however, the Commission erred by determining, at this early stage in the litigation, Cube was not entitled to a *waiver* of the NOC Form requirement. Specifically, Cube argues, "[t]here are several factual issues bearing on the question of waiver that the Majority ignored (or resolved against Cube, contrary to Cube's allegations, at the Rule 12(b)(6) stage) in its summary dismissal." We agree.

As a motion to dismiss "test[s] the law of a claim, not the facts which support it[, r]esolution of evidentiary conflicts is thus not within the scope of the Rule." *White*, 296 N.C. at 667, 252 S.E.2d at 702 (citation

and quotation marks omitted). Generally, our courts recognize waiver arguments are usually fact intensive and ill-suited for a motion to dismiss. *Cf. Duncan v. Duncan*, 232 N.C. App. 369, 377, 754 S.E.2d 451, 457 (2014) ("Whether principles of estoppel apply turns on the particular facts of each case." (alteration, citation, and quotation marks omitted)); *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775-76, 796 S.E.2d 120, 123-24 (2017) (concluding where the plaintiff's complaint asserted waiver and estoppel arguments, the trial court's granting of the defendant's motion to dismiss for failure to state a claim was improper (citations omitted)).

Here, in its Complaint, Cube asserted it was entitled to a waiver of the NOC Form requirement for several reasons. For instance, Cube argued the NOC Form did not apply as Section Three of the Form required a Qualifying Facility to indicate whether it had applied or received a CPCN; however, Cube alleged the CPCN requirement was inapplicable as the Yadkin Project facilities were built well before the statutory enactment of the CPCN requirement. Cube also asserted it had "substantially complied with the substance of the requirement" for establishing a Legally Enforceable Obligation, entitling it to a waiver of the NOC Form requirement. Lastly, Cube alleged facts in its Complaint that it argued showed a lack of good faith on the part of Duke, further supporting its request for a waiver.

In addressing Cube's substantial compliance argument based on the letters sent between the parties in September and October 2016, the Commission concluded these letters "demonstrate[d] the anticipatory nature of [Cube's] position at that time" and that Cube thus did not establish its notice of commitment in October. However, when viewing "the [C]omplaint . . . as admitted," these letters support Cube's assertion that it communicated its commitment to sell to Duke by 11 October 2016. *Stanback*, 297 N.C. at 185, 254 S.E.2d at 615 (citation omitted). In addition, the Order also illustrates the Commission resolved the factual inquiry of whether Duke acted in good faith. However, such a question of fact is ill-suited at this stage in the proceeding. *See White*, 296 N.C. at 667, 252 S.E.2d at 702 ("Resolution of evidentiary conflicts is thus not within the scope of the Rule."); *see also Bledsole v. Johnson*, 357 N.C. 133, 138, 579 S.E.2d 379, 382 (2003) ("Whether a party has acted in good faith is a question of fact for the trier of fact[.]" (citation omitted)). Further, in denying Cube's waiver request, the Commission "weighed equitable considerations, state policy, and considerations of judicial economy in determining whether [Cube] should be granted a waiver of the required use of the [NOC] Form." However, the weighing of such

evidence on an undeveloped record at this preliminary motion-to-dismiss stage is improper. *See Jackson/Hill Aviation, Inc.*, 251 N.C. App. at 775-76, 796 S.E.2d at 123-24 (citations omitted).

Moreover, Section 62-79 of our General Statutes requires the Commission, when issuing a final order, to include "[f]indings and conclusions and the reasons or bases therefor upon all the material issues of fact . . . presented in the record[,]" and under Section 62-94, the Commission's findings on material issues of fact must be supported by "competent, material and substantial evidence[.]" N.C. Gen. Stat. §§ 62-79(a)(1); -94(b)(5) (2017). Here, several material issues of fact bearing on whether Cube was entitled to a waiver of the NOC Form requirement—such as whether Duke acted in bad faith; when Cube committed to sell its energy to Duke; and whether Cube had "substantially complied with the substance" of the Commission's three-part test—were decided by the Commission without the benefit of either party being able to submit additional evidence besides the pleadings. Thus, the Commission's finding that Cube was not entitled to a waiver of the NOC Form requirement could not be supported by "competent, material and substantial evidence[.]" *Id.* § 62-94(b)(5). Therefore, we conclude the Commission erred in dismissing Cube's claim for a waiver of the NOC Form requirement.

Conclusion

Accordingly, for the foregoing reasons, we affirm the Commission's Order in part but reverse the portion of the Commission's Order dismissing Cube's claim for a waiver of the NOC Form requirement, and we remand this matter for further proceedings on the question of whether Cube should be granted a waiver of the NOC Form requirement.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges TYSON and INMAN concur.

JVC ENTERS., LLC v. CITY OF CONCORD

[269 N.C. App. 13 (2019)]

JVC ENTERPRISES, LLC, AS SUCCESSOR BY MERGER TO GEOSAM CAPITAL US, LLC; CONCORD APARTMENTS, LLC; AND THE VILLAS OF WINECOFF, LLC F/K/A THE VILLAS AT WINECOFF, LLC, PLAINTIFFS

v.

CITY OF CONCORD, DEFENDANT

No. COA19-308

Filed 17 December 2019

1. Cities and Towns—city's authority to levy fees—session law amending city charter—statutory interpretation—canon of constitutional avoidance

Where residential subdivision developers (plaintiffs) challenged a city's authority to levy prospective water and sewage capacity fees after a session law amended the city's charter, the trial court improperly entered summary judgment in the city's favor. Because the session law was ambiguous (it dissolved a local board of water commissioners and transferred its powers to the city, but repealed parts of the charter giving the board its powers in the first place), the Court of Appeals adopted plaintiffs' interpretation of the law (that it eliminated the board's power to levy prospective fees, did not transfer that power to the city, but conveyed the board's remaining powers under the General Enterprise Statutes to the city) where, under the doctrine of constitutional avoidance, the city's interpretation risked violating Article II, Subsection 24(1)(a) of the North Carolina Constitution.

2. Cities and Towns—session law amending city charter—statutory interpretation—canon of constitutional avoidance—not a constitutional challenge

Where residential subdivision developers (plaintiffs) challenged a city's authority to levy prospective water and sewage capacity fees after a session law amended the city's charter, the trial court did not err in considering plaintiffs' argument at summary judgment supporting a particular interpretation of the session law under the canon of constitutional avoidance. This statutory canon—asserting that where one of two interpretations of a statute raises a serious constitutional question, the interpretation that avoids the question should control—was not an affirmative cause of action directly challenging the session law's constitutionality, and therefore plaintiffs did not have to plead the canon in their complaint before raising it at the summary judgment hearing.

Appeal by Plaintiffs and cross-appeal by Defendant from an order entered on 10 October 2018 by Judge Joseph N. Crosswhite in Cabarrus County Superior Court. Heard in the Court of Appeals 18 September 2019.

Scarbrough & Scarbrough, PLLC, by James E. Scarbrough, John F. Scarbrough, and Madeline J. Trilling, and Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for Plaintiffs-Appellants.

Hamilton Stephens Steele + Martin, PLLC, by Keith J. Merritt, for Defendant-Appellee.

INMAN, Judge.

JVC Enterprises, LLC, Concord Apartments, LLC, and the Villas of Winecoff, LLC, ("Plaintiffs") appeal the entry of summary judgment in favor of the City of Concord (the "City") and dismissing Plaintiffs' complaint. The City cross-appeals a portion of the summary judgment order, contending the trial court impermissibly ruled on the constitutionality of a session law. After careful review, and able argument on behalf of the parties, we reverse the trial court's entry of summary judgment for the City and remand for further proceedings.

I. FACTUAL & PROCEDURAL HISTORY

The record below discloses the following:

In 2004, the City enacted an ordinance requiring developers of residential subdivisions to pay water and wastewater capacity fees as a prerequisite for development approval by the City. The City assessed these fees at the pre-development stage, and developers were required to pay them before a subdivision plat would be accepted for recordation. The fees were distinct from ordinary installation and meter fees, as they were collected prior to the provision of water and sewer service and were used to fund future improvements to the City's water and sewer systems. Plaintiffs are all developers who built residential subdivisions inside the City prior to October of 2016. Each of the Plaintiffs paid the capacity fees required by the City's ordinance prior to development.

On 19 August 2016, our Supreme Court decided *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016), and held that although cities could assess fees for water and sewer services actually furnished under the Public Enterprise Statutes, N.C. Gen. Stat. §§ 160A–11 to –338 (2015), those enabling statutes "fail[ed] to give [cities] the essential prospective charging power necessary to assess

impact fees." *Quality Built Homes*, 369 N.C. at 22, 789 S.E.2d at 459. The City subsequently amended its capacity fee ordinance in response to *Quality Built Homes* in October of 2016, changing the timing of the collection of the fees from before the subdivision plat approval phase to before the issuance of a zoning clearance permit.

In 2017, Plaintiffs brought suit against the City seeking, among other things, a judgment declaring the fees *ultra vires* and awarding damages in the amount of fees paid to the City in connection with their developments. Three similar cases[1] were also filed against the City, and all parties filed a Joint Motion for Exceptional Case Designation under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. That motion was granted in April 2018.

The City moved for partial summary judgement on 17 September 2018 on Plaintiffs' claim that the City lacked authority to levy the fees. To support its motion, the City filed an affidavit by the city clerk which included as exhibits five session laws amending, revising, or consolidating the City's charter between 1959 and 1986. The first such session law authorized a now-defunct Board of Light and Water Commissioners of the City of Concord (the "Board") "[t]o fix and collect rates, fees and charges for the use of and for the services and facilities furnished *or to be furnished* in the form of electrical and water service." 1959 N.C. Sess. Laws ch. 66, § 1 (emphasis added).[2] Another session law attached to the affidavit revised and consolidated the City's charter, continued the existence of the Board and its powers, and repealed 108 scattered private, public, and session laws that previously composed the City's charter. 1977 N.C. Sess. Laws ch. 744, §§ 1, 5-6 (hereinafter the "1977 Charter"). A third session law—the one on which the City premised its motion for summary judgment—again consolidated the City's charter, dissolved the Board, and provided that "[a]ll powers and duties of said Board shall become powers and duties of the City of Concord[,]" 1985 N.C. Sess. Laws. ch. 861 § 2 (1986) (hereinafter the "1986 Act");[3] at the same time,

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1. Those three cases were also appealed and are resolved consistent with this opinion in separate decisions filed today. *Bost Realty Co. v. City of Concord*, No. COA19-309 (N.C. Ct. App. Dec. 17, 2019) (unpublished); *Journey Capital, LLC v. City of Concord*, No. COA19-310 (N.C. Ct. App. Dec. 17, 2019) (unpublished); *Metro Development Group, LLC v. City of Concord*, No. COA19-311 (N.C. Ct. App. Dec. 17, 2019) (unpublished).

2. An earlier session law allowed the Board to levy prospective fees for sewer service. 1955 N.C. Sess. Laws ch. 1180, § 1.

3. Although the session law is contained in the 1985 volume of the North Carolina Session Laws, it was ratified and made effective by the General Assembly in 1986. 1985 N.C. Sess. Laws ch. 861, § 12.

that session law also expressly repealed all but two sections of the 1977 Charter. *Id.* at §§ 2, 6.

At the summary judgment hearing, the City argued that it was authorized to assess the capacity fees because the session laws: (1) authorized the Board to levy prospective water and sewer fees; and (2) transferred those powers to the City in the 1986 Act. Plaintiffs countered by arguing the 1986 Act: (1) extinguished the Board; and (2) eliminated any power to levy prospective fees allowed in the 1977 Charter by repealing that charter. Plaintiffs further contended that the "powers and duties of said Board" that the 1986 Act transferred to the City were simply those powers that would have otherwise resided in the Board consistent with the general Public Enterprise Statutes. Plaintiffs relied on the doctrine of constitutional avoidance, asserting that the City's interpretation of the pertinent session laws ran the risk of violating the North Carolina Constitution's prohibition against local acts relating to health and sanitation. *See* N.C. Const. art. II, § 24(1)(a).

The trial court granted summary judgment in the City's favor and dismissed all of Plaintiffs' claims with prejudice on 10 October 2018. In its order, the trial court construed the 1986 Act as transferring the Board's ability to levy prospective fees to the City; it then interpreted two local act decisions by our Supreme Court, *Town of Boone v. State*, 369 N.C. 126, 794 S.E.2d 710 (2016), and *City of Asheville v. State*, 369 N.C. 80, 794 S.E.2d 759 (2016), and concluded that the 1986 Act was constitutional. Plaintiffs appealed the order in its entirety, while the City cross-appealed the portion of the order addressing the constitutionality of the 1986 Act.

II. ANALYSIS

A. Standard of Review

We review the trial court's entry of summary judgment *de novo*, and will affirm the ruling "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).

The *de novo* standard also applies to questions of statutory interpretation. *Armstrong v. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998). In discerning the effect of a statute, we "look[ ] 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) (citation omitted). "When determining the extent of legislative power conferred

upon a municipality, the plain language of the enabling statute governs." *Quality Built Homes*, 369 N.C. at 19, 789 S.E.2d at 457 (citation omitted). If the statutory language is unambiguous, we apply its "plain and definite meaning. *Id.* (citation and quotation marks omitted). "But where a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 389 (1978) (citations omitted). Canons of statutory interpretation are employed "[i]f the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings[.]" *Abernethy v. Bd. of Comm'rs*, 169 N.C. 631, 636, 86 S.E. 577, 580 (1915).

B. Plaintiffs' Appeal

[1] Plaintiffs first contend that the 1977 Charter failed to give the Board authority to charge prospective water and sewer fees. Alternatively, Plaintiffs argue that the provisions in the 1986 Act revoking the 1977 Charter's grant of powers to the Board but transferring the Board's powers to the City created an ambiguity as to what powers were actually conveyed to the City by the General Assembly. We address each argument in turn.

We disagree with Plaintiffs' assertion that the 1977 Charter did not authorize the Board to levy fees for future service. The 1977 Charter enabled the Board to:

> Fix and collect rates, fees and charges for the use of and for the services and facilities furnished *or to be furnished* in the form of electrical, sewer and water service to be paid by the owner, tenant or occupant of each lot or parcel of land which *may be served* by such electrical, sewer and water facilities[.]

1977 N.C. Sess. Laws ch. 744, § 1 (emphasis added). Plaintiffs interpret the phrase "to be paid by the owner, tenant or occupant of each lot or parcel of land which may be served" as limiting the Board to charging fees for services currently provided. But the words "owner, tenant or occupant . . . which may be served" encompass persons currently served as well as those who may be served in the present or future. That language aligns with—rather than limits—the Board's authority under the 1977 Charter to levy prospective fees for "services and facilities furnished or to be furnished." *Cf. McNeill v. Harnett Cty.*, 327 N.C. 552, 570, 398 S.E.2d 475, 485 (1990) (holding that the language "to be furnished" in the Public Enterprise Statutes applicable to county water

and sewer districts authorized said districts to levy prospective fees); *Quality Built Homes*, 369 N.C. at 20-21, 789 S.E.2d at 458 (holding that the Public Enterprise Statutes applicable to cities did not allow for prospective water and sewer fees because it lacked "the essential 'to be' language" (citation omitted)). Construing these phrases *in pari materia* as we must to give effect to each, *State v. Johnson*, 278 N.C. 126, 145, 179 S.E.2d 371, 383 (1971), we hold the 1977 Charter provided the Board with authority to levy prospective fees.

We agree with Plaintiffs that the 1986 Act is ambiguous. Section 2 of the Act dissolved the Board and provided "[a]ll powers and duties of said Board shall become powers and duties of the City of Concord." 1985 N.C. Sess. Laws. ch. 861, § 2. But Section 6 of the Act repealed the provisions of the 1977 Charter affording those powers to the Board in the first instance. *Id.* at § 6. So, the 1986 Act ostensibly both eliminates *and* transfers the powers of the Board afforded by the 1977 Charter.

Plaintiffs resolve this ambiguity by arguing that the 1986 Act eliminated the specific powers designated to the Board in the 1977 Charter and merely transferred any remaining powers, *i.e.*, those powers contained in the General Enterprise Statutes applicable to all municipalities, to the City upon the Board's dissolution. Plaintiffs note that, as held by our Supreme Court in *Quality Built Homes*, those General Enterprise Statutes did not authorize the City to levy prospective water and sewer fees.

The City argues that the 1986 Act is not ambiguous, pointing out the language of Section 4 of the Act, which provides that the General Assembly "intended to continue without interruption those provisions of prior acts which are consolidated into this act, so that all rights and liabilities that have accrued are preserved and may be enforced." *Id.* at § 4. The City contends that, by this statement, the General Assembly made clear its intent to transfer the power to levy prospective fees from the Board to the City, even as it repealed the statute vesting those powers in the Board.

But Section 4, considered in context with other provisions of the Act, does not resolve the ambiguity identified by Plaintiffs. Section 4 provides that the Act was intended "to revise the Charter of the City of Concord and to consolidate herein certain acts" so that "those provisions of prior acts *which are consolidated into this act*" would continue. *Id.* (emphasis added). Section 6 repeals the portions of the 1977 Charter granting the Board the power to levy prospective fees. Section 1 recites the newly consolidated charter for the City and contains no mention of the Board's powers. *Id.* at §§ 1, 6. Its powers are not referenced in

the new Charter. *Id.* at § 1. Given the repeal of the enabling provisions in the 1977 Charter, *id.* at § 2, it is unclear whether the Board's powers were actually incorporated into the new charter or the Act itself.

Plaintiffs' interpretation does not deprive Sections 4 or 2 of the meanings argued by the City. Plaintiffs construe Section 4 to continue those powers found in previous statutes and charters that were consolidated into and contained within the 1986 Act—but the power to levy prospective water and sewer fees is simply not one of those continued powers. Plaintiffs construe Section 2, in turn, merely to clarify that the Board was eliminated, and that the general power to operate the water and sewer system reverted to the City.

We are left, then, with two reasonable competing interpretations of the 1986 Act: either (1) the General Assembly intended to eliminate the Board's powers in Section 6 and convey any powers under the General Enterprise Statutes that would have remained with the Board to the City under Section 2; or (2) it merely intended to eliminate the Board, preserve and transfer its powers under the 1977 Charter to the City, and sweep away the 1977 Charter by repeal as a matter of legislative housekeeping. Resort to the canons of statutory construction is necessary to resolve this ambiguity. *Abernethy*, 169 N.C. at 636, 86 S.E. at 580.

Plaintiffs argue, and we agree, that the canon of constitutional avoidance compels us to adopt their interpretation. Under that canon, "[w]hen reasonably possible, a statute . . . should be construed so as to avoid serious doubt as to its constitutionality." *Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 291 N.C. 55, 70, 229 S.E.2d 268, 276 (1976). The canon applies in equal measure to the United States and North Carolina Constitutions. *See, e.g.*, *N.C. State Bd. Of Educ. v. State*, 371 N.C. 170, 180, 814 S.E.2d 54, 62 (2018) (acknowledging the canon in resolving a potential conflict between a state statute and the North Carolina Constitution). Reliance on the canon does not involve a determination of constitutionality. *See, e.g.*, *Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985) ("We do not, of course, purport to decide this constitutional issue. We rely, instead, on the familiar canon of statutory construction that '[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids the question should be adopted.' " (quoting *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) (alteration in original) (additional citations omitted))). This canon does not limit avoidance to interpretations that render a statute conclusively unconstitutional:

> The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*

In re Dairy Farms, 289 N.C. 456, 465, 223 S.E.2d 323, 328-29 (1976) (citation and internal quotation marks omitted) (emphasis added). And, contrary to the arguments raised by the City in its cross-appeal, the canon is not an affirmative cause of action directly challenging the constitutionality of a statute:

> This accusation misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation. The canon is not a method of adjudicating constitutional questions by other means. Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it. And when a litigant invokes the canon of avoidance, he is not attempting to vindicate the constitutional rights of others . . . ; he seeks to vindicate his own *statutory* rights. We find little to recommend [this] novel interpretive approach . . . , which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case.

Clark v. Martinez, 543 U.S. 371, 381-82, 160 L. Ed. 2d 734, 747 (2005) (citations omitted) (emphasis in original).

The City's interpretation in this case raises a serious constitutional question: whether the 1986 Act, in transferring the Board's power to levy prospective water and sewer fees in the 1977 Charter—which were absent from the General Enterprise Statutes in effect at the time—to the City constitutes a local act affecting health and sanitation as prohibited by Article II, Subsection 24(1)(a) of the North Carolina Constitution. *See City of Asheville*, 369 N.C. at 105-06, 794 S.E.2d at 776 (holding that

a local act transferring control over Asheville's water system from the city to Buncombe County was an unconstitutional local act in violation of Article II, Subsection 24(1)(a)). Resolving that question involves the predicate constitutional issue of whether the 1986 Act represents an exercise of the General Assembly's plenary authority to establish the boundaries and organization of municipalities, which would not be subject to the prohibition found in Article II. *See Town of Boone*, 396 N.C. at 136, 794 S.E.2d at 718 (holding that an exercise of that plenary authority under Article VII, Section 1 is not restricted by the prohibitions against certain local acts in Article II, Section 24). As revealed by the thorough briefs from Plaintiffs and the City, these constitutional questions are not easily resolved,[4] and serious doubts as to constitutionality of the 1986 Act, as interpreted by the City, redound as a result.[5]

For example, in arguing that the 1986 Act was an exercise of the General Assembly's plenary powers under Article VII, Section 1, the City points out that the 1986 Act "is a complete revision of the Charter for the City and is concerned with all facets of the governance of the City[,]" while Plaintiffs rightly note that the 1986 Act appears principally concerned with shifting control of the City's water system, as "a close comparison of the [1986 Act and the 1977 Charter it replaced]

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4. Though *Town of Boone* and *City of Asheville* were filed on the same date, each one garnered different majorities and dissents with conflicting interpretations of both decisions. *Compare Town of Boone*, 369 N.C. at 164-65, 794 S.E.2d. at 737 (Ervin, J., concurring) (disagreeing with the majority's holding that a local act was not subject to analysis under Article II, Section 24 and instead applying the test developed in *City of Asheville* to determine that the local act was constitutional), *and id.* at 173-74, 794 S.E.2d at 741-42 (Beasley, J., dissenting) (agreeing with the concurrence that the local act was subject to Article II, Section 24 analysis but disagreeing that it was constitutional under *City of Asheville*), *with City of Asheville*, 369 N.C. at 107-08, 794 S.E.2d at 779 (Newby, J., dissenting) (departing from the majority's holding that an act transferring Asheville's water system to Buncombe County was an unconstitutional local act and arguing instead that it was an exercise of plenary power under Article VII, Section 1 based in part on *Town of Boone*).

5. We acknowledge that the Supreme Court in *Quality Built Homes* noted that "[m]unicipalities routinely seek and obtain enabling legislation from the General Assembly to assess impact fees." 369 N.C. at 21, 789 S.E.2d at 459. However, *Quality Built Homes* did not involve the constitutional question of whether those enabling local acts were unconstitutional under Article II, Section 24. Further, the quoted language appears to be a simple factual observation rather than the legal reasoning relied upon to resolve the case, and thus constitutes nonbinding *dicta*. *See, e.g.*, *State v. Rankin*, ___ N.C. App. ___, ___, 809 S.E.2d 358, 363 ("Our Supreme Court has defined obiter dictum as '[l]anguage in an opinion not necessary to the decision.' " (quoting *Trs. of Rowan Tech. Coll. v. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985)), *aff'd*, 371 N.C. 885, 821 S.E.2d 787 (2018).

reveals that except for the repeal of the provisions relating to the Board . . . , there are hardly any other substantive changes that result." (emphasis omitted).[6]

Similarly, Plaintiffs point to our Supreme Court's holding in *City of Asheville* that a statute that "works a change in the governance of the City's water system . . . impermissibly relate[s] to health and sanitation in violation of Article II, Section 24(1)(a) of the North Carolina Constitution" for the proposition that the City's interpretation is potentially unconstitutional. 369 N.C. at 105, 794 S.E.2d at 777. The City, by contrast, relies on a decision by this Court in a different case—which was not expressly overruled by our Supreme Court in *City of Asheville*—holding that a local act modifying Asheville's ability to charge certain water service fees was not related to health or sanitation as prohibited by the Constitution. *City of Asheville v. State*, 192 N.C. App. 1, 36-37, 665 S.E.2d 103, 128 (2008).

Rather than compelling us to resolve the serious constitutional doubts present in this case, Plaintiffs' interpretation of the 1986 Act removes those doubts consistent with the canon of constitutional avoidance. Under that interpretation of the Act, the General Assembly did little more than provide the City with the fee-levying powers granted to all municipalities under the pertinent General Enterprise Statutes and eliminated the Board consistent with the plenary powers found in Article VII, Section 1. We therefore hold that the 1986 Act eliminated the Board, revoked the power to levy prospective fees provided to it under the 1977 Charter, and vested the City with the ability to levy water and sewer fees consistent with the General Enterprise Statutes.

C. The City's Cross-Appeal

[2] In its cross-appeal, the City asserts that the Plaintiffs' reliance on the canon of constitutional avoidance is in reality a distinct cause of action to declare the 1986 Act unconstitutional, and that it must have been specifically pled consistent with the notice pleading standard found in the North Carolina Rules of Civil Procedure and precedents applying them. As detailed above, however, application of the canon is

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6. Beyond eliminating the Board, the only substantive change found in the 1986 Act was the creation of the position of City Clerk, who was tasked with keeping minutes at Board of Aldermen meetings and acting as custodian of city records. 1985 N.C. Sess. Laws ch. 861, § 1. The 1986 Act did not otherwise substantively alter the City's charter, as it did not change the City's boundaries or modify the size or duties of any other offices except where accounting for the abolishment of the Board. *Compare* 1977 N.C. Sess. Laws 744, § 1, *with* 1985 N.C. Sess. Laws ch. 861, § 1.

not a veiled facial constitutional challenge and is, in actuality, merely a tool for divining legislative intent and statutory meaning. *See Delconte*, 313 N.C. at 402, 329 S.E.2d at 647 ("We do not, of course, purport to decide this constitutional issue."); *Clark*, 543 U.S. at 381, 160 L. Ed. 2d at 747 ("This accusation misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation. The canon is not a method of adjudicating constitutional questions by other means. Indeed, one of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions." (citations omitted) (emphasis in original)). We are not aware of any precedents—and the City provides none—holding that a party arguing against a particular interpretation of a statute relied upon by a movant on summary judgment must have previously pled (or moved to amend a pleading to include) a canon of construction in order to raise it at the summary judgment hearing. We therefore hold the trial court did not err in considering the canon of constitutional avoidance in entering summary judgment.

III. CONCLUSION

We hold that the trial court erred in entering summary judgment in favor of the City because the 1986 Act did not give the City the power to levy prospective water and sewer fees. We reverse the trial court's entry of summary judgment and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges BERGER and MURPHY concur.

STATE v. ALLEN

[269 N.C. App. 24 (2019)]

STATE OF NORTH CAROLINA
v.
HARLEY AARON ALLEN

No. COA18-1150

Filed 17 December 2019

1. Mental Illness—competency to stand trial—determination—six months prior to trial—too remote in time

The trial court's determination, six months prior to trial, that defendant was competent to stand trial for multiple drug charges was too remote in time given defendant's intellectual disability, substance abuse and mental health issues, history of noncompliance with medication and treatment, multiple involuntary commitments between the time of his arrest and trial, two separate determinations that defendant was not capable of proceeding to trial (before another evaluation determined he was competent), concerns raised by defense counsel at the prior hearing, and defendant's own responses during a plea colloquy. The matter was remanded for the trial court to determine whether defendant was competent at the time of his trial.

2. Judgments—criminal—clerical errors

In an appeal from judgments entered on multiple drug convictions, the trial court was directed on remand to correct its written order arresting judgment to show the correct charge being arrested and to identify on the judgment the proper classification of the controlled substance at issue.

Judge DILLON dissenting.

Appeal by defendant by petition for writ of certiorari from judgments entered 9 February 2018 by Judge Alan Z. Thornburg in Mitchell County Superior Court. Heard in the Court of Appeals 7 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

ZACHARY, Judge.

Defendant Harley Aaron Allen appeals from judgments entered upon jury verdicts finding him guilty of selling buprenorphine, delivering buprenorphine, and possession of buprenorphine with intent to sell or deliver. After careful review, we remand for further proceedings.

Background

Defendant, born in 1986, is intellectually disabled.[1] Defendant was also subject to "severe abuse and neglect" during his early childhood, which further impaired his development. Defendant received special education assistance throughout his schooling, and although he received a certificate of attendance upon completion of the 12th grade, he is unable to live independently or maintain a job because of his intellectual disability. In addition to his intellectual disabilities, for which he receives disability benefits, Defendant suffers from opiate abuse, and has been diagnosed with bipolar disorder.

On 22 October 2015, Defendant was arrested for allegedly having sold a single pill of buprenorphine—a Schedule IV controlled substance and opium derivative—to a confidential informant for the Mitchell County Sheriff's Office. Defendant was subsequently indicted for (1) sale, (2) delivery, and (3) possession with the intent to sell or deliver buprenorphine, a Schedule IV controlled substance; and (4) keeping or maintaining a vehicle for the purpose of selling buprenorphine. Defendant was also indicted for having attained the status of an habitual felon.

During the period between his arrest and trial, Defendant was involuntarily committed on three separate occasions and was twice found "not capable of proceeding" to trial. After Defendant's first involuntary commitment, a forensic screener conducted a psychiatric evaluation on 21 November 2016 and opined that Defendant's "prospects of restorability [we]re limited," due to his "profound fund of knowledge deficits." On 28 February 2017, Defendant was again found incapable of proceeding. Following Defendant's third involuntary commitment, a psychiatric report dated June 2017 noted that Defendant had "regained his capacity to proceed" to trial. Based on that report, and despite defense counsel's sentiments to the contrary, on 23 August 2017, the trial court found that Defendant "currently ha[d] the capacity to proceed" to trial.[2] The case

1. A 2017 forensic evaluation noted that "although available IQ scoring seems to place [Defendant] in the borderline to mild intellectual disability range," various other factors exist that "contribute to him being more impaired than IQ scores alone . . . would suggest."

2. It is unclear from the record before this Court whether one of the parties moved for the trial court to assess Defendant's capacity to proceed, or whether the trial court did so *sua sponte*.

came on for trial nearly six months after the trial court's competency determination, and eight months after Defendant's final psychiatric evaluation.

Defendant's trial commenced on 8 February 2018 in Mitchell County Superior Court before the Honorable Alan Z. Thornburg. At the trial's conclusion, the jury found Defendant guilty of selling buprenorphine, delivering buprenorphine, and possession of buprenorphine with the intent to sell or deliver. The jury found Defendant not guilty of keeping or maintaining a vehicle for the purpose of selling buprenorphine. Defendant subsequently pleaded guilty to having attained the status of an habitual felon. The trial court arrested judgment on Defendant's conviction for delivering a controlled substance,[3] and sentenced Defendant for the remaining two convictions to concurrent terms of 58 to 80 months and 8 to 19 months in the custody of the North Carolina Division of Adult Correction.

On 9 February 2018, Defendant filed a procedurally inadequate *pro se* notice of appeal. Thereafter, Defendant filed a petition for writ of certiorari asking this Court to review the merits of his appeal, which we allowed by order entered 10 July 2019.

Standard of Review

"[T]he conviction of an accused person while he is legally incompetent [to proceed to trial] violates due process[.]" *State v. Taylor*, 298 N.C. 405, 410, 259 S.E.2d 502, 505 (1979) (citation omitted). "The defendant bears the burden of demonstrating he is incompetent [to proceed]." *State v. McClain*, 169 N.C. App. 657, 663, 610 S.E.2d 783, 787 (2005) (citation omitted). "The [trial] court's findings of fact as to [the] defendant's mental capacity are conclusive on appeal if supported by the evidence." *State v. Baker*, 312 N.C. 34, 43, 320 S.E.2d 670, 677 (1984) (internal citations omitted). We review a trial court's determination of a defendant's competency to proceed under an abuse of discretion standard. *See McClain*, 169 N.C. App. at 663, 610 S.E.2d at 787. "[T]he trial court's decision that [the] defendant was competent to stand trial will not be overturned, absent a showing that the trial judge abused his discretion." *Id.*

Discussion

I. Competency Hearing

[1] Defendant argues that, "[i]n light of [his] mental health history and prior findings of incompetence, the trial court erred by failing to hold a

3. The trial court's form arresting judgment incorrectly states that the court was arresting judgment on Defendant's conviction for selling a controlled substance.

competence hearing before starting [his] trial" six months after he was found to be competent. We agree.

N.C. Gen. Stat. § 15A-1001(a) (2017) provides that:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

"If a defendant is deficient under any of these tests he or she does not have the capacity to proceed." *State v. Mobley*, 251 N.C. App. 665, 667, 795 S.E.2d 437, 439 (2017) (citations and internal quotation marks omitted).

"A defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time. For this reason, a defendant's competency is assessed at the time of trial." *Id.* at 675, 795 S.E.2d at 443 (internal citations and quotation marks omitted). Nevertheless, "[t]he question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court." N.C. Gen. Stat. § 15A-1002(a).

Whenever there is a bona fide doubt as to the defendant's competency to proceed to trial, the trial court is required to hold a competency hearing. *Mobley*, 251 N.C. App. at 668, 795 S.E.2d at 439. The trial court "has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent [to stand trial]." *Id.* (internal citations omitted).

The trial court's failure to "protect a defendant's right not to be tried or convicted while [incompetent to proceed] deprives him of his due process right to a fair trial." *State v. McRae*, 139 N.C. App. 387, 389, 533 S.E.2d 557, 559 (2000) [hereinafter "*McRae I*"].

In the present case, there was substantial evidence before the trial court that Defendant might have been incompetent to stand trial. It is evident that the trial court correctly recognized its duty to assess Defendant's capacity to proceed, and did so approximately six months prior to trial, on 23 August 2017. However, the competency hearing should have been held closer to trial.

Various factors can raise a bona fide doubt as to the defendant's competency to proceed to trial. "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant to a bona fide doubt inquiry." *Id.* at 390, 533 S.E.2d at 559. Here, Defendant's lengthy and varied history of severe mental health issues and cognitive disabilities—which led to repeated involuntary commitments and psychiatric evaluations—together with defense counsel's reluctance to agree with the evaluating physician's report that Defendant was capable of proceeding to trial, was sufficient to raise a bona fide doubt as to Defendant's competency at the time of trial, thereby triggering the trial court's duty to conduct a hearing immediately prior to trial.

As previously mentioned, Defendant was involuntarily committed three times during the period between his 22 October 2015 arrest and 8 February 2018 trial, due to his severe mental health issues. When Defendant was discharged from his second involuntary commitment in February 2017, the forensic screener's psychiatric report noted that Defendant's mental health diagnoses included "Methamphetamine Use Disorder, Severe, Opioid Use Disorder, Severe, Adjustment Disorder with Depressed Mood, Antisocial Personality Disorder/Traits, [and] Suicidal Ideation, Resolved." Additional reports established that Defendant had also been diagnosed with bipolar disorder, "Attention Deficit/Hyperactivity Disorder Not Otherwise Specified, Mood Disorder Not Otherwise Specified, Polysubstance/Dependence, and a Personality Disorder Not Otherwise Specified."

The psychiatric reports in the record also demonstrate Defendant's history of noncompliance with mental health treatment. Defendant's November 2016 evaluation noted that "Mission Hospital currently has plans to engage [Defendant] in a long-term inpatient treatment." Three months later, Defendant's February 2017 report indicated that Defendant was not consistently compliant with mental health treatment recommendations. Specifically, it detailed that Defendant (i) "has never been compliant [or] consistent with medication treatment (either not taking any medication or taking too much at one time) or mental health follow through"; (ii) that "[a]s an adult there is no clear record of [Defendant] consistently being compliant with mental health treatment recommendations"; and (iii) that Defendant "has not been compliant with treatment in an outpatient setting, and his last two hospitalizations in 2016 were on an involuntary basis, where he appeared to lose behavioral control, threatening suicide and becoming confrontational."

It is also well-documented that Defendant has a significant intellectual disability. As previously noted, the February 2017 psychiatric

evaluation placed Defendant "in the borderline to mild intellectual disability range" based on available IQ scoring criteria. However, the evaluation further stated that when combined, certain of Defendant's conditions—including his significantly impaired adaptive functioning, attention and learning deficits, difficulty moderating his own behavior, and a mood disorder—actually contributed to Defendant "being more impaired than IQ scores alone . . . would suggest." One psychiatric report noted that Defendant's "cognitive deficits . . . have been with him since early childhood, . . . [that] he will likely struggle with them for the remainder of his life[,]" and that "[g]iven the nature of his impairments, . . . [Defendant's] prospects of restorability are limited." The report indicated that Defendant's cognitive disabilities were believed to stem, in part, from "extreme abuse and neglect" that he suffered before his second birthday.

Additionally, although he receives disability benefits as a result of his intellectual disability, Defendant "did not know the amount of the award[,]" which the examiner noted was "somewhat rare in [his] experience[.]" The report further noted that Defendant's "mom is his representative payee because he is unable to manage his own finances."

During the period between his arrest and trial, Defendant was twice found to be incapable of proceeding to trial. *See McRae I*, 139 N.C. App. at 391, 533 S.E.2d at 560 ("In our opinion, the numerous psychiatric evaluations of [the] defendant's competency that were conducted before trial with various findings and expressions of concern about the temporal nature of [the] defendant's competency [to proceed] raised a bona fide doubt as to [the] defendant's competency at the time of his second trial.").

Only one of the reports in which Defendant was found incapable of proceeding to trial noted Defendant's appearance and conduct. In particular, it noted that Defendant "was an average-sized young adult white male who appeared to be in no acute physical distress, displayed no unusual or bizarre mannerisms, and had no obvious physical deformities." Defendant's "beard and haircut were neatly groomed"; he was "initially . . . fairly soft-spoken, but when encouraged to speak up, he did"; and he "maintained intermittent eye contact." This forensic screener's notes demonstrate that, despite the ultimate determination of incompetence, Defendant's physical appearance did not immediately evince his lack of capacity to proceed to trial.

In addition, during the final competency hearing six months before trial, defense counsel expressed reservations concerning Defendant's competency to proceed.

> [C]ourts often look to whether the defense attorney has disputed competency before trial as evidence of competency. Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent.

State v. McRae, 163 N.C. App. 359, 369, 594 S.E.2d 71, 78, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 911 (2004) [hereinafter "*McRae II*"].

At the 23 August 2017 hearing in the instant case, the trial court asked Defendant's attorney whether he agreed with "the doctor's assessment of [Defendant's] ability to understand the nature of the proceedings." While acknowledging that he observed some improvement in Defendant's condition, counsel nevertheless expressed doubt about Defendant's capacity to stand trial:

> THE COURT: All right, [defense counsel], have you had an opportunity to review the [psychiatric evaluation]?
>
> [DEFENSE COUNSEL:] I have, Your Honor.
>
> THE COURT: And do you agree with the doctor's assessment of [Defendant's] ability to understand the nature of the proceedings against him?
>
> [DEFENSE COUNSEL:] Your Honor, . . . I will leave that in the Court's discretion based on the report. I spoke with [Defendant]. I can't tell with the time I've spent with him – I can tell a lot of changes in him. . . . [W]e've discussed his case and he does seem to understand more of what's going on than he did.
>
> THE COURT: Has he been able to communicate his thoughts and feelings to you?
>
> [DEFENSE COUNSEL:] Yes, sir.
>
> THE COURT: So if you don't agree with this report, I want you to tell me what part you don't agree with?
>
> [DEFENSE COUNSEL:] Well . . . I don't agree that [Defendant is] necessarily capable. . . . [H]e goes in two or three different directions sometimes . . . as far as talking to him. He does understand the charges now. He understands what he's charged . . . we've talked a couple of times since

this report since he was released. He does understand what he is facing as far as the felonies, and when he was here the first time he didn't understand that. I think that . . . it may be that . . . they have improved his capability.

[Defendant] is on medication now and he is taking that. He tells me he is taking that on a regular basis. And . . . there is some question in my mind, but I'm not a doctor. I mean, there is some question in my mind because I've dealt with [Defendant] for a number of years. I handled a case for him about two years ago and I've noticed when he came back earlier, earlier this year, the first time in court that he . . . wasn't tracking. We were out there and he . . . didn't understand what was going on. He kept asking me over and over in different ways what was going on. He is not doing that now.

I don't really feel like I'm in a position to judge necessarily if I – I'm not a doctor to judge his condition. But we just ask the Court to look at the report and make a determination, to make a finding . . . based on that. . . . [T]here's really nothing specific that I can disagree with in the report because I have seen some improvement in his condition.

THE COURT: All right, [Defendant], you having any trouble thinking today? Do you feel confused in anyway today?

DEFENDANT: No, sir.

THE COURT: You been able to talk with your attorney about your case?

DEFENDANT: Yes, sir.

THE COURT: Has your attorney gone over the [psychiatric report] with you?

DEFENDANT: Yes, sir.

THE COURT: Are you in agreement with that report?

DEFENDANT: Yeah, yes, sir.

THE COURT: All right, what says the State?

[THE STATE:] Your Honor, we don't have any reason to believe he is not competent.

> THE COURT: All right, I will find that the defendant does currently have the capacity to proceed.

Defense counsel also addressed the issue of capacity during sentencing, after Defendant was found guilty at trial:

> [M]y client is on disability. He's been on that . . . for years. He has a very low – he's a very low-functioning individual. His IQ is somewhere around 82. You can see from the record, . . . that he . . . was found to be incompetent and then found to be competent at a later date when he was sent down to Broughton [Hospital] for some time.

Nonetheless, as our dissenting colleague correctly states, a defendant's behavior during the course of trial may also be a relevant consideration in a bona fide doubt inquiry. *See McRae I*, 139 N.C. App. at 390, 533 S.E.2d at 559. However, a defendant's amiable acquiescence in a colloquy with the trial court is not necessarily indicative of the individual's capacity to stand trial, particularly where, as here, there exists substantial evidence of the defendant's long history of myriad complex mental health issues.

A defendant need only answer a few brief questions in order for his plea to be accepted by the trial court. Here, Defendant's brief responses to those few questions were sufficient to raise doubts about his capacity to stand trial, and therefore warranted further inquiry by the court. In the present case, after the jury rendered its verdicts, but before sentencing, Defendant pleaded guilty to attaining the status of an habitual felon. The following relevant portions of the plea colloquy between the trial court and Defendant should have raised a bona fide doubt as to Defendant's capacity to proceed:

> THE COURT: At what grade level can you read and write?
>
> [DEFENDANT:] Second or third.
>
> THE COURT: . . . Are you now under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances?
>
> [DEFENDANT:] No, sir.
>
> THE COURT: When was the last time that you used or consumed any such substance?
>
> [DEFENDANT:] I can't really remember. Probably about two or three months ago.

Minutes later, at sentencing, Defendant testified that he had "[n]ever failed a drug test[,]" and was "still currently going to RHA three days a week. That's through Broughton [Hospital], kind of intensive outpatient." Stated another way, Defendant told the trial court that he was not presently taking any medication, despite his enrollment in an intensive outpatient program, which he was still attending three days a week.

These statements—combined with Defendant's well-documented history of drug abuse, as well as his noncompliance with medication and outpatient treatment recommendations—while perhaps not indicative of irrational or erratic behavior, nonetheless tend to support defense counsel's concerns at the 23 August 2017 hearing.

Defendant's brief communication with the trial court during the plea colloquy also raises doubts as to his general understanding of the proceedings:

> THE COURT: Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] Yes, sir.
>
> THE COURT: You are pleading guilty – you pled guilty to attaining the status of habitual felon, but was there actually a plea arrangement?
>
> [DEFENDANT:] No.
>
> [DEFENSE COUNSEL:] There's not a plea arrangement, Your Honor.
>
> THE COURT: So let me ask you that again. Have you agreed to plead guilty as part of a plea arrangement?
>
> [DEFENDANT:] No, sir.

"A guilty plea must be made knowingly and voluntarily and the record must affirmatively show it on its face." *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (citing *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969)). Again, Defendant was twice found incompetent to stand trial during the pendency of this case. The second time, the forensic screeners determined that Defendant was "currently not capable of proceeding" because he did "not have the capacity to understand his current charges, potential penalties and d[id] not have the ability to participate in a meaningful way in his legal proceedings and work with this attorney in an affirmative way."

Six months later, on 23 August 2017, Defendant's attorney opined at another competency hearing that for the first time, Defendant seemed to understand the charges against him. However, as the record before us establishes, much can happen in six months. Indeed, Defendant was found incompetent and then competent in a period of six months. It should not strain credulity, then, to suggest that the opposite could have occurred during the six months between Defendant's 23 August 2017 competency hearing and his 8 February 2018 trial.

As this Court has observed, "[a] defendant's competency to stand trial is not necessarily static, but can change over even brief periods of time." *Mobley*, 251 N.C. App. at 675, 795 S.E.2d at 443. Accordingly, the trial court must evaluate the defendant's competency to proceed *at the time of trial*. *State v. Cooper*, 286 N.C. 549, 565, 213 S.E.2d 305, 316 (1975) (noting that a defendant's competency to proceed is assessed "at the time of trial").

Although Defendant's June 2017 psychiatric evaluation indicated that he was competent to proceed to trial, that evaluation was not current, and may not have accurately reflected Defendant's mental state at trial in February 2018. *See State v. Silvers*, 323 N.C. 646, 654-55, 374 S.E.2d 858, 864 (1989) (vacating a defendant's conviction where the trial court, in evaluating the defendant's competency to stand trial, excluded testimony of witnesses who had recently observed the defendant's condition, and wholly relied on two psychiatric reports written three and five months prior to the hearing). The record before the trial court established that Defendant "suffered from lifelong cognitive defects, mild mental retardation, and mental illness," together with frequent, severe, and varied mental health issues during the period between Defendant's arrest and trial. Consequently, there was a legitimate question as to whether the psychiatric evaluation accurately reflected Defendant's capacity eight months later.

The dissent maintains that the trial court would have had a duty to hold another competency hearing "if there was any indication that Defendant had relapsed[,]" but was not required to do so, because neither Defendant nor his counsel raised "any concern that Defendant was incapable of proceeding or participating in his own defense." However, the decision to inquire into a defendant's competency to proceed is not shouldered solely by the Defendant or his attorney. *See*, *e.g.*, *Mobley*, 251 N.C. App. at 668, 795 S.E.2d at 439 (explaining that the trial court "has a constitutional duty to institute, *sua sponte*, a competency hearing, if there is substantial evidence before the court indicating that the accused may be mentally incompetent" to stand trial. (internal citations

omitted)); N.C. Gen. Stat. § 15A-1002(a) ("The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court.").

The trial court properly determined that it needed to assess Defendant's competency to proceed. However, the time for the trial court to make such an assessment was immediately prior to trial, not more than six months earlier. *See Mobley*, 251 N.C. App. at 675, 795 S.E.2d at 443. Accordingly, the trial court erred in failing to determine whether, *at the time of trial*, Defendant was competent to proceed.

II. Clerical Errors

[2] Defendant further contends, and the State concedes, that "[t]wo clerical errors require remand for correction." We agree.

Defendant first observes that "[t]he trial court's written order arresting judgment erroneously indicates the charge of selling a controlled substance was arrested." The State concedes that this is a clerical error because the trial court actually arrested judgment on Defendant's conviction for *delivery* of a controlled substance.

Defendant next notes that the trial court's written judgment improperly classified buprenorphine as a Schedule III controlled substance, because buprenorphine was classified as a Schedule IV controlled substance on the date of the offense. Buprenorphine was classified as a Schedule IV controlled substance until N.C. Gen. Stat. § 90-91(d)(9) was amended by 2017 N.C. Sess. Law 115. Again, the State concedes that this is a clerical error.

Thus, in order that "the record speak the truth," the errors must be corrected on remand. *State v. May*, 207 N.C. App. 260, 263, 700 S.E.2d 42, 44 (2010) (internal quotation marks omitted).

Conclusion

Accordingly, we remand this case for the trial court to conduct a hearing to determine Defendant's competency at the time of trial, and to correct the clerical errors identified herein. "If the trial court determines that a retrospective determination is still possible, the court should review the evidence which was before it preceding" Defendant's trial, including medical records, psychological evaluations, and any other evidence presented by counsel. *McRae I*, 139 N.C. App. at 394, 533 S.E.2d at 562. If the trial court "concludes from this retrospective hearing that [D]efendant was competent at the time of trial, no new trial is required." *Id*. However, if "the trial court determines that a meaningful hearing is

no longer possible, [D]efendant's conviction must be reversed and a new trial granted when he is competent to stand trial." *Id.*

REMANDED.

Judge BROOK concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I believe that Defendant had a fair jury trial, free from reversible error. I do not believe that Judge Thornburg was required to hold a competency hearing when the matter was called for trial in February 2018 or at any time during the trial. Therefore, I respectfully dissent from the majority's holding granting Defendant a retrospective competency determination. Nonetheless, as the State concedes, the matter needs to be remanded for the sole purpose of correcting certain clerical errors in the judgments.

In October 2015, Defendant was arrested for a variety of drug offenses. Two and a half years later, in February 2018, Defendant was tried and convicted.

As late as a year *prior* to trial, in February 2017, Defendant was found *not* to be mentally competent to stand trial.

Months later, though, Defendant underwent a psychiatric evaluation in which it was determined that he had "regained his capacity to proceed." Shortly thereafter, in August 2017, just six months prior to trial, the trial court held a hearing and concluded that Defendant had the capacity to proceed.

Our Supreme Court has held on a number of occasions that a trial court has no duty to conduct a competency hearing when a matter is called for trial unless "*there is substantial evidence before the court* indicating that the accused may be mentally incompetent." *State v. Badgett*, 361 N.C. 234, 259, 644 S.E.2d 206, 221 (2006) (emphasis in the original).[1]

For instance, our Supreme Court has held on more than one occasion that evidence that the defendant had suffered from mental health

1. This quote appears in a number of other cases with the italicized language emphasized. *See, e.g.*, *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001); *State v. Young*, 291 N.C. 562, 568, 231 S.E.2d 577, 581 (1977).

issues months *prior* to trial does not constitute "*substantial evidence*" to require a competency hearing, where during the trial the defendant appears to understand the proceedings and questions from the trial judge and to be able to participate in his defense.[2]

And our Supreme Court has held that a trial court was not required to hold a competency hearing where the defendant had been evaluated and determined to be competent a few months prior to trial, the defendant appeared competent at the time of trial and no concern regarding his competency was raised at the time of trial *even though* the evaluation of the defendant before trial was prompted by the concern expressed by his counsel regarding his competency to stand trial just two months prior to trial and the trial court ordered the defendant to be committed and evaluated. *State v. Young*, 291 N.C. 562, 569, 231 S.E.2d 577, 581 (1977). Indeed, in *Young*, our Supreme Court held that where a defendant is examined and determined to be competent even months prior to trial and that nothing comes to the trial court's attention to suggest that the defendant's condition has deteriorated when the matter is called for trial, the trial court is not required to hold another competency hearing. *Id*. at 568, 231 S.E.2d at 581 ("[W]here, as here, the defendant has been committed and examined relevant to his capacity to proceed, and all evidence before the court indicates that he has that capacity, he is not denied due process by the failure of the trial judge to hold a hearing subsequent to the commitment proceedings.")

Here, the last evaluation of Defendant before trial indicated that he was competent to stand trial, as did the trial court's finding at the last competency hearing conducted before the trial. And there was no indication "at the time his trial commenced" that "defendant 'lacked the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense[.]' " *State v. King*, 353 N.C. 457, 467, 546 S.E.2d 575, 585 (2001) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975). There is every indication

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2. In *Badgett*, our Supreme Court held that the defendant's outburst during the trial, his statement during sentencing implying his desire to be sentenced to death, and his mental health problems experienced *before* trial "was outweighed by substantial evidence that the defendant was competent to stand trial[,]" namely his ability to interact rationally with the trial judge and to work with his counsel in his defense and by his overall demeanor during the trial. 361 N.C. at 260, 644 S.E.2d at 221.

In *King*, our Supreme Court held "that evidence of treatment for depression and suicidal tendencies several months before trial did not constitute substantial evidence requiring the trial court to hold a competency hearing." *Badgett*, 361 N.C. at 261, 644 S.E.2d at 222 (describing the holding in *King*, 353 N.C. at 467, 546 S.E.2d at 585).

that Defendant was able to participate in his defense. For instance, he engaged in a colloquy with Judge Thornburg in which he stated that he had made the decision to waive his right to testify on his own behalf. Further, at no time during the trial did either Defendant, his counsel, or anyone else express any concern regarding Defendant's competency to proceed.[3]

I do not agree with the majority's characterization of certain portions of the trial transcript that Judge Thornburg should have had some doubt about Defendant's competency. For instance, I do not agree that Judge Thornburg should have been concerned that Defendant was not taking his medication when he responded, "No, sir," to the trial court's question, "Are you now under the influence of any alcohol, drugs, narcotics, medicines, pills or any other substances?" The context of the question is clearly that Judge Thornburg was asking Defendant if he was *under the influence* of some impairing substance that would make him unable to understand his plea of guilty to attaining the status of a habitual felon. The context, in no way, indicates that Judge Thornburg was asking if Defendant was still taking his medication that had been prescribed for him. Indeed, Defendant's attorney had already assured Judge Thornburg that Defendant was taking his medication. And, as the majority points out, Defendant followed up his answer by stating that he was participating in an "intensive outpatient" program.

Also, I do not agree that Defendant's exchange with Judge Thornburg, when asked about his agreement to plead guilty without a plea arrangement, indicates that Defendant did not understand what was happening. To the contrary, this exchange showed that he totally understood. Admittedly, his response, "Yes, sir," when asked by Judge Thornburg if he had "agreed to plead guilty as part of a plea arrangement," was not technically correct. Though he had agreed to plead guilty, no plea arrangement had been agreed to. But it is clear that Defendant was merely responding to the first part of Judge Thornburg's question, that he had agreed to plead guilty. For when Judge Thornburg followed up to

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3. Defendant's counsel indicated at trial that his client was much improved and seemed to understand what was going on and that he was taking his medication. Though he expressed some concern, he indicated that he was no expert, he did not state that he had seen his client's condition deteriorate since the August 2017 determination of competency, and that his concern was based on how Defendant had behaved prior to August 2017. Unlike the defendant in *State v. Hollars*, there was no indication from Defendant's behavior *during the course of the trial*, that Defendant's condition ever deteriorated. *See State v. Hollars*, ___ N.C. App. ___, ___, 2019 N.C. App. LEXIS 648, *16-17 (2019) (noting that during the trial, the defendant's counsel alerted the court about concerns regarding the defendant's capacity). And unlike the defendant in *State v. McRae*, there was no indication that Defendant had not taken his medication. *State v. McRae*, 139 N.C. App. 387, 390, 533 S.E.2d 557, 560 (2000).

ask specifically about any agreement *to a plea arrangement*, Defendant immediately responded correctly.

I have reviewed Defendant's other arguments and conclude that he was afforded a fair trial, free from reversible error. However, as the State concedes, I agree that the judgments contain clerical errors; specifically, that it lists the wrong judgment being arrested and identifies the controlled substance involved as a Schedule III substance rather than a Schedule IV substance.

In conclusion, my vote is to find no error in Defendant's trial, but to remand the matter to correct certain clerical errors in the judgments.

STATE OF NORTH CAROLINA
v.
BULENT BEDIZ

No. COA18-1294

Filed 17 December 2019

1. Assault—intent—hitting with car mirror—circumstances and foreseeable consequences

The State presented sufficient evidence to convict defendant of misdemeanor simple assault where testimony and video footage showed defendant driving toward the victim (a code enforcement supervisor who had previously interacted with defendant and was accompanying officers to execute a warrant) and hitting him with his passenger-side mirror, then exiting his vehicle and walking toward the victim while visibly upset. The evidence permitted the reasonable conclusion that defendant intended to hit the victim or that his act of driving so close to the victim led to the foreseeable consequence of hitting the victim with his mirror.

2. Assault—jury instructions—defense of accident—lack of intent—parking car

In a prosecution for assault, the trial court committed reversible error by denying defendant's request for a jury instruction on the defense of accident where defendant presented substantial evidence that his act of striking the victim with his vehicle's side-view mirror was unintentional—that he was just trying to "squeeze by" police officers and the victim to park his car.

Appeal by Defendant from judgment entered 13 June 2018 by Judge Stanley L. Allen in Guilford County Superior Court. Heard in the Court of Appeals 23 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General A. Mercedes Restucha-Klem, for the State-Appellee.

Yoder Law PLLC, by Jason Christopher Yoder, for Defendant-Appellant.

COLLINS, Judge.

Defendant Bulent Bediz appeals from judgment entered upon a jury verdict of guilty of misdemeanor simple assault. Defendant argues that the trial court (1) erred in denying his motion to dismiss because there was insufficient evidence that Defendant intentionally touched Mr. Mark Wayman with the passenger side-view mirror while parking his car, and (2) erred in denying his request for a jury instruction on the defense of accident because Defendant presented substantial evidence that he was parking and did not intend to touch Wayman with the passenger side-view mirror of his car. We affirm in part and reverse in part, ordering a new trial.

I. Procedural History

On 3 December 2015, Defendant was arrested and charged with misdemeanor assault with a deadly weapon pursuant to N.C. Gen. Stat. § 14-33(c)(1) (2015). On 15 November 2016, at a bench trial in district court, Defendant was found guilty as charged. Defendant appealed to superior court. On 29 May 2018, Defendant's case came on for a jury trial de novo.

At the close of the State's evidence, and again at the close of all the evidence, Defendant moved to dismiss for insufficient evidence; the trial court denied both motions. At the jury charge conference, Defendant's request for a jury instruction on the lesser-included offense of misdemeanor simple assault was granted; his request for an instruction on the defense of accident under N.C.P.I.–Crim. 307.11 was denied.

The jury acquitted Defendant of assault with a deadly weapon, but found Defendant guilty of misdemeanor simple assault. The trial court entered judgment upon the jury's verdict, sentencing Defendant to 45 days' imprisonment, suspending the sentence, and placing Defendant

on 12 months' unsupervised probation. On 5 June 2018, Defendant gave proper written notice of appeal to this Court.

II. Factual Background

The evidence at trial tended to show the following: Defendant owned a rental property at 808 Haywood Street in the city of Greensboro (the "Property"). The city had notified Defendant that salvaged building materials on the Property were a nuisance and needed to be removed. Defendant hired workers to clean up the property and believed that he had complied with the notice. At approximately 8:30 a.m. on 3 December 2015, Defendant was working at the Property when he saw a Greensboro city contractor sifting through the remaining salvaged materials. Defendant told the contractor to leave, and the contractor complied.

Later that morning, Code Enforcement Supervisor Mark Wayman, who had previously interacted with Defendant, sought and executed an administrative warrant to remove the salvaged materials from the Property. Wayman requested the assistance of law enforcement in executing the warrant. Officers Watson and Wilson of the Greensboro Police Department accompanied Wayman to the scene.

Upon arriving at the Property, the officers activated their respective body cameras; both body cameras captured footage of the subsequent events. At approximately 10:00 a.m., while Wayman, Watson, Wilson, and another city inspector were standing in the street in front of the Property, Defendant drove up in his car. As Defendant drove by the three men, Defendant's passenger side-view mirror struck Wayman in the hip. Both officers shouted at Defendant to stop and instructed him to get out of the car. Defendant stopped in the middle of the road and rolled down his window to listen to Watson. Defendant then looked away from Watson and toward the front windshield. As this happened, Wayman walked in front of Defendant's car to join the officer on the opposite side of the street. Defendant's car moved forward, striking Wayman in the knee.

Defendant yelled at Wayman from inside his car while the officers repeatedly demanded that Defendant get out of his car. Defendant got out his car, walked toward Wayman pointing his finger, and stated that Wayman "wanted to be hit." Watson took Defendant's keys and immediately called for backup. Defendant was arrested and charged via Uniform Citation with one count of misdemeanor assault with a deadly weapon as follows: "Did assault Mark Wayman with a deadly weapon (vehicle) to wit Mr. Wayman received injury to his right hip, left knee & lower leg. G.S. 14-33(c)(1)[.]"

III. Discussion

1. Motion to Dismiss

[1] Defendant first argues that the trial court erred in denying his motion to dismiss, because the State did not present sufficient evidence that Defendant intentionally touched Wayman with the passenger side-view mirror while parking his car. We disagree.

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

When a defendant moves to dismiss for insufficient evidence, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009) (quotation marks and citations omitted). "[T]he trial court must consider the record evidence in the light most favorable to the State . . . ." *Id.*

The criminal offense of assault is generally defined as an overt act or attempt, with force and violence, to do immediate physical injury to the body of another or to put a person of reasonable firmness in fear of immediate bodily harm. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). An assault requires "the intent to cause apprehension of an imminent offensive or harmful contact . . . ." *Britt v. Hayes*, 142 N.C. App. 190, 192, 541 S.E.2d 761, 762 (2001) (citing *Ormond v. Crampton*, 16 N.C. App. 88, 94, 191 S.E.2d 405, 409–10 (1972)). "A defendant's intent is seldom provable by direct evidence and must usually be proved through circumstantial evidence." *State v. Liggons*, 194 N.C. App. 734, 739, 670 S.E.2d 333, 338 (2009) (citation omitted). "[T]he nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which [] intent . . . may be inferred." *State v. White*, 307 N.C. 42, 49, 296 S.E.2d 267, 271 (1982). "The surrounding circumstances include the foreseeable consequences of a defendant's deliberate actions as a defendant must be held to intend the normal and natural results of his deliberate act." *Liggons*, 194 N.C. App. at 739, 670 S.E.2d at 338 (quotation marks and citation omitted).

Wayman testified that he was standing in the street with Watson when Defendant "swerved towards" them and hit Wayman with the passenger side-view mirror of his car, even though there was "ample room for [Defendant] to maneuver around" them. Wayman also testified that

after exiting the car, Defendant was visibly upset and "[i]mmediately came towards me pointing his finger at me."

Watson testified that he watched Defendant hit Wayman with the passenger side-view mirror of his car. He also testified that after the hit, both officers directed Defendant to exit the car, but Defendant "did not get out of the car when I asked him to do that" and Defendant "was not listening." After Defendant exited the car, he "began to go towards Mr. Wayman" and was upset. Video from Watson's body camera shows Defendant getting out of the car and walking toward Wayman while pointing his finger at him.

The testimony and video footage show that Defendant drove toward Wayman, hit him with the passenger side-view mirror of the car, exited the vehicle, and walked toward Wayman while visibly upset. These circumstances could allow a reasonable person to believe that Defendant intended to hit Wayman, or at least intended to put Wayman in fear of immediate bodily harm. *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. Additionally, Defendant's act of driving within inches of where Wayman stood in the road, in an attempt to "squeeze around" Wayman to park his car, could foreseeably lead to Defendant's car hitting Wayman. As the trial court was permitted to consider these "foreseeable consequences" of Defendant's actions as evidence of Defendant's intent, the State provided substantial evidence of each element of assault. *Liggons*, 194 N.C. App. at 739, 670 S.E.2d at 338. Thus, the trial court did not err by denying Defendant's motion to dismiss.

2. Jury Instruction

[2] Defendant next argues that the trial court committed reversible error in denying his request for a jury instruction on the defense of accident. We agree.

Whether sufficient evidence exists to warrant a jury instruction is a question of law, reviewed de novo on appeal. *State v. Smith*, 832 S.E.2d 678, 684 (N.C. Ct. App. 2019).

"The trial court has a duty to instruct the jury on all substantial features of the case arising on the evidence." *State v. Garrett*, 93 N.C. App. 79, 82, 376 S.E.2d 465, 467 (1989) (citation omitted). "All defenses arising from the evidence presented during trial, including the defense of accident, are substantial features of a case and therefore warrant instructions." *Id.* (citation omitted).

> For a jury instruction to be required on a particular defense, there must be substantial evidence of each

> element of the defense when the evidence is viewed in the light most favorable to the defendant. Substantial evidence is evidence that a reasonable person would find sufficient to support a conclusion. Whether the evidence presented constitutes substantial evidence is a question of law.

State v. Bice, 821 S.E.2d 259, 266-67 (N.C. Ct. App. 2018) (quotation marks, brackets, and citations omitted).

Thus, in this case, the trial court was required to instruct the jury regarding the defense of accident if substantial evidence had been introduced showing that Defendant struck Wayman (1) "unintentional[ly]," (2) "during the course of lawful conduct," and (3) in a manner that did "not involve culpable negligence." N.C.P.I.—Crim. 307.11. "Culpable negligence is such recklessness or carelessness . . . as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Cope*, 204 N.C. 28, 167 S.E. 456, 458 (1933).

Defendant testified,

> [A]s best as I can remember, my sole intent was to park the car and talk to the police and tell them what was going on because I felt like I was the victim and I wanted to talk to the police.
>
> . . . .
>
> I'm coming down Haywood Street and I'm just trying to park in front of 808 Haywood Street to talk to the police. And Mark Wayman was standing there in the middle of the street. There was another police officer. I squeezed by them. And just then the police stopped me. And I didn't even realize I had hit him like he alleges.

When asked whether he could see Wayman walk around the front of the vehicle, Defendant testified that he could not. He explained,

> Well, I understood from [the officer] to go and park my car by the curb. That's what I was intending to do because in the video it's very evident that the car is in direction to go and park by the curbside. So I was just continuing to park my car there so that I can talk to the police. So I lifted my foot off the brake. And then, as you see in the video, the police then afterwards tell me to get out of the car, etcetera.

On cross-examination, Defendant testified, "I was driving my car to park it by the curbside. I was not driving my car to hit Mr. Wayman."

Defendant explained that everything happened very fast, it was a "chaotic and confusing situation," and that he asked Wilson "I hit him?" afterwards because he did not realize that he had hit Wayman.

This evidence was sufficient evidence from which a jury could find that Defendant hit Wayman accidentally–that is, unintentionally, while acting lawfully, and not acting with thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *Cope*, 204 N.C. at 28, 167 S.E. at 458. Accordingly, the trial court erred in not instructing the jury on the defense of accident. As a result, Defendant is entitled to a new trial.

IV. Conclusion

The trial court did not err by denying Defendant's motion to dismiss for insufficient evidence. The trial court did err by refusing to instruct the jury on the defense of accident. We reverse and remand for a new trial.

NEW TRIAL.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
PAUL EDWARD DAWKINS, Defendant

No. COA19-229

Filed 17 December 2019

1. Evidence—real evidence—authentication or identification—smashed rock of illegal drugs

In a drug possession prosecution, the trial court did not err by admitting an exhibit that contained what an officer testified to be the small off-white rock purchased from defendant, which had been smashed but was "substantially the same." The smashing of the rock did not amount to a material change raising admissibility concerns, and even assuming the change was material, the State established the requisite chain of custody to satisfy Evidence Rule 901(a). Finally, any possible error was not prejudicial, because a State Bureau of Investigation witness testified without objection that the substance she received from the officer was cocaine base.

2. Sentencing—clerical error—enhanced sentence—habitual felon

A criminal case was remanded for correction of a clerical error where the trial court failed to adjudge defendant a habitual felon within the judgment enhancing his sentence.

Appeal by Defendant from judgment entered 11 September 2017 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 17 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly Randolph, for the State-Appellee.

Anne Bleyman for Defendant-Appellant.

COLLINS, Judge.

Defendant Paul Edward Dawkins appeals from the trial court's 11 September 2017 judgment entered upon his (1) convictions for one count of possession with intent to sell or deliver cocaine and one count of sale or delivery of cocaine, (2) guilty pleas to two counts of both possession with intent to sell and deliver cocaine and sale and delivery of cocaine, and (3) admission to having attained habitual felon status. Defendant contends that the trial court erred by admitting certain real evidence and by entering a judgment containing clerical errors. We discern no error at trial, but remand to the trial court for the correction of the clerical errors.

I. Background

On 23 January 2015, Detective Jeffrey Scism of the City of Shelby Police Department Vice/Narcotics Unit (along with other law enforcement officers) coordinated a controlled drug-buy operation with the assistance of a paid confidential informant. During the operation, the informant purchased a substance in the form of a small rock from Defendant, whom the officers had suspected of dealing narcotics. Following the buy, the informant gave the rock to Scism, who field tested it as presumptive positive for cocaine. Scism placed the rock in a small evidence bag and later catalogued the evidence and arranged to have it sent to the State Bureau of Investigation ("SBI") for further analysis.

Defendant was indicted in Cleveland County Superior Court on 11 May 2015 for three counts of possession with intent to sell and deliver cocaine and three counts of sale and delivery of cocaine, all in violation of N.C. Gen. Stat. § 90-95(a)(1). On 9 May 2016, Defendant was also

indicted for having attained habitual felon status as set forth N.C. Gen. Stat. § 14-7.1.

One of each of the possession with intent to sell and deliver cocaine and sale and delivery of cocaine charges came on for trial on 11 January 2017. At trial, the State introduced its Exhibit 6, an evidence bag which Scism testified contained the substance he received from the informant on the date of the drug buy and sent off to the SBI in the form of an "off-white-colored small rock." Scism testified that the substance had been smashed, but that it was "substantially the same" as the rock. Defendant objected to the admission of Exhibit 6, arguing that Scism's admission that the substance was in a different form at trial than it was when Scism received it from the informant meant that Scism could not reliably testify that the substance in Exhibit 6 was what the informant gave him, and that Scism therefore could not authenticate Exhibit 6. The trial court admitted Exhibit 6 over Defendant's objection. State's witness Deborah Chancey, an SBI Crime Laboratory Technician, later testified that she had tested Exhibit 6 and concluded that it contained cocaine base, as indicated in State's Exhibit 7, Chancey's laboratory report containing the results of her test. The jury subsequently returned verdicts finding Defendant guilty of both charges.[1]

Later that day, Defendant pled guilty to the other charges and admitted to having attained habitual felon status, and the trial court sentenced Defendant on the charges as an habitual felon. The trial court consolidated the sale or delivery charges under one count and, after adjudging Defendant to be an habitual felon, sentenced him thereupon to 96 to 128 months' imprisonment. The trial court also consolidated the possession charges and sentenced Defendant thereupon. The judgment concerning the possession charges was subsequently struck and reentered several times, ultimately resulting in the 11 September 2017 judgment from which Defendant now appeals.

The 11 September 2017 judgment concerning the possession charges gave Defendant a mitigated Class D sentence of 76 to 104 months'

1. Although Defendant was indicted for "possess[ion] with intent to . . . sell *and* deliver" cocaine and "sale *and* delivery" of cocaine, and was thereafter convicted of "POSSESSION WITH INTENT TO SALE [sic] *OR* DELIVER COCAINE" and "SELL *OR* DELIVER COCAINE" (emphases added), this Court has said that such convictions are proper. *See State v. Mercer*, 89 N.C. App. 714, 715-16, 367 S.E.2d 9, 10-11 (1988) ("It is proper for a jury to return a verdict of possession with intent to sell *or* deliver under [N.C. Gen. Stat. §] 90-95(a)(1). Such a verdict is no less proper when the indictment charges possession with intent to sell *and* deliver since the conjunctive 'and' is acceptable to specify the exact bases for the charge." (citations omitted)).

imprisonment, but (1) while indicating that Defendant "ADMITTED TO HABITUAL FELON" status, does not include an indication that the trial court adjudged Defendant an habitual felon, and (2) while finding that mitigating factors existed as contemplated "on the attached AOC-CR-605" form, does not appear to have such a form attached.[2]

Defendant filed a petition for a writ of certiorari with this Court seeking to belatedly appeal from the judgments, and we allowed Defendant's petition.

II. Discussion

In his brief on appeal, Defendant argues that the trial court erred by (1) admitting Exhibit 6 over his objection and (2) entering the 11 September 2017 judgment without indicating (a) that Defendant had been adjudged an habitual felon and (b) which mitigating factors the Court found to justify a reduction of Defendant's sentence. We address each argument in turn.

A. Exhibit 6

[1] Under North Carolina Rule of Evidence 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2017). Our Supreme Court has said:

> [A] two-pronged test must be satisfied before real evidence is properly received into evidence. The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change. The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility.

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2. No AOC-CR-605 form (or other document indicating the mitigating factors found by the trial court) is attached to the 11 September 2017 judgment included in the record on appeal.

State v. Campbell, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984) (citations omitted). We review a trial court's decision to admit real evidence over an objection, whether regarding the evidence's authenticity or the chain of custody, for abuse of discretion. *State v. Cobbins*, 66 N.C. App. 616, 621, 311 S.E.2d 653, 657 (1984) ("There are no simple standards for determining whether real evidence sought to be admitted has been sufficiently identified as being the object involved in the incident in question. The trial judge has discretion to determine the standard of certainty necessary to show that the object offered is the same as the object involved in the incident and that the object has remained unchanged prior to trial." (quotation marks omitted)); *State v. Hawk*, 236 N.C. App. 177, 180, 762 S.E.2d 883, 885 (2014) ("We review a trial court's decision to admit evidence over an objection concerning the chain of custody for an abuse of discretion."). Abuse of discretion occurs when the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471, 334 S.E.2d 741, 747 (1985).

Defendant argues that because (1) the substance within Exhibit 6 "was not readily identifiable, was susceptible to alteration, and had actually been altered" and (2) no one within the chain of custody testified as to how or when the substance within Exhibit 6 changed from a rock to a powder, Exhibit 6 was not properly authenticated, and its admission was accordingly reversible error.

Defendant's argument fails for a number of reasons. First, the *Campbell* Court set forth that trial courts need only concern themselves with "material change[s]" to real evidence. *Campbell*, 311 N.C. at 388, 317 S.E.2d at 392. Scism identified the substance within Exhibit 6 as the substance he received from the informant on the day of the drug buy, although he noted that that the substance had been smashed. Our cases that have dealt with the admissibility of drugs that have been smashed have held that such impacts do not amount to material changes raising admissibility concerns. *E.g.*, *State v. Johnson*, No. COA17-1306, 2018 N.C. App. LEXIS 857, at *7 (N.C. Ct. App. 2018) (unpublished) (discerning no error from admission of crack-cocaine rocks that the officer testified had "kind of been mashed" and were "kind of pressed together[,]" holding that those impacts upon the drugs "did not constitute evidence that the substance had been materially altered"); *see also State v. Hairston*, No. COA06-184, 2006 N.C. App. LEXIS 2393, at *4 (N.C. Ct. App. 2006) (unpublished) (upholding admission of crack-cocaine rocks that had been crushed by the SBI during the analysis process). We similarly conclude that Defendant has not shown that the substance within Exhibit 6 underwent a material change raising admissibility concerns,

and that the trial court therefore did not abuse its discretion by admitting Exhibit 6. *See State v. Carr*, 122 N.C. App. 369, 374, 470 S.E.2d 70, 74 (1996) (determination of "[w]hether the substance in question has undergone a material change is subject to the exercise of the trial court's sound discretion.").

Second, even assuming *arguendo* that the change to the form of the substance within Exhibit 6 revealed at trial was material, and that the State was accordingly required to establish a chain of custody, *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392, the record demonstrates that the State did so. Defendant argues that the State had issues locating Exhibit 6 and getting it to the courtroom on the day of Defendant's trial. The record shows, however, that the State did ultimately get the evidence to the courtroom. At the trial, with Exhibit 6 in front of them, Scism and Chancey both testified regarding the procedures they usually use with such evidence and that the procedures they used with the substance within Exhibit 6 conformed to their usual procedures. Further: (1) Scism testified that Exhibit 6 reflected his individual seal indicating that it was the bag into which Scism initially placed the drugs, which he sealed before sending it to the SBI for analysis; and (2) Chancey testified that she unsealed Exhibit 6 upon receipt, tested the substance contained within, placed the substance back into Exhibit 6, resealed it, and then placed the resealed bag within State's Exhibits 4 and 5, SBI envelopes which also arrived in the courtroom sealed with Chancey's seal. With this testimony, the State established the requisite chain of custody, and Defendant's chain-of-custody argument accordingly fails. *See also id.* ("any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility").

Finally, "[e]rroneous admission of evidence only entitles the defendant to a new trial if she can show that the error was prejudicial. Such an error is prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *Hawk*, 236 N.C. App. at 180, 762 S.E.2d at 885 (internal quotation marks and citations omitted). As mentioned above, Chancey testified that Exhibit 7 is her laboratory report indicating that the substance she received from Scism and tested was cocaine base. Defendant has challenged neither the trial court's admission of Exhibit 7 nor Chancey's testimony about Exhibit 7. Because he has not, and because the record establishes that Chancey received and tested the substance within Exhibit 6 in the same form in which Scism received the substance from the informant, Exhibit 7 and Chancey's authentication thereof provide compelling evidence to

support Defendant's convictions, regardless of whether Exhibit 6 was received into evidence at trial or not.

Both Scism and Chancey testified that when they handled the substance within Exhibit 6 before the trial, it was in the form of a small rock. The record therefore establishes that the rock was smashed at some point *after* it underwent chemical analysis in Chancey's SBI laboratory. That the substance within Exhibit 6 was in the form of a rock when Chancey performed her analysis confirming that the substance was cocaine base means that Exhibit 7's conclusions are not subject to concerns regarding the subsequent change in form. Accordingly, Exhibit 7 and Chancey's authentication thereof support our conclusion that it is not reasonably possible that, had the trial court refused to admit Exhibit 6, a different result would have been reached at Defendant's trial. Thus, even if the trial court's admission of Exhibit 6 had been error—which it was not—the error would not be prejudicial to Defendant, and would not entitle Defendant to a new trial.

For the aforementioned reasons, we reject Defendant's arguments regarding Exhibit 6.

B. Clerical errors

[2] Because Defendant's convictions and pleas regarding the Class H felony possession charges resulted in a Class D sentence, the trial court was required to specify the reason for the sentence enhancement within the judgment, i.e., that Defendant had attained habitual felon status within the meaning of N.C. Gen. Stat. § 14-7.1. Defendant concedes both that (1) he admitted to having attained habitual felon status and (2) the trial court's failure to adjudge Defendant an habitual felon was merely clerical error. We therefore agree with Defendant that remand is appropriate to correct this clerical error. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." (internal quotation marks and citations omitted)).

Defendant also argues that "[a]n AOC-CR-605 form may also need to be prepared" setting forth the mitigating factors the trial court found justified the reduction of Defendant's sentence, and that this, too, constitutes clerical error requiring remand. As mentioned above, there is no AOC-CR-605 form attached to the 11 September 2017 judgment included in the record on appeal. To the extent that the form has not been executed, rather than merely omitted from the record on appeal,

we also instruct the trial court on remand to execute the AOC-CR-605 form contemplated in the judgment, and thereby to correct that clerical error, as well. *See* N.C. Gen. Stat. § 15A-1340.16(c) (2017) (written findings regarding mitigating factors required when sentence departs from presumptive range under N.C. Gen. Stat. § 1340.17(c)(2)).

III. Conclusion

Because we conclude that the admission of Exhibit 6 was not error, we affirm the 11 September 2017 judgment. However, we remand to the trial court with instructions to mark the appropriate block on the judgment and commitment form indicating that the trial court adjudged Defendant to be an habitual felon, and to execute the AOC-CR-605 form contemplated by the 11 September 2017 judgment, if it has not already done so.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges ARROWOOD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
HENRY THOMAS HAIRSTON

No. COA19-502

Filed 17 December 2019

1. Homicide—voluntary manslaughter—motion to dismiss—sufficiency of evidence

In a murder prosecution where defendant was convicted of voluntary manslaughter, the trial court properly denied defendant's motion to dismiss because the State presented substantial evidence that defendant intentionally stabbed a man with a knife during a parking lot brawl, defendant had a reasonable belief that using force was necessary to prevent death or great bodily harm (a hostile group of men chased defendant and his nephews into the parking lot and attacked them), defendant used excessive force under the circumstances (he used a knife during a fistfight), and the man's stab wound proximately caused his death (according to the man's autopsy).

2. Appeal and Error—preservation of issues—general motion to dismiss—effective assistance of counsel

In a murder prosecution where defendant was convicted of voluntary manslaughter, defense counsel's general motion to dismiss preserved for appellate review all arguments regarding the sufficiency of the evidence supporting defendant's conviction. In this regard, defendant received effective assistance of counsel.

3. Homicide—voluntary manslaughter—jury instructions—essential elements—plain error analysis

In a murder prosecution where defendant was convicted of voluntary manslaughter after stabbing a man during a parking lot brawl, there was no plain error where the trial court's jury instructions clearly explained each essential element the jury would have to find beyond a reasonable doubt to convict defendant of second-degree murder or voluntary manslaughter, and where the instructions apprised the jury that it must find defendant not guilty of voluntary manslaughter if the State failed to prove, as a preliminary matter, that defendant intentionally wounded the man and proximately caused his death.

Appeal by defendant from judgments entered 2 November 2018 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 14 November 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Anne J. Brown, for the State.

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

ARROWOOD, Judge.

Henry Thomas Hairston ("defendant") appeals from judgments entered upon his convictions for voluntary manslaughter and possession of a controlled substance. For the following reasons, we find no error.

I. Background

On 18 April 2016, defendant was indicted on one count each of first-degree murder, possession of methamphetamine, and attaining habitual felon status. Defendant's charge for possession of methamphetamine was superseded by an indictment for possession of 4-chloromethcathinone

on 25 June 2018. Defendant's case came on for trial in Guilford County Superior Court before the Honorable L. Todd Burke on 29 October 2018.

At trial, Tashera Thaxton ("Ms. Thaxton"), Latoya Settle ("Ms. Settle"), and defendant's nephews Jerard and Charles McCollum ("Jerard" and "Charles") testified as follows. On the night of 13 March 2016, defendant and his nephews had driven from Reidsville to celebrate a friend's birthday at a Greensboro bar called Lucky 7's. They exited the bar when it closed at 2 a.m. and met Ms. Thaxton, Ms. Settle, and defendant's cousin Sharonda Irving ("Ms. Irving"), all of whom were friends from Reidsville. In the parking lot, an individual from another group of around five men approached Ms. Settle and asked if she would perform sexual acts for money. Defendant, his nephews, and the women rebuked the man's advances.

The three groups then exited the parking lot in their respective automobiles, with Jerard driving himself, Charles, and defendant, and Ms. Irving driving the women in her silver minivan. At a red light, the other group of men pulled up alongside Jerard's vehicle, smashed a bottle against it, and proceeded to engage in a high-speed pursuit of defendant and his nephews. Ms. Irving followed the vehicles. Jerard feared for their lives and worried that the men would shoot at his car. Detective Stanley Marrow and Officer Camara Gosmon of the Greensboro Police Department were working an off-duty security detail in the parking lot of a Greensboro nightclub called Shooters on the night of 13 March 2016. Upon seeing a police car, Jerard pulled into a parking lot in hopes that the presence of law enforcement would de-escalate the situation. Ms. Irving's vehicle arrived shortly thereafter. Defendant and his nephews quickly exited the vehicle and were immediately met with an attack from the other group of men. In the parking lot, a large fight occurred in which Markos Leonard Jones ("Mr. Jones") was killed.

Testimony from Detective Marrow, Officer Gosmon, and other responding officers tended to show that Detective Marrow and Officer Gosmon were engaged in conversation in the otherwise empty parking lot when, at approximately 2:30 a.m., they became aware of a brawl of fifteen to twenty people breaking out. This brawl consisted of up to four distinct fights between groups of several individuals. Neither officer observed a weapon being used by any of the combatants. The officers responded to the affray and, in the course of breaking up the first two fights, made separate contact with both defendant and Mr. Jones. Mr. Jones told Officer Gosmon that he was trying to break up a fight. Defendant told Detective Marrow that he was trying to get those

he knew to disperse from the parking lot. The officers called for backup, because the brawl was too large for two officers to subdue.

When the officers next saw defendant and Mr. Jones, the two were near each other and Mr. Jones turned away from defendant, bent over clutching his neck, and was bleeding profusely. Detective Marrow then asked two nearby individuals with "deep lacerations" on their lower arms who had a knife, and their response led Detective Marrow to believe it was defendant. Defendant was the closest person to Mr. Jones at this time. Defendant began to walk toward the silver minivan belonging to Ms. Irving and, ignoring Detective Marrow's repeated orders to halt, bumped aside a woman standing by an open door of the minivan and made a "furtive move" appearing to throw an item into the vehicle. Detective Marrow then arrested defendant and found a controlled substance commonly known as "bath salts" on his person. Officer Deon Carter then found a bloody knife in the driver's seat of the vehicle. Two investigating officers testified that defendant had blood on his shoes and clothing. Detective Tony Hinson testified that, during defendant's subsequent interview at the police station, he repeatedly stated that he suffered no injuries in the fight and did not need to go to the hospital.

Private investigator Edward Cobbler ("Mr. Cobbler") testified that he interviewed defendant about the events in question on 31 March 2016. Defendant admitted to him that he had obtained a knife from his nephew's car. Defendant stated that during the fight several individuals were stomping and hitting him on the ground and he grabbed the knife from his pocket and "came out swinging[,]" cutting several of his attackers. He then threw the knife in the silver minivan belonging to Ms. Irving.

A forensic analyst from the State Crime Laboratory testified that Mr. Jones' DNA was present on swabs collected from the knife and from blood spots on the interior and exterior of the silver minivan. The medical examiner who conducted the autopsy of Mr. Jones testified that his death was caused by a stab wound to his neck consistent with the bloody knife on which his DNA was found.

At the close of the State's evidence, defendant moved to dismiss the charge of first-degree murder and its lesser-included offenses. The trial court denied the motion and defendant presented his own evidence as detailed above. Defendant renewed his prior motion to dismiss at the close of all evidence. The court again denied his motion. The trial court then held an off-the-record, *in camera* charge conference with counsel for defendant and the State. An agreement was reached to instruct the jury on, among other things, possession of the "bath salt"

4-chloromethcathinone, first-degree murder, second-degree murder, and voluntary manslaughter. The court instructed the jury on these offenses, and the jury subsequently returned a verdict finding defendant guilty of voluntary manslaughter and possession of 4-chloromethcathinone.

II. Discussion

On appeal, defendant argues that: (a) the trial court erred in denying his motion to dismiss the charge of murder and the lesser-included offense of voluntary manslaughter; (b) alternatively, if this issue has not been preserved for appellate review, defendant's counsel rendered ineffective assistance in failing to preserve the issue of evidentiary sufficiency; and (c) the trial court erred in its instructions to the jury on voluntary manslaughter. We address each argument in turn.

A. Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss the charge of first-degree murder and the lesser-included offense of voluntary manslaughter because there was insufficient evidence from which a reasonable jury could convict him. We disagree.

As an initial matter, we note that defendant has properly preserved this assignment of error for our review by renewing his prior general motion to dismiss based on the evidence at the close of all evidence pursuant to N.C.R. App. P. 10(a)(1), (a)(3) (2019). Defendant's counsel made a general motion to dismiss based on the State's evidence, and proceeded to argue more specifically that the evidence warranted dismissal under the doctrine of self-defense. *See, e.g.*, *State v. Glisson*, 251 N.C. App. 844, 847, 796 S.E.2d 124, 127 (2017) ("[A] general motion to dismiss for insufficiency of the evidence preserves all issues regarding the insufficiency of the evidence, even those issues not specifically argued before the trial court.") (citation omitted); *State v. Pender*, 243 N.C. App. 142, 152-53, 776 S.E.2d 352, 360 (2015) (holding that defendant's general motion to dismiss preserved all arguments as to sufficiency of evidence to convict on all his charges, where counsel subsequently made more specific arguments concerning only some elements of some charges against defendant during his argument in support of general motion to dismiss). Therefore, we review the trial court's denial of defendant's motion to dismiss *de novo* to determine whether substantial evidence supported the charge of voluntary manslaughter. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of

the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *State v. Barfield*, 127 N.C. App. 399, 401, 489 S.E.2d 905, 907 (1997) (citation omitted).

Voluntary manslaughter is the intentional, unlawful killing of a human being either: (1) perpetrated "by reason of sudden anger or 'heat of passion' that temporarily removes reason and malice or (2) a premeditated and deliberated first-degree murder or second-degree murder for which the defendant has an imperfect right to self-defense." *State v. Alston*, 161 N.C. App. 367, 373, 588 S.E.2d 530, 535 (2003) (citations omitted), *aff'd*, 359 N.C. 61, 602 S.E.2d 674 (2004). Because defendant's conviction for voluntary manslaughter could have resulted from the jury finding that he committed second-degree murder but for an imperfect right of self-defense, we need not decide whether the State produced substantial evidence of the greater offense of first-degree murder.

Second-degree murder is a killing done with malice and without premeditation and deliberation. *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations omitted). Malice may be found from, among other things, "evidence that a person intentionally inflicted a wound that results in death." *Id.* at 451, 527 S.E.2d at 47 (citation omitted). An imperfect right of self-defense exists where: (1) "it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm[;]" (2) this belief "was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness[;]" but (3) "the defendant, without murderous intent, either was the aggressor in bringing on the affray or used excessive force." *State v. Lyons*, 340 N.C. 646, 661, 459 S.E.2d 770, 778 (1995) (citations omitted). Excessive

force is "more force than [is] necessary or reasonably appear[s] to [the defendant] to be necessary under the circumstances to protect himself from death or great bodily harm." *Id.* (citation omitted).

In the instant case, killing in the "heat of passion" and imperfect self-defense by an aggressor were not theories advanced by the State; nor was the jury instructed on such theories. Thus, to survive defendant's motion to dismiss the charge of voluntary manslaughter, the State was required to present substantial evidence that: (1) defendant intentionally inflicted a wound upon Mr. Jones, (2) proximately causing his death, (3) under an actual, reasonable belief that use of force was necessary to prevent death or great bodily harm, (4) by use of force that was greater than was, or appeared, necessary under the circumstances to prevent such harm. Viewed in a light most favorable to the State, there was substantial evidence of each of these four elements.

First, the State put forth substantial evidence that defendant intentionally wounded Mr. Jones with a knife. Viewed in a light most favorable to the State, the evidence suggested that defendant and his nephews exchanged words with another group of men leaving Lucky 7's regarding their disrespect towards defendant's female friends. Defendant and his nephews were then pursued by this group of men in a car chase that ended in the Shooter's parking lot. During the car chase, defendant obtained a knife from his nephew's car. Defendant and his nephews exited the vehicle and immediately became involved in a large brawl with their pursuers. Defendant used the knife to cut several people in the brawl, including Mr. Jones, and then secreted it into his cousin's nearby vehicle.

Second, the State put forth substantial evidence that Mr. Jones' death was proximately caused by a stab wound to his neck from the knife in question. The medical examiner who conducted Mr. Jones' autopsy testified that his death was caused by a stab wound to his neck consistent with the bloody knife on which his DNA was found.

Third, the State put forth substantial evidence that defendant stabbed Mr. Jones due to an actual, reasonable belief that use of force was necessary to defend himself from death or great bodily harm. Viewed in the State's favor, the evidence suggested that defendant and his nephews were aggressively pursued into the Shooter's parking lot by another group of men. This group of men attacked defendant in the parking lot. Several of these men continued their assault against defendant even after he fell to the ground. Defendant reasonably feared that he may face serious harm if he did not take action to repel his attackers, and he was thus entitled to use at least some degree of force.

Fourth and finally, the State put forth substantial evidence that defendant used more force than was necessary in the circumstances to defend himself against death or great bodily harm. Viewed in a light most favorable to the State, the evidence suggests that stabbing Mr. Jones in the neck escalated the nature of the brawl and exceeded what reasonably appeared necessary to defend himself in what was essentially a collection of fistfights.

The State put forth substantial evidence from which a reasonable juror could find that defendant would have committed second-degree murder, but for his entitlement to use self-defense that he abused by using excessive force. Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of voluntary manslaughter.

B. Ineffective Assistance of Counsel

[2] Because we hold that defense counsel's motions to dismiss adequately preserved defendant's challenge to sufficiency of the evidence for appellate review, counsel did not render ineffective assistance on this ground and we need not further review this claim.

C. Jury Instructions for Voluntary Manslaughter

[3] Finally, defendant argues that the trial court plainly erred in its instructions to the jury on voluntary manslaughter. We disagree.

Defendant first asserts that he has preserved this issue for appellate review. The transcript reflects that the trial court briefly described the results of the off-the-record charge conference. This included an agreement to give an instruction on first-degree murder, second-degree murder, and voluntary manslaughter without reference to any specific pattern instructions for each offense. Defendant contends that the trial court's synopsis of the charge conference, together with the similar instruction ultimately given to the jury, implies that it agreed to give N.C.P.I. Crim. 206.10 (2018). Thus, any deviation from this requested pattern instruction would be preserved for our review despite defense counsel's subsequent failure to object to the court's ultimate instructions. *See State v. Lee*, 370 N.C. 671, 676, 811 S.E.2d 563, 567 (2018) ("When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection."). Based on the record before us, we cannot infer an agreement to use a specific pattern instruction.

Accordingly, our review is limited to plain error. N.C.R. App. P. 10(a)(2), (a)(4) (2019); *State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333-34 (2012).

> 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 affect[s] the fairness, integrity or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 518, 723 S.E.2d at 334 (alteration in original) (internal quotation marks and citations omitted). "In giving jury instructions, . . . the court is not required to follow any particular form, as long as the instruction adequately explains each essential element of the offense." *State v. Fletcher*, 370 N.C. 313, 325, 807 S.E.2d 528, 537 (2017) (alteration, internal quotation marks, and citations omitted). Using this guiding principle, we find no error in the trial court's instructions.

Defendant first argues that the trial court plainly erred in its instructions on voluntary manslaughter by failing to note that the jury would have to find beyond a reasonable doubt that "(1) [defendant] killed Jones by an intentional and unlawful act[ ] and (2) [defendant]'s act was the proximate cause of Jones's [sic] death." This argument is unsupported.

In its charge to the jury, the trial court first included a simple definition of each charge it was to consider: first-degree murder, second-degree murder, and voluntary manslaughter. The court briefly described voluntary manslaughter as follows:

> Voluntarily [sic] manslaughter on the facts in this case is if you find the defendant was acting in self[-]defense, whether he used excessive force, the defendant will be excused from first[-]degree murder and second[-]degree murder on the ground of self[-]defense . . . .

Then the court went into greater detail on the doctrines of perfect self-defense and imperfect self-defense by use of excessive force, noting that "[i]f the [S]tate fails to prove that the defendant did not act in self[-]defense, you may not convict the defendant of either first[-] or second[-] degree murder. However, you may convict the defendant of voluntary manslaughter if the [S]tate proves that the defendant used excessive force." The court proceeded to enumerate each element the jury would have to find beyond a reasonable doubt in order to convict defendant of each of the three charges in succession. The full instruction on first-degree murder included a detailed explanation of proximate causation.

Together, the full instructions on second-degree murder and voluntary manslaughter were as follows:

> For you to find the defendant guilty of second[-]degree murder, the [S]tate must prove beyond a reasonable doubt that the defendant unlawfully, intentionally, and with malice wounded the victim with a deadly weapon proximately causing the victim's death.
>
> The [S]tate must also prove that the defendant did not act in self[-]defense.
>
> Voluntarily [sic] manslaughter on these facts is if you find the defendant was acting in self[-]defense and the defendant . . . used excessive force.
>
> Voluntarily [sic] manslaughter is committed if the defendant kills in self[-]defense but uses excessive force under the circumstances. The burden is on the [S]tate to prove beyond a reasonable doubt that the defendant did not act in self[-]defense.
>
> However, if the [S]tate proves beyond a reasonable doubt that the defendant, though otherwise acting in self[-]defense used excessive force, the defendant would be guilty of voluntarily [sic] manslaughter.
>
> If you do not find the defendant guilty of murder or voluntarily [sic] manslaughter, you must find the defendant not guilty.

The court then gave a final instruction on each of the three offenses, ending with the following instruction on voluntary manslaughter:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon and thereby proximately caused the victim's death, and that the defendant used excessive force, it would be your duty to find the defendant guilty of voluntarily [sic] manslaughter.
>
> However, if the [S]tate has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self[-]defense and that the defendant used excessive force, then the defendant's actions . . . would be justified by self[-]defense and it would be your duty to return a verdict of not guilty.

The instant case is not one in which the trial court made a material misstatement of the requirements to convict defendant of voluntary manslaughter and later corrected itself. *See State v. Cousins*, 289 N.C. 540, 547-50, 223 S.E.2d 338, 343-45 (1976). Rather, the trial court merely omitted the *actus reus* and proximate causation elements in some references to voluntary manslaughter directly preceded by descriptions of second-degree murder containing these elements. The trial court ended with a full recitation of the elements of voluntary manslaughter.

Read as a whole, the instructions clearly explain: (1) that, in order to find defendant guilty of second-degree murder, the State was required to prove that defendant proximately caused Mr. Jones' death by intentionally wounding him with a deadly weapon, and did not do so in self-defense; and (2) that, in order to find defendant guilty of voluntary manslaughter, the State was required to prove the same facts except that defendant acted in self-defense but used excessive force. This instruction sufficiently explained each element the jury would have to find beyond a reasonable doubt to convict defendant of voluntary manslaughter. Therefore, the trial court did not err on this ground.

Defendant further argues that "[t]he only option given to the jury to find [defendant] not guilty was based on the jury's determination that the State failed to prove beyond a reasonable doubt that [defendant] did not act in self-defense and that he did not use excessive force." This argument is without merit. The instructions clearly apprised the jury that, as with the charge of second-degree murder, it must find defendant not guilty of voluntary manslaughter if the State failed to prove as a preliminary matter that defendant intentionally wounded Mr. Jones or proximately caused his death.

Because the jury was informed of the essential elements it would have to find beyond a reasonable doubt in order to convict defendant of voluntary manslaughter, the trial court did not err in its jury instructions.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges DILLON and DIETZ concur.

STATE OF NORTH CAROLINA
v.
KAYSHAWN CHRISTOPHER JOHNSON

No. COA19-18

Filed 17 December 2019

1. Search and Seizure—consensual encounter—conversation outside gas station—weapons frisk

Defendant was not seized at the time he consented to a weapons pat-down where two police officers approached him outside a gas station, asked him to finish his loud and profane cell phone conversation elsewhere, and then asked for permission to perform the pat-down when defendant began acting nervous.

2. Search and Seizure—weapons frisk—scope of search—contraband immediately apparent

A police officer did not exceed the scope of defendant's consent for a weapons pat-down where the officer performed a flat-handed pat-down, felt objects through defendant's pocket that were immediately apparent as "corner bags" of illegal drugs, manipulated the objects for confirmation, and finally reached into defendant's pocket to remove the bags.

Appeal by defendant from order entered 6 August 2018 by Judge Charles H. Henry in Craven County Superior Court. Heard in the Court of Appeals 22 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander Walton, for the State.

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

ARROWOOD, Judge.

Kayshawn Christopher Johnson ("defendant") appeals from the trial court's 6 August 2018 order denying his motion to suppress evidence he argues was seized in violation of his rights under the Fourth Amendment to the United States Constitution. Defendant contends, *inter alia*, that the law enforcement officer who seized the evidence at issue lacked probable cause to search his person and that the warrantless search that

produced the evidence was therefore unconstitutional. For the following reasons, we affirm.

I. Background

Captain Jesse Pittman began working at the Craven County Sheriff's Office over 25 years ago. During his time with the Sheriff's Office, Captain Pittman served on road patrol for approximately eight years, during which he encountered individuals who possessed controlled substances, which he had been trained to identify. At times relevant to this appeal, Captain Pittman served in an administrative role.

On the morning of 5 April 2017, Captain Pittman stopped at a gas station to purchase a cup of coffee. He was casually dressed, but wore his badge visibly and wore a pistol on his ankle.

While walking into the station, Captain Pittman observed defendant talking loudly and using abusive language on a cellular telephone outside of the station. Inside the station, the clerk told him that she was concerned that defendant was bothering other customers with his conversation. Captain Pittman exited the station, returned to his vehicle, and called for assistance. He then approached defendant, and Sergeant William Scott arrived as backup.

After approaching, Captain Pittman identified himself as law enforcement and asked defendant to terminate his conversation. Defendant complied with his request after some delay. Captain Pittman told defendant that "he needed to finish his conversation elsewhere, [and] that it was inappropriate to be using that kind of language" in front of the gas station.

Defendant then "began to shift from foot to foot . . . [and] look side to side" and over Captain Pittman's shoulder. Seeing this, Captain Pittman became concerned that defendant might pose him danger; in his words, "his nervousness made me nervous." Captain Pittman asked defendant whether he had any weapons on his person, and he replied that he did not. Captain Pittman remained concerned, however, so he asked defendant for consent to pat him down for weapons. Defendant hesitated, but consented.

While conducting a flat-handed pat-down of defendant for weapons, Captain Pittman felt a "soft, rubbery" item "like . . . a wad of rubber bands" in defendant's pocket that was "immediately apparent to [him] that was associated with the packaging normally used to package and sell narcotics." Captain Pittman completed the pat-down for weapons and then returned to the suspicious object, manipulated it to ensure that it was

what he thought it was, and then reached into defendant's pocket. He removed three tied up plastic bag corners ("corner bags") containing a white, powdery substance he believed to be cocaine, as well as a tube of Orajel liquid. Captain Pittman handed these items to Sergeant Scott, who placed defendant under arrest for possession of a controlled substance.

Sergeant Scott field-tested the powdery substance, which tested negative for cocaine. Defendant volunteered that the powdery substance was baking soda, and that he had the Orajel to mix with the baking soda to fool potential buyers into believing the substance was cocaine. Subsequent testing by the State Bureau of Investigation corroborated defendant's statement.

On 11 December 2017, defendant was indicted for possession with intent to sell and deliver a counterfeit controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(2) (2017).

On 19 June 2018, defendant filed a motion to suppress and a supporting affidavit, arguing that: (1) he did not give consent to the pat-down for weapons or the search into his pocket; and (2) Captain Pittman's conduct in reaching into his pocket exceeded the scope of a weapons search, thereby violating his rights under the Fourth Amendment to the United States Constitution. Defendant asked the trial court to suppress any evidence obtained as a result of Captain Pittman's search. On 29 June 2019, defendant filed an addendum to his motion to suppress, arguing that he had been illegally detained, and that Captain Pittman's search was therefore void *ab initio*.

Defendant's motion to suppress came on for hearing on 3 July 2018. On 6 August 2018, the trial court entered an order denying defendant's motion (the "MTS Order"). In the MTS Order, the trial court concluded that: (1) defendant was not detained by Captain Pittman; (2) defendant consented to the pat-down for weapons; and (3) "Pittman felt something unusual in [defendant's] right pants pocket which [Captain Pittman] immediately concluded, based on his training and experience, was packaging for controlled substances[,]" and that Captain Pittman accordingly had probable cause to believe that defendant was in possession of contraband and to place defendant under arrest after seizing the contents of defendant's pocket.

That same day, defendant pleaded guilty to the offense charged, specifically reserving his right to appeal from the MTS Order as part of the plea arrangement. Defendant was sentenced to 5 to 15 months imprisonment, which the trial court suspended for 18 months of supervised

probation. Defendant timely gave oral notice of appeal from the MTS Order in open court.

II. Discussion

This case requires us to determine whether the trial court erred by concluding that Captain Pittman did not violate defendant's Fourth Amendment protection from "unreasonable searches and seizures[.]" U.S. Const. amend. IV.

Defendant argues that: (1) Captain Pittman's warrantless pat-down of defendant's person for weapons was unreasonable, because the officers seized him without reasonable suspicion that he was armed or involved in criminal activity and his consent to Captain Pittman's pat-down for weapons was invalid; or, alternatively, (2) if defendant was not seized by the officers and his consent to be patted down for weapons was valid, Captain Pittman exceeded the scope of this consent. Under either alternative, defendant contends that the evidence obtained as a result of the constitutionally impermissible search and seizure must be suppressed as fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 453-55 (1963).

We address each argument in turn.

A. Standard of Review

Appellate review of the denial of a motion to suppress "is strictly limited to determining whether the trial [court]'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 [court]'s ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Uncontested findings of fact are binding on appeal. *State v. Evans*, 251 N.C. App. 610, 613, 795 S.E.2d 444, 448 (2017). We review the trial court's conclusions of law *de novo*. *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012).

B. Seizure/Consent

[1] First, defendant argues that he was unlawfully seized by Captain Pittman and Sergeant Scott. We disagree.

An unlawful seizure invalidates any subsequent consent to search derived therefrom. *See State v. Myles*, 188 N.C. App. 42, 51, 654 S.E.2d 752, 758 (citation omitted), *aff'd*, 362 N.C. 344, 661 S.E.2d 732 (2008). Generally, when a law enforcement officer merely engages with an individual in a public place, the encounter is consensual and does not implicate Fourth Amendment concerns. *State v. Brooks*, 337 N.C. 132, 142,

446 S.E.2d 579, 585-86 (1994) (citation omitted). An initially consensual interaction with law enforcement becomes a seizure only if, under the totality of the circumstances, "a reasonable person would [not] feel free to decline the officer's request or otherwise terminate the encounter[.]" *State v. Icard*, 363 N.C. 303, 308-309, 677 S.E.2d 822, 826 (2009) (citations omitted). "Relevant circumstances include, but are not limited to, the number of officers present, whether the officer displayed a weapon, the officer's words and tone of voice, any physical contact between the officer and the individual, whether the officer retained the individual's identification or property, the location of the encounter, and whether the officer blocked the individual's path." *Id.* at 309, 677 S.E.2d at 827 (citations omitted).

Defendant concedes that his encounter with Captain Pittman began consensually, but argues that the encounter transformed into a seizure before Captain Pittman asked him for his consent to pat him down for weapons. Noting that the State conceded at the MTS Hearing that Captain Pittman lacked reasonable suspicion to believe that he was engaged in criminal activity, defendant argues that the seizure lacked legal justification and that his subsequent consent to Captain Pittman's search was therefore involuntary and insufficient to render the search lawful.

Our review of the record confirms that defendant was not seized at the time he consented to the pat-down for weapons. The trial court's findings of fact 1-4, which include the relevant circumstances leading up to defendant's consent, are not contested by defendant and are thus binding for the purposes of our analysis. *See Evans*, 251 N.C. App. at 613, 795 S.E.2d at 448. These findings of fact include that, with Sergeant Scott present as backup, Captain Pittman "told [defendant] that it would be appropriate if [defendant] wanted to continue his conversation to do it somewhere besides the front of the store[,]" "that [defendant] needed to finish his conversation elsewhere, and that it was inappropriate to be using . . . profanity at the entrance of" the gas station.

These facts do not support defendant's contention that he was seized within the meaning of the Fourth Amendment. Defendant adds that he "was cornered against the gas station wall, unable to leave, with two readily-identified police officers making demands." Without more, Captain Pittman's and Sergeant Scott's statuses as law enforcement officers do not render the encounter involuntary. *Florida v. Royer*, 460 U.S. 491, 497, 75 L. Ed. 2d 229, 236 (1983) ("Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.") (citation omitted). Furthermore, the record does not contain evidence

that defendant's egress was in any way obstructed. On the contrary, the facts found by the trial court indicate that Captain Pittman in fact encouraged defendant to leave the gas station and "finish his conversation elsewhere." It was only after defendant hesitated to leave, and thereby made Captain Pittman nervous that he might be dangerous, that he asked defendant whether he was armed and requested consent to search for weapons.

Accordingly, under the totality of these circumstances, we conclude that the trial court did not err by concluding that defendant was not seized within the meaning of the Fourth Amendment when he consented to the search for weapons, and that defendant's consent gave Captain Pittman legal justification for that search.

C. Scope of Search

[2] Second, defendant argues that Captain Pittman exceeded the scope of the consent he gave to a frisk of his person for weapons. We disagree.

Consent renders a search presumptively reasonable. *Katz v. United States*, 389 U.S. 347, 359 n.22, 19 L. Ed. 2d 576, 586 n.22 (1967) (citation omitted). However, if a law enforcement officer's search exceeds the scope of the consent given, it must be justified by other considerations to remain reasonable under the Fourth Amendment. *See State v. Stone*, 362 N.C. 50, 57, 653 S.E.2d 414, 419 (2007) (holding defendant entitled to a new trial because law enforcement officer's search exceeded the scope of defendant's consent and violated defendant's Fourth Amendment rights).

1. *Terry* Pat-Downs and the "Plain Feel" Doctrine

In, *Terry v. Ohio*, the Supreme Court established the circumstances under which an officer may briefly stop a person and conduct a limited search of their person with less than probable cause:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

> Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

392 U.S. 1, 30-31, 20 L. Ed. 2d 889, 911 (1968).

The carefully limited search of the outer clothing for weapons described in *Terry* does not allow an officer to go into a defendant's pockets to search for drugs. *Sibron v. New York*, 392 U.S. 40, 65-66, 20 L. Ed. 2d 917, 936 (1968). However, if a law enforcement officer conducting a legitimate *Terry* frisk for weapons "feels an object whose contour or mass makes its identity [as contraband] immediately apparent," the officer may seize the evidence because "there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons[.]" *Minnesota v. Dickerson*, 508 U.S. 366, 375, 124 L. Ed. 2d 334, 346 (1993) (internal citations omitted). *Dickerson* established what has since become known as the plain feel doctrine, which we discuss in further detail *infra* part 2.b.

2. Analysis

In the instant case, both defendant and the State agree that defendant only consented to a "carefully limited search of the outer clothing" for weapons pursuant to *Terry*. Defendant argues that the trial court erred in finding that Captain Pittman's pat-down complied with the accepted protocol of a *Terry* frisk for weapons and concluding that it was "immediately apparent" to Captain Pittman that the objects in defendant's pocket were contraband. We address each argument in turn.

a. Finding of Fact 5

Defendant first challenges the trial court's finding of fact 5 in the MTS Order, which asserts that the contraband was "immediately apparent" to Captain Pittman when he initially felt over the pocket during a flat-handed, *Terry*-compliant pat-down. Defendant argues that Captain Pittman's testimony establishes that he suspended his pat-down at defendant's pocket to manipulate its contents before developing probable cause to further investigate those contents.

Although Captain Pittman's testimony on direct examination makes the sequence of events less than clear, his testimony on cross-examination and redirect examination clarifies that his initial pat-down complied with *Terry*. He testified that he felt the objects in defendant's pocket with a flat hand over defendant's pants, and at that point it was immediately apparent to him that the objects were likely corner bags containing

illicit drugs. He then finished his flat-handed pat-down down defendant's legs before returning to the pocket. He further testified that, despite having already developed probable cause in his opinion to reach into the pocket, he nonetheless manipulated the pocket's contents for additional confirmation before further intruding on defendant's privacy by reaching into the pocket.

This testimony is competent evidence supporting the trial court's finding of fact that it was immediately apparent to Captain Pittman during a flat-handed *Terry* pat-down that the pocket contained contraband, *before* he subsequently manipulated the contents of the pocket. Therefore, finding of fact 5 is binding on appeal. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. We now turn to the more nuanced question of law raised by defendant's appeal.

b. "Immediately Apparent"

The question of law before us is whether the results of the presumptively-valid *Terry* frisk conducted by Captain Pittman justified his subsequent intrusion into defendant's pocket under *Dickerson* and its progeny. In other words, whether the trial court erred in its legal conclusion that it was "immediately apparent" to Captain Pittman that defendant's pocket contained contraband.

Probable cause to extend a *Terry* frisk for weapons into a search within the pockets of a suspect's clothing requires that the searching officer "feel[ ] an object whose contour or mass makes its identity [as contraband] immediately apparent[.]" *Dickerson*, 508 U.S. at 375, 124 L. Ed. 2d at 346. In *State v. Briggs*, we clarified that "immediately apparent" is synonymous with probable cause to believe the object is contraband. 140 N.C. App. 484, 493, 536 S.E.2d 858, 863 (2000).

> "Probable cause exists where the facts and circumstances within [an officer's] knowledge, and of which [he] had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed," and that evidence bearing on that offense will be found in the place to be searched.

State v. Pigford, 248 N.C. App. 797, 800, 789 S.E.2d 857, 860 (2016) (alterations in original) (internal quotation marks omitted) (quoting *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 370, 174 L. Ed. 2d 354, 361 (2009)).

The defendant relies heavily on *State v. Beveridge*, 112 N.C. App. 688, 436 S.E.2d 912 (1993), *aff'd*, 336 N.C. 601, 444 S.E.2d 223 (1994), in arguing that Captain Pittman's incursion into defendant's pocket was not supported by probable cause. However, a thorough analysis of our precedent on the plain feel doctrine reveals that *Beveridge* represents an outlying fact pattern in a body of law which otherwise strongly supports the proposition that the "immediately apparent" contraband requirement is satisfied where, in addition to the surrounding circumstances, the searching officer testifies to feeling objects consistent with the common methods of packaging controlled substances. *See State v. Rich*, No. COA 15-1204, 2016 WL 3887224, at *3 (N.C. Ct. App. July 19, 2016) ("Detective testified that, as he was lawfully patting down Defendant, he felt 'items consistent with controlled substances.' At that time, Detective had five and a half years of law enforcement experience, had worked 'a hundred or more' drug cases, and was familiar with cocaine, marijuana, and how those substances are typically packaged. In addition, Detective thought Defendant was a man wanted by the Sampson County Special Investigations Division, which investigates all drug activity in the county. Based on the totality of the circumstances regarding Detective's lawful pat down, Detective had probable cause to withdraw the object based on its plain feel through the fabric of Defendant's coat."); *State v. Wilson*, 112 N.C. App. 777, 782, 437 S.E.2d. 387, 389 (1993) (" '[G]iven what the officer knew about the storage of cocaine, his conclusion about the character of the plastic baggie [that he felt in the defendant's waistband was] reasonable.' ") (quoting *State v. Buchanan*, 178 Wis. 2d 441, 450, 504 N.W.2d 400, 404 (Wis. Ct. App. 1993)); *In re Whitley*, 122 N.C. App. 290, 293, 468 S.E.2d 610, 612 (1996) (nature of contraband immediately apparent where officer testified that: (a) during pat-down of defendant's pants, he felt an object fall from defendant's buttocks into the seat of his pants and rest upon his hand on the other side of the fabric, (b) "which with [his] personal experience as a law enforcement officer, gave [him] the probable cause to believe that it was some type of illegal substance").

The specific identity of the narcotics in a small bag containing a powdered substance need not be immediately *identifiable* by touch for its illicit nature to be "immediately apparent" to an experienced law enforcement officer conducting a pat-down. *See State v. Richmond*, 215 N.C. App. 475, 481, 715 S.E.2d 581, 585-86 (2011) ("[U]nder the plain feel doctrine, to conduct a search an officer need only have probable cause to believe the object felt during the pat down was contraband before he seized it, not that he determine the specific controlled substance before taking action. . . . [T]he probable cause determination[ ] involves more of a common-sense determination considering evidence as understood by

those versed in the field of law enforcement.") (internal quotation marks and citations omitted).

Based upon officer testimony very similar to the instant case, in *Richmond* we upheld the trial court's finding that the officer who felt small bags in the defendant's pocket had probable cause to justify further intrusion. The officer who conducted the pat-down of the defendant testified as follows:

> [Defense counsel:] So, if your hands are out, then how could you determine that what was in his pocket was some sort of contraband?
>
> [Investigator Dunkley:] Through six years of doing this job, knowing what it feels like.
>
> Q. What did it feel like?
>
> A. A knot of lumps. I don't know how else to describe it to you.
>
> Q. Did you have your hands out—just with your hands flat out, you could feel a knot of lumps?
>
> A. Yes, ma'am. They got good feeling in them.
>
> . . . .
>
> Q. And somehow with this pat-down for weapons, you felt a knot of something?
>
> A. Yes.
>
> Q. And why would that be considered contraband in your experience?
>
> . . . .
>
> A. Because I discovered that same thing many times.
>
> Q. But what was it when you discovered it before?
>
> A. Bags of marijuana, bags of cocaine, bags of crack.

Id. at 481-82, 715 S.E.2d at 586. We held this testimony supported the trial court's finding that, "[b]ased on the officer's training and experience," it was immediately apparent to him that the "bumpy bulge" in the defendant's pocket was a controlled substance, and therefore the officer's further intrusion into the defendant's pocket to retrieve the bulge was supported by probable cause. *Id.* at 482, 715 S.E.2d at 586 (alteration in original).

In contrast, the searching officer's testimony in *Beveridge* was lacking in several regards and the facts differed from the more traditional scenario where an officer feels immediately recognizable corner bags of narcotics during a pat-down. In *State v. Williams*, we aptly distinguished the facts of *Beveridge* on the following grounds:

> [I]n *Beveridge*, the officer, during his pat down of defendant, felt in defendant's front pocket a "rolled up plastic bag, it was a large size plastic bag rolled up[;][i]t was cylindrical in his pocket long." 112 N.C. App. at 689, 436 S.E.2d at 913. In its application of the plain feel doctrine, this Court noted that the officer's testimony "indicates that he did not know that the bag contained contraband until he asked the defendant to turn out his pockets and show him the contents in his hands[,]" and therefore, it "was not *immediately apparent* to him that the [baggy] held contraband." *Id.* at 696, 436 S.E.2d at 916.

No. COA09-837, 2010 WL 1957862, at *6 (N.C. Ct. App. May 18, 2010) (emphasis in original). Thus, the shape of the bag that the officer felt in the defendant's pocket differed from the traditional cluster of lumps that officers in the aforementioned cases have immediately recognized as bags of narcotics. Probable cause to extend the pat-down into a pocket search requires surrounding circumstances more indicative of illicit drug activity in the former scenario than in the latter, where the officer feels what in his experience is consistent with a bag of controlled substances. *See Briggs*, 140 N.C. App. at 493-94, 536 S.E.2d at 863-64 (where searching officer felt cigar holder, more detailed analysis of surrounding circumstances was necessary to determine whether it was immediately apparent that it held narcotics).

For example, in *Williams* we held that the officer had probable cause to remove a bag from the defendant's pocket during a pat-down even though the defendant was not suspected of being involved in any drug activity. 2010 WL 1957862, at *5-6. The searching officer was on patrol looking for a suspect in a recent armed robbery. *Id.* at *1. The defendant, who matched the suspect's description, was walking in a nearby "high-crime area." *Id.* Believing the defendant could be armed, the officer asked the defendant to remove his hands from his coat pockets. *Id.* At this point, the defendant "stopped walking and his whole body locked up[.]" *Id.* Then, after initially ignoring the officer's commands, he walked towards the officer's patrol vehicle and removed several items from his pockets and placed them on the vehicle. *Id.* In so doing, the defendant exposed the top of a plastic baggy still within his coat

pocket. *Id*. Believing the defendant to be the armed suspect from the robbery, the officer conducted a *Terry* frisk for weapons and felt in the defendant's coat pocket a bulky item that he immediately knew from his experience was consistent with a bag containing a large "crack cookie" surrounded by smaller pieces that "are broken off to be sold individually as crack rocks." *Id*.

That officer testified extensively regarding his knowledge of how crack cocaine is cooked in bulk and then broken up for individual sales, and that in his past experience bags containing bulk amounts of crack felt exactly like the object in the defendant's pocket. *Id*. We held that the officer had probable cause to extend his *Terry* pat-down and pull the bag from defendant's pocket, despite the lack of any suspicion that the defendant was involved in drug activity, primarily based upon the defendant's behavior upon being stopped and the officer's knowledge that what he felt was consistent with a "crack cookie." *Id*. at *5-6. *Williams* is unpublished. Nonetheless, it persuasively speaks to the proposition that probable cause to extend a pat-down into a pocket search requires less reliance on surrounding circumstances indicating illicit drug activity when the officer knows from experience that the object he feels is identical to a common method of packaging narcotics.

This principle applies equally to the case *sub judice*. Here, Captain Pittman and Sergeant Scott gave detailed testimony similar to that of the searching officers in *Richmond* and *Williams*. When Captain Pittman approached defendant and requested that he end his phone conversation, defendant immediately began looking nervously from side to side and over Captain Pittman's shoulder and shifting his weight from foot to foot. Captain Pittman testified that to him "that was indicative of someone who was about to flee or about to fight[,]" and that "his nervousness made [Captain Pittman] nervous." Captain Pittman then requested to pat defendant down for weapons, to which he consented after some nervous hesitation.

Captain Pittman testified that during the pat-down he "felt something unusual in [defendant's] right front pocket that was *immediately apparent* to me that was associated with the packaging normally used to package and sell narcotics. . . . I[n] my experience, I have felt that before, and [what] I liken it to is [ ] a soft, rubbery feel, maybe like a wad of rubber bands. And oftentimes in my past experience, what I have determined is that that's usually plastic bags, little corner baggies, and a lot of times those are used to [ ] package and sell crack cocaine, powder cocaine, other illicit substances, and individuals—they're dosage units, and individuals will put those

dosage units on their person. And in the past I have found those items, and so I identified it when I felt it. *It immediately came to me*, the possibility of what it could be." (emphasis added).

Sergeant Scott offered additional testimony on the nature of corner bags as the preferred method for packaging narcotics. As he explained, "They usually have the corner of the plastic baggie, because it allows the narcotic to be placed in the corner. You tear the baggie off and twist it at the top to form the little individual-type baggie." He further testified that, in his ten years of experience on the criminal patrol unit, drugs are packaged in corner bags in "seven or eight" out of every ten narcotics arrests.

Here, defendant acted nervous and shifty when approached by law enforcement officers. During a valid, consensual *Terry* pat-down, Captain Pittman felt objects in defendant's pocket that from experience he knew were consistent with corner bags, the most common means of packaging illicit drugs. Therefore, the trial court did not err in concluding that it was "immediately apparent" to Captain Pittman that the objects were contraband, and that his subsequent manipulation of the objects and search of defendant's pocket for confirmation was therefore supported by probable cause. Accordingly, the trial court did not err in denying defendant's motion to suppress the evidence taken from his pocket at trial.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order denying defendant's motion to suppress evidence obtained from the search of his person.

AFFIRMED.

Judges BERGER and COLLINS concur.

STATE OF NORTH CAROLINA
v.
BRYAN XAVIER JOHNSON, DEFENDANT

No. COA19-96

Filed 17 December 2019

Search and Seizure—reasonable suspicion—weapons frisk—traffic stop

Reasonable suspicion existed that defendant was armed and dangerous, justifying a weapons frisk of the lungeable areas of his vehicle, where the trial court expressly and impliedly found that defendant was stopped for a fictitious license tag late at night in a high-crime area, he held his hands outside his window (which in the testifying officer's experience could indicate that he had a gun), he appeared highly nervous, he used his body to shield officers' view of the right-hand area of his vehicle, and he had a history of violent crimes involving weapons.

Judge MURPHY dissenting.

Appeal by Defendant from Judgment entered 26 June 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Douglas W. Corkhill, for the State.

Kimberly P. Hoppin for Defendant Appellant.

INMAN, Judge.

Bryan Xavier Johnson ("Defendant") appeals his convictions following guilty pleas to felony cocaine possession and misdemeanor possession of drug paraphernalia. Defendant argues the trial court erred in denying a motion to suppress evidence supporting these convictions because the police officer who searched Defendant's vehicle (1) lacked reasonable suspicion to conduct the search and (2) unlawfully extended the duration of the traffic stop. After thorough review of the record and applicable law, we hold that Defendant has failed to demonstrate error.

I. FACTUAL AND PROCEDURAL BACKGROUND

The record and the evidence introduced at the suppression hearing tend to show the following:

At about 12:45 am on 14 January 2017, Officer Elliot Whitley ("Officer Whitley") and Sergeant Visiano of the Charlotte-Mecklenburg Police Department were traveling on Central Avenue in Charlotte in a single patrol car. Officer Whitley described the location as a high crime area, where he has been involved in numerous drug and firearm cases.

During their patrol, Officer Whitley observed Defendant's black Dodge Charger. Sergeant Visiano ran a computer database search of the license plate number and discovered that it was registered to a different vehicle. Officer Whitley then initiated a traffic stop of Defendant's vehicle. Defendant stopped "fairly immediately."

As Officer Whitley approached the driver's side of Defendant's vehicle, he noticed Defendant raising his hands in the air and holding them outside the window of the vehicle. Based on his seven years of experience, including almost five years with particular involvement in drug crimes, Officer Whitley took notice that Defendant was raising his hands because "sometimes it can mean [that the person has] a gun."

Officer Whitley asked Defendant for his license and registration and stated that he stopped him because his vehicle tag was registered to an Acura MDX. Officer Whitley also asked Defendant if he had a firearm; Defendant responded that he did not. As Defendant was looking for his license and the vehicle registration, he explained to Officer Whitley that he had just purchased the vehicle that day. Defendant handed Officer Whitley his license out of his wallet and then searched in the center console to retrieve the registration and the bill of sale. As Defendant was searching in the console, Officer Whitley noticed him "blading his body," as if he were "trying to conceal something that [was] to his right." Although Defendant was cooperative throughout this process, he appeared "very nervous . . . like his heart [was] beating out of his chest a little bit." Defendant eventually provided the paperwork, including an apparent bill of sale. Officer Whitley returned to the patrol car to run Defendant's information through law enforcement databases. Defendant remained in his vehicle and Sergeant Visiano stood near the right passenger door during this time.

While reviewing Defendant's information on law enforcement databases, Officer Whitley learned that from 2003 to 2009, Defendant was charged with violent crimes of robbery with a dangerous weapon,

conspiracy to commit robbery with a dangerous weapon, assault with a deadly weapon with the intent to kill, and discharging a weapon into occupied property. Officer Whitley testified that, of Defendant's criminal history, he recalled that there were two convictions, the most recent occurring in 2009. Considering the totality of the circumstances, including Defendant's placement of his hands, blading of his body, nervous behavior, and criminal history, Officer Whitley believed that Defendant "was armed and dangerous at that point."

Officer Whitley directed Defendant to step out of the vehicle and stand behind the vehicle on the driver's side. With Sergeant Visiano and two other officers who had arrived behind him, Officer Whitley conducted a consensual frisk of Defendant's person, which did not reveal a weapon. Officer Whitley then searched the "lungeable areas" of the vehicle, over the objection of Defendant. Although no weapon was discovered in the vehicle, Officer Whitley found cocaine in the center console and placed Defendant under arrest.

On 14 January 2017, Defendant was charged with felony possession with the intent to sell or deliver cocaine and misdemeanor possession of drug paraphernalia. On 25 September 2017, Defendant was indicted on a charge of felony possession of cocaine.

Defendant filed a motion to suppress the evidence seized as a result of the search, arguing that Officer Whitley lacked authority to search his vehicle. A hearing on the motion was held on 26 June 2018. Officer Whitley was the sole witness and the only other evidence presented was a video of the stop and search captured by Officer Whitley's audio visual body camera. The trial court denied Defendant's motion, and Defendant then entered guilty pleas to felony possession of cocaine and misdemeanor possession of drug paraphernalia, reserving the right to appeal the denial of his motion to suppress. The trial court entered judgment, sentencing Defendant to 8 to 19 months' imprisonment, but suspended that sentence and placed Defendant on supervised probation for 24 months.

Defendant appeals.[1]

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1. Defendant petitions this Court to issue a writ of certiorari in the event that we determine any defect in his appeal exists. Because Defendant specifically reserved his right to appeal before entering his guilty plea and gave oral notice of appeal thereafter, his appeal is properly before us, rendering his petition moot. *State v. Crandall*, __ N.C. App. __, __, 786 S.E.2d 789, 792 (2016).

II. ANALYSIS

A. Standard of Review

"When reviewing a motion to suppress, the trial court's findings of fact are conclusive and binding on appeal if supported by competent evidence." *State v. Fields*, 195 N.C. App. 740, 742-43, 673 S.E.2d 765, 767 (2009). Unchallenged findings of fact are presumed to be supported by competent evidence. *State v. Roberson*, 163 N.C. App. 129, 132, 592 S.E.2d 733, 735-36 (2004). The trial court's conclusions of law are reviewed *de novo*. *Fields*, 195 N.C. App. at 743, 673 S.E.2d at 767.

Here, the trial court made the following relevant findings of fact:

1. That on January 14, 2017, Officer E. Whitley was licensed, sworn, and on duty, and was acting as a patrol officer conducting traffic control near Central Ave. and N. Sharon Amity Rd. in Charlotte, Mecklenburg County, North Carolina.

2. That based on his training and experience working in that area for 7 years, the above mentioned area is considered by Officer Whitley to be a high crime area.

3. That while Officer Whitley observed a black Dodge Charger on N. Sharon Amity Rd. his partner ran the license plate through Department of Motor Vehicle (DMV) on that particular vehicle.

4. That upon searching the vehicle in the DMV database, officers learned that the license plate displayed on the black Dodge Charger had been issued to an Acura MDX vehicle.

5. That when the tag appeared to be fictitious, Officer Whitley initiated a traffic stop to investigate further.

6. That when Officer Whitley initiated the traffic stop, the driver stopped fairly immediately and pulled into a Burger King parking lot.

7. That the Defendant was the driver and sole passenger of the black Dodge Charger.

8. That after the Defendant stopped, he raised both of his hands in the air upon the officer's approach.

9. That Officer Whitley observed the Defendant's hands in the air, and based on Officer Whitley's training and experience, he believed that the gesture of raising one's hands in the car can indicate that a person has a gun inside the vehicle.

10. That based on his training and experience, Officer Whitley was on alert about the possible presence of a gun.

11. That when Officer Whitley explained that the stop was conducted for the fictitious tag, the Defendant immediately provided an explanation and told Officer Whitley that he had purchased the vehicle earlier that day.

12. That the Defendant presented Officer Whitley with documentation, one of which appeared to be a Bill of Sale.

13. That Officer Whitley asked the Defendant whether he had a gun and the Defendant indicated that he did not.

14. That Officer Whitley went to his patrol vehicle to check the Defendant's information in NCID, including his criminal history, and to run the VIN of the vehicle.

15. That Officer Whitley described that each step mentioned in finding 14 is part of Officer Whitley's routine practice during a traffic stop.

16. That when Officer Whitley observed the Defendant's record, there was an indication of a criminal history including: Robbery with a Dangerous Weapon, Conspiracy to Commit Robbery with a Dangerous Weapon, Assault with a Deadly Weapon with the Intent to Kill, and Discharging a Weapon into Occupied Property.

17. That Officer Whitley reasonably had concerns for his safety.

18. That when Officer Whitley returned to the vehicle, he asked the Defendant to step out.

19. That once the Defendant had exited the vehicle, Officer Whitley conducted a frisk of the Defendant for weapons and did not find any weapons.

20. That Officer Whitley asked for the Defendant's consent to frisk the vehicle for weapons, which the Defendant denied.

21. That the Defendant questioned the officer about why he would need to frisk the car.

22. That Officer Whitley conducted a weapons frisk of the lungeable areas of the Defendant's car without consent of the Defendant.

23. That during that weapons frisk, Officer Whitley found a substance in a plastic baggie in the center console which appeared to be an illegal substance.

24. That after Officer Whitley completed the weapons frisk, the Defendant was placed under arrest.

B. Sufficiency of the Findings

Defendant first argues that portions of the trial court's findings are not supported by competent evidence. In reviewing the competency of the evidence, we afford "great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and . . . render a legal decision" based on those facts. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982).

Defendant argues finding of fact 10—that "based on his training and experience, Officer Whitley was on alert about the possible presence of a gun"—is not supported by either Officer Whitley's testimony or the video evidence. Officer Whitley testified that, in his experience, when people raise their hands in the manner Defendant did, there is the possibility of a firearm being present. This testimony supports the trial court's finding.

Defendant also challenges finding of fact 17 that "Officer Whitley reasonably had concerns for his safety." This "finding," however, is a conclusion of law that requires *de novo* review, without deference to the trial court. *See State v. Campola*, __ N.C. App. __, __, 812 S.E.2d 681, 687 (2018) ("If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' *de novo*." (citation omitted)). "As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law," while findings of fact normally involve "logical reasoning through the evidentiary facts." *In re Helms*, 127 N.C. App.

505, 510, 491 S.E.2d 672, 675 (1997) (quotations and citation omitted). This "finding" is akin to the reasonable suspicion framework establishing when a police officer can reasonably search a suspect. *See Terry v. Ohio*, 392 U.S. 1, 27, 20 L. Ed. 2d 889, 909 (1968) ("[T]he issue is whether a *reasonably* prudent man in the circumstances would be warranted in the belief that his *safety* or that of others was in danger." (emphasis added)).

C. Reasonable Suspicion to Search the Vehicle

In addition to determining that Officer Whitley had a reasonable concern for his safety when he first spoke with Defendant, the trial court concluded, in relevant part, as follows:

> 1. That the motion of having hands up upon an officer's approach does not automatically incriminate an individual by itself, and the Defendant's action of showing his hands was reasonable. However, based on an officer's experience, it is reasonable for an officer to infer that the motion of hands up upon an officer's approach could indicate the presence of a weapon.
>
> 2. That based on the totality of [the] circumstances, including but not limited to: the Defendant's hands in the air upon the Officer's approach, and the Defendant's prior criminal history, that the limited frisk of the lungeable areas of the vehicle was justified.

Defendant contends that these conclusions are not supported by the findings of fact. We disagree.

Both the federal and North Carolina constitutions protect an individual's right to be free from unreasonable government searches and seizures absent probable cause. *State v. Cabbagestalk*, __ N.C. App. __, __, 830 S.E.2d 5, 9 (2019) (citing U.S. Const. amend. IV; N.C. Const. art. I, § 20). Exceptions to the requirement of probable cause include the *Terry* stop and frisk exception, which allows a police officer to stop and briefly search a suspect and the area within the suspect's grasp for weapons if: "(1) the stop, *at its initiation*, was premised on a reasonable suspicion that crime may have been afoot; and (2) the officer possessed a reasonable suspicion that the individual involved was armed and dangerous." *State v. Malachi*, __ N.C. App. __, __, 825 S.E.2d 666, 669 (2019) (citing *Terry*, 392 U.S. 1, 30-31, 20 L. Ed. 2d at 911) (emphasis added).

Reasonable suspicion must "be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed

through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (quotation marks and citation omitted). No fact is viewed in isolation, but rather a court "must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists." *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 440 (2008) (quotation marks and citations omitted). Reasonable suspicion "is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence," *Illinois v. Wardlow*, 528 U.S. 119, 123, 145 L. Ed. 2d 570, 576 (2000) (quotation marks omitted), needing only "some minimal level of objective justification." *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quotation marks and citations omitted).

Although originally applied to searches of a suspect's person, the second prong of the *Terry* analysis has been extended to encompass brief and limited searches of a vehicle, "even after the subject is removed from the vehicle." *State v. Minor*, 132 N.C. App. 478, 481, 512 S.E.2d 483, 485 (1999). As explained by the United States Supreme Court:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. . . . If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.

Michigan v. Long, 463 U.S. 1032, 1049-50, 77 L. Ed. 2d 1201, 1220 (1983) (quotation marks and citations omitted) (emphasis added). In other words, we review the frisking of a vehicle the same way we would analyze an officer's frisk of a person. *Minor*, 132 N.C. App. at 481, 512 S.E.2d at 485. Because Defendant challenges the search of his vehicle, but not the traffic stop, we only address whether Officer Whitley had reasonable suspicion that Defendant was armed and dangerous.[2]

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2. Defendant does not challenge the evidence supporting the trial court's finding of fact that Officer Whitley searched the "lungeable areas" of Defendant's vehicle. *See State v. Edwards*, 164 N.C. App. 130, 137, 595 S.E.2d 213, 218 (2004) (handcuffing the defendant

The facts that the trial court considered in denying Defendant's motion to suppress have all been established as "articulable facts" utilized in supporting an officer's reasonable suspicion. Here, the evidence shows that it was late at night, *State v. Watkins*, 337 N.C. 437, 442-43, 446 S.E.2d 67, 70-71 (1994); the stop occurred in a high crime area, *Wardlow*, 528 U.S. at 124, 145 L. Ed. 2d at 576; Defendant exhibited a hand gesture, *State v. King*, 206 N.C. App. 585, 590, 696 S.E.2d 913, 916 (2010); Defendant appeared highly nervous, *State v. Willis*, 125 N.C. App. 537, 542, 481 S.E.2d 407, 411 (1997); Defendant "bladed" his body to shield something from being seen, *Malachi*, __ N.C. App. at __, 825 S.E.2d at 671; and Defendant had a violent criminal history involving weapons. *State v. Malunda*, 230 N.C. App. 355, 360, 749 S.E.2d 280, 284 (2013).

Though the trial court's findings do not note what time the stop occurred, that Defendant appeared nervous, or that Defendant bladed his body when reaching into the console, because that evidence was uncontradicted, we may imply those findings from the ruling of the court and include them in our reasonable suspicion calculus. *Campola*, __ N.C. App. at __, 812 S.E.2d at 690; *see also State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) ("When there is no conflict in the evidence, the trial court's findings can be inferred from its decision.").

Defendant likens this case to *State v. Minor*, 132 N.C. App. 478, 481, 512 S.E.2d 483, 485 (1999), in which we analyzed the defendant's hand movements and the officers' decision to leave the defendant in the vehicle for an extended period of time prior to the search. In *Minor*, at about 4:00 in the afternoon, a police officer pulled over the vehicle in which the defendant was a passenger because its temporary tag was illegible. *Id.* at 480, 512 S.E.2d at 484. When the officer activated his blue emergency lights, he saw the defendant "move his hand toward the center console of the car." *Id.* Once the car stopped, the officer frisked the driver and started talking to him. While that was going on, another officer on the scene saw the defendant "put his hand on the door handle as if to emerge from the car, but [then] dropped his hand and remained in the car when he saw" the officer looking at him. *Id.* It was not until the

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and placing him on the curb did not prevent "the possibility of him gaining immediate control of the handgun" found in the vehicle); *State v. Braxton*, 90 N.C. App. 204, 209, 368 S.E.2d 56, 59 (1988) ("[T]hose areas of a passenger compartment of a motor vehicle where weapons might be hidden may be searched if the facts, coupled with rational inferences drawn therefrom, reasonably warrant an officer's belief that a suspect is dangerous and may gain control of weapons."). Defendant simply challenges Officer Whitley's reasonable suspicion to search any part of Defendant's vehicle based on a suspicion that he was armed and dangerous.

other officer finished speaking with the driver that the defendant was removed from the vehicle and frisked for weapons. Although a frisk of the defendant's person revealed nothing, the officers found a handgun in the interior of the vehicle and found crack cocaine upon a further search of the defendant's pocket incident to his arrest. *Id.* We held in *Minor* that the officers' decision to leave the defendant in the vehicle until the officer conversing with the driver was finished, despite the defendant's hand movements, cut against the finding that "the officers supposedly feared" that the defendant was armed and dangerous. *Id.* at 483, 512 S.E.2d at 486.

Minor is readily distinguishable from this case. Officer Whitley witnessed a vehicle with a mismatched tag driving around midnight in an area where the officer had investigated "[n]umerous drug cases as well as firearm cases." Defendant then raised his hands out of the window, a gesture Officer Whitley has found in his experience increases the probability that a firearm is present. Defendant was also "very nervous" and contorted his body in such a way that made it seem like he was trying to hide something from Officer Whitley's vantage point. Though Officer Whitley was suspicious at this point, it was not until he learned of Defendant's violent weapons related criminal history that he then decided to frisk Defendant and the lungeable areas of the vehicle.

Citing a decision by the Fourth Circuit Court of Appeals, Defendant asserts that raising one's hands out of the window is a "show of respect and an attempt to avoid confrontation" similar to that of "a young man[] keeping his eyes down during a police encounter." *United States v. Massenburg*, 654 F.3d 480, 489 (4th Cir. 2011). *Massenburg* is neither binding nor persuasive.[3] The officers in *Massenburg* thought, and the trial court agreed, that the suspect was acting nervously when he refused to make eye contact with them during their request to search him. *Id.* The Fourth Circuit disagreed, writing that a lack of eye contact brings little weight to a determination as to nervousness because "the Government often argues just the reverse: that it was suspicious when an individual looks or stares back at [officers]." *Id.* (quotation marks and citation omitted) (alteration in original).

Here, Defendant is not potentially vulnerable to such a catch-22 as the defendant in *Massenburg* and this Court has established that raising

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3. While decisions from other jurisdictions are not binding, "we may consider such decisions as persuasive authority" if found to be instructive. *State v. Fernandez*, __ N.C. App. __, __, 808 S.E.2d 362, 367 n.1 (2017) (citing *Carolina Power & Light Co. v. Emp't Sec. Comm'n of N.C.*, 363 N.C. 562, 569, 681 S.E.2d 776, 780 (2009)).

one's hands in a similar fashion is a factor to be considered in determining whether reasonable suspicion justified a search. *See King*, 206 N.C. App. at 590, 696 S.E.2d at 916 (holding reasonable suspicion existed to search the defendant when considering, *inter alia*, "the unusual gesture of [the d]efendant placing his hands out of his window."). While it could be construed that a suspect who has his hands up means to convey his concession to police authority, decisions following *Terry* have long held that reasonable suspicion is circumstance dependent and that each factor, no matter how individually innocent or inconsequential, must be viewed in conjunction with all other factors. *State v. Mangum*, __ N.C. App. __, __, 795 S.E.2d 106, 119 (2016). And as to the notion of Defendant possibly having a gun by the raising of his hands, courts are encouraged to "credit the practical experience of officers," like Officer Whitley, "who observe on a daily basis what transpires on the street." *State v. Johnson*, 246 N.C. App. 677, 692, 783 S.E.2d 753, 764 (2016) (quotations, citations, and alterations omitted). It is not within our purview to "indulge in unrealistic second guessing" of what reasonable officers should have done in light of their past histories in similar scenarios. *United States v. Sharpe*, 470 U.S. 675, 686, 84 L. Ed. 2d 605, 616 (1985).

In viewing the express and implied facts through the totality of the circumstances, we affirm the trial court's conclusion that, at the time of the search, reasonable suspicion existed that Defendant was armed and dangerous. We acknowledge that Defendant responded to each of Officer Whitley's requests and commands and cooperated with him. However, "even in the face of an otherwise cooperative defendant who present[s] no obvious signs of carrying a weapon," *State v. McRae*, 154 N.C. App. 624, 630, 573 S.E.2d 214, 219 (2002), Officer Whitley was entitled to rely on his experience and training and "formulate 'common sense conclusions' about 'the modes or patterns of operation of certain kinds of lawbreakers' in reasoning that" Defendant may have been armed. *Johnson*, 246 N.C. App. at 692, 783 S.E.2d at 764 (quoting *State v. Butler*, 331 N.C. 227, 234, 415 S.E.2d 719, 723 (1992)).

C. Extension of the Stop

Defendant also argues that Officer Whitley unlawfully extended the duration of the traffic stop. Because we have already determined that Officer Whitley had reasonable suspicion to conduct the search for weapons following the discovery of Defendant's criminal history, Defendant's argument is overruled.[4] *See State v. Myles*, 188 N.C. App.

4. Defendant concedes that Officer Whitley's criminal history check was a lawful precautionary safety measure. *See State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674

42, 45, 654 S.E.2d 752, 754 (2008) ("Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." (quotations and citation omitted)).

III. CONCLUSION

For the foregoing reasons, we hold that Defendant has failed to demonstrate that the trial court erred in denying his motion to suppress.

NO ERROR.

Judge BERGER concurs.

Judge MURPHY dissents in a separate opinion.

MURPHY, Judge, dissenting.

The officer did not have reasonable suspicion Defendant was armed and dangerous to support his search of Defendant's vehicle and I must respectfully dissent from the Majority's opinion to the contrary.

The Majority correctly sets out our binding rule regarding *Terry* searches of a vehicle's interior being appropriate where the officer has reasonable suspicion the suspect is armed and dangerous:

> [T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

Michigan v. Long, 463 U.S. 1032, 1049, 77 L. Ed. 2d 1201 (1983). However, I disagree with the Majority's analysis of the "articulable facts" of Defendant's case and cannot conclude that, under the circumstances, the police officer here possessed a reasonable belief that Defendant was dangerous.

(2017) (" '[T]he almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive.' " (quoting *United States v. McRae*, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996)).

The Majority concludes, in relevant part, "[t]he facts that the trial court considered in denying Defendant's motion to suppress have all been established as 'articulable facts' utilized in supporting an officer's reasonable suspicion." In support of this statement, the Majority cites the following facts: (1) "it was late at night" when Defendant was pulled over; (2) "the stop occurred in a high-crime area"; (3) "Defendant exhibited a hand gesture"; (4) "Defendant appeared highly nervous"; (5) "Defendant 'bladed' his body to shield something from being seen"; and (6) "Defendant had a violent criminal history involving weapons." These facts were largely not found by the trial court and are not reflected in the record.

The Majority correctly notes that, "[w]hen there is no conflict in the evidence, the trial court's findings can be inferred from its decision." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). In *Bartlett*, our Supreme Court reaffirmed the principle that, when the evidence is undisputed, certain findings can be inferred from the trial court's decision without the entry of formal findings of fact. *Id.* For example, implicit in a trial court's conclusion that a Defendant's statement to SBI agents must be suppressed because he did not initiate the dialogue with the officers is the finding that the Defendant did not initiate such a dialogue. *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996). This rule does not, however, give our appellate courts carte blanche to imply findings of fact in every instance, and I believe the Majority's reliance on the rule in this case is a misapplication of our jurisprudence. *See Moses v. Bartholomew*, 238 N.C. 714, 718, 78 S.E.2d 923, 926 (1953) (internal citation omitted) ("[The trier of facts] is the sole judge of the credibility and weight of the evidence. As a consequence, it may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same.").

As the Majority notes, the trial court did not enter findings of fact that Defendant appeared nervous—let alone "highly" nervous—or that he bladed his body—let alone that he did so "to shield something from being seen"—during the stop at issue. Based on the record, I cannot agree with the Majority that these findings may be inferred from the trial court's ruling. Unlike the trial courts in *Bartlett* and *Munsey*, the trial court here entered detailed findings of fact to support its conclusion that the officer had reasonable suspicion to believe Defendant was armed and dangerous. In entering those findings, the trial court did not enter findings regarding Defendant's purported nervousness or "blading" of his body, and I do not infer such findings from the trial court's ruling in this case. Inferring additional findings, ones that go beyond what the

trial court actually found, to rescue an otherwise insufficient ruling of the trial court is a perversion of the rule our Supreme Court described in *Bartlett*.

Additionally, I disagree with the Majority's reliance on *State v. King*, 206 N.C. App. 585, 590, 696 S.E.2d 913, 916 (2010), which is a case with facts that are distinguishable from those here. In *King*, the defendant held "both of his hands out of the window as [the officer] approached the vehicle, and without any question or inquiry, [the d]efendant immediately told [the officer] that he had a gun sitting on the dashboard." *King*, 206 N.C. App at 587, 696 S.E.2d at 914. In weighing the factual circumstances supporting the officer's reasonable suspicion that the defendant was dangerous, we stated:

> The combination of this loaded handgun, the late hour, the odd manner by which Defendant and his passenger continued to look at Cecil as they passed the officer, and the unusual gesture of Defendant placing his hands out of his window, gave rise to far more than a hunch that Defendant might have been armed.

Id. at 590, 696 S.E.2d at 916. The Majority cites *King* as support for its contention that "Defendant made a hand gesture" that supported the officer's reasonable suspicion that he was armed and dangerous. I do not disagree that Defendant's "hand gesture" may enter our calculus, but I note the facts of *King* are distinguishable from those here, where Defendant raised his hands when the officer approached and then acted politely and cooperatively for the remainder of the stop.

Here, where the Majority lists six "articulable facts" supporting the officer's reasonable suspicion Defendant was armed and dangerous, I see far fewer facts to support such a conclusion. Defendant was pulled over late at night[1] in what the officer described as a "high crime area," that he raised his hands in a manner the officer believed was "sometimes" or "potentially" indicative of possession of a firearm, and that he had a criminal record that included violent offenses involving weapons. Those facts do not provide a sufficient basis from which the officer may have reasonably suspected Defendant to be armed and dangerous.

I believe the Majority would agree that a holding that any traffic stop that occurs late at night in a "high crime area" is grounds for a *Terry* frisk

1. This is another fact that the trial court did not specifically find. However, the time of a traffic stop is a verifiable and purely objective fact that I am much more comfortable relying upon without a formal finding from the trial court.

of the stopped vehicle—even just the areas within the driver's immediate reach—grants officers overbroad authority to search. When I add to that scenario the combined weight of Defendant's action of raising his hands upon being pulled over and his criminal record, the facts of this case are still not enough for me to conclude the officer could articulate, based on demonstrable facts, reasonable suspicion Defendant was armed and dangerous at the time the officer decided to conduct his search. Specifically, in regard to his criminal record, Defendant had paid his debt to society for his previous transgressions and convictions are not meant to be a lifetime scarlet letter or permanent justification for police to treat that individual with a different class of liberty under our State or Federal Constitutions. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
KENNETH PIERRE, DEFENDANT

No. COA18-1088

Filed 17 December 2019

Firearms and Other Weapons—discharging firearm into occupied dwelling—jury instructions—acting in concert—prejudice analysis

Where the State presented exceedingly strong evidence of defendant's guilt of discharging a firearm into an occupied dwelling, which was neither in dispute nor subject to serious credibility-related questions, no prejudicial error occurred by the inclusion of a jury instruction on acting in concert, even if the instruction was not supported by the evidence.

Appeal by Defendant from judgments entered 14 May 2018 by Judge Rebecca W. Holt in Orange County Superior Court. Heard in the Court of Appeals 9 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Thomas H. Moore, for the State.

Coleman, Gledhill, Hargrave, Merritt & Rainsford, P.C., by James Rainsford and Cyrus Griswold, for defendant-appellant.

MURPHY, Judge.

When a trial court errs in instructing the jury on a theory of guilt that was not supported by the evidence adduced at trial, we will not order a new trial unless the defendant can show the instructional error was prejudicial. To prove such an error prejudicial, the defendant must show that the State failed to present exceedingly strong evidence of his guilt or that that evidence was either in dispute or subject to serious credibility-related questions. Here, the State presented exceedingly strong evidence of Defendant's guilt that was neither in dispute nor subject to serious credibility-related questions. We hold the trial court committed no prejudicial error.

BACKGROUND

On 17 May 2016, Willie Stroud ("Stroud") and Bernard Degraffenreidt ("Bernard") hosted two young women, Jermisha Baldwin ("Jermisha") and Defendant's niece, Kendretta Pierre ("Kendretta"), and also Bernard's brother, Derrick Degraffenreidt, at their home in Chapel Hill. Stroud, the owner of the house, called local police during the visit and claimed one of the women had stolen his wallet. Chapel Hill Police reported to the house and identified Jermisha and Kendretta as the female houseguests. The officers interviewed the women, who denied taking Stroud's wallet, and left after Stroud informed them that he did not wish to file any criminal charges. The same group was back at Stroud's house the following day.

During the second visit, Kendretta "went into a spell . . . [and] started throwing things off the [kitchen] table. She then went in the living room and fell down on the floor and started kicking." This presumably occurred as a result of Kendretta's drinking and consuming "synthetic weed." Kendretta and Jermisha left the house shortly after Kendretta regained her faculties, and "about an hour later" Defendant, Kenneth Pierre, arrived at Stroud's house.

Defendant was driving a car with at least two passengers. After parking in the driveway, Defendant approached Stroud and Bernard, who were on the porch when he arrived. Both Stroud and Bernard testified that Defendant asked which one of them was Stroud and accused Stroud of trying to take sexual advantage of Kendretta. Defendant then said, "I'm coming to kill—kill Willie[,]" and reached down to draw a handgun from a holster on his waist. Stroud struggled with Defendant to keep him from drawing the gun, but, eventually, Defendant was able to draw his gun and aim it at Stroud, who fled inside his home. At this point,

Bernard, who was already inside the house, tried to call the police, "but my nerves were so bad I couldn't even hit the numbers right."

Bernard believed Defendant had left and went to the door to see if he had, but Stroud advised him that Defendant was still there and knocked Bernard to the ground. "[T]hat's when the shots went off." Multiple gunshots were fired and one entered Stroud's house, landing in a dresser inside Stroud's bedroom. After the gunshots, Stroud and Bernard heard what they assumed was Defendant's car driving away. Shortly thereafter, Stroud's son, Willie Stroud Jr., and a neighbor both reported the shooting to police.

During their investigation of the crime scene, police found two .40-caliber bullet casings in the street in front of Stroud's house and also recovered a .40-caliber bullet from a dresser inside his home. Stroud told the officers he did not know the man who had confronted him, but noted that the man identified himself as "KP" and that he thought the man was related to one of the women who had visited his house earlier that day. While police remained on the scene, Stroud called his niece, Retillias Byrd Johnson ("Retillias"), and Retillias traveled to Stroud's house to comfort him and assist in cleaning up the house.

When Retillias arrived, Stroud told her what happened, and that the perpetrator had identified himself as "KP." Retillias testified:

> I told him that I only knew one KP. So I actually pulled out my cell phone. And I pulled up my Facebook; and I showed him a picture of KP, which was actually [Defendant,] Kenneth Pierre. And from that picture, the Facebook photo I showed him, he told me that's who he had just finished wrestling with. So that's how we knew exactly who it was.

Suspecting Defendant was the person who had shot into Stroud's home, Retillias confronted Defendant about the incident the next time the two saw each other, and Defendant told her he had been the one who fired the weapon. Retillias testified that she asked Defendant:

> "Why did you go and shoot up my uncle's house and why were you wrestling with him --"
>
> Q: Okay. And he told you that he went there?
>
> [Retillias:] --that he could have shot him. Yes.
>
> Q: And shot and had a firearm?
>
> [Retillias:] And that he was upset. Yes.

Defendant was eventually arrested and charged with discharging a firearm into an occupied dwelling and possession of a firearm by a convicted felon, and the grand jury for Orange County subsequently indicted Defendant on the same. Defendant was tried by a jury in Orange County Superior Court. During the conference regarding jury instructions, Defendant objected to the inclusion of an acting in concert instruction for the discharging a firearm into an occupied dwelling charge. The trial court overruled that objection and also chose not to grant Defendant's request to include a separate box on the verdict sheet that the jury could check if they found him guilty by reason of his acting in concert with another individual.[1]

The jury found Defendant guilty of both discharging a firearm into an occupied dwelling and possession of a firearm by a felon. Defendant was sentenced to consecutive active sentences of 99 to 131 months and 18 to 31 months, respectively, for his two convictions. Defendant timely filed notice of appeal.

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1. The trial court instructed the jury:

> The defendant has been charged with discharging a firearm into an occupied dwelling. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: First, that the defendant willfully or wantonly discharged a firearm into a dwelling – an act is willful or wanton when it is done intentionally with knowledge or a reasonable ground to believe that the act would endanger the rights or safety of others; second, that the dwelling was occupied by one or more persons at the time the firearm was discharged; and third, that the defendant knew or had reasonable grounds to believe that the dwelling was occupied by one or more persons.
>
> For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit discharging a firearm into an occupied dwelling, each of them, if actually or constructively present, is guilty of the crime. A defendant is not guilty of a crime merely because the defendant is present at the scene, even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty, the defendant must aid or actively encourage the person committing the crime or in some way communicate to another person the defendant's intention to assist in its commission.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant, acting either by himself or together with others, willfully or wantonly discharged a firearm into a dwelling while it was occupied by one or more persons and that the defendant knew or had reasonable grounds to believe that it was occupied by one or more persons, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

ANALYSIS

Defendant raises two interrelated arguments on appeal: (1) the trial court erred by instructing the jury on acting in concert because that charge was not supported by the evidence; and (2) he is entitled to a new trial on the charge of discharging a firearm into an occupied dwelling because the trial court's error was prejudicial. We hold the trial court committed no prejudicial error in its jury instructions.

"It is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "The question of whether a trial court erred in instructing the jury is a question of law reviewed *de novo*." *State v. McGee*, 234 N.C. App. 285, 287, 758 S.E.2d 661, 663 (2014). Additionally, we review such challenges for harmless error. N.C.G.S. § 15A-1443(a) (2017); *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018). Our Supreme Court has stated:

> As a general proposition, a defendant seeking to obtain appellate relief on the basis of an error to which he or she lodged an appropriate contemporaneous objection at trial must establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a)(2017). However, the history of this Court's decisions in cases involving the submission of similar erroneous instructions and our consistent insistence that jury verdicts concerning a defendant's guilt or innocence have an adequate evidentiary foundation persuade us that instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure that there is no "reasonable possibility" that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.

Malachi, 371 N.C. at 738, 821 S.E.2d at 421 (internal footnote omitted).

Defendant argues the trial court committed prejudicial or harmful error by instructing the jury on acting in concert when there was

insufficient evidence to support that instruction. Even if the trial court's instruction on acting in concert was erroneous because it was unsupported by the evidence presented at trial, we cannot hold such an error was prejudicial.

Since it was decided in December 2018, *State v. Malachi* has not received much attention in our appellate courts. Our published cases interpreting the *Malachi* decision coupled with *Malachi* inform the structure of our analysis in deciding whether an unsupported jury instruction was prejudicial. *Id.*; *see also State v. Steen*, 826 S.E.2d 478 (N.C. Ct. App. 2019); *State v. Chevallier*, 824 S.E.2d 440, 450 (N.C. Ct. App. 2019) (holding that "[g]iven the strong, undisputed, and credible evidence of [the d]efendant's possession of a firearm based upon a constructive-firearm-possession theory, even if the trial court erred by also instructing on actual possession, [the d]efendant has failed to satisfy his burden of demonstrating prejudice"). The analysis is twofold: first we ask whether the State presented "exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support" from the evidence presented; and, second, we must ensure that "the State's evidence is neither in dispute nor subject to serious credibility-related questions[.]" *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421. If we are satisfied that those conditions have been met, we must conclude "it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." *Id.*

A. Exceedingly Strong Evidence

Here, the evidence of Defendant's guilt was exceedingly strong. Testimony of both Stroud and Bernard showed Defendant drove to Stroud's house and approached the front porch alone with a holstered firearm on his hip. Defendant then threatened to kill Stroud, accused him of trying to take sexual advantage of Defendant's niece, and then brandished a handgun and pointed it at him. After Stroud was able to get inside his house he told Bernard not to go back outside because Defendant was still there. Stroud tackled Bernard to the ground because he still heard someone outside and shortly thereafter multiple gunshots were fired into the house.

Bernard's testimony identified Defendant as the person who approached him and Stroud on the porch on the evening in question:

> [Bernard:] We was sitting on the porch talking. And we seen this little car pull up; looked like a station wagon; looked like a Kia . . . pulled up. Somebody hollered out the window and said, "That's that – that's that bald-headed

> fucker on the porch. Willie. Willie." And I looked at Willie. I said, "Willie, do you know them?" Willie said, "I don't know them." So they took the car and pulled up in the back of the house, came up through in our driveway, pulled up in the back.
>
> Q: Could you tell how many people were in the car?
>
> [Bernard:] It was three people in the back, a guy in the back, one sitting on the passenger side, and the young man there was driving.
>
> Q: Okay.
>
> [Bernard:] So I was sitting on the porch on the corner of the porch like this. He comes up on the side –
>
> Q: When you say "he," who do you mean?
>
> [Bernard:] Mr. KP. Mr. KP came up on the side.
>
> Q: Okay. And you say "the young man over there," are you pointing out somebody in the courtroom?
>
> [Bernard:] Yes, sir.
>
> Q: And who is that person?
>
> [Bernard:] That's Mr. KP right here (indicating).

Additionally, Retillias gave the following testimony in describing the conversation she had with Defendant after the incident at Stroud's home:

> [Retillias:] . . . I said, "Kenneth, do you know that was my uncle whose house that you shot up, or whatever?" He said he did not know that that was my uncle. . . . And he went on to explain about his nieces and the situation that occurred and that it was inappropriate behavior with my uncle. And so he in return went to confront my uncle there where they had their altercation.
>
> . . .
>
> Me and Kenny really didn't have a detailed conversation about, you know, anything pertaining to him wresting [sic] or attacking; I just really questioned him on why, 'Why did you do it?' "
>
> Q: Why did you shoot his house?

> [Retillias:] Yeah. "Why did you go and shoot up my uncle's house and why were you wrestling with him --"
>
> Q: Okay. And he told you that he went there?
>
> [Retillias:] --that he could have shot him. Yes.
>
> Q: And shot and had a firearm?
>
> [Retillias:] And that he was upset. Yes.

Retillias's testimony, coupled with Stroud and Bernard's testimony placing Defendant at the scene and threatening to kill Stroud, brandishing a firearm, and engaging in an altercation with Stroud over the firearm, amounts to exceedingly strong evidence that Defendant committed the offense of discharging a firearm into an occupied dwelling. Having determined as much, we may only find that the trial court's instructional error was prejudicial if the aforementioned evidence is either "in dispute [or] subject to serious credibility-related questions[.]" *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421.

B. Evidence in Dispute

Malachi requires us to determine whether the evidence that provides exceedingly strong support of Defendant's guilt is in dispute. *Id.* The evidence providing support for Defendant's guilt is not in dispute, and Defendant makes no argument to the contrary. Defendant argues "the evidence that Defendant drove the vehicle involved in the shooting is in dispute, [because] Bernard . . . saw Defendant driving a Kia, . . . Stroud saw him driving a dark grey Jetta GTI hatchback with dark tinted windows, and [Stroud's neighbor] saw a white Honda moments after he heard gunshots." However, the testimony regarding the color or model of the car Defendant was allegedly driving on the night in question is not material to Defendant's conviction. That evidence is in dispute, but it does not create a material dispute that would render the instruction prejudicially harmful under *Malachi*.

Again, *Malachi* states the trial court does not commit prejudicial error "in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions[.]" *Id.* A broad reading of this language could be that the State must present exceedingly strong evidence of Defendant's guilt and *none* of the State's overall body of evidence may be in dispute or subject to serious credibility-related questions. However, we feel the more accurate interpretation is that the latter two conditions operate

on the same body of evidence described in the first part of the sentence; i.e., the evidence that provides strong support cannot be in dispute or subject to serious credibility-related questions.

Aside from the evidence regarding the car, Defendant does not argue any other evidence was in dispute and we do not see where any of the exceedingly strong evidence material to the theory of Defendant's conviction was disputed at trial.

C. Serious Credibility-Related Questions

If the material evidence is not in dispute, we must next review the same evidence to determine whether it is "subject to serious credibility-related questions." *Id*. This issue is closer than the previous two.

Defendant's attorney effectively impeached Retillias after she testified that Defendant confessed to her that he "shot up" Stroud's house on the night in question. After Retillias's testimony (which is set out above), Defense counsel raised a few reasons Retillias may be biased against Defendant; namely, two occasions in which he or his friends and family seemingly wronged Retillias's mother. Retillias answered questions about both instances and stated that she did not "have any hard feelings" toward Defendant stemming from those incidents. Then, at the conclusion of Retillias's testimony on re-direct, she was asked if she had animosity toward Defendant and testified:

> [Retillias:] No, most definitely not. And in all -- I mean, I -- I wish [Defendant] the best. He knows I -- I hate it. I hate this. I hate this, but I have been asked to come here and do something that affects my life and affects my children as well. And I have to be honest, and that's just is what it is. I asked them could I not come and it was a "no" so I had to be here. So this is really painful for me to sit here and have to just speak, in all honesty, on the situation that occurred because I do care for [Defendant]. I care for [Defendant]. I care for him. I care for his family. I -- I just can't believe this situation occurred.
>
> [District Attorney:] Yes, ma'am. I understand. Thank you very much.
>
> [District Attorney]: That's all the questions I have.
>
> THE COURT: Recross?

[Defense Attorney]: No, Your Honor.

THE COURT: All right. Ma'am, you may step down.

Reading Retillias's testimony in its entirety, we cannot conclude it is "subject to *serious* credibility-related questions[.]" *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421 (emphasis added). While she was impeached during cross-examination, she answered the questions about her alleged bias head-on and flatly denied having any bias against Defendant, going as far as to say she cares for him and his family. We find this testimony remediates the seriousness of any credibility-related questions.

We are cognizant of the concern that we "should . . . take care to refrain from conducting [our] own examination of witness credibility issues." *Malachi*, 371 N.C. at 742, 821 S.E.2d at 423 (Morgan, J. dissenting). However, our Supreme Court's mandate in *Malachi* is clear: if we are satisfied the State has presented exceedingly strong evidence of Defendant's guilt, we are only to find harmful error where the evidence is either in dispute or "subject to *serious* credibility-related questions[.]" *Malachi*, 371 N.C. at 738, 821 S.E.2d at 421 (emphasis added.) Just as we cannot conclude the relevant evidence is subject to dispute, we cannot hold Retillias's testimony is subject to serious credibility-related questions.

CONCLUSION

Assuming *arguendo* the trial court's instruction on acting in concert was erroneous, we cannot conclude that error was prejudicial. The State presented exceedingly strong evidence of Defendant's guilt that was neither in dispute nor subject to serious credibility-related questions. Therefore, our Supreme Court's holding in *Malachi* requires us to hold the trial court committed no prejudicial error.

NO PREJUDICIAL ERROR.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD SMITH

No. COA18-1268

Filed 17 December 2019

Appeal and Error—jury instructions—no objection—failure to argue plain error—waiver

Defendant's failure to object to the trial court's jury instructions on solicitation to commit first-degree murder and his failure to assert plain error on appeal precluded review of his argument that the jury should have been instructed to make a special finding about which theory of malice supported the verdict, an omission which he asserted resulted in a higher felony classification at sentencing.

Appeal by defendant from judgment entered 16 February 2018 by Judge J. Carlton Cole in Pitt County Superior Court. Heard in the Court of Appeals 8 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexandra M. Hightower, for the State.

W. Michael Spivey for defendant-appellant.

ZACHARY, Judge.

Defendant James Edward Smith appeals from a judgment entered upon a jury's verdict finding him guilty of solicitation to commit first-degree murder. Upon careful review, we conclude Defendant received a fair trial, free from error.

Background

On 20 July 2017, Defendant revealed to Clayton Edwards—an individual who Defendant had recently met through a mutual connection—that he wanted his wife to be killed, and he offered to pay Edwards to kill her. Defendant told Edwards to "basically kill her in cold blood, walk up and shoot her," and provided him with details of where the killing should take place. These requests continued over the next three days.

Edwards contacted Pitt County Crime Stoppers and informed them that he "had information on someone who wanted someone killed." In

conjunction with the Greenville Police Department, Edwards scheduled a meeting with Defendant for 23 July 2017, during which Edwards would wear audio and video recording devices. At the meeting, the two men spoke "more in depth about what [Defendant] wanted [Edwards] to do."

Later that day, a Greenville police officer served Defendant with an arrest warrant for solicitation to commit first-degree murder. Two weeks later, the Pitt County grand jury returned an indictment formally charging him with the same offense. Defendant's case came on for trial before the Honorable J. Carlton Cole in Pitt County Superior Court on 12 February 2018. After a four-day trial, the jury found Defendant guilty of solicitation to commit first-degree murder, a Class C felony. The trial court sentenced defendant, a prior record level I offender, to a presumptive term of 73 to 100 months in the custody of the North Carolina Division of Adult Correction. Defendant gave notice of appeal in open court.

Discussion

Defendant's brief states the issue presented as follows: "The trial court erred by sentencing [Defendant] for a Class C felony where the jury convicted [him] for solicitation to commit second-degree murder but did not determine the nature of the element of malice." To properly analyze Defendant's appeal, we first review the crimes of solicitation and murder.

A. Solicitation

Our Supreme Court has "defined the crime of solicitation as counseling, enticing or inducing another to commit a crime." *State v. Kemmerlin*, 356 N.C. 446, 475, 573 S.E.2d 870, 890 (2002) (citation and quotation marks omitted). Solicitation is a specific-intent crime, *State v. Davis*, 110 N.C. App. 272, 275, 429 S.E.2d 403, 404, *disc. review denied*, 334 N.C. 436, 433 S.E.2d 180 (1993), and the offense is complete upon the request. *See generally* 2 Wayne R. LaFave, Substantive Criminal Law § 11.1, at 264 (3d ed. 2018) ("For the crime of solicitation to be completed, it is only necessary that the actor, with intent that another person commit a crime, have enticed, advised, incited, ordered or otherwise encouraged that person to commit a crime."). Thus, the crime is committed "even though the solicitation is of no effect and the crime solicited is never committed." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977).

Solicitation to commit a felony is punished as follows:

> Unless a different classification is expressly stated, a person who solicits another person to commit a felony is

> guilty of a felony that is two classes lower than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor.

N.C. Gen. Stat. § 14-2.6(a).

B. Murder

North Carolina recognizes first-degree murder and second-degree murder. *State v. Watson*, 338 N.C. 168, 176, 449 S.E.2d 694, 699 (1994), *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995).

> The elements of first-degree murder are: (1) the unlawful killing, (2) of another human being, (3) with malice, and (4) with premeditation and deliberation. The elements of second-degree murder, on the other hand, are: (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation.

State v. Coble, 351 N.C. 448, 449, 527 S.E.2d 45, 46 (2000) (citations omitted).

First-degree murder is a specific-intent crime because it includes as an essential element the intent to kill, whereas second-degree murder is a general-intent crime because it lacks the essential element of an intent to kill. *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994) (noting that general-intent crimes "only require the doing of some act"), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). However, malice is an element of both first- and second-degree murder, and may be established in at least three ways:

> (1) actual malice, meaning hatred, ill-will or spite; (2) an inherently dangerous act done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief; or (3) that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Arrington, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018) (quotation marks omitted).

Prior to 2012, all second-degree murders in North Carolina were classified as Class B2 felonies. *See* N.C. Gen. Stat. § 14-17 (2011). However, in 2012, the General Assembly amended N.C. Gen. Stat. § 14-17 by adding subsection (b), thereby elevating most second-degree murders to Class B1 felonies, save for two statutory exceptions. *See* 2012 N.C. Sess. Laws 781, 782, ch. 165, § 1. Subsection (b) provides that:

> (b) A murder other than described in subsection (a) [first-degree murder defined] or (a1) [presumption of first-degree murder where prior conviction for an act of domestic violence against the victim] of this section or in G.S. 14-23.2 [murder of an unborn child] shall be deemed second degree murder. Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> > (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done 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.
> >
> > (2) The murder is one that was proximately caused by the unlawful distribution of [certain controlled substances], and the ingestion of such substance caused the death of the user.

N.C. Gen. Stat. § 14-17(b) (2017).

Our Supreme Court has observed that the text of N.C. Gen. Stat. § 14-17 shows the legislature's intent "to elevate second-degree murder to a B1 offense, except in the two limited factual scenarios" addressed in subsection (b). *Arrington*, 371 N.C. at 523-24, 819 S.E.2d at 333. With this amendment, "the legislature assigned culpability to convicted offenders depending upon the nature of their conduct at the time of the homicide resulting in their second-degree murder convictions and the intent with which they acted at that time." *Id.* at 522-23, 819 S.E.2d at 332. In doing so, "the legislature distinguishe[d] between second-degree murders that involve an intent to harm (actual malice or the intent to take a life without justification) versus the less culpable ones that involve recklessness (an inherently dangerous act or omission) or a drug overdose." *Id.* at 524, 819 S.E.2d at 333.

C. Analysis

The parties are in disagreement over the issue before us. Defendant asserts that the trial court erred in sentencing him. The State counters that this is actually an unpreserved challenge to the jury instructions. We agree with the State.

Defendant's argument is this: that although the jury was instructed on solicitation to commit the felony of common-law (or second-degree) murder, the trial court failed to instruct the jury "to make any special finding about the nature of the malice supporting its finding that [Defendant] solicited second-degree murder." Absent any special findings, Defendant contends that he should have been convicted of soliciting a Class B2 felony. He would accordingly have us conclude that he should have been sentenced for a Class D felony, and that we should review his sentence *de novo*.

Defendant creatively sidesteps the fact that he was not charged with murder, but with solicitation to commit murder. The jury was not required to find any of the elements of murder. As previously explained, one may be guilty of solicitation regardless of whether the solicited crime—murder, in this case—actually occurs. *See Furr*, 292 N.C. at 720, 235 S.E.2d at 199. The crime was in the asking. Thus, Defendant's appeal begins and ends with the jury instruction on the offense of solicitation, and not with his subsequent sentencing.

Here, the trial court properly instructed the jury on the offense of solicitation to commit murder:

> The Defendant has been charged with solicitation to commit murder. For you to find the Defendant guilty of this offense, the State must prove two things beyond a reasonable doubt:
>
> First, that the Defendant solicited, that is, urged or tried to persuade another person to murder the victim. Murder is the unlawful killing of another with malice.
>
> And second, that the Defendant intended that the person he solicited—solicited murder—that the Defendant intended that the person he solicited murder the victim.

Defendant failed to object to these instructions at trial. Our appellate rules make clear that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]" N.C.R. App. P. 10(a)(1). Unpreserved issues related

to jury instructions in criminal cases may nevertheless be reviewed where "the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4); *see also State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). "However, since Defendant's brief failed to specifically and distinctly allege that the jury instruction amounted to plain error, he is not entitled to appellate review under this rule either." *State v. Christian*, 150 N.C. App. 77, 84, 562 S.E.2d 568, 573, *disc. review denied*, 356 N.C. 168, 568 S.E.2d 618 (2002). Therefore, he has waived appellate review.

Conclusion

In that Defendant's entire appeal was predicated on an unpreserved issue and he failed to request plain error review, his conviction and subsequent sentence shall remain undisturbed.

NO ERROR.

Judges DILLON and BERGER concur.

STATE OF NORTH CAROLINA
v.
JERVARE MOQUAN WISE, DEFENDANT

No. COA19-385

Filed 17 December 2019

Robbery—attempted robbery with a firearm—jury instruction—lesser-included offense—common law robbery

In a prosecution for attempted robbery with a firearm, where at least some evidence indicated that defendant tried to rob a convenience store with a BB gun (which is not considered a "firearm" or "dangerous weapon" under the robbery statute), the trial court erred by not instructing the jury on the lesser-included offense of common law robbery.

Appeal by Defendant from judgment entered 11 October 2018 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for the State.

Cooley Law Office, by Craig M. Cooley, for the Defendant.

DILLON, Judge.

Defendant Jervare Moquan Wise appeals from a judgment finding him guilty of attempted robbery with a dangerous weapon. After careful review, we conclude that the trial court committed reversible error by not instructing the jury on the lesser included offenses of common law robbery.

I. Background

Defendant was arrested and tried by a jury for attempted robbery with a firearm based on events that occurred at a convenience store.

The evidence introduced by the State at trial tended to show as follows:

On 30 March 2016, Defendant and another man entered a convenience store shortly before midnight. Defendant jumped over the counter, pointed what appeared to be a gun at the store clerk and demanded money. When the store clerk replied that he had already put the register's money in the safe, both men fled the scene.

The detective testified at trial that during the investigation Defendant admitted to the attempted robbery but claimed that the gun was actually a BB gun painted black. No gun or BB gun was ever recovered.

During the charge conference, Defendant requested jury instructions on attempted common law robbery and simple assault, lesser included offenses of attempted robbery with a dangerous weapon. The trial court denied Defendant's request and instructed the jury on the charge of attempted robbery with a firearm.

Defendant was found guilty of attempted robbery with a firearm. Defendant timely appealed to our Court.

II. Analysis

Defendant argues that the trial court erred in refusing to give jury instructions concerning simple assault and attempted common law robbery. We review this argument *de novo*. *See, e.g.*, *State v. Ligon*, 332 N.C. 224, 241-42, 420 S.E.2d 136, 146-47 (1992).

Defendant, here, was convicted of armed robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87. The crime of "common law robbery" is a lesser included offense of armed robbery with a dangerous

weapon, the difference being that common law robbery does not require proof that the defendant used a firearm or dangerous weapon. *State v. Langley*, 371 N.C. 389, 396, 817 S.E.2d 191, 197 (2018).

Our Supreme Court has held that a trial court is required to instruct the jury on lesser included offenses "whenever there is *some* evidence to support it," *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981) (emphasis in original) (citations omitted), and that "[t]he test is whether there is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Millsaps*, 356 N.C. 556, 562, 572 S.E.2d 767, 772 (2002) (internal marks omitted) (citation omitted).

Our Supreme Court has further held that "the failure to [instruct the jury on a lesser included offense] constitutes reversible error that cannot be cured by a verdict finding the defendant guilty of the greater offense." *State v. Lawrence*, 352 N.C. 1, 19, 530 S.E.2d 807, 819 (2000).

With regard to robbery, our Supreme Court has instructed that when the implement used appears to be a firearm, the law presumes, in the absence of any evidence to the contrary, that the implement is, in fact, a firearm, whereupon no instruction for common law robbery need be given. *See, e.g.*, *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985). However, if there is *any evidence* – whether offered by the State or by the defendant – that the implement used was *not* a deadly weapon, then the trial court *must* also instruct the jury on common law robbery:

> The mandatory presumption [that the implement was, in fact, a deadly weapon], however, is of the type which merely requires the defendant to come forward with some evidence (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts. Therefore, when any evidence is introduced tending to show that the life of the victim was not endangered or threatened, the mandatory presumption disappears, leaving only a mere permissive inference. . . . Such evidence . . . require[s] the trial court to permit the jury also to consider a possible verdict of guilty of the lesser included offense of common law robbery.

Id. at 783-84, 324 S.E.2d at 844-45 (emphasis in the original).

In this case, Defendant argued that he was entitled to an instruction on the lesser included offense of common law robbery because the State

put forth *some* evidence that the weapon used was a BB gun and a BB gun is not a dangerous weapon.

The resolution of this case is controlled by our Supreme Court's holding in *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982). In that case, the State put forth evidence that the weapon used was a .22 rifle. *Id.* at 649, 290 S.E.2d at 615. But the State also put on evidence from another witness that the weapon used was a BB gun. *Id.* at 650, 290 S.E.2d at 616. Our Supreme Court held that the latter testimony "that the rifle was a BB rifle constituted affirmative evidence . . . [and] that the victims' lives were not endangered . . . required the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous weapons." *Id.* at 651, 290 S.E.2d at 616. *See also State v. Allen*, 317 N.C. 119, 123, 343 S.E.2d 893, 896 (1986) (recognizing that a BB rifle is not a firearm or dangerous weapon within the meaning of the robbery statute).

Based on our Supreme Court precedent, had that State's witness not testified that Defendant had claimed the weapon he used was a BB gun, then an instruction on the crime of common law robbery would not have been required. But since the witness *did* so testify, the trial court was required to instruct on common law robbery. Defendant's hearsay statement that the gun was a BB gun made to the detective is substantive evidence on this issue, though offered by the State. *See* N.C. Gen. Stat. § 8C-1, Rule 801(d) (out-of-court statement by party-opponent is an exception to hearsay); *see also Joyner*, 312 N.C. at 782, 324 S.E.2d at 844 (a defendant is entitled to instruction on lesser included offense of common law robbery where either the State or the defendant offers evidence that the weapon used was not a firearm).

III. Conclusion

The trial court was required to instruct the jury on the lesser included offense of common law robbery. Since the trial court failed to do so, we are compelled by Supreme Court precedent to vacate the judgment against him for armed robbery with a firearm and remand for a new trial.

NEW TRIAL.

Judges DIETZ and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 DECEMBER 2019)

BARCLAYS BANK DELAWARE v. ALLEN No. 19-586	Pitt (16CVD1913)	Reversed and Remanded
BOST REALTY CO., INC. v. CITY OF CONCORD No. 19-309	Cabarrus (17CVS1144)	Reversed and Remanded
DAVIS v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 19-449	Office of Admin. Hearings (18OSP02327)	Affirmed
DISCOVER BANK v. ROGERS No. 19-217	Caldwell (16CVD939)	Affirmed
DUFF v. SANCTUARY AT LAKE WYLIE PROP. OWNERS ASS'N, INC. No. 18-1199	Mecklenburg (16CVS14204)	No Error
IN RE J.B. No. 18-1263	Craven (18JB27A)	Reversed
JOURNEY CAP., LLC v. CITY OF CONCORD No. 19-310	Cabarrus (17CVS210)	Reversed and Remanded
METRO DEV. GRP., LLC v. CITY OF CONCORD No. 19-311	Cabarrus (16CVS3017)	Reversed and Remanded
PARKER v. DESHERBININ No. 19-315	New Hanover (15CVS2255)	AFFIRMED; CROSS-APPEAL DISMISSED
PRIDGEN v. COGDELL No. 19-289	New Hanover (06CVD1606)	Affirmed in Part; Reversed and Remanded in Part
QL TITLING TR. LTD. v. THOMAS No. 19-412	Cumberland (18CVD4018)	Affirmed in Part, Reversed in Part and Remanded
STATE v. ALFALLA No. 19-113	Wake (17CRS207348-50)	No error in part; Vacated in part; and Remanded for a new sentencing hearing.

STATE v. ANDERSON No. 19-433	Union (17CRS50376)	NO ERROR IN PART; VACATED AND REMANDED IN PART.
STATE v. BALICO-VILLALOBOS No. 19-97	Mecklenburg (17CRS203765)	No Error
STATE v. GIBBS No. 19-523	Wilson (16CRS50973)	Affirmed
STATE v. HINTON No. 19-321	Watauga (17CRS51070)	No error in part; reversed in part.
STATE v. McMOORE No. 19-329	Forsyth (17CRS4536) (17CRS58561) (17CRS58562)	NO ERROR IN PART; REMANDED IN PART
STATE v. RIDDLE No. 19-276	Yancey (17CRS224) (17CRS50024-32)	Vacated
STATE v. SCOTT No. 18-744	Orange (14CRS51474)	No Error
STATE v. SWARTZ No. 19-55	Wake (17CRS207762)	New Trial

AKSHAR DISTRIBUTION COMPANY, D/B/A THE GREENSBORO DISCOUNTS, PLAINTIFF
v.
SMOKY'S MART INC., AND UMESH RAMANI, DEFENDANTS

No. COA19-316

Filed 7 January 2020

1. Appeal and Error—Rule 59 motion—tolling period for taking appeal—motion for sanctions

After the trial court entered an order granting plaintiff's motion for sanctions, defendants timely made a Rule 59 motion within the meaning of Appellate Rule 3—using language tracking the text of Rule 59(a)(1) and (3) and supporting the motion with affidavits containing relevant factual details regarding defendants' inability to procure certain bank records and a calendaring mistake by defendants' attorney—tolling the thirty-day period for taking appeal.

2. Appeal and Error—preservation of issues—argument made for the first time on appeal

Where defendants' Rule 59 motion did not argue that the default judgment against them should be set aside due to the complaint's failure to state a claim for unfair and deceptive trade practices, defendants were precluded from making the argument for the first time on appeal.

3. Judges—leaving the bench—rendering judgments unreviewable by other trial judges—review by appellate court

Where a trial judge entered an order imposing sanctions upon defendants and then retired from the bench, rendering the judgment unreviewable by another trial court judge, the task of reviewing defendants' Rule 59 motion seeking relief from the order fell to the Court of Appeals.

4. Discovery—sanctions—motion for relief—unreasonable delay—absence from hearing

Defendants' Rule 59 motion seeking relief from the trial court's order imposing sanctions (for failing to comply with discovery orders) should have been denied where defendants unreasonably delayed in seeking to acquire the required bank documents and defendants' attorney inexcusably missed the hearing on the motion for sanctions due to a calendaring mistake.

Appeal by Defendants from orders entered 21 March 2018 by Judge Patrice A. Hinnant and 3 December 2018 by Judge R. Stuart Albright, both in Guilford County Superior Court. Heard in the Court of Appeals 1 October 2019.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Matthew B. Tynan, Clint S. Morse, and Kimberly M. Marston, for Plaintiff-Appellee.

Hill Evans Jordan & Beatty, PLLC, by R. Thompson Wright, for Defendants-Appellants.

COLLINS, Judge.

Defendants Smoky's Mart Inc. and Umesh Ramani appeal from the trial court's (1) 21 March 2018 order granting Plaintiff Akshar Distribution Company's motion for sanctions filed pursuant to N.C. Gen. Stat. § 1A-1, Rule 37, in which the trial court entered default judgment for treble damages against Defendants, and (2) 3 December 2018 order denying Defendants' motion for reconsideration or a new hearing regarding Plaintiff's motion for sanctions filed pursuant to N.C. Gen. Stat. § 1A-1, Rules 54 and 59. Defendants contend that the trial court (1) erred by entering default judgment against Defendants for treble damages in the 21 March 2018 order and (2) abused its discretion by denying Defendants' N.C. Gen. Stat. § 1A-1, Rule 59[1] motion in the 3 December 2018 order. We dismiss Defendants' appeal from the 21 March 2018 order, vacate the trial court's 3 December 2018 order, and deny Defendants' Rule 59 motion.

I. Background

Plaintiff Akshar Distribution Company is a wholesale distributor for convenience stores. At the time relevant to Plaintiff's allegations, Defendant Umesh Ramani was a minority shareholder of Plaintiff.

According to the first amended complaint, Ramani also owns Defendant Smoky's Mart Inc. ("Smoky's," or collectively with Ramani, "Defendants"),

1. Because Defendants characterize their motion for reconsideration or a new hearing as a "Rule 59 motion" in their briefs on appeal and Defendants do not make any arguments based upon N.C. Gen. Stat. § 1A-1, Rule 54 ("Rule 54") in their briefs, Defendants have abandoned any argument that the trial court erred by denying their purported Rule 54 motion, and we analyze Defendants' motion under N.C. Gen. Stat. § 1A-1, Rule 59 ("Rule 59") alone. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

which operates a convenience store in Greensboro. Smoky's purchased inventory from Plaintiff at various times between December 2014 and January 2017. Although Plaintiff invoiced Smoky's for the merchandise, Smoky's never paid the invoices, which totaled $30,040.09.

On 28 March 2017, Plaintiff filed a complaint against Smoky's in connection with the unpaid invoices. On 28 April 2017, Plaintiff filed its first amended complaint, adding allegations that Ramani had misappropriated Plaintiff's funds for his and Smoky's use in the collective amount of $125,981.55 between March 2014 and April 2016. Plaintiff's first amended complaint brought the following causes of action: (1) action for the price of goods purchased pursuant to N.C. Gen. Stat. § 25-2-709(1)(a), against Smoky's; (2) breach of contract, against Smoky's; (3) unjust enrichment, against Smoky's; (4) conversion, against Defendants; (5) breach of fiduciary duty, against Ramani; (6) unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1, against Defendants; and (7) action to impose a constructive trust, against Ramani.

Defendants answered the first amended complaint on 6 July 2017. In their answer, Defendants (1) admitted that Smoky's owed Plaintiff for the unpaid invoices, (2) denied that Ramani had misappropriated Plaintiff's funds, and (3) raised a number of affirmative defenses.

On 31 July 2017, the trial court entered an order scheduling discovery, pursuant to the consent of the parties. The parties exchanged discovery over the following months. On 18 December 2017, Plaintiff filed a motion to compel discovery pursuant to N.C. Gen. Stat. § 1A-1, Rule 37 ("Rule 37"), arguing that Defendants had insufficiently responded to Plaintiff's discovery requests. On 16 January 2018, the trial court entered a consent order compelling Defendants to respond to Plaintiff's requests.

Plaintiff filed a motion for sanctions pursuant to Rule 37 on 12 February 2018, alleging that Defendants had continued to fail to comply with the trial court's orders governing discovery. Plaintiff's motion for sanctions came on for hearing on 8 March 2018. Defendants did not attend the hearing.

On 21 March 2018, the trial court entered an order granting Plaintiff's motion for sanctions. In the 21 March 2018 order, the trial court: (1) found that Defendants had unjustifiably failed to comply with its orders governing discovery; (2) concluded that Defendants were in contempt of its orders governing discovery; (3) "conclude[d] that sanctions less severe than striking Defendants' answer and entering partial summary judgment for Plaintiff[] would not be adequate given the seriousness of [Defendants'] misconduct"; (4) struck Defendants' answer; (5) entered

default judgment for Plaintiff on all claims brought in the first amended complaint, notably including Plaintiff's claim for unfair and deceptive trade practices, and therefore trebled its damage awards pursuant to N.C. Gen. Stat. § 75-16 to total $90,147.27 from Defendants jointly and severally (for the unpaid invoices) and $377,944.65 from Ramani (for the allegedly misappropriated funds); and (6) ordered Defendants to pay Plaintiff's expenses in connection with preparing, filing, and arguing the motion for sanctions. Noting that it had also granted Plaintiff's motion to file a second amended complaint the same day adding other defendants and causes of action to the lawsuit, the trial court also certified the default judgment as a final judgment pursuant to Rule 54(b).

On 3 April 2018, Defendants filed a motion for reconsideration or a new hearing pursuant to Rules 54 and 59. In their Rule 59 motion,[2] Defendants moved the trial court to set aside its 21 March 2018 order granting Plaintiff's motion for sanctions because (1) Defendants did not have certain documents the trial court had ordered they produce to Plaintiff until 2 April 2018 and (2) Defendants' counsel missed the 8 March 2018 hearing on Plaintiff's motion for sanctions due to a calendaring mistake. Defendants attached affidavits to the motion providing supporting factual details regarding the bases for their Rule 59 motion. Defendants' motion came on for hearing on 3 December 2018. On that date, the trial court denied Defendants' Rule 59 motion.

Defendants noticed appeal from both the 21 March 2018 and 3 December 2018 orders on 2 January 2019.

II. Appellate Jurisdiction

[1] Plaintiff argues that because Defendants did not notice their appeal from the 21 March 2018 order until 2 January 2019, Defendants failed to timely notice appeal from that order, and we accordingly lack jurisdiction to consider Defendants' arguments regarding that order. Defendants counter that their 3 April 2018 Rule 59 motion was timely filed within 10 days following the entry of the 21 March 2018 order, and that Defendants' period to appeal from that order was accordingly tolled pursuant to North Carolina Rule of Appellate Procedure 3 ("Appellate Rule 3") until after the entry of an order disposing of the motion. Because they appealed from the 21 March 2018 order on 2 January 2019—within 30 days following the 3 December 2018 entry of the order denying their Rule 59 motion—Defendants argue that their notice of appeal from the 21 March 2018 order was timely.

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2. As noted above, we analyze Defendants' 3 April 2018 motion under Rule 59 alone. *See supra* note 1.

Appellate Rule 3 says that "if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion[.]" N.C. R. App. P. 3(c)(3) (2018). But merely invoking Rule 59 within the motion is not sufficient to toll the period for taking appeal from an order under Appellate Rule 3. This Court has said:

> To qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must "state the grounds therefor" and the grounds stated must be among those listed in Rule 59(a). The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of [N.C. Gen. Stat. § 1A-1,] Rule 7(b)(1). The motion, to satisfy the requirements of Rule 7(b)(1), must supply information revealing the basis of the motion.

Smith v. Johnson, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (internal citations omitted). This Court has also said:

> In analyzing the sufficiency of a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, one should keep in mind that a failure to give the number of the rule under which a motion is made is not necessarily fatal, if the grounds for the motion and the relief sought is consistent with the Rules of Civil Procedure. As long as the face of the motion reveals, and the Clerk and the parties clearly understand, the relief sought and the grounds asserted and as long as an opponent is not prejudiced, a motion complies with the requirements of N.C. Gen. Stat. § 1A-1, Rule 7(b)(1).

Batlle v. Sabates, 198 N.C. App. 407, 413, 681 S.E.2d 788, 793-94 (2009) (internal quotation marks, brackets, and citations omitted). The essence of the inquiry, then, is "to ascertain whether [the movant] stated a valid basis for seeking to obtain relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 59." *Id.* at 414, 681 S.E.2d at 794. The parties disagree over whether Defendants' Rule 59 motion stated a valid basis thereunder.

Generally, Rule 59 is applicable only where there has been a trial. *See Ennis v. Munn*, No. COA12-1349, 2013 N.C. App. LEXIS 977, at *11 (unpublished) (N.C. Ct. App. Sept. 17, 2013) (noting that this Court has reasoned that "Rule 59 applies only to judgments resulting from trials"). There has been no trial in this case. But some decisions from this Court have stated in dicta that Rule 59 may be a viable avenue

to attack non-trial judgments, including default judgments entered as Rule 37 sanctions. *See Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 ("[T]he defendants indicate in the[ir purported Rule 59] motion that they rely on Rule 59(a)(2) & (7) as the bases of their motion. . . . It appears that the motion is merely a request that the trial court reconsider its earlier decision granting the sanction and *although this may properly be treated as a Rule 59(e) motion*, it cannot be used as a means to reargue matters already argued or to put forth arguments which were not made but could have been made." (internal citation omitted)); *Batlle*, 198 N.C. App. at 413 n.1, 681 S.E.2d at 793 n.1 (noting that *Smith* "appears to assume that relief under N.C. Gen. Stat. § 1A-1, Rule 59, is, at least in theory, available to individuals who have been sanctioned for discovery violations"). Accordingly, we will assume that Defendants' motion is a technically-proper Rule 59 motion for purposes of our analysis.

As mentioned above, the gravamen of Defendants' Rule 59 motion is that (1) Defendants did not have certain bank records the trial court had ordered they produce to Plaintiff until 2 April 2018 and (2) Defendants' counsel missed the 8 March 2018 hearing on Plaintiff's motion for sanctions due to a calendaring mistake. Defendants supported their Rule 59 motion with affidavits providing relevant supporting factual details. Defendants did not specify the Rule 59(a) subsections upon which their motion is based within the text of the motion, but the *Batlle* Court said that this deficiency is not dispositive of the inquiry so long as the grounds asserted are clear and Plaintiff was not prejudiced thereby. *Id.*

Defendants argued in their motion that the lack of documents and the calendaring mistake comprise "circumstances [which] constitute mistake, inadvertence, surprise and excusable neglect, and constitute an irregularity by which defendants Smoky's and Ramani were prevented from having a fair hearing on the Motion for Sanctions[.]" While it also speaks in terms not found within Rule 59—and instead closely tracks language from N.C. Gen. Stat. § 1A-1, Rule 60 (contemplating relief from final judgment based upon "[m]istake, inadvertence, surprise, or excusable neglect")—Defendants' motion tracks the language of Rule 59(a)(1) (contemplating new trial based upon "[a]ny irregularity by which any party was prevented from having a fair trial") and speaks in terms resonant with Rule 59(a)(3) (contemplating new trial based upon "[a]ccident or surprise which ordinary prudence could not have guarded against"). Because Defendants' motion speaks in language tracking text found within Rule 59(a)(1) and (3), and the grounds asserted in the motion are supported by relevant factual details contained within the affidavits, we conclude that Defendants' motion was sufficiently clear to put Plaintiff

on notice of the bases for the motion, and that Plaintiff accordingly was not prejudiced thereby.

Having determined that Defendant's motion was technically proper and sufficiently revealed the bases for the motion, the question remains whether the motion stated valid Rule 59 bases for relief. A Rule 59 motion does not have to be meritorious in order to fall within Appellate Rule 3's ambit, but rather must only state a "potentially valid basis for an award of relief." *Batlle*, 198 N.C. App. at 418 n.4, 681 S.E.2d at 796 n.4 ("The fact that Plaintiff alleged a valid ground for relief from the . . . order in her . . . motion does not, of course, mean that her argument is substantively valid. At this stage, our inquiry is limited to the issue of whether Plaintiff has adequately stated a potentially valid basis for an award of relief. The extent to which Plaintiff is actually entitled to relief on the basis of this claim or is subject to sanctions for advancing it are entirely different issues . . . ."). For the same reasons we conclude that Defendants sufficiently revealed the bases for their motion, we conclude that Defendants stated potentially-valid bases for an award of relief from the trial court's discovery sanction within the meaning of Rule 59.

In sum, although it could have been more artfully drafted, we conclude that Defendants timely made a Rule 59 motion within the meaning of Appellate Rule 3. Accordingly, Defendants' period to notice appeal from the 21 March 2018 order was tolled by Appellate Rule 3(c)(3) until at least 30 days following the 3 December 2018 entry of the order denying Defendants' Rule 59 motion. Because Defendants noticed their appeal from the 21 March 2018 and 3 December 2018 orders within 30 days of entry of the 3 December 2018 order, Defendants' appeals from both orders were timely under Appellate Rule 3, and we have jurisdiction to consider both appeals.

III. Discussion

Defendants contend that the trial court (1) erred by entering default judgment against Defendants for treble damages in the 21 March 2018 order on Plaintiff's motion for sanctions and (2) abused its discretion by denying Defendants' Rule 59 motion for reconsideration or a new hearing in the 3 December 2018 order. We address the two orders in turn.

a. Plaintiff's Motion for Sanctions

[2] Under Rule 37, a trial court may sanction a party's failure to comply with its order to provide or permit discovery in a number of enumerated ways, including by entering "[a]n order striking out pleadings or parts

thereof, or . . . rendering a judgment by default against the disobedient party[.]" N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(c) (2018).

Defendants argue that the trial court erred in its 21 March 2018 order by entering default judgment against them because the first amended complaint fails to state a claim for unfair and deceptive trade practices within the meaning of N.C. Gen. Stat. § 75-1.1, and liability under Section 75-1.1 was the statutory predicate for the treble-damage awards the trial court entered pursuant to N.C. Gen. Stat. § 75-16. However, Defendants did not move the trial court to set aside the default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rules 55(d) or 60(b). This Court has said that the failure to attack a default judgment at the trial court precludes an attack on the default judgment on appeal. *Golmon v. Latham*, 183 N.C. App. 150, 151-52, 643 S.E.2d 625, 626 (2007); *see Collins v. N.C. State Highway & Pub. Works Comm'n*, 237 N.C. 277, 284, 74 S.E.2d 709, 715 (1953) ("To set aside a judgment for irregularity it is necessary to make a motion in the cause before the court which rendered the judgment, with notice to the other party; the objection cannot be made by appeal, or an independent action, or by collateral attack." (quotation marks and citation omitted)). As the *Golmon* Court said: "Defendants should have first filed a motion pursuant to N.C.R. Civ. P. 55(d) or 60(b). They would then have been able to appeal to this Court from any denial of that motion. Because defendants failed to follow this procedure, we are precluded from reviewing the issues they raise." *Golmon*, 183 N.C. App. at 152, 643 S.E.2d at 626.

Defendants did seek to have the 21 March 2018 order—including the default judgment entered therein—set aside in its entirety in their Rule 59 motion. And as discussed above in Section II, there is some authority that a litigant may seek relief from Rule 37 sanctions via Rule 59. *See Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. However, Defendants' Rule 59 motion raised factual circumstances as the bases for the relief sought, and Defendants did not argue in that motion (or elsewhere below) that the default judgment should be set aside because the first amended complaint fails to state a claim under N.C. Gen. Stat. § 75-1.1. Defendants' argument is therefore made for the first time on appeal, which our Appellate Rules expressly prohibit. 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 if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *Grier v. Guy*, 224 N.C. App. 256,

260-62, 741 S.E.2d 338, 342-43 (2012) (dismissing argument on appeal that default judgment should be set aside because complaint failed to state a claim because the argument was not made to the trial court).

Because Defendants did not attack the default judgment at the trial court on the basis that the first amended complaint failed to state a claim under N.C. Gen. Stat. § 75-1.1, they are precluded from making that argument on appeal.

b. Defendants' Motion for Reconsideration or a New Hearing

[3] Defendants also argue that the trial court abused its discretion by denying their Rule 59 motion in its 3 December 2018 order.

In this case, the parties acknowledge that Judge Hinnant—who entered the 21 March 2018 order whose reconsideration Defendants sought in their 3 April 2018 Rule 59 motion—retired from the bench before the Rule 59 motion came on for hearing on 3 December 2018. Plaintiff argues, despite the fact that Defendants filed their Rule 59 motion in April 2018, that Judge Hinnant's subsequent retirement rendered Defendants' Rule 59 motion unreviewable, and that Judge Albright—who entered the 3 December 2018 order denying Defendants' Rule 59 motion—properly denied that motion accordingly.

This Court has held that a trial judge who did not preside at trial lacks jurisdiction to rule on a Rule 59 motion for a new trial. *Sisk v. Sisk*, 221 N.C. App. 631, 636-37, 729 S.E.2d 68, 72-73 (2012), *disc. review denied*, 366 N.C. 571, 738 S.E.2d 368 (2013). The same rationale—that "[o]ne superior court judge may not overrule another[,]" *Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995)—applies here. Judge Albright therefore should have dismissed Defendants' Rule 59 motion, and erred by denying it. *See Quevedo-Woolf v. Overholser*, 820 S.E.2d 817, 840 (N.C. Ct. App. 2018) (vacating order: "Because Judge Randolph lacked subject matter jurisdiction to hear Plaintiff's Rule 59 motion, the Randolph Order is void."), *disc. review denied*, 372 N.C. 359, 828 S.E.2d 164 (2019); *In re J.T.*, 363 N.C. 1, 3, 672 S.E.2d 17, 18 (2009) ("[T]he proceedings of a court without jurisdiction of the subject matter are a nullity. When the record clearly shows that subject matter jurisdiction is lacking, the court will take notice and dismiss the action *ex mero motu* in order to avoid exceeding its authority." (quotation marks, brackets, and citations omitted)).

However, where the trial judge who entered the judgment from which a litigant seeks relief pursuant to Rule 59 leaves the bench, thereby rendering the judgment unreviewable by another trial judge,

our Supreme Court has said that "justice requires that [the] defendant be afforded an opportunity to have considered on appeal any asserted errors of law which he contends entitles him to a new trial." *Hoots v. Calaway*, 282 N.C. 477, 490, 193 S.E.2d 709, 717 (1973). The task of reviewing Defendants' Rule 59 motion therefore falls upon us. *See Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co. of Hartford*, 192 N.C. App. 376, 390, 665 S.E.2d 505, 514 (2008) ("[I]t is not appropriate for a superior court judge who did not try a case to rule upon a motion for a new trial, and in that situation, an appellate court should conduct the review of errors to determine if the party is entitled to a new trial."). Because we are not reviewing any decision of a lower court, we necessarily review Defendants' Rule 59 motion *de novo*. *Sisk*, 221 N.C. App. at 631, 729 S.E.2d at 70.

[4] As a threshold matter, as discussed above in Section III(a), Defendants did not argue in their Rule 59 motion that the first amended complaint failed to state a claim under N.C. Gen. Stat. § 75-1.1, so we do not consider this argument, which Defendants impermissibly raise now for the first time on appeal. Defendants made no other assertions of legal error in their Rule 59 motion, which solely asserted factual circumstances as bases for the relief sought.

It is unclear whether the *Hoots* Court, which said that a party must "be afforded an opportunity to have considered on appeal any asserted errors *of law* which he contends entitles him to a new trial[,]" *Hoots*, 282 N.C. at 490, 193 S.E.2d at 717 (emphasis added), also intended that we review asserted Rule 59(a) grounds premised upon factual circumstances, such as the asserted lack of documents and the calendaring mistake upon which Defendants based their Rule 59 motion. But at least one decision of this Court applying *Hoots* and its progeny appears to have conducted such a review, *see Sisk*, 221 N.C. App. at 635-36, 729 S.E.2d at 71-72 (ruling on Rule 59 motion asserting, *inter alia*, irregularity preventing a fair trial and surprise as grounds for new trial), and our Supreme Court denied review of that decision, 366 N.C. 571, 738 S.E.2d 368. We will therefore review Defendants' fact-based arguments.

A careful review of the record leads us to conclude that Defendants' Rule 59 motion should be denied. The record tends to show the following:

- On 31 July 2017, Defendants consented to an order scheduling discovery in this litigation.
- On 25 August 2017, Plaintiff served Defendants with its discovery requests, including requests for the production of "all bank statements for the periods from January 2015 to December

2016, for any Person on which Ramani has signatory authority, including but not limited to, any of Ramani's personal accounts, and any of Smoky's Mart's accounts[,]" ("Document Request 10") and "[f]or the period January 2013 to present . . . all documents evidencing income received by Ramani" ("Document Request 16").

- On 18 December 2017 and 8 January 2018, Plaintiff moved the trial court to compel Defendants to comply with their discovery requests, specifically noting that Defendants had failed to sufficiently respond to Document Requests 10 and 16.
- On 16 January 2018, Defendants consented to the entry of an order compelling them to supplement their discovery responses, including by producing "all documents in their possession, custody or control responsive to" Document Requests 10 and 16 "[o]n or before January 22, 2018[.]"
- Defendants did not seek to procure the documents whose unavailability they assert as grounds for a new trial—which include bank records that would be responsive to Document Requests 10 and 16—until 5 February 2018.

The result of Defendants' unreasonable delay in seeking to procure and produce the documents requested by Plaintiff and ordered to be produced by the trial court is not an "irregularity by which [Defendants were] prevented from having a fair [hearing]" within the meaning of Rule 59(a)(1), and Defendants cannot claim that their inability to produce the documents is the product of "surprise which ordinary prudence could not have guarded against" within the meaning of Rule 59(a)(3). Rather, Defendants' delay tends to demonstrate inexcusable imprudence in heeding the trial court's orders. We therefore reject Defendants' argument that their inability to produce the bank records entitles them to a new hearing on Plaintiff's motion for sanctions.

Defendants' imprudence also leads us to reject Defendants' argument regarding their counsel's calendaring mistake. Our Supreme Court has upheld the denial of relief sought under N.C. Gen. Stat. § 1A-1, Rule 60 for attorney neglect, saying that "[a]llowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and present a temptation for litigants to use the negligence as an excuse to avoid court-imposed rules and deadlines." *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998). Further, even had Defendants' counsel properly calendared and appeared at the hearing on Plaintiff's motion for sanctions, the fact that Defendants had

consistently failed to meet their obligations under the trial court's orders governing discovery would remain, and sanctioning Defendants would have been the proper outcome. *See Robinson v. Seaboard Sys. R.R., Inc.*, 87 N.C. App. 512, 528, 361 S.E.2d 909, 919 (1987) (a party seeking a new trial "must demonstrate that he has been prejudiced"). We therefore reject Defendants' Rule 59 argument regarding their counsel's calendaring mistake.

IV. Conclusion

Because Defendants did not raise below the argument they raise in support of their appeal from the trial court's 21 March 2018 order, we dismiss Defendants' appeal from that order. Because the trial judge who entered the 3 December 2018 order lacked subject-matter jurisdiction to consider Defendants' Rule 59 motion, we vacate that order. Because we do not conclude that Defendants are entitled to a new hearing on Plaintiff's motion for sanctions, we deny Defendants' Rule 59 motion.

DISMISSED IN PART, VACATED IN PART, AND DENIED IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

RAY DION BROWN, PETITIONER
v.
FAYETTEVILLE STATE UNIVERSITY, RESPONDENT

No. COA19-13

Filed 7 January 2020

Employer and Employee—contested case—by career state employee—after-acquired evidence doctrine—applicability—mandatory dismissal

In a contested case brought under N.C.G.S. § 126-34.02 by a career state employee (petitioner), an administrative law judge (ALJ) properly applied the after-acquired evidence doctrine when concluding that, although petitioner's employer fired him without just cause, petitioner was not entitled to reinstatement or front pay because later-acquired evidence showed that petitioner lied about his criminal history in his job application and the employer would have fired him anyway had it discovered the misconduct earlier. The ALJ did not violate petitioner's due process rights (including his

right to notice of the specific grounds for dismissal) by admitting the after-acquired evidence, which simply limited petitioner's remedy for wrongful dismissal. Further, petitioner's dismissal would have been "mandatory" under N.C.G.S. § 126-30(a) because he disclosed "false and misleading information" in his job application.

Appeal by Petitioner from Final Decision entered 10 July 2018 by Administrative Law Judge Stacey Bice Bawtinhimer in the Office of Administrative Hearings. Heard in the Court of Appeals 5 September 2019.

The Angel Law Firm, PLLC, by Kirk J. Angel, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Vanessa N. Totten, for respondent-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Ray Dion Brown (Petitioner) appeals from a Final Decision of the Administrative Law Judge (ALJ) concluding Fayetteville State University (Respondent or FSU) failed to show its decision to terminate Petitioner was for "just cause" but further concluding Petitioner was not entitled to reinstatement and additional damages based on after-acquired evidence of Petitioner's misconduct. The Record before us tends to show the following:

Petitioner began employment with Respondent as a housekeeper on a temporary basis in June 2000. On 21 August 2000, Petitioner submitted an application for full-time employment with Respondent, and on 1 February 2001, Respondent hired Petitioner into a permanent position as a housekeeper, thereby rendering Petitioner a "career State employee" under N.C. Gen. Stat. § 126-1.1(a). Petitioner continued working in this position until Respondent fired him on 26 July 2017.

On 14 July 2017, Petitioner was assigned to clean the FSU library. While in the library, Petitioner took an iPhone charger cube (charger) from Library Technician Man-Yee Chan's (Chan) desk. After realizing the charger was missing, Chan contacted her supervisor to report the missing charger and to request viewing security camera footage. Chan testified she did not recognize Petitioner on the footage and also could not remember whether she had given Petitioner permission to use the charger, even though in the past she had given several other coworkers

permission to use the charger. Petitioner asserted Chan had previously given him permission to use her charger.

On 20 July 2017, Petitioner was placed on Investigatory Leave with Pay for "stealing an item from a staff member's desk." After attending a pre-disciplinary conference, Respondent notified Petitioner on 26 July 2017 in writing that he was dismissed for unacceptable personal conduct for "stealing a staff member's personal item from their . . . desk." Petitioner appealed his discharge through Respondent's Internal Grievance Process, and Respondent issued a Final University Decision upholding Petitioner's dismissal on 19 December 2017. Thereafter, on 23 January 2018, Petitioner filed a Petition for a Contested Case Hearing with the Office of Administrative Hearings (OAH), alleging his termination was without just cause. The matter came on for hearing before the ALJ on 18 May 2018.

Sometime prior to this hearing, Respondent submitted a Motion for Summary Judgment.[1] The ALJ found that in this Motion, Respondent alleged for the first time that dismissal of Petitioner's claims was warranted because Petitioner had falsified his employment application in 2000 by "submitt[ing] false and misleading information about his criminal background[.]" Respondent asserted it first learned of Petitioner's alleged false application on 9 August 2017 and that Petitioner would have been terminated immediately for this reason. Although Respondent learned of this falsification on 9 August 2017 during the Internal Grievance Process, Respondent did not disclose this evidence to Petitioner until it filed its Motion for Summary Judgment sometime prior to the hearing before the ALJ.

Petitioner's 2000 job application asked whether Petitioner had "ever been convicted of an offense against the law other than a minor traffic violation[.]" If answered in the affirmative, the application requested the applicant to "explain fully on an additional sheet." Petitioner listed driving without a license as his only prior criminal conviction. During an offer of proof at the hearing before the ALJ, Petitioner acknowledged that prior to submitting his 2000 job application with FSU, he had been convicted of carrying a concealed weapon, possession of drug paraphernalia, resisting an officer, and larceny. Petitioner, however, contended there was an additional page on his application that was not presented at the hearing showing he did disclose these prior convictions. Also during

1. In his brief, Petitioner contends Respondent filed its Motion for Summary Judgment on 21 March 2018. However, Petitioner failed to include this Motion in the Record on Appeal.

this offer of proof by Respondent, FSU's Director of Facilities Operation, who directly oversaw Petitioner, testified that had Respondent known of Petitioner's prior criminal history, Respondent would have terminated Petitioner immediately in accordance with Respondent's Employment Background and Reference Check Policy.

At the hearing on 18 May 2018, the ALJ bifurcated the hearing to address two separate issues: "Whether Respondent . . . had just cause to terminate Petitioner from his position as a Housekeeper with FSU and, if not, what is the appropriate remedy considering the 'after acquired' evidence of Petitioner's misconduct?" Regarding the first issue, the ALJ found "there [was] no credible evidence to suggest Petitioner willfully and intentionally stole the charger cube from Ms. Chan" and therefore concluded "Respondent's termination of Petitioner was without 'just cause.' " Turning to the after-acquired evidence of Petitioner's failure to disclose his prior criminal convictions on his 2000 job application, the ALJ in its Final Decision made the following relevant Conclusions of Law:

> 27. Even though FSU lacked "just cause" to terminate Petitioner on July 26, 2017, FSU provided substantial "after-acquired" evidence demonstrating that Petitioner provided false and misleading information on his August 21, 2000 State Application for Employment. FSU did not discover that Petitioner had submitted false and misleading information on his August 21, 2000 job application until August 9, 2017 after Petitioner was terminated.
>
> 28. "Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit." *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 362, 130 L. Ed. 2d 852, 864 (1995). The North Carolina Court of Appeals explicitly adopted the after-acquired evidence doctrine established by *McKennon*. *See Johnson v. Bd. of Trs. of Durham Tech. Cmty. College*, 157 N.C. App. 38, 48, 577 S.E.2d 670, 675 (2003). If an employer demonstrates that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge, neither reinstatement nor front pay are allowed, and back pay is limited to the time between

the discharge and the time of discovery. *Id.* at 48-49, 577 S.E.2d at 676.

29. "[F]alsification of a State application or in other employment documentation" also constitutes unacceptable personal conduct. 25 N.C.A.C. 01J .0614(8)(h).

30. Furthermore, a State agency may discharge "[a]ny employee who knowingly and willfully discloses false or misleading information, or conceals dishonorable military service; or conceals prior employment history or other requested information, either of which are significantly related to job responsibilities on an application for State employment." N.C.G.S. § 126-30(a).

31. Dismissal is "mandatory" for any employee who "discloses false or misleading information in order to meet position qualifications." N.C.G.S. § 126-30(a).

32. The preponderance of evidence shows that Petitioner falsely claimed on the application that his only conviction prior to August 21, 2000 was for driving without a license.

33. Petitioner admitted at hearing that, prior to August 21, 2000, he had also been convicted of: assault on a female; carrying a concealed weapon; resisting a public officer; possession of drug paraphernalia; and larceny. . . .

34. Pursuant to N.C.G.S. § 126-30(a), if Petitioner were still employed by FSU, his dismissal would have been mandatory.

35. FSU provided substantial "after-acquired evidence" that bars Petitioner's reinstatement, front pay, and significantly limits his back pay to the period between July 26, 2017, his discharge, to August 9, 2017, the date FSU discovered the falsification on his application.

The ALJ's Final Decision then reversed the Final University Decision and ordered that "Petitioner is barred from reinstatement and front pay . . . [and] his back-pay shall be limited to the time between his discharge on July 26, 2017 and the discovery of the 'after acquired' evidence on August 9, 2017." Petitioner timely filed Notice of Appeal from the ALJ's Final Decision. *See* N.C. Gen. Stat. § 126-34.02(a) (2017) (allowing an

aggrieved party to appeal the ALJ's final decision to this Court, as further provided under N.C. Gen. Stat. § 7A-29(a)).[2]

Issue

The sole issue on appeal is whether the ALJ erred by applying the after-acquired-evidence doctrine to Petitioner's contested case under N.C. Gen. Stat. § 126-34.02 and concluding Petitioner was barred from the remedies of reinstatement and additional compensation.

Standard of Review

" 'It is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test.' " *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 99, 798 S.E.2d 127, 132 (quoting *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004)), *aff'd per curiam*, 370 N.C. 386, 808 S.E.2d 142-43 (2017).

"Where the petitioner alleges that the agency decision was based on error of law, the reviewing court must examine the record *de novo*, as though the issue had not yet been considered by the agency." *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 207, 784 S.E.2d 509, 518 (2016) (citation and quotation marks omitted). As such, "[u]nder a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [ALJ]." *Id.* (alteration in original) (citation and quotation marks omitted).

On the other hand, "[u]nder the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative agency's findings and conclusions." *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988) (citation omitted). "When the trial court applies the whole record test, however, it may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation and quotation marks omitted).

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2. Although the ALJ concluded "Petitioner may seek reasonable attorney's fees proportionate to his limited prevailing party status[,]" the ALJ did not decide the amount to be awarded to Petitioner; however, the fact the ALJ left open the issue of the amount of attorney's fees "does not alter the final nature of the ALJ's Final Decision for purposes of its appealability under N.C. Gen. Stat. § 7A-29(a)." *Ayers v. Currituck Cty. Dep't of Soc. Servs.*, ___ N.C. App. ___, ___, 833 S.E.2d 649, 654 (2019) (citation omitted).

Analysis

Petitioner contends the trial court erred by applying the after-acquired-evidence doctrine because the application of this doctrine to a career State employee would "contravene the just cause statute and deny due process." Specifically, Petitioner asserts this doctrine is inapplicable to contested cases brought under N.C. Gen. Stat. § 126-34.02 and that applying the doctrine in this case would violate Petitioner's due process rights. In addition, Petitioner argues that even assuming the after-acquired-evidence doctrine applies, the ALJ erred by concluding Petitioner's dismissal was "mandatory." We address each of Petitioner's contentions in turn below.

The United States Supreme Court first articulated the after-acquired-evidence doctrine, or *McKennon* rule, in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 130 L. Ed. 2d 852 (1995). In *McKennon*, the employee, McKennon, alleged she was discharged by her employer in violation of the Age Discrimination in Employment Act (ADEA). *Id.* at 354-55, 130 L. Ed. 2d at 859. While conducting a deposition of McKennon during discovery, McKennon's employer learned McKennon had copied confidential company documents before her discharge, as McKennon suspected she would be fired based on her age and wanted "insurance" and "protection" against her employer. *Id.* at 355, 130 L. Ed. 2d at 859 (quotation marks omitted). A few days after these deposition disclosures, McKennon's employer sent her a letter advising her that the "removal and copying of the records was in violation of her job responsibilities[,]" informing her that she was terminated again, and stating "had it known of McKennon's misconduct it would have discharged her at once for that reason." *Id.* The Sixth Circuit Court of Appeals held this misconduct was grounds for McKennon's termination and affirmed the trial court's granting of summary judgment in favor of the employer. *Id.*

The Supreme Court reversed, concluding the after-acquired evidence of McKennon removing and copying confidential company documents could not serve as a valid justification for upholding the employee's termination because the employer did not know of McKennon's misconduct until *after* she was discharged. *Id.* at 359-60, 130 L. Ed. 2d at 862. Therefore, "[t]he employer could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the nondiscriminatory reason." *Id.* at 360, 130 L. Ed. 2d at 862. Although the after-acquired evidence of the employee's misconduct could not bar the employee's ADEA claim, this type of evidence could be used to limit the employee's *relief*. *Id.* at 361-62, 130 L. Ed. 2d at 863. Specifically, the Supreme Court in *McKennon* held: "as a general rule in

cases of this type, neither reinstatement nor front pay is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.* Rather, the *McKennon* Court limited the remedy of a wrongfully discharged employee in such circumstances to backpay for the period between the wrongful termination and discovery of the new information:

> Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party.

Id. at 362, 130 L. Ed. 2d at 864.

In *Johnson v. Board of Trustees of Durham Technical Community College*, this Court adopted the *McKennon* rule to the plaintiff's claim under the North Carolina Persons with Disabilities Protection Act (NCPDPA), N.C. Gen. Stat. § 168A-1, *et seq.* 157 N.C. App. 38, 48, 577 S.E.2d 670, 676 (2003). The *Johnson* Court looked to the common purposes and remedial provisions of the NCPDPA and the ADA, and after noting the purposes and contents of the two statutes were consistent with one another, our Court held the *McKennon* rule applies for determining the proper remedy in NCPDPA cases involving after-acquired evidence of wrongdoing on the part of the employee. *Id.* at 46-48, 577 S.E.2d at 674-76.

Accordingly, the question presented here is whether the *McKennon* rule should also apply to contested cases brought by career State employees. As our Court did in *Johnson*, "we look to the provisions of the statute [governing career State employees] to ensure that *McKennon* is consistent with its purpose and content." *Id.* at 46, 577 S.E.2d at 674.

Pursuant to Section 126-35 of our General Statutes, "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a) (2017). Although

Petitioner focuses on the purpose of the notice requirements under Section 126-35, see *infra*, the overall statutory scheme of the North Carolina Human Resources Act, which includes Section 126-35, is to ensure employees are not arbitrarily or discriminatorily fired by their employer. *See, e.g.*, N.C. Gen. Stat. § 126-34.02(b)(1)-(6) (allowing the ALJ to hear an employee's claim that the employee was wrongfully terminated based on, *inter alia*, discrimination or harassment, retaliation, or a lack of just cause). Although the North Carolina Human Resources Act protects a different class of employees than either the NCPDPA or the ADA, all three acts are designed to guard against adverse employment action by employers. *See id.* § 126-34.02(a)-(b) (allowing "an applicant for State employment, a State employee, or former State employee" to file a contested case alleging their adverse employment action was based on impermissible grounds); *see also* N.C. Gen. Stat. § 168A-5(a)(1) (2017) (barring an employer from making an adverse employment action based on the employee's or applicant's disability); 42 U.S.C.A. § 12112(a) (West 2013) (same under federal law). In addition, the ADA, NCPDPA, and the North Carolina Human Resources Act all "contain similar remedial provisions, including those for injunctive relief and back pay awards." *Johnson*, 157 N.C. App. at 46, 577 S.E.2d at 674 (citing 42 U.S.C. § 2000e-5(g); then citing N.C. Gen. Stat. § 168A-11); *see also* N.C. Gen. Stat. § 126-34.02(a)(1)-(3).

Further, Section 126-35 sets the benchmark for a state employer who desires to terminate a career State employee. This Section "establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 350, 342 S.E.2d 914, 922 (1986) (citation omitted). "The employer must provide the employee with a written statement enumerating specific acts or reasons for the disciplinary action" *before* the action is taken. *Id.* (citation omitted). As in *Johnson*, "[t]his is consistent with *McKennon*, which focuses on the intent of the employer at the time of the alleged discriminatory act." 157 N.C. App. at 46, 577 S.E.2d at 675 (citing *McKennon*, 513 U.S. at 360, 130 L. Ed. 2d at 862). Accordingly, "[w]e find nothing in the purpose or content of the [North Carolina Human Resources Act] that is inconsistent with or contrary to the *McKennon* rule." *Id.* Therefore, both *Johnson* and *McKennon* support the proposition that the *McKennon* rule should be adopted to contested cases brought under N.C. Gen. Stat. § 126-34.02.

This does not end our inquiry, however, as Petitioner claims extending the *McKennon* rule to this context violates a career State employee's due process rights. Specifically, Petitioner alleges by allowing the

after-acquired evidence of Petitioner's misconduct—which Petitioner first learned of in Respondent's Motion for Summary Judgment before the ALJ—to limit Petitioner's remedy, Petitioner was not given the required notice and opportunity to be heard, thereby denying his due process rights.

Petitioner correctly notes a career State employee has a property interest in continued employment, therefore requiring a state employer to comply with certain procedural due process requirements before terminating employment. *See Leiphart*, 80 N.C. App. at 348-49, 342 S.E.2d at 921-22 (citations omitted). The North Carolina Human Resources Act affords these obligatory protections by requiring, *inter alia*, written notice to the employee stating the precise grounds for termination and by providing an employee with the opportunity to be heard on why the adverse employment action is not warranted. *See* N.C. Gen. Stat. §§ 126-35; -34.02. Our Supreme Court has explained these statutory protections "fully comport[] with the constitutional procedural due process requirements mandated by the Fourteenth Amendment" of the United States Constitution. *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 327, 507 S.E.2d 272, 280 (1998).

Adoption of the *McKennon* rule to contested cases brought by career State employees, however, does not conflict with these due process protections. This is so because after-acquired evidence of misconduct does not serve as a justification for the *termination*.[3] Rather, under the *McKennon* rule, this after-acquired evidence simply limits the *remedy* of an employee who was wrongfully discharged. *See Johnson*, 157 N.C. App. at 48, 577 S.E.2d at 675 (explaining that "while 'after-acquired' evidence of employee misconduct could not bar an employer's liability for discriminatory discharge, such evidence may be relevant to determining the *relief* available to the employee" (emphasis added) (citation omitted)). Therefore, the application of the *McKennon* rule is not inconsistent with the statutory notice provisions mandated by a career State employee's due process rights. Further, this result is consistent with N.C. Gen. Stat. § 126-34.02(a)(3), which grants the ALJ "express statutory authority to '[d]irect other suitable action' upon a finding that just cause does not exist for the particular action taken by the agency."

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3. Indeed, if it did serve as a justification for termination, this would flout the purpose of the North Carolina Human Resources Act's statutory notice protections. *See Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 922 (Section 126-35(a) "was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal.").

Harris, 252 N.C. App. at 109, 798 S.E.2d at 138 (alteration in original) (quoting N.C. Gen. Stat. § 126-34.02(a)(3)).

In any event, and on these facts, Petitioner was afforded sufficient notice to comport with due process. Regarding the after-acquired evidence and Petitioner's notice thereof, the ALJ found that Respondent first disclosed this evidence in its "Motion for Summary Judgment to bolster Respondent's 'just cause' argument"; Petitioner filed a Motion in Limine to exclude this evidence as support for Petitioner's termination, which Motion the trial court granted; after the ALJ concluded just cause did not exist to terminate Petitioner, "Respondent was allowed to submit this 'after acquired' evidence as Offers of Proof in the form of documentation and testimony"; and "Petitioner cross-examined the witnesses on this documentation during Respondent's Offer of Proof." Because Petitioner has not challenged these Findings of Fact and because substantial evidence in the Record supports these Findings, they are binding on appeal. *See id.* at 108, 798 S.E.2d at 137 (citation omitted). These Findings show Petitioner knew of Respondent's intent to offer this evidence prior to the hearing before the ALJ and that Petitioner was given the opportunity to cross-examine the State's witnesses on this evidence, thereby comporting with constitutional procedural due process requirements. *See Peace*, 349 N.C. at 322, 507 S.E.2d at 278 ("The fundamental premise of procedural due process protection is notice and the opportunity to be heard." (citation omitted)).

As discussed *supra*, the structure and content of the North Carolina Human Resources Act are consistent with the application of the *McKennon* rule. Further, application of this rule does not conflict with Petitioner's due process rights under the Act. Accordingly, we hold the *McKennon* rule applies in a contested case brought under N.C. Gen. Stat. § 126-34.02 and that the ALJ did not err in applying this doctrine to Petitioner's contested case.

Lastly, Petitioner contends even assuming the application of this doctrine was appropriate, the ALJ erred by concluding Petitioner's dismissal was "mandatory" because "there was not sufficient evidence to show that Petitioner should have been terminated[.]" Under Section 126-30(a) of our General Statutes, "[d]ismissal shall be mandatory where the applicant discloses false or misleading information in order to meet position qualifications." N.C. Gen. Stat. § 126-30(a) (2017).

Here, the ALJ found that Petitioner's 2000 job application listed his only criminal conviction as driving without a license. However, at the hearing before the ALJ, Petitioner admitted he had been previously

convicted of carrying a concealed weapon, possession of drug paraphernalia, resisting an officer, and larceny. When asked whether he listed any of these convictions on his application, Petitioner contended "[t]here was another sheet that should have been with [the application] that had all that stuff on it." Petitioner presented no additional evidence regarding another sheet attached to his application. Based on this testimony, the ALJ found Petitioner failed to "report[] these criminal convictions on his application." The ALJ also found, based on FSU's Director of Facilities Operation's testimony, that Respondent would have terminated Petitioner immediately upon learning of Petitioner's inaccurate application. These Findings are supported by substantial evidence in the Record and thus binding on appeal. *See Harris*, 252 N.C. App. at 108, 798 S.E.2d at 137 (explaining that as the ALJ is "the only tribunal with the ability to hear testimony, observe witnesses, and weigh credibility[,] . . . we defer to the ALJ's findings of fact, even if evidence was presented to support contrary findings" (citation omitted)). In turn, these Findings support the ALJ's conclusion—"Pursuant to N.C.G.S. § 126-30(a), if Petitioner were still employed by FSU, his dismissal would have been mandatory." Therefore, the ALJ did not err in applying the *McKennon* rule, concluding Petitioner's after-acquired evidence of misconduct would have warranted dismissal, and limiting Petitioner's remedy to back pay from the time of his discharge to the discovery of this after-acquired evidence.

Conclusion

Accordingly, for the foregoing reasons, we affirm the ALJ's Final Decision.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

CAUSEY v. CANNON SUR., LLC

[269 N.C. App. 134 (2020)]

MIKE CAUSEY, COMMISSIONER OF INSURANCE
OF NORTH CAROLINA, PETITIONER
v.
CANNON SURETY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, RESPONDENT

MARK L. BIBBS, ATTORNEY AT LAW D/B/A BIBBS LAW GROUP, PLAINTIFF
v.
CANNON SURETY, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY, DEFENDANT

No. COA19-27

Filed 7 January 2020

1. Insurance—seizure order and injunction—North Carolina Captive Insurance Act—confession of judgment—void

After granting the Commissioner of Insurance's petition for a seizure order and injunction against a captive insurance company under the North Carolina Captive Insurance Act, the trial court properly struck a confession of judgment filed against the company in favor of the company's attorney, which arose from the company's breach of contract to pay the attorney for his legal services in the case. The company's president violated the seizure order—which enjoined the company's officers from transacting the company's business without the Commissioner's consent—by signing the confession of judgment, and therefore the confession of judgment was void.

2. Estoppel—judicial estoppel—applicability—insurance action—seizure order and injunction

Where the trial court granted the Commissioner of Insurance's petition for a seizure order and injunction against a captive insurance company under the North Carolina Captive Insurance Act, the doctrine of judicial estoppel did not prevent the court from also granting the Commissioner's motion to strike a confession of judgment filed against the company in favor of the company's attorney (for failure to pay for legal services in the case). The company's president did not violate the seizure order by hiring legal counsel, but he did violate the order by signing the confession of judgment. Therefore, where the Commissioner did not object to the company's legal representation in the case, the Commissioner did not change positions by later asserting that the company violated the seizure order by signing the confession of judgment.

Appeal by Plaintiff from orders entered 18 April 2018 by Judge A. Graham Shirley, II, in Wake County Superior Court. Heard in the Court of Appeals 22 August 2019.

Bibbs Law Group of North Carolina, by Mark L. Bibbs, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel S. Johnson, Special Deputy Attorney General M. Denise Stanford, and Assistant Attorney General Heather H. Freeman, for Petitioner-Movant-Appellee and Respondent-Defendant-Appellee in Rehabilitation.

COLLINS, Judge.

Attorney Mark L. Bibbs ("Bibbs") appeals from orders granting motions filed by Commissioner of Insurance Mike Causey ("Commissioner") to strike a confession of judgment against Cannon Surety, LLC ("Cannon") in favor of Bibbs for $227,850.50 plus 8% interest, arising from Cannon's breach of contract to pay for Bibbs' legal services. The confession of judgment violated an existing seizure order entered under the North Carolina Captive Insurance Act, and it was void. Accordingly, we affirm the trial court's orders.

I. Statutory Background: North Carolina Captive Insurance Act

A captive insurance company is "an insurance company that is owned by another organization and whose exclusive purpose is to insure risks of the parent organization and affiliated companies." N.C. Gen. Stat. § 58-3-165 (2018). Captive insurance companies must be licensed, must meet certain capital and surplus requirements, and must file annual reports to the Commissioner. N.C. Gen. Stat. §§ 58-10-345, -370, -405(b), -415 (2018). A captive insurance company failing to meet these requirements may be subject to seizure, rehabilitation, and liquidation by the Commissioner of Insurance. N.C. Gen. Stat. §§ 58-10-475, 58-30-1 to -310 (2018).

To initiate seizure, the Commissioner must file a petition in Wake County Superior Court requesting a formal delinquency proceeding, after which the trial court may issue an ex parte seizure order directing the Commissioner to

> take possession and control of all or a part of the property, books, accounts, documents, and other records of an insurer, . . . and that, until further order of the Court,

> enjoins the insurer and its officers, managers, agents, and employees from disposing of its property and from transacting its business except with the written consent of the Commissioner.

N.C. Gen. Stat. § 58-30-65(b) (2018).

To initiate rehabilitation, the Commissioner must petition the court on one or more specified grounds. N.C. Gen. Stat. § 58-30-75 (2018). If granted, a rehabilitation order appoints the Commissioner as the rehabilitator and directs the Commissioner to "take possession of the assets of the insurer and to administer them under the general supervision of the Court." N.C. Gen. Stat. § 58-30-80 (2018). As the rehabilitator, the Commissioner has "all the powers of the directors, officers, and managers, whose authority shall be suspended" and has broad powers to "take such action as he considers necessary or appropriate to reform and revitalize the insurer." N.C. Gen. Stat. § 58-30-85(c) (2018).

II. Factual and Procedural History

Cannon was a licensed special purpose captive insurance company. Accordingly, Cannon was governed by the requirements set forth in the North Carolina Captive Insurance Act, N.C. Gen. Stat. §§ 58-10-335 to -655, and regulated by the Department of Insurance, which included oversight and enforcement by the Commissioner. Cannon's license permitted it to transact insurance for judicial appearance bonds written by or on behalf of the members of its parent company, Premier Judicial Consultants, LLC.

On 27 September 2017, the Commissioner filed a verified petition in Wake County Superior Court requesting a seizure order, an order of rehabilitation, an order appointing a receiver, and injunctive relief against Cannon. This filing commenced case number 17 CVS 11692 (the "Insurance Action"). On that day, the trial court entered a 60-day seizure order and an injunction as follows:

> SEIZURE ORDER
>
> 1. Pursuant to the provisions of N.C. Gen. Stat. § 58-30-65, Mike Causey, in his capacity as Commissioner of Insurance of the State of North Carolina, is HEREBY ORDERED to take possession and control of all the property, books, accounts, documents, and other records of [Cannon], and of the premises occupied by it for transaction of its business.

2. The Commissioner is hereby authorized, empowered and directed to take into his possession and control all property, stocks, bonds, securities, bank accounts, savings accounts, monies, accounts receivable, books, papers, records, data bases, printouts and computations, . . . and all other assets of any and all kinds and nature whatsoever belonging to [Cannon], wherever located, and to conduct [Cannon's] business and administer [Cannon's] assets and affairs.

INJUNCTION AGAINST
INTERFERENCE WITH COMMISSIONER

3. Until further Order of this Court, [Cannon], its trustees, officers, directors, agents, employees, third party administrators, and all other persons with notice of this Order are hereby ENJOINED and RESTRAINED from the disposition, waste or impairment of any of [Cannon's] property, assets, or records, and said persons are enjoined from transacting [Cannon's] business except with the written consent of the Commissioner. All such persons are hereby ORDERED to surrender to the Commissioner any and all property or records of [Cannon] in their custody or control, wherever situated.

4. Until further order of this Court, [Cannon], its officers, managers, agents, employees, and third party administrators are hereby ENJOINED and RESTRAINED from interfering in any manner with the Commissioner in the exercise of his duties.

5. All persons, firms and corporations with notice of the Court's Order are hereby enjoined from obtaining preferential payments or transfers against [Cannon] or its assets.

6. This Seizure Order shall be effective, unless otherwise extended, for sixty (60) days from the date of this Seizure Order, which is the period the undersigned considers necessary for the Commissioner to ascertain the condition of the insurer.

As counsel for Cannon, Bibbs filed a motion requesting review, relief, and dissolution of the seizure order, followed by an emergency motion asking the trial court to stay enforcement of and set aside the seizure

order. The Commissioner filed a motion for partial summary judgment, seeking to be appointed rehabilitator of Cannon. The trial court extended the seizure order until the latter of a ruling on the Commissioner's partial summary judgment motion or 28 December 2017. The Commissioner served Bibbs, as counsel for Cannon, with the extension of the seizure order on 17 November 2017.

On 15 December 2017, Bibbs moved to withdraw as counsel of record for Cannon, on the ground that Cannon had failed to pay Bibbs for legal representation in the Insurance Action. The trial court granted the motion that day.

On 18 December 2017, Bibbs filed a confession of judgment as a plaintiff in Wake County Superior Court, commencing case number 17 CVS 15505 (the "Attorney Action"). The confession of judgment was signed by Dallas R. McClain ("McClain"), President of Cannon, and averred that (1) Cannon breached a contract with Bibbs for legal services by defaulting on payments due; (2) the confession of judgment resulted from settlement negotiations to resolve the balance owed; (3) McClain authorized the entry of judgment against Cannon in favor of Bibbs for $227,850.50 plus 8% interest; (4) Cannon, "through its President and legally authorized officer, Dallas R. McClain, expressly agree[d] to waive any right to a hearing or appeal arising from entry of" the confession of judgment; and (5) the confession of judgment, executed "by its President and legally authorized officer, Dallas R. McClain," should be binding on all future successors in interest of Cannon.

In the Insurance Action, the trial court entered orders in January 2018 granting the Commissioner's motion for partial summary judgment, placing Cannon in rehabilitation, appointing the Commissioner as rehabilitator and receiver of Cannon, and issuing an injunction against Cannon to prevent interference with rehabilitation.

On 6 February 2018, the Commissioner filed motions in the Insurance Action and the Attorney Action to strike the "purported" confession of judgment filed by Bibbs, contending that McClain's act of signing the confession of judgment violated the seizure order and injunction, rendering the confession of judgment void.[1]

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1. Specifically, the Commissioner alleged in his motions that (a) McClain transacted business on behalf of Cannon while lacking authority to do so under the seizure order and interfered with the Commissioner's exercise of his duties under the seizure order; (b) with knowledge of the terms of the seizure order, Bibbs obtained the purported confession of judgment against Cannon in Bibbs' pecuniary favor, and in so doing sought to obtain preferential payments against Cannon as prohibited by the seizure order; (c) the

On 15 March 2018, Bibbs filed motions to intervene and for payment of attorney fees in the Insurance Action. The trial court heard arguments regarding the motions filed by both parties on 21 March 2018. The trial court had show cause orders served on McClain and Bibbs "for interference with this Court's Seizure Order and Extension of the Seizure Order." On 18 April 2018, the trial court entered orders granting the Commissioner's motions to strike the confession of judgment and denying Bibbs' motions to intervene and for payment of attorney fees in the Insurance Action.

From the 18 April 2018 orders, Bibbs timely filed notice of appeal.[2]

III. Discussion

Bibbs asserts that the trial court improperly struck the confession of judgment and urges this Court to apply the doctrine of judicial estoppel to reverse the trial court's order.

A. Confession of Judgment

[1] Whether a confession of judgment is void is a question of law, which we review de novo. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004). Under de novo review, we consider the matter anew and freely substitute our own judgment for that of the lower tribunal. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

"A judgment by confession may be entered without action at any time in accordance with the procedure prescribed by [N.C. Gen. Stat. § 1A-1, Rule 68.1]. Such judgment may be for money due or for money that may become due." N.C. Gen. Stat. § 1A-1, Rule 68.1(a) (2018). "A prospective defendant desiring to confess judgment shall file with the clerk of the superior court . . . a statement in writing signed and verified or sworn to by such defendant authorizing the entry of judgment for the amount stated." N.C. Gen. Stat. § 1A-1, Rule 68.1(b) (2018). "If the statutory requirements [governing a confession of judgment] are not complied with, the judgment is irregular and void, because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings." *Cline v. Cline*, 209 N.C. 531, 535, 183 S.E. 904, 906 (1936) (internal quotation marks and citations omitted); *see*

Commissioner's rights under the seizure order were impaired by the purported confession of judgment and Bibbs' interference; and (d) accordingly, McClain's and Bibbs' actions rendered the purported confession of judgment void.

2. Bibbs makes no argument on appeal regarding the trial court's orders denying his motions to intervene and for payment of attorney fees in the Insurance Action.

Nimocks v. Cape Fear Shingle Co., 110 N.C. 20, 23-24, 14 S.E. 622, 623 (1892) (affirming a trial court's order setting aside a confession of judgment as void because it did not appear in the record that the directors of defendant corporation had authorized the treasurer or agent to confess the judgment). "A void judgment is not a judgment and may always be treated as a nullity. It lacks some essential element; it has no force whatever; it may be quashed *ex mero motu*." *Clark v. Carolina Homes, Inc.*, 189 N.C. 703, 708, 128 S.E. 20, 23 (1925).

In this case, McClain transacted Cannon's business when McClain executed the confession of judgment on behalf of Cannon in favor of Bibbs. Bibbs conceded as much at the hearing on 21 March 2018:

> THE COURT: Executing a Confession of Judgment is – you know, people do that in transacting the business of their company. Is that correct?
>
> MR. BIBBS: That is correct.
>
> THE COURT: Okay. So when Mr. McClain executed that Confession of Judgment, he was transacting the business of Cannon Surety.
>
> MR. BIBBS: That is correct.

As the seizure order stripped McClain of the authority to transact Cannon's business, and McClain did not obtain the Commissioner's written consent to do so, the confession of judgment was executed in violation of the seizure order. Moreover, because Bibbs had notice of the seizure order and was attempting to obtain immediate payment, the confession of judgment was executed in violation the seizure order's provision enjoining persons with notice of the court's order from obtaining preferential payments or transfers against Cannon or its assets. Additionally, because McClain lacked the legal authority to sign the confession of judgment or otherwise transact any business on behalf of Cannon while the seizure order and injunction were in effect, the confession of judgment was void for "want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings." *See Cline*, 209 N.C. at 535, 183 S.E. at 906. Because the confession of judgment was executed in violation of the seizure order and injunction and was void for want of jurisdiction, the trial court did not err by striking the orders.[3]

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3. While the trial court declared the confession of judgment null and void as a matter of law in its order granting the motion to strike, the trial court *also* stated at the hearing that it could treat the Commissioner's motion to strike as a motion for appropriate relief

B. Judicial Estoppel

[2] Bibbs argues that the trial court abused its discretion by refusing to apply the doctrine of judicial estoppel to this case. Bibbs' estoppel argument proceeds as follows: (1) the Commissioner participated in the October 2017 hearing in the Insurance Action after the seizure order had been entered and without objecting to Bibbs' representation of Cannon or arguing that McClain lacked authority to hire Bibbs to represent Cannon in the Insurance Action; (2) the Commissioner, as the "purported rehabilitator," did not take it upon himself to hire counsel to represent Cannon in the Insurance Action; (3) by failing to object to Bibbs' representation of Cannon, the Commissioner waived the ability to hire counsel on behalf of Cannon and to contest representation by Bibbs later; and (4) when the Commissioner later moved to strike the confession of judgment signed by McClain, the Commissioner effectively changed positions.

"[J]udicial estoppel is to be applied in the sound discretion of our trial courts." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 33, 591 S.E.2d 870, 891 (2004). Our review of a trial court's application of the doctrine is limited to determining whether the trial court abused its discretion. *Id.* at 38, 591 S.E.2d at 894.

Judicial estoppel is an equitable, gap-filling doctrine that "provid[es] courts with a means to protect the integrity of judicial proceedings" from "individuals who would play fast and loose with the judicial system." *Id.* at 26, 591 S.E.2d at 887 (internal quotation marks and citation omitted) (noting that this doctrine protects courts, not litigants). The doctrine prohibits parties from deliberately changing positions on factual assertions. *Id.* at 22-33, 591 S.E.2d at 883-91. While circumstances allowing for judicial estoppel "are probably not reducible to any general formulation of principle[,]" *id.* at 28, 591 S.E.2d at 888, the United States Supreme Court set forth three factors to guide its application, which our courts have articulated as follows:

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and, accordingly, invoke its authority under Rule 60(b)(6) to strike the judgment "for any reason justifying relief from the operation of the judgment." A motion for relief from a judgment or order made pursuant to Rule 60(b) is "addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion." *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). A trial court abuses its discretion if its ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] . . . [t]he judgment is void[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (2018). Because we conclude the confession of judgment was void as a matter of law, as discussed in Part A, even were we to review the trial court's order as a grant of relief under 60(b) for abuse of discretion, we would likewise affirm the trial court's decision.

> (1) whether a party has taken a subsequent position that is clearly inconsistent with its earlier position,
>
> (2) whether the party successfully persuaded a court to accept the earlier, inconsistent position raising a threat to judicial integrity by inconsistent court determinations or the appearance that the first or the second court was misled, and
>
> (3) whether the inconsistent position gives the asserting party an unfair advantage or imposes on the opposing party unfair detriment if not estopped.

Harvey v. McLaughlin, 172 N.C. App. 582, 584, 616 S.E.2d 660, 662-63 (2005) (citing *Whitacre*, 358 N.C. at 28-29, 591 S.E.2d at 888-89 (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001))). Our Supreme Court noted in *Whitacre* that only the first factor is essential. *Whitacre*, 358 N.C. at 29 n.7, 591 S.E.2d at 888 n.7.

The doctrine of judicial estoppel is not applicable in this case because the Commissioner did not take a subsequent position on a factual assertion that was clearly inconsistent with his earlier position. *See id.* at 33, 591 S.E.2d at 891. By participating in the October 2017 hearing, in which Bibbs represented Cannon, the Commissioner did not manifest consent to McClain transacting the company's business in any manner, including by signing a confession of judgment. When McClain appeared at the hearing with legal counsel, he was not transacting business on behalf of Cannon, which would have violated the terms of the seizure order.

The Commissioner's implicit acknowledgment of Bibbs as counsel for Cannon in the Insurance Action was not inconsistent with the Commissioner's later assertion that McClain violated the seizure order by signing the confession of judgment filed in the Attorney Action. As the doctrine of judicial estoppel was not applicable in this case, the trial court did not abuse its discretion by declining to apply it.

IV. Conclusion

The confession of judgment violated the seizure order and was void. The trial court did not abuse its discretion by failing to apply the doctrine of judicial estoppel. The trial court's orders striking the confession of judgment are affirmed.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

COPELAND v. AMWARD HOMES OF N.C., INC.

[269 N.C. App. 143 (2020)]

WILLIAM EVERETT COPELAND IV AND CATHERINE ASHLEY F. COPELAND, CO-ADMINISTRATORS OF THE ESTATE OF WILLIAM EVERETT COPELAND, PLAINTIFFS
v.
AMWARD HOMES OF N.C., INC., CRESCENT COMMUNITIES, LLC; AND CRESCENT HILLSBOROUGH, LLC, DEFENDANTS

No. COA18-1021

Filed 7 January 2020

1. Negligence—dump truck roll-away accident—planned community developer—duty to inspect construction site

The developer of a planned community owed no legal duty to regularly inspect or monitor a construction site in the development, on a lot that had been sold to a builder, which was being graded by an independent contractor without the developer's permission. Summary judgment was therefore properly entered for the developer in a negligence action brought by the parents of a five-year-old boy who was struck and killed when an unattended dump truck rolled downhill from the nearby construction site.

2. Negligence—dump truck roll-away accident—planned community developer—duty to prevent negligent construction work

The developer of a planned community owed no legal duty to take precautions against the possible negligence of others performing construction work in the development. Summary judgment was therefore properly entered for the developer in a negligence action brought by the parents of a five-year-old boy who was struck and killed when an unattended dump truck—which was overloaded, left with its engine running, and without wheel chocks—rolled downhill from a nearby construction site.

3. Negligence—dump truck roll-away accident—planned community developer—duty to sequence construction responsibly

In a negligence action brought after their five-year-old son was struck and killed by an unattended dump truck that rolled downhill from a nearby construction site, plaintiffs presented a genuine issue of material fact regarding whether the developer of the planned community owed a legal duty to ensure that the construction of homes in the hilly and steep development was sequenced in such a way as to minimize the known risk of a roll-away accident causing injury to someone.

Appeal by plaintiffs from order entered 7 May 2018 by Judge W. Osmond Smith III in Orange County Superior Court. Heard in the Court of Appeals 12 February 2019.

Edwards Kirby, LLP, by David F. Kirby and William B. Bystrynski, and Holt Sherlin LLP, by C. Mark Holt and David L. Sherlin, for plaintiffs-appellants.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart and F. Marshall Wall, for defendants-appellees.

DIETZ, Judge.

Five-year-old Everett Copeland died after an overloaded dump truck rolled away and struck him as he played near his home. The dump truck was left unattended, with its engine running and without wheel chocks, at a home construction site up a hill from the Copeland's home.

This case screams of negligence—by the dump truck driver, by the company that operated the dump truck, perhaps even by the general contractor responsible for supervising the operation. This appeal involves none of those parties.

This case concerns negligence claims against the real estate developer who designed the planned community where the accident occurred. The Copelands argue that the developer—although it sold the lots to independent builders to handle construction—retained a duty to develop a safety plan, sequence the project to minimize harm from construction accidents, and conduct inspections of builders' progress.

Most of the Copelands' theories of legal duty are barred by settled tort principles established by our Supreme Court. A real estate developer, like anyone else, may hire a contractor to perform a service such as building a home, and has no duty to supervise that contractor's work. *Woodson v. Rowland*, 329 N.C. 330, 350, 407 S.E.2d 222, 234 (1991). Similarly, a real estate developer, like anyone else, has no duty to imagine all of the harms that might be caused by other people's negligence and then to take precautionary steps to avoid those harms. *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951).

Still, as explained below, the Copelands have advanced a theory of legal duty that survives summary judgment under these principles. They have forecast evidence that this development occurred on unusually steep, hilly terrain; that the construction would involve heavy equipment and materials; that there were foreseeable risks of roll-aways during

construction; and that a reasonably prudent developer would take steps to sequence construction or grade the area in advance to avoid foreseeable harm caused by these construction accidents. There are genuine issues of material fact on this theory of duty and we therefore reverse and remand for further proceedings on this legal claim.

Facts and Procedural History

The following recitation of facts represents the Copelands' version of events, viewed in the light most favorable to them. As the non-movant at the summary judgment stage, this Court must accept the Copelands' evidence as true. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000).

In 2013, Defendants Crescent Communities, LLC and Crescent Hillsborough, LLC, to which we refer collectively as "Crescent," began developing a residential planned community known as Forest Ridge. Crescent purchased more than 100 acres of steep, hilly land as the future site of the development.

Crescent recorded the necessary instruments to subdivide the site and create applicable covenants and declarations typical of planned communities. The company then sold lots to builders, who constructed homes consistent with the overall aesthetic and design elements of the community.

Although Forest Ridge is situated on hilly terrain, Crescent did not mass grade the entire community before selling lots to builders—meaning at least some of the lots had to be individually graded before a home could be built on them. "Grading" is the process of ensuring the earth on which construction will take place is either level, or appropriately sloped for the necessary construction. Grading typically involves heavy equipment including dump trucks, excavators, and bulldozers.

Crescent also did not sequence the construction of the community so that uphill lots were built before downhill ones. As a result, the Copelands moved into their home in Forest Ridge while at least some lots uphill from the Copelands' home had yet to be graded.

In late 2016, on a lot uphill from the Copelands' home, a subcontractor employed by the home builder began grading work. This grading work occurred on hilly, sloping terrain facing the Copelands' home. It involved a dump truck and heavy excavating equipment.

During the grading, the dump truck driver left the truck unattended. The dump truck was overloaded, had its engine running, and did not

have wheel chocks. The truck broke free and rolled downhill. Five-year-old Everett Copeland was playing outside near his home. The dump truck struck and killed Everett.

The Copelands, as administrators of their son's estate, sued Crescent for wrongful death, asserting several theories of negligence. After a full opportunity for discovery, Crescent moved for summary judgment, arguing that it owed no legal duty to the Copelands. The trial court granted Crescent's motion for summary judgment. The Copelands timely appealed.

Analysis

The Copelands appeal the trial court's grant of summary judgment in favor of Crescent. "Summary judgment is appropriate when viewed in the light most favorable to the non-movant, 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." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 164, 665 S.E.2d 147, 152 (2008) (citations omitted). We review the trial court's grant of summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

To survive a motion for summary judgment in a negligence case, the plaintiff must establish a "prima facie case" by showing "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Lavelle v. Schultz*, 120 N.C. App. 857, 859–60, 463 S.E.2d 567, 569 (1995).

In their briefing, the parties focus entirely on the question of duty. "The duty of ordinary care is no more than a duty to act reasonably." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010). "The duty does not require perfect prescience, but instead extends only to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care." *Id.* The Copelands assert several independent theories of legal duty in this case and we address each in turn below.

I. Duty to inspect or monitor the construction site

[1] We begin with the Copelands' argument that Crescent had a duty to "routinely inspect the construction going on in its subdivision." Crescent designed this planned community and recorded an

instrument containing covenants that included various architectural limits on homes constructed there. But the company did not actually build the homes. It sold the lots to builders, who would then construct homes consistent with the covenants and other restrictions included in the lot purchase agreement.

Those lot purchase agreements required builders to obtain permission from Crescent before clearing trees or grading the lot. There is evidence in the record showing the builder of the home from which the dump truck rolled away began grading the lot without permission from Crescent, and that the builder did not take routine safety measures such as installing a silt fence or creating a temporary gravel driveway. The Copelands argue that "Crescent violated the standard of care for a master developer because it failed to routinely inspect the construction going on in its subdivision" and that, had it done so, it would have discovered the builder's unauthorized and unsafe grading work, halted it, "and Everett Copeland would not have been killed."

This theory of legal duty is barred by precedent. The builder was not an employee of Crescent. It was, at most, an independent contractor performing construction work on property that was part of a planned community designed and managed by Crescent. When one hires an independent contractor to perform work, there is no legal duty "to take proper safeguards against dangers which may be incident to the work undertaken by the independent contractor." *Cook v. Morrison*, 105 N.C. App. 509, 515, 413 S.E.2d 922, 926 (1992). The legal responsibility for the safe performance of that work rests entirely on the independent contractor. *Id.*

The only exception to this rule concerns "inherently dangerous activities." *See Woodson v. Rowland*, 329 N.C. 330, 352–53, 407 S.E.2d 222, 235–36 (1991). Our caselaw does not establish a bright-line rule for determining which activities are inherently dangerous, but home construction is not inherently dangerous. *Id.* Our Supreme Court has long held that ordinary building construction work is not "of that character which the policy of the law requires that the owner shall not be permitted to free himself from liability by contract with another for its execution." *Vogh v. F. C. Geer Co.*, 171 N.C. 672, 676, 88 S.E. 874, 876 (1916).

Were we to hold that owners of property on which homes are being constructed have a legal duty to monitor the builder's grading work, it would be an unprecedented expansion of tort liability at odds with our Supreme Court's longstanding application of these negligence principles in the home construction context. As we have often explained,

"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).

The Copelands also suggest that Crescent retained sufficient control over the project to subject itself to liability for the negligence of the builder or its subcontractors. *See Trillium Ridge Condo. Ass'n, Inc. v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 489, 764 S.E.2d 203, 212 (2014). But this principle applies only in situations where the developer retains control over how the work is performed. In *Trillium Ridge*, for example, a developer hired a construction firm to act as "Asst Project Manager" but employees of the developer retained various "[c]onstruction duties & responsibilities." *Id.* at 490, 764 S.E.2d at 212.

Here, by contrast, there is no evidence that Crescent retained any construction responsibilities or had any control over the builder's decisions concerning grading work. To be sure, the declaration Crescent recorded when creating the Forest Ridge community imposed aesthetic restrictions on builders and required builders to obtain permission from Crescent before beginning various phases of construction. But there is no evidence that Crescent retained any control over the actual construction work performed by the builders. Accordingly, we reject the Copelands' argument that Crescent had a legal duty to monitor or inspect the grading work of a subcontractor of the builder.

II. Duty to take precautions against negligent construction work

[2] The Copelands next argue that when Crescent "decided to develop the Forest Ridge subdivision, it was undertaking a course of conduct that required it to exercise ordinary care to protect others from harm." This duty, according to the Copelands, included anticipating the risk of harm caused by negligent operation of heavy equipment at construction sites and taking reasonable precautionary steps to prevent that harm.

Again, this theory of duty is barred by precedent. "It is a well established principle in the law of negligence that a person is not bound to anticipate negligent acts or omissions on the part of others." *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E.2d 276, 279 (1951). This principle has been repeated by our State's appellate courts many times. *Britt v. Sharpe*, 99 N.C. App. 555, 558, 393 S.E.2d 359, 361 (1990) (citing Supreme Court cases).

Here, undisputed facts in the record demonstrate that the driver of a dump truck at the construction site left the vehicle unattended, with

its engine running, without wheel chocks. There is no dispute that the dump truck operator acted negligently and that this negligence proximately caused Everett Copeland's death. The Copelands concede this in their reply brief.

The law *could* impose a duty on Crescent, as the developer of a large planned community, to anticipate potential negligence on construction sites within the community and to take precautionary steps to prevent harm should that occur. But the tort law of our State, as it exists today, does not impose that duty. *Chaffin*, 233 N.C. at 380, 64 S.E.2d at 279.

Some tort scholars have criticized this type of bright-line rule and argued that there should be a "duty to take precautions against the negligence of others" when "a reasonable person would recognize the existence of an unreasonable risk of harm to others through the intervention of such negligence." W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 33, p. 199 (5th ed. 1984). But that is not what our law holds today. And, as explained above, we do not have the authority to change settled common law tort principles established by our Supreme Court. *Shera*, 219 N.C. App. at 126, 723 S.E.2d at 358.

To be sure, *Chaffin* and its progeny carve out an exception when the defendant is aware of any fact "which gives or should give notice" that the negligence will occur. *Chaffin*, 233 N.C. at 380, 64 S.E.2d at 279. But that is not the case here. There is no evidence that Crescent was aware of the negligent activities of the dump truck operator. Accordingly, we must reject this theory of legal duty because it would impose on a real estate developer a duty to take precautionary steps to protect against harm resulting from unknown negligence of others at a construction site. That theory is inconsistent with existing North Carolina law that the negligence of others is not reasonably foreseeable.

III. Duty to sequence construction or conduct mass grading

[3] We thus turn to the Copelands' third, and final, theory of duty. This theory is unlike the other two in a critical way—it does not depend on Crescent having failed to address negligence at the construction site, either through adequate supervision or adequate precautions.

Instead, the Copelands argue that there was a risk that the dump truck could have broken loose and rolled downhill even without negligence at the construction site. This is so, they contend, because there *always* is a risk of roll-away accidents during construction on steep terrain. And, the Copelands argue, developers of large planned communities have the ability to limit any harm from these accidents in a

way ordinary property owners do not. They contend that developers can choose the order in which homes in the development will be constructed and can choose which construction steps will occur all at once and which will occur lot-by-lot. Thus, the Copelands argue, developers of large projects on hilly terrain have a duty to sequence and manage construction to limit the risk that bystanders downhill might be harmed by foreseeable roll-away accidents.

We agree that the Copelands have forecast evidence creating a genuine issue of material fact on this theory of duty. They put forth experts who testified in depositions that there are various "hazards" and "risks" associated with roll-away equipment on hilly construction sites. Those experts testified that the risks of roll-away accidents are known in the planned development industry. They also testified that a reasonably prudent developer would undertake a "safety analysis" or "hazard analysis" and take steps such as sequencing development or conducting mass grading to eliminate the risk of injury from these roll-away accidents.

If all of these things are true, it would be sufficient to impose a duty of care. *See Fussell*, 364 N.C. at 226, 695 S.E.2d at 440; *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 406–07, 263 S.E.2d 313, 318 (1980). The Copelands will have established that a prudent planned community developer would foresee that the construction creates a risk of roll-away accidents and that sequencing the construction in various, reasonable ways will reduce the risk of injury resulting from those accidents.

Unsurprisingly, Crescent disputes *all* of the Copelands' evidence supporting this theory of duty—everything from the notion that developers can foresee these types of risks to the assertion that the Forest Ridge community is situated on hilly terrain.

Ordinarily, the determination of whether one owes another a duty of care is a question of law. But "when the facts are in dispute or when more than a single inference can be drawn from the evidence, the issue of whether a duty exists is a mixed question of law and fact. The issues of fact must first be resolved by the fact finder, and then whether such facts as found by the fact finder give rise to any legal duty must be resolved by the court." *Mozingo by Thomas v. Pitt Cty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 588, 400 S.E.2d 747, 753 (1991), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992). Because there are disputed issues of material fact on the question of duty, this matter cannot be resolved at summary judgment.

We note that, although the question of duty involves fact disputes that cannot be resolved as a matter of law, there may be other legal barriers to the relief the Copelands seek. The appellate briefing in this case

dealt entirely with the legal question of duty. Issues concerning intervening or superseding causation, and the admissibility of the rather vague discussions by the Copelands' experts of the risk of non-negligent rollaway accidents on hilly construction sites, were not briefed by the parties. Although our review of a summary judgment ruling is *de novo*, we decline to comb through the record and independently address issues not raised by the parties. *Johnson v. Causey*, 207 N.C. App. 748, 701 S.E.2d 404, 2010 WL 4288511, at *9 (2010) (unpublished); N.C. R. App. P. 28(b)(6). We leave for the trial court, on remand, the determination of whether there are other grounds on which to rule in this case as a matter of law, or whether the case must proceed to trial.

Conclusion

We reverse the trial court's grant of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges BRYANT and MURPHY concur.

MISTY JENKINS DEANES, PLAINTIFF
v.
KEVIN MICHAEL DEANES, DEFENDANT

No. COA19-120

Filed 7 January 2020

1. Child Custody and Support—modification of custody—substantial change in circumstances—findings of fact—sufficiency

In an action to modify child custody, the trial court properly awarded primary custody of the parties' younger son to the father and primary custody of their elder son to the mother, where the court's findings of fact supported its determination that a substantial change in circumstances affected the children. Substantial evidence supported these findings, including that the father resolved his prior drinking problems, enjoyed unsupervised visits with his sons without incident, and was a good father to his child from a second marriage, and that the mother prevented him from visiting or communicating with their sons for about a year and a half (even though he called them 225 times in that period), resulting in a severed relationship between him and the elder son.

2. Child Custody and Support—modification of custody—best interests of child—split custody

In an action to modify child custody, the trial court did not abuse its discretion by determining that awarding primary custody of the younger child to the father and primary custody of the elder child to the mother was in the children's best interests. The court found that the mother tried to sever the children's relationship with the father by refusing to cooperate with him, failing to notify him of the children's medical issues, and interfering with his visitation rights, and that—despite the damaged relationship between the father and his elder son—the father's relationship with his younger son remained strong. The court also accounted for the children's separation by ordering visitation enabling them to see each other often.

3. Contempt—civil—willful violation of child custody order—telephone communication—not equal to in-person visitation

In an action to modify child custody, the trial court properly held a mother in civil contempt for willfully violating a custody order by denying the father "reasonable telephone communication" with their two sons (for about a year and a half, she only allowed him to speak to the children five times even though he called them 225 times) and by failing to consult the father on major medical, educational, and religious decisions affecting the children. Although the order limited the father's in-person visitation if he consumed alcohol in front of the children, the mother incorrectly argued that those limits also applied to the father's telephone communication with their sons, because electronic communication is not a form of visitation equal to in-person visits.

4. Child Custody and Support—modification of child support—calculation—split custody worksheet—health insurance and childcare credits

In an action to modify child custody and support, where the trial court properly awarded primary custody of the parties' younger son to the father and primary custody of their elder son to the mother, the court properly calculated the father's support obligation using the "split custody" worksheet from the N.C. Child Support Guidelines. Nevertheless, the matter was remanded for the trial court to redetermine the appropriate health insurance and childcare credits the father should receive toward his support obligation.

Appeal by Plaintiff from an Order entered 13 November 2018 by Judge Teresa Freeman in Bertie County District Court. Heard in the Court of Appeals 19 September 2019.

Pritchett & Burch, PLLC, by Lloyd C. Smith, Jr. and Lloyd C. Smith, III, for plaintiff-appellant.

Cordell Law, LLP, by Zach Underwood, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Misty Jenkins Deanes (now Gibbs) (Plaintiff) appeals from an Order modifying a previous child custody and support order and holding both parties in civil contempt. The Record tends to show the following:

Plaintiff and Kevin Michael Deanes (Defendant) married on 5 May 2007 and separated on 4 November 2011. The parties have two minor children from their marriage—Carter, born in 2006, and Bobby, born in 2010.[1] On 16 March 2012, Plaintiff filed a civil action seeking child custody, child support, and attorney's fees. On 4 April 2012, Defendant filed his Answer and Counterclaim. Defendant's Counterclaim requested child custody, equitable distribution, and attorney's fees.

The trial court entered an Order of Child Custody and Child Support on 27 December 2012 (2012 Order). The 2012 Order granted the parties joint legal custody and primary physical custody of the two minor children to Plaintiff. The 2012 Order provided Defendant with visitation supervised by his father and granted him "reasonable telephone communication with his minor children at reasonable times and for reasonable lengths with the same being between 7:00 o'clock p.m. and 8:00 o'clock p.m. every other weekday during the week."

Shortly after entry, the parties modified visitation under the 2012 Order as Defendant's father was unable to continue supervising. The parties presented conflicting evidence as to whether Defendant's now-wife agreed to supervise visitation in light of that change; however, the Record indicates the parties continued to operate under the framework of the 2012 Order with visitation being unsupervised until 26 November

1. Pseudonyms are used to protect the identities of the minor children.

2016.[2] On that evening, the two minor children were in Defendant's custody. Defendant, his new wife, and their combined four children—his wife's child from a previous marriage, his two children with Plaintiff, and the couples' biological daughter—were decorating for the holidays. Later that evening, Defendant's oldest son, Carter, remained awake after the other children went to bed. Around 10 p.m., Defendant and his wife left their residence to observe a neighbor's decorations. Defendant testified that he spoke with Carter before they left to make sure he was "agreeable to staying home alone with the other children for a short period of time." Defendant provided him with a cell phone so that he could contact Defendant if he became concerned. The duration of Defendant's absence is unclear from the Record; however, during that time Carter became worried and upset. Carter testified at trial he tried to reach Defendant but he could not unlock the cell phone he was given. He contacted Plaintiff from his own cell phone during Defendant's absence. In response to Carter's call, Plaintiff traveled through the night to Defendant's residence in Virginia. Around 4 a.m. the following morning, Plaintiff arrived at Defendant's residence and instructed her two children to leave Defendant's house without notifying Defendant. After the children were in Plaintiff's custody around 5 a.m., Plaintiff texted Defendant that she retrieved the children.

Defendant did not see his two minor children from the time Plaintiff retrieved them the morning of 27 November 2016 until the trial court's initial hearing on 11 June 2018. Defendant's phone records indicated that he called Plaintiff 225 times during that period, but he testified that he only spoke with his children five times from 27 November 2016 until the date of trial, 11 June 2018. On 9 November 2017, Defendant filed a Motion for Contempt and Motion for Modification of Custody. Plaintiff responded on 24 January 2018 and moved for modification of custody and child support as well as for Defendant to show cause why he should not be held in civil contempt.

On 13 November 2018, the trial court entered an Order for Modification of Custody, Child Support, and Contempt (2018 Order). In the 2018 Order, the trial court found a substantial change in circumstances that affected the minor children and accordingly determined

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2. The trial court found, in Findings of Fact 10 and 14, "the evidence from both parties showed that Defendant's supervised visits did not last more than six (6) months after entry of the [2012] Order." And further "that when Defendant's father stopped supervising the visits in 2013, Defendant's visits thereafter were no longer 'supervised,' and that since 2013 Defendant has exercised his visits without any sort of supervision." These Findings were not challenged by Plaintiff on appeal.

it was in the children's best interests to make several modifications to the 2012 Order. The trial court granted Defendant's Motion to Modify Custody, Plaintiff's Motion to Modify Child Support, and both parties' contempt Motions. The trial court entered a split custody arrangement: Plaintiff retained primary physical custody of Carter and was awarded primary legal custody. The 2018 Order granted Defendant primary legal and physical custody of the younger child, Bobby. The trial court also found both parties willfully violated the 2012 Order, holding both parties in civil contempt. As a result of the modification of child custody, the trial court also modified Defendant's child support obligation. Plaintiff timely appealed from the 2018 Order.

Issues

Plaintiff presents three primary issues before this Court. (I) Plaintiff contends the trial court erred in modifying the parties' child custody arrangement in the 2012 Order by (1) finding a substantial change in circumstances that materially affected the minor children and (2) determining that a split custody arrangement was in the best interests of the children. Plaintiff next contends the trial court erred by (II) holding Plaintiff in civil contempt of the 2012 Order and (III) in calculating Defendant's child support obligation.

Analysis

I. Modification of Child Custody

A. Standard of Review

"Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[.]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations and quotation marks omitted). The trial court examines whether to modify a child custody order in two parts. First, "[t]he trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Id.* "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." *Id.* Findings of fact supported by substantial evidence "are conclusive on appeal, even if record evidence might sustain findings to the contrary." *Id.* at 475, 586 S.E.2d at 254 (citation and quotation marks omitted). We then "determine if the trial court's factual findings support its conclusions of law." *Id.*

Second, the trial court must "examine whether a change in custody is in the child's best interests." *Id.* at 474, 586 S.E.2d 253. "As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Stephens v. Stephens*, 213 N.C App. 495, 503, 715 S.E.2d 168, 174 (2011) (citation and quotation marks omitted)). "Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.*

B. The 2018 Order

[1] In the 2018 Order, the trial court determined that there was a substantial change in circumstances that affected the minor children and that it was in the best interests of the minor children to enter a split custody arrangement. Plaintiff challenges the trial court's determination a substantial change in circumstances existed affecting the minor children and that modification of child custody was in the children's best interests. First, we review the trial court's determination that a substantial change in circumstances affected the minor children to see if the Findings of Fact are supported by competent evidence. We then review the trial court's determination of the best interests of the minor children for abuse of discretion.

1. Substantial Change in Circumstances that Affected the Minor Children

Plaintiff challenges the 2018 Order's Findings that support its ruling a substantial change in circumstances affected the minor children and further contends the trial court erred because "the Court made no findings of fact as to how any alleged significant change of circumstances had affected the minor children." "Where the 'effects of the substantial changes in circumstances on the minor child . . . are self-evident,' there is no need for evidence directly linking the change to the effect on the child." *Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395, 398 (2009) (quoting *Shipman*, 357 N.C. at 479, 586 S.E.2d at 256) (alteration in original). Moreover, "both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child[ ] . . . may support a modification of custody on the ground of a change in circumstances." *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998).

Plaintiff challenges Finding of Fact 54, which determined a substantial change in circumstances existed because:

a. Six years have passed since the entry of the [2012] Order.

b. The children have grown from toddler/small children to elementary/middle-school aged children.

c. The Defendant is no longer exhibiting a drinking problem.

d. The Defendant enjoyed unsupervised visits with [Carter] and [Bobby] for years without incident . . . .

e. The Defendant has cared for his children that he shares with his current wife for years without incident.

f. Defendant has not been able to see or speak regularly by phone with [his children] since November 2016 as a direct consequence of Plaintiff's unilateral decisions, as further detailed in this Court's findings hereinabove.

Plaintiff argues the trial court erred in Findings 54(a),(b), and (f). Specifically, Plaintiff contends it was error for the trial court to find the time since entry of the 2012 Order and the age of the parties' children as facts supporting a substantial change in circumstances. Plaintiff cites to our Supreme Court's decision in *In re Peal* in support of her argument. 305 N.C. 640, 290 S.E.2d 664 (1982). However, in *Peal* our Supreme Court held the trial court correctly considered the age of the parties' son when it modified a previous custody order. *Id.* at 646-47, 290 S.E.2d at 668. We emphasize, as was the case in *Peal*, that here the trial court did not find the change in the children's age as the sole basis for its determination there was a substantial change in circumstances. In *Peal*, the trial court made additional findings and considered the child's testimony and preference. *Id.* Here, the age of the children and the time since the entry of the 2012 Order is but one of several factors used by the trial court and is therefore consistent with our Supreme Court's decision in *Peal*. Therefore, the trial court properly considered the time since entry of the 2012 Order and the age of the minor children as part of its determination.

Plaintiff contends the trial court erred in Finding 54(f) because Plaintiff did not unilaterally act to terminate Defendant's visitation and instead that Defendant's visitation rights terminated under the 2012 Order when he consumed alcohol in front of the minor children. We disagree. The 2012 Order stated "[i]f the Defendant possess or consumes said intoxicating substances, then his visitations will terminate immediately and his father is to return the children to the Plaintiff until such time as further orders are entered by [the trial court]." The 2012 Order

did not contemplate Plaintiff would have the sole authority to terminate Defendant's visitation. In fact, the 2012 Order named Defendant's father as the supervisor and, as such, designated him to "return the children to the Plaintiff until such time as further orders are entered by this Court[ ]" in the event Defendant consumed alcohol during a visitation. Therefore, the trial court vested the authority to terminate visitation with either a court-approved party—like Defendant's father—or by further order of the trial court, not with Plaintiff.

Furthermore, early in the morning of 27 November 2016, Plaintiff drove to Defendant's residence and instructed Carter and Bobby to leave without alerting Defendant. The Record evidences Defendant did not see his children from that time until the trial court's hearing and that he called Plaintiff over 200 times during that same period and was only able to speak with his children on five occasions. As such, we conclude there is substantial evidence in the Record to support Finding 54(f)—that due to Plaintiff's unilateral decision "Defendant has not been able to see or speak regularly by phone with [his children] since November 2016 . . . ."

Plaintiff concedes the trial court's Findings 54(c)-(e) "may be redeeming factors" but states "they are not a substantial change of circumstances which would justify a modification of [the 2012 Order]." Therefore, the trial court's Findings that Defendant "is no longer exhibiting a drinking problem[,] . . . enjoyed unsupervised visits with [his children] for years without incident[, and] . . . has cared for his children that he shares with his current wife for years without incident[,]"are conclusive on appeal. Furthermore, we disagree with Plaintiff and instead conclude these Findings support the trial court's determination a substantial change in circumstances exists that affected the minor children.

The trial court found the fact Defendant no longer exhibits a drinking problem or suffers from alcohol abuse as a substantial change in circumstances. From this Finding and other evidentiary findings made by the trial court, it is evident the change positively impacts Defendant's ability to care for his children, as highlighted in the trial court's next Finding "Defendant enjoyed unsupervised visits with [his children] for years without incident until November 2016[.]" As Plaintiff notes in her brief, the 2012 Order focused heavily on Defendant's alcohol consumption in denying his request for unsupervised visitation. Thus, the trial court's Finding—unchallenged on appeal—that Defendant no longer exhibits a drinking problem supports the trial court's determination that a substantial change in circumstances exists of which the effects are evident. *See Lang*, 197 N.C. App. at 750, 678 S.E.2d at 398. As such, the

trial court did not need to find "evidence directly linking the change to the effect on the child[ren.]" *Id.* (citations and quotation marks omitted).

The trial court's Findings—"Defendant enjoyed unsupervised visits with [his minor children] for years without incident until November 2016[,]" Defendant has a "new child with his current wife," and his minor children have a strong bond with his new child and his wife's first child—support the conclusion that a substantial change in circumstances affected his minor children. At the time of the 2012 Order, Defendant had not remarried. However, his subsequent marriage and the birth of his daughter with his new wife are linked to an effect on his minor children in the trial court's Finding that a strong bond existed between them. That Finding is supported by competent evidence and evidences the substantial change in circumstances affected the minor children.

As such, the trial court's determination a substantial change in circumstances existed is supported by the Findings of Fact, which also supports the trial court's determination the substantial change in circumstances affected the welfare of the parties' minor children.

Plaintiff also challenges Findings 62, 64, 65, 66, 67, and 68 as erroneous and not supported by the evidence.[3] Although we conclude the trial court sufficiently demonstrated a substantial change in circumstances affected the welfare of the minor children, we briefly address Plaintiff's additional challenges. The trial court's Findings, in relevant part, are as follows:

> 62. However, the Court also finds everything that has transpired in this case since November 26, 2016 is a direct result of Plaintiff's poor decision making as it relates to the minor children.
>
> . . . .
>
> 64. Instead of speaking with the Defendant prior to retrieving the minor children, [Plaintiff] did it herself. That demonstrates poor-decision making by Plaintiff, and

3. The trial court acknowledged:

> There are or may be mixed findings of fact and conclusions of law or conclusions of law set forth in the [Findings of Fact] . . . as the Court must make mixed findings of fact and conclusions of law in determining the best interest of the minor children, the type of visitation and custody that should be awarded, and the amount of child support which should be awarded."

this poor decision-making was not in the best interests of the children[.]

65. Plaintiff's decision to completely cut off all communication and visitation with Defendant was not in the best interests of the minor children.

66. Plaintiff's decision not to notify Defendant of the oldest child's therapy, or involve him in any way was not in the child's best interests.

67. Any parent who completely severs a child's relationship with the other parent, barring extreme circumstances, has shown a clear inability to act in the children's best interests. There are no such extreme circumstances present in this case. Plaintiff attempted to completely sever the children's relationship with Defendant, and has therefore shown an inability to act in the children's best interests.

68. Because of Plaintiff's poor decision making, the oldest minor child no longer wishes to have a relationship with his father of any kind.

The trial court's above Findings are supported by competent evidence in the Record. Namely, Plaintiff admits she utilized self-help to retrieve the minor children from Defendant's custody, without his knowledge, on the morning of 27 November 2016. The Record further reflects prior to 26 November 2016, Defendant was able to visit and communicate with his minor children regularly and without incident under the 2012 Order as modified by the parties. Yet, after the 26 November 2016 incident, Defendant did not see his children until the 11 June 2018 hearing and only spoke with them a combined five times. Despite the fact Defendant shared joint legal custody with Plaintiff and was to be informed of major medical decisions regarding their minor children under the 2012 Order, Plaintiff did not inform or consult with Defendant about Carter's mental health issues even though his therapist testified the 26 November 2016 event was a "major stressor" in his life. Moreover, Plaintiff did not inform Defendant of Bobby's dental surgeries or Carter's braces, and additional testimony elicited at trial indicated Carter no longer wishes to have a relationship with Defendant.

As such, we conclude there is competent evidence in the Record supporting the trial court's Findings Plaintiff attempted to completely sever the children's relationship with Defendant and that the events that

transpired after 26 November 2016 are the result of Plaintiff's poor decision-making. Thus, the trial court sufficiently demonstrated a substantial change in circumstances affected the minor children.

2. Best Interests

[2] Plaintiff contends the trial court incorrectly determined it was in the best interests of the minor children to grant Defendant primary physical and legal custody of the parties' younger son, entering a split custody arrangement. We disagree. "Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child[,]" *Phelps v. Phelps*, 337 N.C. 344, 352, 446 S.E.2d 17, 22 (1994), and "[e]vidence of a parent's ability or inability to cooperate with the other parent to promote their child's welfare is relevant in a custody determination and material to determining the best interests of the child." *Cunningham v. Cunningham*, 171 N.C. App. 550, 559, 615 S.E.2d 675, 682 (2005). "As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Stephens*, 213 N.C App. at 503, 715 S.E.2d at 174 (citation and quotation marks omitted).

The trial court made Findings that the Defendant and the younger child "shared a strong relationship prior to November 26, 2016, and have maintained some phone contact since November 26, 2016. There was no evidence presented at trial that Defendant and the younger minor child currently have a strained relationship or unhealthy relationship." Further, the trial court found Plaintiff: cut off communication and visitation with Defendant and his minor children; did not notify Defendant of the older minor child's enrollment in therapy; and did not consult with Defendant regarding "how to proceed with such major medical procedures prior to them being carried out[ ]" for either of the minor children.

As this Court held, "[e]vidence of a parent's ability or inability to cooperate with the other parent . . . is relevant in a custody determination and *material* to determining the best interests of the child." *Cunningham*, 171 N.C. App. at 559, 615 S.E.2d at 682 (emphasis added). Moreover, "although interference alone is not enough to merit a change in the custody order, where interference with visitation becomes so pervasive as to harm the child's close relationship with the noncustodial parent, it may warrant a change in custody." *Stephens*, 213 N.C App. at 499, 715 S.E.2d at 172 (alterations, citations, and quotation marks omitted).

As previously discussed, the trial court's Findings reflect Plaintiff's inability to cooperate with Defendant and her interference with Defendant's visitation rights—Findings that are material to the trial

court's decision regarding the best interests of the minor children. The trial court determined the best interests of Carter were best served by ordering he remain with Plaintiff due to his damaged relationship with Defendant and, accordingly, ordering Defendant and Carter enroll in reunification therapy. However, the trial court determined that the best interests of Bobby were best served by granting Defendant primary physical and legal custody. The trial court's Findings support its determination that the best interests of Bobby are met by granting Defendant primary physical and legal custody because Plaintiff acted in opposition to the child's best interest when she attempted to completely sever the child's relationship with Defendant, which the trial court found to be strong, and by her demonstrated inability to cooperate with Defendant. "[T]he trial court 'need not wait for any adverse effects on the child to manifest themselves before the court can alter custody.' " *Id.* at 502-03, 716 S.E.2d at 174 (citation and quotation marks omitted). Therefore, we conclude the trial court did not abuse its discretion in ordering Defendant primary custody of Bobby.

Plaintiff additionally argues it was not in the best interests of the minor children to be separated and that the trial court did not consider the effect of separation on the best interests of the minor children. However, the trial court's 2018 Order evidences, in fact, that the trial court considered the effects of separation on the minor children. The trial court ordered: "In an effort to ensure both children still see each other and maintain their sibling relationship, the parties shall exchange the children such that the minor children spend every weekend together . . . ." "Prior to school releasing for the summer, the parties shall work together to develop a schedule for the summer where . . . the children are together." From the language of the 2018 Order, we conclude the trial court contemplated the separation of the minor children in the 2018 Order and accordingly ordered visitation to account for the change. Thus, the trial court did not abuse its discretion, and we affirm the 2018 Order's modification of child custody.

II. Contempt

[3] We review a trial court's determination of civil contempt to determine "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted). The trial court's findings of fact "are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Id.* (citation and quotation marks omitted).

The trial court held Plaintiff in civil contempt of the 2012 Order for willfully violating two provisions. The trial court found Plaintiff violated the 2012 Order by denying Defendant reasonable telephone communication with his children and for failing to "consult as appropriate on major medical, educational, and religious decisions in the children's lives."

Plaintiff challenges the trial court's Findings 79, 80, 81, 82, 83, and 84 finding Plaintiff in contempt for her willful violation of Defendant's right to telephone visitation with his sons. The trial court found Defendant called Plaintiff over 200 times since 26 November 2016 and that she had answered five times. Plaintiff argued in response that Defendant's visitation, both in-person and telephone, terminated when he consumed alcohol in front of the parties' sons. Plaintiff erroneously relies on *Routten v. Routten* for her argument that electronic communication is an equal form of visitation. ___ N.C. App. ___, ___, 822 S.E.2d 436, 443 (2018), *disc. rev. denied*, ___ N.C. ___, 831 S.E.2d 77 (2019). *Routten*, however, simply points to N.C. Gen. Stat. § 50-13.2(e), which states "[e]lectronic communication with a minor child may be used to *supplement* visitation with the child. Electronic communication *may not* be used as a replacement or substitution for custody or visitation." N.C. Gen. Stat. § 50-13.2 (e) (2017) (emphasis added). As such, Plaintiff's contention that electronic communication is a form of visitation equal to that of in-person visitation is incorrect.

In addition, the 2012 Order addresses Defendant's right to electronic and in-person visitation separately. The 2012 Order grants Defendant supervised visitation on the condition that "[i]f the Defendant possesses or consumes said intoxicating substances, then his visitations will terminate immediately and his father is to return the children to the Plaintiff . . . ." In a separate paragraph, the 2012 Order provides "Defendant will be allowed reasonable telephone communication with his minor children at reasonable times and for reasonable lengths . . . ." The trial court did not limit Defendant's telephone communication on his consumption of alcohol as it did his supervised visits. As such, the trial court correctly determined Plaintiff was in civil contempt for denying Defendant telephone communication provided to him by the 2012 Order.

The trial court also held Plaintiff was in civil contempt for failing to "consult as appropriate on major medical, educational, and religious decisions in the children's lives." Plaintiff did not challenge this portion of the 2018 Order finding her in civil contempt. Therefore, we affirm the trial court's 2018 Order holding Plaintiff in civil contempt of the 2012 Order.

III. Child Support Modification

[4] Plaintiff contends the trial court erred using Worksheet C, provided by the North Carolina Child Support Guidelines, to calculate Defendant's child support obligation because the trial court should not have ordered a split custody arrangement. Considering our previous conclusion, we disagree and hold it was correct for the trial court to use Worksheet C to calculate Defendant's child support obligation.

Next, Plaintiff argues the trial court committed "plain error" in its inclusion of a one-hundred-dollar-per-month health insurance credit and a one-hundred-dollar-per-month childcare credit to Defendant in its child support calculation. There is no plain error review in civil trials. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citation omitted) ("[P]lain error review is available in criminal appeals[.]"). Instead, a trial court's child support modification is reviewed for abuse of discretion. *See Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002).

Defendant contends, in brief, the parties consented to submit their proposed child support worksheets to the trial court after the trial court announced its award of split custody. This may well be true, but there is nothing in the Record before us reflecting Defendant's contention. Therefore, we are constrained to remand this matter to the trial court to make findings, supported by evidence and other materials properly before it, resolving this very limited issue of the appropriate health insurance and childcare cost credit to be given to Defendant in calculating his child support obligation.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's conclusion there was a substantial change of circumstances justifying a modification in child custody. We also affirm the trial court's holding Plaintiff in civil contempt. We vacate the 2018 Order in part and remand this matter to the trial court for further proceedings to redetermine the appropriate health insurance and childcare cost credit Defendant should be given for his child support calculation.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges ZACHARY and ARROWOOD concur.

ASHELY DEMINSKI, AS GUARDIAN AD LITEM ON BEHALF OF C.E.D., E.M.D., AND K.A.D., PLAINTIFFS
v.
THE STATE BOARD OF EDUCATION, AND THE PITT COUNTY BOARD OF EDUCATION, DEFENDANTS

No. COA18-988

Filed 7 January 2020

1. Appeal and Error—interlocutory order—governmental immunity—substantial right

In an action brought by a mother alleging violations of her children's constitutional right to education, the trial court's interlocutory order denying the county school board's motion to dismiss was immediately appealable as affecting a substantial right where the school board alleged the defense of governmental immunity.

2. Constitutional Law—North Carolina—right to education—harassment by other students

A mother's complaint failed to state a claim upon which relief could be granted where she alleged that her children were deprived of their constitutional right to an education due to persistent harassment at school by other students, which went unaddressed by school personnel. The trial court erred by denying the county board of education's motion to dismiss the constitutional claim because the harm alleged did not directly relate to the nature, extent, and quality of the educational opportunities made available to plaintiff's children.

Judge ZACHARY dissenting.

Appeal by defendant Pitt County Board of Education from order entered 3 July 2018 by Judge Vince M. Rozier, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 13 March 2019.

No brief filed for plaintiff-appellee.

Tharrington Smith, LLP, by Deborah R. Stagner, for defendant-appellant Pitt County Board of Education.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and Jill R. Wilson, and the North Carolina

School Boards Association, by Allison Brown Schafer, for Amicus Curiae North Carolina School Boards Association.

STROUD, Judge.

The Pitt County Board of Education ("Defendant") appeals from the trial court's order denying its motion to dismiss the portion of Plaintiff's complaint alleging violations of the right to education guaranteed under the North Carolina Constitution. Because this case is controlled by *Doe v. Charlotte-Mecklenburg Board of Education*, 222 N.C. App. 359, 731 S.E.2d 245 (2012), we reverse the trial court's order denying Defendant's motion to dismiss the constitutional claims in the Plaintiff's complaint and remand for further proceedings.

I. Background

Plaintiff Ashley Deminski,[1] on behalf of her minor children C.E.D., E.M.D., and K.A.D. ("Minor Plaintiffs"), initiated this action against Defendant and the State Board of Education[2] by filing a verified complaint in Superior Court, Wake County on 11 December 2017.

The complaint was filed in response to Defendant's alleged "deliberate indifference" to the "hostile academic environment" at Lakeforest Elementary School while the Minor Plaintiffs were enrolled there. Plaintiff alleges that because of Defendant's conduct, the Minor Plaintiffs "were each denied their rights to a sound basic education."

According to the complaint, during the 2016-2017 academic year, Defendant allowed C.E.D. to be "repeatedly and severely bullied" by two particular students, and to be "repeatedly harassed sexually by two other students." For example, the complaint alleges that Defendant permitted Student #1 and Student #2 to "grab C.E.D. by the shoulders and push along [her] spine with sufficient force that [she] . . . had trouble breathing and swallowing." This happened "each week" and "at varying times during the school day."

The complaint also describes Student #3's repeated sexual harassment of C.E.D. for two full academic years while at Lakeforest Elementary, as follows:

> a. On multiple occasions, Student #3 put his hands in his pants to play with his genitals in C.E.D.'s presence;

1. Plaintiff Ashley Deminski's name was misspelled in the caption of the order.

2. The State Board of Education is not party to the instant appeal.

> b. On multiple occasions, Student #3 informed C.E.D. he "f***s like a gangster";
>
> . . . .
>
> d. On multiple occasions, Student #3 informed C.E.D. he has "got something special for you" before putting his hands in his pants to play with his genitals;
>
> e. On multiple occasions, Student #3 would play with his genitals and then attempt to touch C.E.D.;
>
> f. On at least one occasion, . . . Student #3 pulled down his pants in the hallway in C.E.D.'s presence to expose his penis and wiggle it to simulate masturbation; and,
>
> g. On at least one occasion, Student #3 pulled down his pants in the classroom in C.E.D.'s presence to expose his penis and show it to her.

This "was in addition to other harassing conduct, including staring at C.E.D., interrupting C.E.D. during tests and other assignments, and repeatedly talking to C.E.D. during instructional time."

School personnel also failed to act when Student #4 would subject C.E.D. to similar sexual harassment:

> 15. Student #4, perhaps encouraged by Student #3's lewd conduct going unaddressed, sexually harassed C.E.D. repeatedly:
>
> a. On multiple occasions, Student #4 would tell C.E.D. and other students that he and C.E.D. were dating and intimate;
>
> b. On at least one occasion, Student #4 rolled a piece of paper to approximate a penis and made motions simulating masturbation while in C.E.D.'s presence; and,
>
> c. On at least one occasion, . . . Student #4 rolled a piece of paper to approximate a penis, put it in his pants, walked over to C.E.D. and attempted to show C.E.D. how to insert himself into C.E.D.'s vagina. When C.E.D. attempted to get away from Student #4 and move to another seat, Student #4 attempted to reposition himself to attempt to get under where C.E.D. would be sitting.

Minor Plaintiffs E.M.D. and K.A.D. are diagnosed with autism, and during their enrollment as students at Lakeforest Elementary, services were provided to them under their Individualized Education Plans. The complaint alleges that Defendant allowed both E.M.D. and K.A.D. "to endure substantially the same conduct by Student #3, including sexual conduct, constant verbal interruptions laced with vulgarity, and physical violence including knocking students' items onto the floor, throwing objects, and pulling books and other items off shelves onto the ground."

According to the complaint, C.E.D. "repeatedly informed her teacher of each of the acts by the four students[,]" and Plaintiff also "repeatedly notified the teacher, Assistant Principal, and Principal in efforts to resolve the situation." However, school personnel's only response was to insist that the "process" would "take time;" meanwhile, "no substantive changes" were made, and "the bullying and harassing conduct continued unabated." The uncorrected harassment continued to such a degree that Plaintiff ultimately "obtained a transfer of the Minor Plaintiffs to a new school." Nevertheless, the complaint alleges that "[t]he academic performance of all three Minor Plaintiffs fell as a result of the perpetually chaotic school environment" at Lakeforest Elementary.

Plaintiff asserted one claim for violations of Article I, section 15 and Article IX, section 2 of the North Carolina Constitution, in that Defendant's deliberate indifference to the hostile academic environment at Lakeforest Elementary denied the Minor Plaintiffs "their rights to a sound basic education." As relief, the complaint requested, among other things, that Defendant "be compelled to make all necessary modifications to policy and/or personnel to bring its schools into compliance with the School Violence Prevention Act;"; that Plaintiff recover "compensatory damages . . . to be held in trust for the benefit of the Minor Plaintiffs"; and that the trial court "grant any such additional and further relief as [it] deems proper and just."

Defendant filed a motion to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted,[3] because Plaintiff's claims were barred by the doctrine of governmental immunity.[4] The trial

3. The State Board of Education likewise filed a motion to dismiss, which was granted. This order was not appealed.

4. Defendant also filed a motion to dismiss for lack of standing under Rules 12(b)(1) and (6), asserting that "Plaintiff Ashley Deminski has not been duly appointed by the Court to serve as guardian ad litem for the [Minor Plaintiffs]." However, the trial court did not specify the grounds upon which its order was based, and Defendant does not raise an argument concerning standing on appeal.

court denied Defendant's motion to dismiss Plaintiff's constitutional claim by order entered 3 July 2018.[5] Defendant appeals the interlocutory order to this Court.

On appeal, Defendant contends the trial court erred by denying its motion to dismiss Plaintiff's constitutional claim, arguing this Court "has clearly held that public school students do not have a claim for relief under article I or article IX of the North Carolina Constitution based on allegations of failure by school employees to prevent harm by a third party." Defendant maintains that Plaintiff "may not avoid the effect of the Board's governmental immunity by simply labeling a tort action as a constitutional claim." The North Carolina School Boards Association filed an amicus brief with this Court contending the same. Amicus further emphasizes that "[d]eclaring individual educational claims to be constitutional violations would be disastrous public policy for the State and boards of education."

II. Interlocutory Appeal

[1] The trial court's order denying Defendant's motion to dismiss Plaintiff's constitutional claim is interlocutory in that it "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). This Court will not generally entertain an appeal from an interlocutory order. *Doe*, 222 N.C. App. at 363, 731 S.E.2d at 248. However, a party may immediately appeal an interlocutory order where the order "deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Id.*

Here, Defendant argues that the trial court's order denying its motion to dismiss Plaintiff's constitutional claim is immediately appealable because it affects Defendant's substantial right to governmental immunity. *See Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 230, 664 S.E.2d 649, 652 (2008) ("Cases which present defenses of governmental or sovereign immunity are immediately appealable because such orders affect a substantial right."). Although the doctrine of governmental immunity will not operate to bar a *constitutional* claim, for the reasoning articulated in *Doe v. Charlotte-Mecklenburg Board of Education*, we conclude that Defendant's appeal is properly before this Court. *See*

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5. Plaintiff's complaint also asserted a claim against Defendant for violation of the School Violence Prevention Act, North Carolina General Statute § 115C-407.15 *et seq.*, which the trial court dismissed. Plaintiff did not appeal the trial court's dismissal of this claim.

Doe, 222 N.C. App. at 365, 731 S.E.2d at 249 ("A failure to evaluate the validity of Plaintiff's constitutional claims would allow Plaintiff to simply re-label claims that would otherwise [be] barred on governmental immunity grounds as constitutional in nature, effectively circumventing the Board's right to rely on a governmental immunity bar.").

III. Standard of Review

[2] Upon appeal from the denial of a defendant's motion to dismiss under Rule 12(b)(6), this Court must review *de novo* "whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Christmas*, 192 N.C. App. at 231, 664 S.E.2d at 652 (ellipsis and brackets omitted). This Court "must consider the allegations in the plaintiff's complaint to be true, construe the complaint liberally, and only reverse the trial court's denial of a motion to dismiss if the plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Doe*, 222 N.C. App. at 366, 731 S.E.2d at 250 (quotation marks and brackets omitted).

IV. The Right to Education

A. Governmental Immunity

Under the doctrine of governmental immunity, county boards of education are often shielded "entirely from having to answer for [their] conduct at all in a civil suit for damages." *See Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). As our Supreme Court has made clear, however, the doctrine of governmental immunity will not "stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights" under the North Carolina Constitution. *Corum v. University of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992).

It is, therefore, well settled that an individual may bring a direct claim under the North Carolina Constitution where the individual's constitutional rights have been abridged, but she is otherwise without an adequate remedy under state law—for example, when her common law claim would be barred by the doctrine of governmental immunity. *Id.* at 782, 413 S.E.2d at 289; *see also Craig*, 363 N.C. at 340, 678 S.E.2d at 355 ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when governmental immunity stands as an absolute bar to such a claim. But . . . plaintiff may move forward in the alternative, bringing his colorable claims directly under our State Constitution based on the same facts that formed the basis for his common law negligence claim.").

Accordingly, a colorable direct constitutional claim will survive a Rule 12(b)(6) motion to dismiss, notwithstanding the doctrine of governmental immunity. *Craig*, 363 N.C. at 340-41, 678 S.E.2d at 355-56. We now consider whether Plaintiff has stated such a claim here.

B. *Leandro v. State of North Carolina*

The North Carolina Constitution explicitly guarantees the "right to a free public education." *Leandro v. State of North Carolina*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). Specifically, Article I, section 15 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. Article IX, section 2 further provides that "[t]he General Assembly shall provide . . . for a general and uniform system of free public schools, . . . wherein equal opportunities shall be provided for all students." *Id.* art. IX, § 2(1).[6]

In the landmark decision of *Leandro v. State of North Carolina*, our Supreme Court considered whether the right to education under Article I, section 15 and Article IX, section 2 has "any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality." 346 N.C. at 345, 488 S.E.2d at 254. The Supreme Court answered "in the affirmative," and concluded that

> the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.

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6. Based on *Hoke County Board of Education v. State of North Carolina*, 358 N.C. 605, 599 S.E.2d 365 (2009) (*Leandro II*), and *Silver v. Halifax County Board of Commissioners*, 371 N.C. 855, 821 S.E.2d 755 (2018), our dissenting colleague notes, "the State is a necessary party to the instant action but has not been joined as such." We did not address this issue for two reasons. First, it was not raised by the parties. Second, even if the Plaintiff's claims fell within the constitutional right to a sound basic education, *Silver v. Halifax County* did not give this Court the authority to direct *sua sponte* that the State be added as a party. In *Silver*, the Supreme Court did not suggest that the State must be added as a party, despite its clear recognition of the State's duty: "[W]e are not confronted by a civil action that is merely imperfect, but rather we have been presented with an action that must fail because plaintiffs simply cannot obtain their preferred remedy against this particular defendant on the basis of the claim that they have attempted to assert in this case. The allegations in plaintiffs' complaint, if true, are precisely the type of harm *Leandro I* and its progeny are intended to address. In keeping with *Leandro*, however, *the duty to remedy these harms rests with the State, and the State alone.*" 371 N.C. at 869, 821 S.E.2d at 764 (emphasis added).

Id. Our Supreme Court proceeded to more particularly define a "sound basic education" as

> one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Id. at 347, 488 S.E.2d at 255.

In *Doe v. Charlotte-Mecklenburg Board of Education*, the plaintiff sued her local school board, alleging a violation of her constitutional right to education. 222 N.C. App. at 361, 731 S.E.2d at 247. The plaintiff's claims were based upon

> sexual abuse that she suffered at the hands of Defendant Richard Priode, her band teacher at South Mecklenburg High School. According to Plaintiff's complaint, Defendant Priode made sexual advances towards her and eventually induced her to engage in various types of sexual activity, including oral sex and vaginal intercourse, with him both on and off school grounds. Defendant Priode was later arrested, charged, and entered a plea of guilty to taking indecent liberties with a child as a result of his involvement with Plaintiff.

Id. Based upon these facts, the plaintiff in *Doe* asserted these claims:

> In her complaint, Plaintiff asserted claims against Defendant Board for negligent hiring, supervision, and retention; negligent infliction of emotional distress; and violation of Plaintiff's rights to an education and to proper educational opportunities as guaranteed by N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1, and her right

to obtain a safe education as guaranteed by N.C. Const. art. I, § 19. According to Plaintiff, the Board should have recognized the signs that Defendant Priode posed a threat to her and taken action to prevent the sexual abuse which she suffered at his hands. More specifically, Plaintiff alleged, with respect to her constitutional claims, that:

> 40. As a separate and distinct cause of action, Plaintiff sues the Defendants for violating her constitutional rights pursuant to North Carolina State Constitution in the following particulars:
>
> a. Violation of Article I[,] Section 15 on the grounds that the Defendant allowed the conduct as alleged in this complaint and that this conduct deprived the Plaintiff of her right to an education that is free from harm:
>
> b. Violation of Article IX[,] Section 1 in that the Plaintiff was denied educational opportunities free from physical harm or psychological abuse; and
>
> c. Violation of Article I[,] Section 19 in that the Plaintiff has been deprived of her liberty, interest and privilege in an education free from abuse or psychological harm as alleged in this complaint.

Id. (alterations in original).

This Court concluded that the constitutional right to education did not encompass claims arising from abuse of a student, even on school premises. *Id.* at 370, 731 S.E.2d at 252-53. We noted *Leandro*'s enumeration of the right to education was strictly confined to the intellectual function of academics, and that neither this Court nor our Supreme Court had extended that right "beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Id.* Simply put, the right guaranteed to students under the North Carolina Constitution is the opportunity to receive a *Leandro*-compliant education, and that right is satisfied so long as such an education has, in fact, been afforded.[7]

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7. North Carolina General Statute § 115C-42 immunizes the State's educational entities from liability for harm suffered by students, short of constitutional deprivation. "[A]ny change in this doctrine should come from the General Assembly." *See Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 435 (1992).

Because the psychological harm in *Doe* was alleged to have been suffered as the result of a "negligent failure to remain aware of and supervise the conduct of public school employees," *id.* at 371, 731 S.E.2d at 253, rather than of any inadequacy in the "nature, extent, and quality of the *educational opportunities made available to*" the plaintiff, the allegations failed to state a claim for violation of the constitutional right to education. *Id.* at 370, 731 S.E.2d at 253 (emphasis added). We therefore reversed the trial court's denial of the defendant's motion to dismiss that claim. *Id.* at 372, 731 S.E.2d at 254.

Here, the abuse was perpetrated by other students instead of a school employee as in *Doe*, but the claims are otherwise essentially the same. As in *Doe*, the Plaintiff alleges that school personnel were aware or should have been aware of the abuse the Minor Plaintiffs suffered at school but they failed to prevent it. Both alleged that the abuse they suffered deprived them of their constitutionally protected right to a sound basic education. The plaintiff in *Doe* alleged that she was deprived of her right to an education that is "free from physical harm or psychological abuse" under North Carolina's Constitution. *Id.* at 361, 731 S.E.2d at 247. The fact that the complaint in this case goes into more factual detail about the abuse and how it harmed the Minor Plaintiffs' educational opportunities does not change the result. Neither this Court nor our Supreme Court has recognized abuse, even repeated abuse, or an abusive classroom environment as a violation of the constitutional right to education.

This Court fully considered the rights addressed by *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997), in the context of physical or psychological abuse of a student at school in *Doe* and determined:

> To date, we are not aware of any decision by either this Court or the Supreme Court which has extended the educational rights guaranteed by N.C. Const. art. I, § 15 and N.C. Const. art. IX, § 1, beyond matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system. Although the serious wrongfulness inherent in the actions in which Defendant Priode allegedly engaged should not be minimized in any way, we are unable to see how the allegations set out in Plaintiff's complaint state a claim for violating these constitutional provisions. Put another way, we are unable to discern from either the language of the relevant constitutional provisions or

> the reported decisions construing these provisions that North Carolina public school students have a state constitutional right to recover damages from local boards of education for injuries sustained as the result of a negligent failure to remain aware of and supervise the conduct of public school employees. As a result, Plaintiff's complaint "on its face reveals the absence of facts sufficient to make a good claim" under N.C. Const. art. I, § 15 or N.C. Const. art. IX, § 1, such that Plaintiff has failed to state a claim based on those constitutional provisions upon which relief may be granted.

Doe, 222 N.C. App. at 370-71, 731 S.E.2d at 252-53.

The factual allegations of Plaintiff's complaint, which we consider for purposes of a motion to dismiss as true, are extremely disturbing; no child should be subjected to this sort of harassment at school or anywhere else. The alleged failure of school personnel to take immediate action to protect the Minor Plaintiffs is troubling, but we cannot distinguish this case from *Doe*, 222 N.C. App. 359, 731 S.E.2d 245. Accordingly, Plaintiff's complaint stated "a defective cause of action," and Defendant's motion to dismiss should have been granted. *See Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 4, 745 S.E.2d 316, 319 (2013).

V. Conclusion

For the reasons set forth above, we reverse the trial court's denial of Defendant's motion to dismiss Plaintiff's constitutional claim and remand for further proceedings.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge ZACHARY dissents with separate opinion.

ZACHARY, Judge, dissenting.

The right to education set forth in the North Carolina Constitution requires that our State's educational entities provide their students with an education that meets a certain minimum standard of quality. "An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work

is devoid of substance and is constitutionally inadequate." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 254 (1997). Because the facts alleged in Plaintiff's complaint establish that Defendant failed to provide Minor Plaintiffs with the constitutionally adequate quality of education, I respectfully dissent.

Discussion

I. The Right to Education—*Leandro v. State of North Carolina*

It is undisputed that our state constitution explicitly guarantees the "right to a free public education." *Id*. Specifically, article I, section 15 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. Article IX, section 2 further provides that "[t]he General Assembly shall provide . . . for a general and uniform system of free public schools, . . . wherein equal opportunities shall be provided for all students." *Id*. art. IX, § 2(1).

In its 1997 decision in *Leandro v. State*, our Supreme Court held that together, article I, section 15 and article IX, section 2, require the State to provide North Carolina children with a sound basic education. 346 N.C. at 345, 488 S.E.2d at 254.

Nonetheless, as the majority notes, the constitutional right to education has been narrowly interpreted in subsequent case law. *See*, *e.g.*, *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 370, 731 S.E.2d 245, 252 (2012). The majority, however, misconstrues this precedent as imposing an outright prohibition against the prosecution of any such claim grounded in tort. I find no support for such an interpretation. The post-*Leandro* jurisprudence does not limit the *conduct* that may give rise to a claim for violation of the constitutional right to education; any such judicial limitations have only pertained to the *scope* of the constitutional right that is subject to enforcement.

The majority's holding rests primarily upon this Court's analysis in *Doe v. Charlotte-Mecklenburg Board of Education*. *Id*. The plaintiff in *Doe* filed suit against her local school board, alleging a violation of her constitutional right to education. *Id*. In her complaint, the plaintiff alleged that her high school's band teacher had "made sexual advances towards her and eventually induced her to engage in various types of sexual activity, including oral sex and vaginal intercourse, with him both on and off school grounds." *Id*. at 361, 731 S.E.2d at 247. The plaintiff further claimed that in allowing this conduct to occur, the school board had "violated her 'right to an education *that was free from harm*' and

'*psychological abuse*.' " *Id.* at 370, 731 S.E.2d at 252 (emphases added) (brackets omitted).

This Court disagreed, and determined that the constitutional right to education is limited to "matters that directly relate to the nature, extent, and quality of the educational opportunities made available to students in the public school system." *Id.* at 370, 731 S.E.2d at 252-53.

In *Doe*, the school board's alleged "negligent failure to remain aware of and supervise the conduct of public school employees" was collateral to the "nature, extent, and quality of the educational opportunities made available to" the plaintiff. *Id.* at 370-71, 731 S.E.2d at 253. Thus, absent any allegation that the school board had failed to provide the plaintiff with a *Leandro*-compliant education, the school board's alleged negligence in allowing the illicit sexual activity to occur, though appalling, fell short of a *constitutional violation*.

The allegations presented in the case at bar are manifestly distinguishable from those in *Doe*. The conduct of which Plaintiff complains violates the constitutional ambit set forth in *Leandro*.

Here, unlike in *Doe*, Plaintiff explicitly charges Defendant with the failure to provide the Minor Plaintiffs with the very "nature, extent, and quality of the educational opportunities" to which all public school students are constitutionally entitled pursuant to *Leandro*. *Id.* at 370, 731 S.E.2d at 253. Plaintiff's complaint reveals that the hostile classroom environment at Lakeforest Elementary School was such that there was a persistent, two-year-long interruption of the Minor Plaintiffs' daily test-taking, assignment, and instructional opportunities. Due to Defendant's indifference to this environment, the "academic performance of all three Minor Plaintiffs fell . . . with the Minor Plaintiffs each suffering substantially adverse educational consequences."

Taking these allegations as true, as we must, Plaintiff's claim falls squarely within the constitutional deprivation that was contemplated in *Leandro*.[1] *See Leandro*, 346 N.C. at 345, 488 S.E.2d at 254 ("An education

1. In fact, our General Assembly has also recognized, through the enactment of Chapter 115C, Articles 27, 27A, and 29C, that providing an education of the standard guaranteed by the North Carolina Constitution necessarily requires an environment that is conducive to learning—or at the very least, one that does not hinder learning. *See, e.g.*, N.C. Gen. Stat. § 115C-390.2(f) (2017) ("Board policies shall . . . restrict[ ] the availability of long-term suspension or expulsion to . . . serious violations of the board's Code of Student Conduct that . . . threaten to substantially disrupt the educational environment."); *Id.* § 115C-397.1 ("Management and placement of disruptive students"); *Id.* § 115C-407.17 ("Schools shall develop and implement methods and strategies for promoting school

that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate."); *see also* N.C. Const. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to *guard and maintain* that right." (emphasis added)).

Nevertheless, in its *amicus* brief to this Court, the North Carolina School Boards Association contends that "[d]eclaring individual educational claims to be constitutional violations would be disastrous public policy for the State and boards of education." Of course, the same could be said for *any* constitutional violation that the private right of action endeavors to deter.

Moreover, it would be credulous to differentiate, for constitutional purposes, between a student whose teacher refuses to teach math and a student whose teacher fails to intervene when other students' harassing and disruptive behavior prevents her from learning it.[2] In the latter instance, the instructional environment may be so disordered, tumultuous, or even violent that the student is denied the opportunity to receive a sound basic education. *Cf. King v. Beaufort Cty. Bd. Of Educ.*, 364 N.C. 368, 376, 704 S.E.2d 259, 264 (2010) ("The primary duty of school officials and teachers . . . is the education and training of young people. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." (citation omitted)).

This is precisely what Plaintiff has alleged in the instant case. At this stage in the proceedings, Plaintiff's allegations must be taken as true, and the trial court did not err by allowing her the opportunity to produce a forecast of evidence tending to prove the same. I would therefore affirm the trial court's order denying Defendant's motion to dismiss Plaintiff's constitutional claim. Accordingly, I respectfully dissent.

II. *Silver v. Halifax County Board of Commissioners*

Lastly, I note that the State is a necessary party to the instant action, but has not been joined as such.

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environments that are free of bullying or harassing behavior."); *see also Leandro*, 346 N.C. at 354, 488 S.E.2d at 259 ("To the extent that plaintiff[s] can produce evidence tending to show that defendants have committed . . . violations of chapter 115C alleged in the complaints and that those violations have deprived children . . . of the opportunity to receive a sound basic education, plaintiff[s] are entitled to do so.").

2. I would emphasize that "[n]one of the preceding cases contains any suggestion that the fundamental right to the opportunity for a sound basic education is limited to any particular context." *King v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368, 381, 704 S.E.2d 259, 267 (2010) (Timmons-Goodson, J., concurring in part and dissenting in part).

Historically, our courts have expressed no issue with a county board of education being a proper party to a claim alleging violation of various constitutional rights related to education. *See*, *e.g.*, *id.* at 378, 704 S.E.2d at 265; *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 678 S.E.2d 351 (2009); *Sneed v. Bd. of Educ.*, 299 N.C. 609, 264 S.E.2d 106 (1980); *see also* N.C. Gen. Stat. § 115C-47(1) (2017) ("It shall be the duty of local boards of education to provide students with the opportunity to receive a sound basic education . . . ."). As our Supreme Court explained in *Hoke County Board of Education v. State*, the appropriateness of joining a local board of education as a party to a claim alleging a violation of article I, section 15 rests upon the reality that any resulting decision is "likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings." 358 N.C. 605, 617, 599 S.E.2d 365, 378 (2004) ("*Leandro II*"); *see also id.* at 617, 599 S.E.2d at 377-78 ("[T]he school boards clearly held a stake in the trial court's determination of whether or not the student plaintiffs were being denied their right to an opportunity to obtain a sound basic education.").

Proper parties notwithstanding, our Supreme Court recently held in *Silver v. Halifax County Board of Commissioners* that the State must be joined as a party defendant to any otherwise valid claim alleging a violation of article I, section 15.[3] *See generally* 371 N.C. 855, 821 S.E.2d 755 (2018). Indeed, the text of article I, section 15 provides: "The 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 (emphasis added). Thus, "to the extent that a county, as an agency of the State, hinders the opportunity for children to receive a sound basic education, it is the State's constitutional burden to take corrective action." *Silver*, 371 N.C. at 868, 821 S.E.2d at 764.

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3. Necessary parties *must* be joined in an action. Proper parties *may* be joined. . . . A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence. A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others.

Carding Devs. v. Gunter & Cooke, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971) (citations omitted).

Therefore, although Defendant is indeed a proper party to the instant action,[4] the holding in *Silver* directs that the State will shoulder the "ultimate responsibility," and hence, must be joined as a necessary party. *Id.* at 866-67, 821 S.E.2d at 762-63. Plaintiff, however, did not join the State as a defendant, as *Silver* requires. Our Supreme Court did not issue its decision in *Silver* until 21 December 2018—one year after Plaintiff filed her complaint in the instant case, and nearly two months after briefs were filed in this Court.

Accordingly, although I would affirm the trial court's denial of Defendant's motion to dismiss Plaintiff's constitutional claim, I would remand the matter with instruction for the trial court to allow Plaintiff the opportunity to join the State as a party to the instant action. S*ee*, *e.g.*, *City of Albemarle v. Sec. Bank & Tr. Co.*, 106 N.C. App. 75, 77, 415 S.E.2d 96, 98 (1992) ("The absence of a necessary party under Rule 19, N.C. Rules of Civil Procedure, does not merit dismissal of the action."); *see also White v. Pate*, 308 N.C. 759, 764, 304 S.E.2d 199, 203 (1983) ("Any such defect[,] [that is, absence of a necessary party,] should be corrected by the trial court *ex mero motu* in the absence of a proper motion [to join the necessary party] by a competent person.").

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4. For instance, Plaintiff's complaint seeks relief from Defendant in the form of a "permanent [injunction] from assigning any of the Minor Plaintiffs to attend Lakeforest Elementary School," as well as a mandatory injunction "to make all necessary modifications to policy and/or personnel to bring [Defendant's] schools into compliance with the School Violence Prevention Act." In that the General Assembly has delegated to county boards of education a corresponding statutory duty to provide students with the opportunity to receive a sound basic education, *see* N.C. Gen. Stat. § 115C-47(1), Defendant *does*, "on its own, have the authority to provide [this] relief." *Silver v. Halifax Cty. Bd. of Comm'rs*, 255 N.C. App. 559, 587, 805 S.E.2d 320, 339 (2017), *aff'd*, 371 N.C. 855, 821 S.E.2d 755 (2018); *e.g.*, *Sneed*, 299 N.C. at 611, 619, 264 S.E.2d at 109, 114 (requiring the defendant Greensboro City Board of Education to amend its "constitutionally infirm" fee waiver policy); *cf. Silver*, 371 N.C. at 861, 868, 821 S.E.2d at 759-60, 764 (affirming the trial court's Rule 12(b)(6) dismissal of the plaintiffs' claims for declaratory judgment and injunctive relief against the Halifax County Board of Commissioners for its alleged violation of the plaintiffs' constitutional right to education, which the plaintiffs alleged was caused by the Board's method of distributing local sales tax revenue, because (1) a board of county commissioners is not responsible for affording children the opportunity to receive a sound basic education, and (2) the General Assembly had already provided a statutory remedy for the allegedly inadequate funding of which the plaintiffs complained (citing N.C. Gen. Stat. § 115C-431)).

GENERAL FIDELITY INSURANCE COMPANY, PLAINTIFF
v.
WFT, INC., BLESSMATCH MARINE INSURANCE SERVICES, INC., ALPHA MARINE UNDERWRITERS, INC., AND PETER J. WILLIS FLEMING, DEFENDANTS

No. COA18-1103

Filed 7 January 2020

1. Creditors and Debtors—breach of fiduciary duty—constructive fraud—alter ego entities—avoidance of judgment

Where plaintiff insurance company became a creditor of a business entity through arbitration awards entered in its favor, that entity owed a fiduciary duty to plaintiff prior to the time it began winding down its business operation and transferring its assets to another entity. Summary judgment was therefore properly entered for plaintiff on its claims for breach of fiduciary duty and constructive fraud where there was evidence that the entity's president transferred assets to alter ego entities to benefit himself and to shield the assets from judgment.

2. Creditors and Debtors—fraudulent transfer—reasonably equivalent value—summary judgment

Summary judgment was properly granted for plaintiff creditor on its claim for fraudulent transfer where the business entity against which it was granted an award and judgment wound down its business and transferred its assets to another entity without receiving a reasonably equivalent value for the assets transferred.

3. Corporations—piercing the corporate veil—instrumentality rule

In an action by a creditor to enforce a judgment against a business entity that wound down its operation and transferred assets to another entity, summary judgment was properly granted to plaintiff creditor on its claim for piercing the corporate veil where the president of the business entity had full control over the rebranding of the original entity, which he acknowledged was nothing more than a name change, and where the trial court properly granted summary judgment for plaintiff on its claims for breach of fiduciary duty, constructive fraud, and fraudulent transfer.

4. Unfair Trade Practices—business activity—in or affecting commerce—asset transfer

In an action by a creditor seeking to enforce an award and judgment against a business entity, the creditor's claim for unfair and deceptive trade practices involved conduct in or affecting commerce where defendants transferred assets from the debtor entity to alter ego entities in an effort to shield those assets from liability for the judgment.

Appeal by defendants from order entered 12 January 2018 by Judge Eric L. Levinson and judgment entered 30 April 2018 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 May 2019.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, John R. Buric, and John R. Brickley, for plaintiff-appellee.

Lincoln Derr PLLC, by Sara R. Lincoln and Kathleen K. Lucchesi, for defendants-appellants.

ZACHARY, Judge.

Defendants appeal from two judgments. Defendants first argue that the trial court erred (1) by granting partial summary judgment in favor of Plaintiff on Plaintiff's claims for breach of fiduciary duty/corporate fraud and fraudulent transfer; and (2) by disregarding Defendants' corporate form and piercing the corporate veil, thereby enabling the court to enter judgment against all Defendants. Next, Defendants challenge a judgment entered against them for unfair and deceptive trade practices. Upon review, we affirm both judgments.

Background

Defendant WFT, Inc. ("WFT") was a North Carolina corporation with its principal place of business in Mecklenburg County. In 2005, WFT began working with General Fidelity Insurance Company ("Plaintiff"), a company organized in South Carolina with its principal place of business in New Hampshire. A dispute eventually arose, and arbitration proceedings commenced in Texas in June 2010. Following interim arbitration awards in 2012 and 2013, a final award was entered in favor of Plaintiff on 2 August 2013.

On 27 December 2013, a Texas court entered judgment on the arbitration award ("the Texas Judgment"). WFT was ordered to pay Plaintiff

the principal amount of $2,367,943.89, together with pre-judgment interest of $67,022.00, attorneys' fees of $218,586.69, and interest at the rate of 5% per year until fully paid. However, WFT was administratively dissolved on 7 January 2015, prior to fulfilling its obligation to Plaintiff under the Texas Judgment.

On 15 May 2014, Plaintiff filed the instant action in Mecklenburg County Superior Court seeking enforcement of the Texas Judgment. Plaintiff sued not only WFT, but also Blessmatch Marine Insurance Services, Inc. ("Blessmatch"), Alpha Marine Underwriters, Inc. ("Alpha Marine"), and Peter J. Willis Fleming ("Fleming").[1] Defendants are closely connected to one another. Blessmatch was incorporated in North Carolina in 2011 and administratively dissolved on 7 January 2015—the same day as WFT. Fleming was the registered agent and president of both WFT and Blessmatch. Fleming also formed Alpha Marine, which was incorporated in Delaware on 14 January 2013.

In its complaint, Plaintiff alleged that "sometime during the underlying arbitration, Defendants ceased conducting business through WFT and instead are now operating the same business through Blessmatch Marine and/or Alpha Marine[.]" Plaintiff further contended that these businesses were "the alter egos of each other," which were created to "avoid WFT paying Plaintiff the amounts due pursuant to the Texas Judgment." Plaintiff sought to enforce the Texas Judgment and pierce the corporate veil, and also asserted claims for (1) breach of fiduciary duty, (2) constructive fraud, (3) fraudulent transfer, (4) unfair and deceptive trade practices, and (5) facilitation of fraud and civil conspiracy.

On 13 July 2017, Plaintiff moved for summary judgment on all claims. The motion came on for hearing before the Honorable Eric L. Levinson in Mecklenburg County Superior Court on 17 August 2017 and 13 November 2017. By order entered 12 January 2018, Judge Levinson granted summary judgment in Plaintiff's favor as to its claims for (1) action on the Texas Judgment, (2) constructive fraud, (3) breach of fiduciary duty, and (4) fraudulent transfer; he also permitted recovery from Defendants jointly and severally, based on piercing the corporate veil. Judge Levinson denied Plaintiff's motion for summary judgment on its claim for unfair and deceptive trade practices, and granted summary judgment in favor of Defendants as to Plaintiff's claim for facilitation of fraud and civil conspiracy. The trial court denied Defendants' request

1. The four individual defendants will be collectively referred to as either "Defendants" or, for clarity, "all Defendants."

to certify the order for immediate appeal. On 19 January 2018, Fleming filed notice of appeal from the interlocutory summary judgment order.

On 22 January 2018, Fleming filed a Motion to Stay Proceedings Pending Appeal. The motion asserted that "[w]hile Fleming's appeal is interlocutory, he has a substantial right to immediately appeal the [summary judgment] order to avoid the possibility of two trials and inconsistent verdicts on the same issues." Plaintiff challenged the Motion to Stay, arguing that "Fleming's intent is clear – he simply seeks to delay this matter and avoid a trial where he faces liability" on Plaintiff's claim for unfair and deceptive trade practices. Plaintiff further asserted that postponing appeal until resolution of the unfair and deceptive trade practices claim would not affect any substantial right of Fleming, and that "there is no risk of inconsistent verdicts" because all of the claims are distinct.

On 1 February 2018, the remaining Defendants filed notice of appeal from Judge Levinson's summary judgment order, and four days later, they too filed a Motion to Stay Proceedings Pending Appeal. Defendants set forth two grounds for staying the proceedings: (1) they had undergone several changes in counsel; and (2) like Fleming, they were at risk "of two trials and inconsistent verdicts on the same issues."

On 12 February 2018, a bench trial was held before the Honorable Forrest D. Bridges in Mecklenburg County Superior Court on Plaintiff's remaining claim for unfair and deceptive trade practices.

On 20 March 2018, Judge Bridges entered an order denying both of Defendants' Motions to Stay. Judge Bridges concluded that there was little risk of inconsistent verdicts, and, although there may be some "overlapping facts" between the unresolved claim and those in the 12 January 2018 summary judgment order, the issues are "separate and apart" from each other. He also noted that "the matters will best be addressed by the appellate court when considered within the context of the case as a whole and not a series of piecemeal appeals."

On 30 April 2018, Judge Bridges entered judgment in Plaintiff's favor on its claim for unfair and deceptive trade practices. All Defendants timely appealed the judgment on 21 May 2018.

Discussion

On appeal, Defendants argue that (1) Judge Levinson erred in granting partial summary judgment in favor of Plaintiff; and (2) Judge Bridges erred by entering judgment in favor of Plaintiff on its claim for unfair and deceptive trade practices.

I.

We first consider whether the trial court erred in granting partial summary judgment in favor of Plaintiff on its claims for (1) breach of fiduciary duty/constructive fraud, and (2) fraudulent transfer, and (3) by piercing the corporate veil and entering judgment against all Defendants. We affirm the trial court's ruling and address each issue in turn.

A. Standard of Review

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." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). On appeal, summary judgment orders are reviewed *de novo*. *Mancuso v. Burton Farm Dev. Co. LLC*, 229 N.C. App. 531, 536, 748 S.E.2d 738, 742 (quotation marks omitted), *disc. review denied*, 367 N.C. 279, 752 S.E.2d 149 (2013). "Both before the trial court and on appeal, the evidence must be viewed in the light most favorable to the non-moving party and all inferences from that evidence must be drawn against the moving party and in favor of the non-moving party." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 296, 603 S.E.2d 147, 157 (2004), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). "If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision." *Nifong v. C.C. Mangum, Inc.*, 121 N.C. App. 767, 768, 468 S.E.2d 463, 465, *aff'd*, 344 N.C. 730, 477 S.E.2d 150 (1996).

B. Breach of Fiduciary Duty/Constructive Fraud

[1] Constructive fraud "arises where a confidential or fiduciary relationship exists, which has led up to and surrounded the consummation of the 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 citations and quotation marks omitted). To recover under a claim of constructive fraud, "a plaintiff must establish the existence of circumstances (1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust[.]" *Trillium Ridge Condo. Ass'n v. Trillium Links & Vill., LLC*, 236 N.C. App. 478, 502, 764 S.E.2d 203, 219 (internal brackets and quotation marks omitted), *disc. review denied*, 766 S.E.2d 646 (2014). Unlike a claim for actual fraud, there is no element of intent to deceive. *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971).

"[D]irectors of a corporation owe a fiduciary duty to creditors of the corporation only where there exist circumstances amounting to a winding-up or dissolution of the corporation." *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 31, 560 S.E.2d 817, 825 (internal quotations omitted), *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002). Once a fiduciary relationship is established, constructive fraud occurs when the director of the debtor-corporation takes advantage of the fiduciary relationship in order to benefit himself, and the plaintiff-creditor is injured as a result. *White*, 166 N.C. App. at 294, 603 S.E.2d at 156.

Several non-dispositive factors may be considered in determining whether circumstances amount to a "winding-up or dissolution of the corporation[,]" including

> (1) whether the corporation was insolvent, or nearly insolvent, on a balance sheet basis; (2) whether the corporation was cash flow insolvent; (3) whether the corporation was making plans to cease doing business; (4) whether the corporation was liquidating its assets with a view of going out of business; and (5) whether the corporation was still prosecuting its business in good faith, with a reasonable prospect and expectation of continuing to do so.

Keener Lumber Co., 149 N.C. App. at 31, 560 S.E.2d at 825.

In the present case, it is evident that Fleming created Blessmatch for the purpose of continuing WFT operations under the name of a separate corporate entity. Fleming testified that all of WFT's business and assets were transferred to Blessmatch, and that WFT became "insolvent at the time that Blessmatch was formed[.]" He further confirmed that WFT laid off its last employees and ceased operations sometime around 2013. WFT's operations were clearly winding up around the time when WFT's business and assets were transferred to Blessmatch. Thus, WFT owed a fiduciary duty to its creditors.

Nevertheless, Defendants contend that WFT owed no fiduciary duty to Plaintiff because Plaintiff was not a creditor of WFT when the Texas Judgment was entered. Defendants argue that "at the time the decision was made to rebrand WFT as Blessmatch and to transfer all the assets, [Plaintiff] was not a creditor of WFT. . . . [B]y the time the Texas Judgment was entered . . . Blessmatch had assumed the business of WFT[.]" We disagree.

Plaintiff became WFT's creditor prior to the entry of the Texas Judgment on 27 December 2013. In his deposition, Fleming confirmed

that WFT laid off its last employees and ceased operations sometime around 2013. However, Plaintiff was granted two interim awards—one in 2012 and another in April of 2013—in the binding arbitration proceedings prior to entry of the Texas Judgment. Plaintiff was also granted a final arbitration award in August of 2013. Accordingly, WFT owed a fiduciary duty to Plaintiff, its creditor since at least 2012, well before WFT's operations were winding down.

Alternatively, Defendants argue that if a fiduciary duty were owed to Plaintiff, a claim for constructive fraud cannot be maintained because Fleming did not act to benefit himself by transferring WFT's business and assets to Blessmatch. We reject this argument on several grounds.

First, by transferring WFT's business and assets to Blessmatch, Fleming ensured that his business would be shielded from liability for any judgments entered against WFT, including the Texas Judgment. Second, after the dissolution of WFT, Fleming received a total of $754,850 in salary, dividends, and interest from Blessmatch as its shareholder and director. Fleming could not have received this income but for his decision to transfer WFT's business to Blessmatch.

In sum, both the record and Fleming's actions establish no genuine issue of material fact, and therefore Plaintiff was entitled to summary judgment on its claim for breach of fiduciary duty/constructive fraud.

C. Fraudulent Transfer

[2] The Uniform Fraudulent Transfer Act provides, in pertinent part, that:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

N.C. Gen. Stat. § 39-23.5(a) (2017).

"An essential element of a transfer in fraud of creditors claim . . . is that the transfer was made without the debtor receiving 'reasonably equivalent value.' " *Estate of Hurst v. Jones*, 230 N.C. App. 162, 169, 750 S.E.2d 14, 20 (2013). "To evaluate whether reasonably equivalent value was exchanged, we examine the net effect of the transaction on

the debtor's estate and whether there has been a net loss to the debtor's estate as a result of the transaction." *Id.* A plaintiff who successfully proves a claim for fraudulent transfer may either avoid the transfer to the extent necessary to satisfy the claim, or obtain a judgment for the amount of the claim or transfer. N.C. Gen. Stat. § 39-23.7(a)(1), (b).

In this case, it is undisputed that Plaintiff's claim arose before the alleged fraudulent transfer. Our review is therefore limited to whether any genuine issue of material fact exists with respect to whether WFT received the reasonably equivalent value when its assets and business were transferred to Blessmatch.

Defendants argue that WFT received adequate value for its business and assets because WFT's liabilities were also transferred to Blessmatch. However, there is no indication in the record that any of WFT's liabilities were transferred to Blessmatch. By contrast, it is manifest that Blessmatch did not pay WFT for the transfer of its assets and business. Likewise, when asked specifically whether any "consideration" was exchanged for WFT's assets, Fleming responded, "I don't recall, but, no, I wouldn't have thought so." It is clear, then, that WFT did not receive reasonably equivalent value when its assets and business were transferred to Blessmatch, and that summary judgment was properly granted in Plaintiff's favor.

D. Piercing the Corporate Veil

[3] Ordinarily, corporations and their shareholders are treated as distinct and separate entities, and a corporation's liability to a creditor cannot be imputed to its shareholders. *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 438, 666 S.E.2d 107, 112 (2008). However, "while a corporation's separate and independent existence is not to be disregarded lightly," it is well established that courts should disregard the corporate form when recognizing it "would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim." *Id.* at 438-39, 666 S.E.2d at 112-13 (internal quotation marks omitted).

In determining whether to pierce the corporate veil and extend liability from a corporation to a shareholder, North Carolina courts apply the "instrumentality rule." *Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966) (quotation marks omitted). Our Supreme Court has explained the rule as follows: "[A] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In

such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded." *Id.*

Under the instrumentality rule, a plaintiff is required to prove the following:

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

Glenn v. Wagner, 313 N.C. 450, 455, 329 S.E.2d 326, 330 (1985) (quotation marks omitted).

To determine whether each prong of the instrumentality test is satisfied, courts consider four primary factors: (1) inadequate capitalization; (2) lack of compliance with corporate formalities; (3) complete domination and control of the corporation such that it has no independent identity; and (4) excessive fragmentation. *Estate of Hurst v. Moorehead I, LLC*, 228 N.C. App. 571, 578, 748 S.E.2d 568, 574 (2013). A showing of constructive fraud or fraudulent transfer is sufficient to satisfy the second and third elements of the instrumentality rule. *See Hamby v. Thurman Timber Co.*, ___ N.C. App. ___, ___, 818 S.E.2d 318, 324 (2018).

In the instant case, Fleming was the president and sole stockholder of WFT and Blessmatch at all relevant times, including when he decided to transfer all of WFT's business and assets to Blessmatch. When asked whether "WFT, Alpha Marine, and Blessmatch are . . . one and the same" business, Fleming answered in the affirmative. Indeed, Fleming testified that the decision to rebrand WFT as Blessmatch amounted to nothing more than a "name change."

Defendants argue that WFT had a corporate board that was involved in the decision to rebrand WFT as Blessmatch, and that Fleming was therefore not in full control of the decision to transfer WFT's business and assets to Blessmatch. Fleming testified that "senior people" associated

with WFT would have been involved in the decision to change the name to Blessmatch.

However, the change from WFT to Blessmatch occurred in 2013, and only two employees remained affiliated with WFT after 2011. Fleming described one of those employees as his assistant, and the other was not one of the "senior people" he named in his deposition. More importantly, Fleming had full authority to transfer all of WFT's business and assets to Blessmatch at the time of the decision. Thus, Fleming, WFT, and Blessmatch had "no separate mind, will or existence of [their] own" with respect to the decision to transfer WFT's business and assets to Blessmatch. *See Glenn*, 313 N.C. at 455, 329 S.E.2d at 330.

Because we affirm the trial court's order with respect to Plaintiff's claims for breach of fiduciary duty/constructive fraud and fraudulent transfer, we need not continue our analysis on piercing the corporate veil. *See Hamby*, ___ N.C. App. at ___, 818 S.E.2d at 324. Accordingly, Judge Levinson did not err in granting partial summary judgment in favor of Plaintiff.

II.

[4] Defendants next argue that Judge Bridges erred by entering judgment in favor of Plaintiff on its claim for unfair and deceptive trade practices, in that the underlying conduct in this case was not "in or affecting commerce." We disagree.

A. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (quotation marks omitted). "While an appellant may challenge the sufficiency of the evidence supporting the findings of fact, we are bound by the trial court's findings so long as there is some evidence to support them—even if the evidence might sustain findings to the contrary." *Golver v. Dailey*, 254 N.C. App. 46, 50-51, 802 S.E.2d 136, 140 (2017) (internal citations and quotation marks omitted). Conclusions of law are reviewed *de novo*. *Id.* at 51, 802 S.E.2d at 140.

B. Unfair and Deceptive Trade Practices

Under North Carolina law, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or

affecting commerce, are . . . unlawful." N.C. Gen. Stat. § 75-1.1(a). To establish a prima facie case under the statute, the plaintiff must show: "(1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995) (citation omitted).

Defendants concede that "[b]ecause the trial court had already granted summary judgment on the issue of fraud and injury to [Plaintiff], the only remaining issue for the trial court at the time of trial was whether the conduct at issue was 'in or affecting commerce.' " Chapter 75 of our General Statutes defines "commerce" as "all business activities, however denominated[.]" N.C. Gen. Stat. § 75-1.1(b). Our Supreme Court has also determined that "commerce" can be broadly read to include "intercourse for the purposes of trade in any form." *Johnson v. Phoenix Mut. Life Ins.*, 300 N.C. 247, 261, 266 S.E.2d 610, 620 (1980), *overruled on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Likewise, the term "business activities" "connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 32, 519 S.E.2d 308, 311, *reh'g denied*, 351 N.C. 191, 541 S.E.2d 716 (1999).

In the instant case, the trial court thoroughly explained its basis for concluding that Defendants' actions were "in or affecting" commerce. First, the trial court determined that "the regular *business activity* for which [Blessmatch and Alpha Marine] were formed was simply to aid in defeating the use of WFT's assets for satisfaction of claims of its creditors[.]" (Emphasis added). The trial court reasoned that, were this to be generally permitted, it would adversely affect the marketplace and consumers, because it "would allow corporate entities . . . to incur debts, be subject to judgments, and yet freely transfer assets to other entities in order to avoid payment of those obligations[.]" Such actions "would totally erode the marketplace and [the] free enterprise system and undermine the rule of law as it pertains to business operations."

The trial court's findings are well supported by the evidence, and its comprehensive analysis is bolstered by our existing case law. *See, e.g.*, *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 624, 664 S.E.2d 388, 395 (2008) ("The purpose of [N.C. Gen. Stat. §] 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State,

and applies to dealings between buyers and sellers at all levels of commerce."), *aff'd per curiam*, 363 N.C. 252, 675 S.E.2d 332 (2009).

Defendants nevertheless contend that the transfer of assets from WFT to the other businesses did not affect commerce. In support of this claim, Defendants cite *Ivey v. ES2, LLC*, 544 B.R. 833 (Bankr. M.D.N.C. 2015), in which the court held that a dispute between a parent company and its subsidiary did not affect commerce. However, *Ivey* is manifestly inapposite for two simple reasons. First and foremost, this Court is not bound by bankruptcy court rulings. *See Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App 198, 209, 794 S.E.2d 898, 904 (2016). Second, in this case, Plaintiff is neither a parent company nor a subsidiary of Defendants, but rather a market participant which conducted business with Defendants.

Accordingly, we confine our analysis to the facts of this case: Plaintiff obtained a significant award and judgment against WFT; Fleming transferred all of WFT's assets to other companies, which either quickly failed or never conducted any business; the asset transfer prevented Plaintiff from enforcing its judgment against WFT; and all of this, in turn, had a harmful effect on commerce. Consequently, Defendants' final argument fails.

Conclusion

For the reasons stated herein, we affirm (1) Judge Levinson's grant of partial summary judgment in favor of Plaintiff; and (2) Judge Bridges's judgment entered against Defendants as to Plaintiff's claim for unfair and deceptive trade practices.

AFFIRMED.

Judges DILLON and BERGER concur.

GRIFFIN v. ABSOLUTE FIRE CONTROL, INC.

[269 N.C. App. 193 (2020)]

STACY GRIFFIN, EMPLOYEE-PLAINTIFF
v.
ABSOLUTE FIRE CONTROL, INC., EMPLOYER, EVEREST NATIONAL INS. CO. &
GALLAGHER BASSETT SERVS., CARRIER, DEFENDANTS

No. COA19-461

Filed 7 January 2020

1. Workers' Compensation—effort to obtain employment—conclusion of no reasonable job search—supported by finding

The Industrial Commission's finding that a pipe fitter (plaintiff) had not looked for work or filed any job applications was sufficient to support its determination that plaintiff did not make a reasonable effort to obtain suitable employment—in order to establish eligibility for disability payments—even though plaintiff continued to work for his employer in a different position.

2. Workers' Compensation—disability—futility of seeking employment—findings in conflict with conclusion

The Industrial Commission erred by concluding that plaintiff presented no evidence on the futility of seeking employment and that plaintiff had therefore failed to establish disability on that basis where the Commission made findings that plaintiff was forty-nine years old at the time of the hearing, had a ninth-grade education, had worked primarily in the construction industry, and had permanent physical restrictions due to his workplace injury. Pursuant to prior case law, these findings implicate all of the factors typically discussed when analyzing the futility prong of proving disability.

3. Workers' Compensation—disability—suitable employment—make-work position—availability in competitive job market

The Industrial Commission erred by concluding that a position in a fabrication shop, offered to plaintiff by his employer after his workplace injury as a pipe fitter rendered him unable to continue in that role, constituted suitable employment so as to make plaintiff ineligible for disability payments. The Commission failed to conduct an analysis of whether the fabrication shop job was a make-work position created for plaintiff or was a job that would have been available to others in a competitive marketplace.

Judge TYSON concurring in part and dissenting in part.

Appeal by Plaintiff from an opinion and award entered 25 January 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 October 2019.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers, and John F. Ayers, III, for Plaintiff.

Brotherton, Ford, Berry & Weaver, PLLC, by Demetrius Worley Berry, and Daniel J. Burke, for Defendant.

BROOK, Judge.

Stacy Griffin ("Plaintiff") appeals from the opinion and award of the North Carolina Industrial Commission (the "Commission") denying his request for disability compensation from Absolute Fire Control and its insurance carriers, Everest National Insurance Company and Gallagher Bassett Services (collectively "Defendants"). On appeal, Plaintiff argues the Commission erred in concluding he was not disabled and that his post-injury job was suitable employment. We affirm in part. We reverse in part and remand for additional findings.

I. Factual and Procedural Background

Plaintiff worked for Defendant from 4 June 2007 to 23 October 2014 as a pipe fitter in Charlotte, North Carolina. Plaintiff's job responsibilities included installing and hanging sprinkler pipes and operating power machines and grease fittings. Plaintiff worked ten hours a day, five days a week, and earned between $18 and $20 dollars per hour. Plaintiff testified that pipefitters are expected to be able to lift the pipes they are working with and that pipes could weigh anywhere from 25 to 300 pounds.

On 23 October 2014, while Plaintiff was operating a scissor lift at work, the machine malfunctioned and threw Plaintiff into the rails of the lift, which caused injuries to his upper left back and ribs. Plaintiff returned to work one month after his injuries but was restricted from lifting anything over 20 pounds, standing or walking over 30 minutes, and driving while taking hydrocodone. Plaintiff's pre-injury job duties were outside of his assigned restrictions, so Defendant offered Plaintiff work in the fabrication shop, which Plaintiff accepted. In the fabrication shop, Plaintiff cut rods, drove a truck, made deliveries, and boxed up materials needed at job sites. Plaintiff testified at the hearing before the Full Commission that he primarily was "helping" another employee in the shop who had been assigned to the shop around the same time as Plaintiff. That employee, according to Jeffrey Younts, Vice President of

Absolute Fire Control, replaced someone who had previously been in that position and was lifting more than 20 pounds. Plaintiff maintained his pre-injury work schedule and wage earnings.

After two years of therapy, treatment, and joint injections, Plaintiff's treating physician assigned Plaintiff permanent work restrictions of no lifting more than 20 pounds, to alternate sitting and standing, no bending, and to wear a brace while working.

In August 2016, Plaintiff underwent non-work-related heart surgery. When he returned to work in November 2016, Plaintiff asked his supervisor if he could return to work in the field. Plaintiff believed the additional walking in the field would help his back condition. Defendant allowed Plaintiff to return to the field as a helper, where his job duties included wrapping Teflon tape on sprinkler heads, putting pipe hangers together, and driving a forklift to load sprinkler pipe for the installation crews.

On 28 November 2016, Plaintiff filed a Form 33 "Request for Hearing" seeking a determination as to whether the fabrication shop and field helper positions were suitable jobs. A hearing was held before Deputy Commissioner Jesse M. Tillman, III, on 20 June 2017. Deputy Commissioner Tillman issued an opinion and award finding Plaintiff had failed to meet his burden of proving he was disabled and thus did not reach the question of whether the positions were suitable employment. Deputy Commissioner Tillman denied Plaintiff's request for temporary total and temporary partial disability payments.

Plaintiff appealed to the Full Commission (the "Commission"). After hearing the appeal on 7 May 2018, the Commission issued its opinion and award on 25 January 2019 affirming the Deputy Commissioner and additionally finding the fabrication shop position was suitable employment. The Commission found in part:

> 28. [Vice President of Absolute Fire Control] Mr. Younts testified the fabrication shop positions are permanent positions with Defendant-Employer. Mr. Younts testified the work within the fabrication shop is an essential part of what Defendant-Employer does through packaging material, putting the parts together so the pipe fitters and foreman can do the work at the job sites and Defendant-Employer continues to have a need to hire and employ workers in the fabrication shop.
>
> . . .

32. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that the fabrication shop is suitable employment. The fabrication shop position is a permanent position with Defendant-Employer for which Defendant-Employer has a regular and constant need to keep staffed. The fabrication shop position was not specifically tailored or created for Plaintiff. Further, the job duty requirements for the fabrication shop position are within Plaintiff's permanent restrictions and Plaintiff was physically able to perform these job duties for almost two years from November 24, 2014 until his non-work-related heart surgery in August 2016. The fabrication shop position entailed the same wages and hours as Plaintiff's pre-injury position.

33. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Defendant-Employer's unique hiring practices of hiring based upon word of mouth and personal recommendations does not render the fabrication shop position not suitable. Albeit confined to Defendant-Employer's unique "advertisement," the positions available with Defendant-Employer, including the fabrication shop position, are available to individuals in the marketplace.

34. With regard to Plaintiff's contention that the field helper job is not suitable employment, the Full Commission finds that Defendant-Employer never offered Plaintiff the field helper job as suitable employment. To the contrary, Plaintiff specifically requested to return to work in the field following his non-work-related heart surgery and Defendant-Employer accommodated Plaintiff's request. Further, at the time Plaintiff chose to return to work in the field, Defendant-Employer had suitable employment available for Plaintiff in the fabrication shop.

. . .

37. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to show that he is disabled. To the contrary, a preponderance of the evidence shows that Plaintiff is able to earn his pre-injury wages with Defendant-Employer in a suitable position that is within

> his permanent work restrictions. Furthermore, none of Plaintiff's treating physicians have removed him from work in any employment. He has not made a reasonable, but unsuccessful search for work nor has he shown that it would be futile due to preexisting factors to search for work. Plaintiff has not proven that he is disabled in employment outside of his employment with Defendant-Employer.

The Commission then concluded:

> 4. In controversy is whether the fabrication shop position that Plaintiff worked in from November 24, 2014 until August 2016 and field worker position that Plaintiff worked in following his return to work in 2016 are suitable jobs and indicative of his wage earning capacity. Plaintiff contends that although he remains employed by Defendant-Employer, the work he is performing for Defendant-Employer is "make-work" and if his employment with Defendant-Employer were to end, then he would be unable to earn his pre-injury wages in the competitive marketplace. . . . In the present case, a preponderance of the evidence shows that the fabrication shop position with Defendant-Employer is suitable employment as it is a permanent position with Defendant-Employer and it is essential to Defendant-Employer's business and is a position that Defendant-Employer has a regular and constant need to keep staffed. The fabrication shop position was not tailored or created specifically to fit Plaintiff's restrictions. The fabrication shop position is within Plaintiff's permanent restrictions and physical capacity to perform as evidenced by Plaintiff successfully performing the job duties of the fabrication shop position for almost two years and Plaintiff is working the same hours and earning the same wages he did in his pre-injury position. Further, the mere fact that Defendant-Employer confines the advertisement of its positions to the unique practice of word of mouth and/or personal recommendations does not render the positions with Defendant employer not suitable. . . . With regard to the field worker position, Defendant-Employer did not offer Plaintiff this position as suitable employment, instead Plaintiff requested to return to work in this position and Defendant-Employer

accommodated Plaintiff's request. Thus, the suitability of this position is moot.

5. Furthermore, Plaintiff has not otherwise proven that he is disabled as no medical evidence was produced by Plaintiff that he is physically or mentally, as a result of the work-related injury, incapable of work in any employment. No reasonable effort was made to obtain employment elsewhere. No evidence was presented that Plaintiff is capable of some work, but that seeking work would be futile because of preexisting conditions, such as wage, inexperience, or lack of education, to seek employment or that he is earning less than his pre-injury wages. Hilliard, 305 N.C. at 595, 290 S.E.2d at 683; Russell, 108 N.C. App. 762, 425 S.E.2d 454.

Plaintiff timely appealed.

II. Standard of Review

Our review of an opinion and award of the Commission is "limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Philbeck v. Univ. of Mich.*, 235 N.C. App. 124, 127, 761 S.E.2d 668, 671 (2014) (citation and marks omitted). The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence "even if there is evidence to support a contrary finding." *Nale v. Ethan Allen*, 199 N.C. App. 511, 514, 682 S.E.2d 231, 234 (2009). The Commission's conclusions of law are reviewed *de novo*. *Gregory v. W.A. Brown & Sons*, 212 N.C. App. 287, 295, 713 S.E.2d 68, 74 (2011).

III. Analysis

The Plaintiff challenges three of the Commission's conclusions that served to bar him from disability benefits. First, the Commission concluded that Plaintiff had not engaged in a reasonable but unsuccessful effort to obtain post-injury employment. Second, the Commission concluded "[n]o evidence was presented that Plaintiff is capable of some work, but that seeking work would be futile because of preexisting conditions, such as wage, inexperience, or lack of education, to seek employment or that he is earning less than his pre-injury wages." And, finally, Plaintiff takes issue with the Commission's conclusion that Defendant provided and, for a time, Plaintiff performed suitable employment.

We hold that the reasonable effort analysis reflects a well-reasoned application of the law to these facts but conclude that the Commission's futility and suitable employment assessments are built on a misapplication of the governing case law.

A. Disability and Suitable Employment Jurisprudence

Disability means incapacity, because of injury, to earn the wages the employee was receiving at the time of injury in the same or any other employment. N.C. Gen. Stat. § 97-2(9) (2017). The burden is on the employee to prove diminished earning capacity as the result of the work-related injury. *See Harvey v. Raleigh Police Dep't*, 96 N.C. App. 28, 35, 384 S.E.2d 549, 553 (1989).

A determination of disability is a conclusion of law that must be supported by specific findings which show: (1) plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment; (2) plaintiff was incapable after his injury of earning the same wages he had earned before his injury at any other employment; and (3) the incapacity to earn was caused by plaintiff's injury.[1] *See Hilliard v. Apex Cabinet Co.*, 305 N.C. at 593, 290 S.E.2d at 682. The burden is on the employee to establish all three findings. *See Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 420, 760 S.E.2d 732, 736 (2014). The employee may offer proof of the first two findings through several methods, including:

> (1) By producing medical evidence that the employee is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; or
>
> (2) By producing evidence that the employee is capable of some work, but after reasonable effort on the part of the employee has been unsuccessful in efforts to obtain employment; or
>
> (3) By producing evidence that the employee is capable of some work but that it would be futile because of pre-existing conditions, i.e. age, inexperience, lack of education, to seek other employment; or

1. There is no dispute in this case that Plaintiff is incapable of working in his pre-injury job after his accident (*Hilliard* factor 1). Similarly, the parties agree and the Commission found Plaintiff's incapacity to earn was caused by his injury (*Hilliard* factor 3). Our analysis, and the parties' arguments, are concerned only with whether Plaintiff is capable of earning his pre-injury wages at any other employment (*Hilliard* factor 2).

> (4) By producing evidence that the employee has obtained other employment at a wage less than that earned prior to the injury.

*Russell v. Lowes Product Distributio*n, 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993).

Once the employee presents substantial evidence that he is incapable of earning the same wages in the same or any other employment, the burden shifts to the employer to show the employee is capable of suitable employment. *See Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 446-47 (1997). Suitable employment is "any job that a claimant is capable of performing considering his age, education, physical limitations, vocational skills and experience." *Shah v. Howard Johnson*, 140 N.C. App. 58, 68, 535 S.E.2d 577, 583 (2000) (internal marks and citation omitted).

However, "[t]he fact that an employee is capable of performing employment tendered by the employer [post-injury] is not, as a matter of law, an indication of plaintiff's ability to earn wages." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997). For example, make-work positions are those which have been "so modified because of the employee's limitations" that they do not "accurately reflect the [employee]'s ability to compete with others for wages." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 438, 342 S.E.2d 798, 806 (1986). Central to determining whether employment constitutes make work is whether or not the post-injury job is "ordinarily available on the competitive marketplace." *Id.* at 437-38, 342 S.E.2d at 805-06 (reasoning earning capacity "must be measured . . . by the employee's own ability to compete in the labor market, . . . [because] [w]ages paid by an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity[]"); *Id.* ("The ultimate objective of the disability test is . . . to determine *the wage that would have been paid in the open market under normal employment conditions to [the employee] as injured.*") (emphasis in original). Indeed, "[i]f the proffered job is generally available in the market, the wages earned in it may well be strong, if not conclusive, evidence of the employee's earning capacity." *Id.* at 440, 342 S.E.2d at 807.

B. Plaintiff's Challenges to Full Commission Opinion

We now turn to whether the Full Commission correctly applied the law when it concluded that Plaintiff was barred from disability benefits based on its findings, addressing each of Plaintiff's three challenges on point in turn.

i. Reasonable Effort

[1] Plaintiff claims he demonstrated a reasonable but unsuccessful effort to obtain employment under the second *Russell* factor. He argues the Commission erred as a matter of law in concluding otherwise, and its findings as to these issues were not supported by competent evidence.

Though there is no general rule for determining the reasonableness of an employee's job search, *see Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 478, 768 S.E.2d 886, 894 (2015), the Commission is "free to decide" whether an employee made a reasonable effort to obtain employment, *see Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006). On appeal, this Court defers to the Commission in its determination of whether or not a claimant engaged in a reasonable job search, so long as: (1) the Commission's conclusion is based upon findings that are not conclusory and sufficiently explains its determination; and (2) such findings are supported by competent evidence. *Patillo v. Goodyear Tire & Rubber Co.*, 251 N.C. App. 228, 239-41, 794 S.E.2d 906, 914 (2016). Consistent with this deferential approach, this Court has previously affirmed the Commission's conclusion that an employee established a reasonable but unsuccessful effort to find employment when he remained employed by his current employer. *Snyder v. Goodyear*, 252 N.C. App. 265, 796 S.E.2d 539, 2017 WL 900050 (2007) (unpublished).[2]

Here, the Commission's findings were supported by competent evidence and not conclusory. The Commission found:

> 36. Although he submitted a job list, Plaintiff testified he has not looked for work outside of Defendant-Employer's business nor has he filed any applications with any employer because he likes who he is working for and enjoys working for Defendant-Employer. Plaintiff

2. Plaintiff argues *Snyder* and a Deputy Commissioner opinion in *Gregory S. Carpenter v. Commonscope Holding Co., Inc.*, Op. Award, I.C. No. X30121 (N.C.I.C. Oct. 13, 2014) stand for the proposition that "there is no requirement in the law that an employee attempt to obtain employment elsewhere . . . if the employee continues to work with the employer in a make work job." This argument has two shortcomings. First, neither decision constitutes binding precedent. *See Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (explaining that *stare decisis* mandates decisions by one court binds courts of the same or lower rank); N.C. R. App. P. 30(e)(3) (2019) (articulating the non-precedential value of unpublished opinions). Second, *Snyder* is first and foremost rooted in deference to a well-reasoned Full Commission reasonable effort determination. *Snyder* at *12 ("[O]ur holding is simply that, based on our limited standard of review, the Commission's unchallenged findings of fact support its determination that Plaintiff made reasonable efforts to find employment under the specific facts of this case.").

> remained employed with Defendant-Employer as of the date of the hearing before the Deputy Commissioner.

This finding, under these circumstances, provides a sufficient basis for the Commission's determination that Plaintiff did not engage in a reasonable job search. As in *Snyder*, we affirm the Commission's well-reasoned conclusion of law, which, on this occasion, holds that Plaintiff failed to establish he is disabled under the second *Russell* method.

ii. Futility

[2] Plaintiff next argues that the Commission erred in concluding that Plaintiff did not prove disability through a showing of futility because he brought forward "no evidence" on this point.

Under *Russell*, an employee may meet his burden of proving disability by showing "the employee is capable of some work, but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment." 108 N.C. at 766, 425 S.E.2d at 457; *see also Wilkes v. City of Greenville*, 243 N.C. App. 491, 500, 777 S.E.2d 282, 289 (2015), *rev. allowed*, *writ allowed*, 784 S.E.2d 468 (N.C. 2016), *aff'd as modified*, 369 N.C. 730, 799 S.E.2d 838 (2017) (holding employee met his burden of proof that it was futile to seek sedentary employment when he had a tenth grade education, was 60 years old, had an IQ of 65, and was physically incapable of performing previous job); *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 357, 734 S.E.2d 125, 128 (2012) (concluding it would be futile for the claimant to seek other employment because he was 45 years old, had only completed high school, his work experience was limited to heavy labor jobs, and he was restricted to lifting no more than 15 pounds); *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 392, 656 S.E.2d 608, 615 (2008) (holding that evidence tended to show that effort to obtain sedentary light-duty employment, consistent with doctor's restrictions, would have been futile given plaintiff's limited education, limited experience, limited training, and poor health); *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-523 (2005) (upholding Commission's conclusion that plaintiff was disabled under prong three based on plaintiff's evidence that he was 61, had only a GED, had worked all of his life in maintenance positions, was suffering from severe pain in his knee, and was restricted from repetitive bending, stooping, squatting, or walking for more than a few minutes at a time).

In the present case, on the claim of futility, the Commission found:

> 37. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to show that he is disabled. . . . He has not . . . shown that it would be futile due to preexisting factors to search for work.

And then concluded:

> 5. Furthermore, Plaintiff has not otherwise proven that he is disabled. . . . No evidence was presented that Plaintiff is capable of some work, but that seeking work would be futile because of preexisting conditions, such as age, inexperience, or lack of education, to seek employment.

However, the Commission also found:

> 1. At the time of the hearing before the Deputy Commissioner, Plaintiff was forty-nine years old. Plaintiff has a ninth-grade education and has worked primarily in the construction industry building houses or as a pipefitter.
>
> 2. Plaintiff began working for Defendant-Employer on June 4, 2007 as a pipefitter and he has been employed by Defendant-Employer since that date.
>
> . . .
>
> 16. On March 21, 2016, Dr. Jaffe assigned Plaintiff permanent restrictions of no lifting more than twenty pounds, alternate sitting and standing, no bending, and to wear a brace while working. . . .
>
> . . .
>
> 21. With regard to Plaintiff reaching maximum medical improvement, on 2 June 2017, Dr. Jaffe recorded that it was his opinion, . . . There are some days [Plaintiff] needs to leave work because of increased pain.

It is unclear how the Commission concluded that Plaintiff presented "no evidence" on futility given its findings reflect factors our appellate courts have found to support a finding of futility. Plaintiff's circumstance is quite similar, for example, to that of the employee in *Thompson* in

the respective parties' ages, work experience, educational attainment, and work restrictions.[3] Plaintiff is 52 years old, 49 years old at the time of the hearing, has a ninth-grade education, has worked primarily in the construction industry building houses or as a pipefitter, and has been employed by Defendant for over ten years. *See Thompson*, 223 N.C. App. at 359, 734 S.E.2d at 129 ("[P]laintiff was, at the time of [the Commission's] decision, 45 years old, had only completed high school, and his work experience was limited to heavy labor jobs."). Plaintiff suffers from a ten percent permanent partial disability, which restricts him from lifting anything over 20 pounds and bending, and there "are some days [Plaintiff] needs to leave work because of increased pain." *Id.* ("[Plaintiff] was restricted to lifting no more than 15 pounds. . . . He was required to avoid repetitious bending, lifting, and twisting. . . . Further, plaintiff was experiencing steady pain, although that pain varied greatly in intensity."). These findings clearly constitute evidence consistent with a holding of disability as they implicate every factor stressed in *Russell*'s discussion of futility. 108 N.C. at 766, 425 S.E.2d at 457 ("[I]t would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment.").[4]

In short, the Commission's conclusion that there was no evidence to support Plaintiff's claim of futility reflects a misapplication of the governing precedent and is undermined by its own findings (and lack thereof).[5]

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3. Neither the employee in *Thompson* nor any of the employees in the cases cited above benefited from a presumption of disability. Each of the employees met their burden of proving disability through a showing of futility under *Russell* and through *Medlin*. *See*, *e.g.*, *Thompson*, 223 N.C. App. at 356, 734 S.E.2d at 127 ("In the instant case, plaintiff has met his initial burden to show that he was totally disabled from September 10, 2008 and continuing, by showing that a job search would be futile in light of his physical and vocational limitations.").

4. While Defendant argues Plaintiff possesses "marketable skills" that show he would be able to find employment, the Commission made no findings that support Defendant's position.

5. The dissent states that we cannot review the Commission's futility conclusion. Specifically, the dissent argues that finding of fact 37, which "found," in part, that Plaintiff had not "shown that it would be futile . . . to search for work" "is binding upon this Court" as it was not challenged by Plaintiff on appeal. *Griffin*, *infra* at ___. It is well-established, however, that labels are not dispositive in our review of a lower court's factual findings and conclusions of law. *See State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) ("Proper labeling [of findings of fact and conclusions of law] might have made this Court's task a little easier, but we nonetheless have been able to separate facts from conclusions in examining appellants' various assignments of error."). Concluding that Plaintiff had not shown futility requires legal reasoning, *see* discussion

iii. Suitable Employment

[3] We now turn to the Commission's holding that the fabrication shop position was suitable employment and not make work.

As previously discussed, makeshift positions or "made work" are those that have been so altered that they are not ordinarily available on the job market and thus are not indicative of an employee's earning capacity; this despite the fact the employee may be earning the same wages or more post-injury. *Peoples*, 316 N.C. at 437, 342 S.E.2d at 805. The harm the make-work inquiry aims to address is plain: "[i]f an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated." *Id.* at 438, 342 S.E.2d at 806.

Assessing whether a position exists with employers beyond a defendant-employer is an essential part of the make-work inquiry, because

> [t]he Worker's Compensation Act does not permit [employers] to avoid [their] duty to pay compensation by offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else and which the employer could terminate at will, or . . . for reasons beyond its control.

Peoples, 316 N.C. at 439, 342 S.E.2d at 806. Thus, we look outward to the competitive marketplace to determine whether or not a position "accurately reflect[s] the person's ability to compete with others for wages . . . should the employee's job be terminated." *Id.* at 438, 342 S.E.2d at 806; *see Saums*, 346 N.C. at 765, 487 S.E.2d at 750 ("There is no evidence that employers, *other than defendant*, would hire plaintiff to do a similar job at a comparable wage.") (emphasis added); *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 489 S.E.2d 445 (1997) (holding a position make work when the employer failed to show that there were others who would hire claimant for a similar job at a similar wage).

In the instant case, the Commission's findings and conclusion failed to address the central tenet of the make-work analysis: whether the job is available with employers *other* than Defendant. There is no evidence

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supra Section III.B.ii, and, as such, constitutes a conclusion of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law."). Further, the Plaintiff unmistakably challenges this legal reasoning, meaning it is subject to *de novo* review by our Court. *Gregory*, 212 N.C. App. at 295, 713 S.E.2d at 74.

in the record and no findings by the Commission as to whether the fabrication shop position exists in the competitive job market. Furthermore, there is no evidence that any employer, other than Defendant, would hire Plaintiff in the same or similar job. In fact, Plaintiff highlighted record evidence indicating that even Defendant might not have hired him if not for their longstanding relationship.[6]

The Commission's assessment of whether Defendant offered Plaintiff suitable employment is inwardly focused. Its holding that "Defendant's *unique* hiring practice of hiring based upon word of mouth and personal recommendations" means the position was "available to individuals in the marketplace" exemplifies this shortcoming.[7] Such a conclusion defines the competitive marketplace based on Defendant's admittedly idiosyncratic employment practices, i.e., if it exists with this employer, then it is necessarily available on the open market under normal conditions. This, of course, is not so. And, as noted above, the Workers' Compensation Act does not find suitable positions an employee "could find nowhere else[,]" thus leaving him or her unemployable should his or her employer no longer offer said position.[8] *Peoples*, 316 N.C. at 439, 342 S.E.2d at 806.

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6. Mr. Younts' testimony is particularly salient on this point, where in response to Defense counsel's question, "If someone in [Plaintiff's] position here, only being able to lift twenty pounds, applied for a job in the loose material side, would that discount him from [the fabrication position] job?" Mr. Younts testified, "Yes, it probably would . . . Not knowing him, walk – walking in off the street, not having any recommendations from any other employers, yes it probably would."

7. The narrowness of the Commission's conception of the marketplace is underlined when it concedes this position's sole connection to open competitive market is "confined to Defendant-Employer's unique 'advertisement[,]' " i.e., the aforementioned word of mouth and personal recommendations.

8. The Commission also found that Defendant had a "regular and constant need to keep staffed" the position in question and did not "specifically tailor[] or create[] [it] for Plaintiff." Though Plaintiff challenges whether these findings are supported by competent evidence, a review of the record shows Mr. Younts testified that the position was permanent, Defendant had a regular and constant need to keep it staffed, and Defendant did not specifically tailor the position for Plaintiff. Given that this Court's duty in reviewing factual findings "goes no further than to determine whether the record contains any evidence[,]" we conclude that the Commission's findings on these points are supported by competent evidence. *Adams v. AVX Corp.*, 349 N.C. at 681, 509 S.E.2d at 414. While these findings afford Defendant room to argue suitability on remand, they do not change the fact that the Commission's analysis was improperly skewed to focus on the employer's workplace as opposed to the broader marketplace.

IV. Conclusion

For the above reasons, we affirm the Commission's findings and conclusion that Plaintiff did not make a reasonable but unsuccessful effort to obtain employment.

We reverse and remand for additional findings as to whether Plaintiff made a showing of disability since the only factual findings in the record are consistent with a conclusion of disability under the futility method from *Russell*.

Lastly, we remand for further findings as to whether the fabrication shop position is available on the competitive marketplace such that it constitutes suitable employment.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Jude COLLINS concurs.

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

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

The majority's opinion correctly determines and properly affirms the Commission's findings and conclusion that Plaintiff failed to make any reasonable efforts to obtain other employment. Plaintiff failed to carry and meet his burden to prove any disability.

Overruling the Commission's unchallenged findings and conclusion by asserting a double-negative burden on *Defendant* to disprove disability through a showing of non-futility is error. This Court cannot disregard our appellate standard of review and substitute new fact findings on the evidence.

It is unnecessary to address either the futility or suitable employment arguments. Remand is unnecessary. Applying the correct appellate standard of review and long-established burdens on the Plaintiff, I vote to affirm the Commission's findings and conclusions of law in the Commission's opinion and award in their entirety. I concur in part and respectfully dissent in part.

I. Standard of Review

The Supreme Court of North Carolina, and applied by this Court long ago, established the proper appellate standard of review of the

Industrial Commission's opinion and award. An appellate "[c]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/ Allegis Group*, 362 N.C. 657, 660, 689 S.E.2d 582, 584 (2008) (citation and quotations omitted).

"The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965). "It is the duty of the Commission to decide the matters in controversy and not the role of this Court to re-weigh the evidence." *Starr v. Gaston Cty. Bd. Of Educ.*, 191 N.C. App. 301, 305, 663 S.E.2d 322, 325 (2008).

II. Futility

The Commission's unchallenged finding of fact thirty-seven states:

> Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff has failed to show that he is disabled. To the contrary, a preponderance of the evidence shows that Plaintiff is able to earn his pre-injury wages with Defendant-Employer in a suitable position that is within his permanent work restrictions. Furthermore, none of Plaintiff's treating physicians have removed him from work in any employment. He has not made a reasonable, but unsuccessful search for work nor has he shown that it would be futile due to preexisting factors to search for work. Plaintiff has not proven that he is disabled in employment outside of his employment with Defendant-Employer.

This finding of fact is supported by competent evidence in the record, is not challenged by Plaintiff, and is binding upon this Court on appeal. The majority's opinion disregards long-established precedents and purports to substitute, re-cast, and re-weigh the evidence before the Commission to arrive at its conclusion. The Commission, not this Court, is the "sole judge of the weight and credibility of the evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

The majority's opinion seeks to re-classify finding of fact thirty-seven as a conclusion of law, to ignore long-established precedents in treating unchallenged findings of fact from the Commission as binding and to disregard the appellant's burden before the Commission and this Court. The majority's opinion's footnote cites a wholly inapposite juvenile neglect and dependency case. *In re Helms*, 127 N.C. App. 505, 510,

491 S.E.2d 672, 675 (1997) ("[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.").

The very next sentence in *Helms*, omitted by the majority, states "[a]ny determination reached through 'logical reasoning from the evidentiary facts' is more properly classified a finding of fact." *Id.* (quoting *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982)). Unlike *Helms*, where the application of statutory legal principles was involved, unchallenged finding of fact thirty-seven does not involve the application of legal principles, merely "logical reasoning from the evidentiary facts," and is correctly designated as an unchallenged and binding on appeal finding of fact. *Id.*

Beyond the error of improperly classifying and re-weighing the evidence, the majority opinion's analysis and application of *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993), is erroneous. All of the cases cited in the majority's opinion found competent evidence in their records *to uphold* the Commission's findings, properly applying the standard of review and the requirements of *Russell* to show futility. *See Wilkes v. City of Greenville*, 243 N.C. App. 491, 500, 777 S.E.2d 282, 289 (2015) (*upholding the futility* of seeking employment when plaintiff was sixty years old, had an IQ of 65, read at a second grade level, and was physically unable to complete the work), *aff'd as modified*, 369 N.C. 730, 799 S.E.2d 838 (2017); *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 359, 734 S.E.2d 125, 129 (2012) (*upholding the futility* of a forty-five year old, who completed high school, was restricted to lifting no more than fifteen pounds, and whose prior work experience was limited to heavy labor jobs); *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 392, 656 S.E.2d 608, 615 (2008) (*upholding the futility* of finding a job of a thirty-eight-year-old high school graduate with conflicting testimony regarding futility); *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-53 (2005) (*upholding the futility* of a sixty-one-year-old maintenance worker who had retired due to inability to work due to knee pain).

Our Supreme Court in *Wilkes* examined a similar issue regarding futility when it also *upheld* the findings and an award of the Commission that it was futile for that plaintiff to seek sedentary employment. The plaintiff in *Wilkes* had a tenth-grade education, was over the age of sixty years old, and had a limited IQ of 65. *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849. Our Supreme Court upheld the Commission's findings concerning how anxiety and depression affected his ability to work but remanded for additional findings related to his compensable tinnitus. *Id.* at 746, 799

S.E.2d at 850. The findings related to his alleged compensable tinnitus were absent from the conclusion that the plaintiff was disabled. *Id.* at 747-48, 799 S.E.2d at 850.

Here, the Commission found no evidence of Plaintiff showing it "would be futile due to pre-existing factors to search for work" as a result of Plaintiff's only complained of injury. The Commission also made no bifurcated analysis and made only one conclusion which included all of Plaintiff's alleged injuries. No other unaddressed injury exists upon which to remand to the Commission for further findings. The holding in *Wilkes* is inapposite and does not support the majority's conclusion. *See id.*

The Court in *Wilkes* relied, in part, on *Peoples v. Cone Mills Corp.*, where our Supreme Court held: "In order to prove disability, *the employee* need not prove he unsuccessfully sought employment *if the employee* proves he is unable to obtain employment." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986) (emphasis supplied). Under *Peoples*, Plaintiff, not Defendant, carries the burden to provide evidence of the futility of his established duty to find work, where disability has not been proven. *Id.* We all agree and concur in the Commission's finding and conclusion that Plaintiff failed to make any reasonable efforts to obtain other employment.

Here, the Commission found Plaintiff remains employed in a job at his original employer performing work his physician had approved at "his pre-injury wages," and hours, where he had been working for the past five years. Plaintiff, not his employer, carries the burden to prove he was unable to find work. *Id.* Nothing in the record supports the conclusion that Plaintiff made any effort to meet or carry this burden or demonstrate futility. *See id.*

In *Russell*, this Court *upheld* the Commission's findings of futility when a thirty-five-year-old fork-lift operator with a high school equivalency degree could no longer bend forward, engage in overhead activity, stand or sit for prolonged periods of time, or engage in prolonged lifting of any weight greater than twenty-five pounds. *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457.

In *Thompson*, our Court *upheld* the Commission's finding of futility where the claimant was a forty-five-year-old high school graduate who could not lift more than fifteen pounds. *Thompson*, 223 N.C. App. at 359, 774 S.E.2d at 129. This Court concluded "the Commission's findings are sufficient to support its conclusion that plaintiff met his burden of showing futility." *Id.*

By re-weighing the evidence, and comparing the characteristics and injuries of Plaintiff, the majority's opinion misconstrues and misapplies the holding of *Russell* and its progeny by ignoring an unchallenged and binding finding of fact, "rummage[ing] through the record" to support its notion to shift the burden and to re-weigh the evidence to reach a contrary finding. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 118, 665 S.E.2d 493, 497 (2008) (citation omitted).

Compounding this error of burden shifting and factual comparisons, the majority's opinion further disregards long-established precedents from our Supreme Court. Our Supreme Court held: "The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity." *Little v. Anson Cty. Schs. Food Serv.*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978).

The majority's opinion applies broad generalizations based upon re-weighing characteristics and capabilities, instead of the individualized analysis our Supreme Court articulated in *Little*, and as the Commission correctly applied here. In all the above cases, the Court upheld the findings and a conclusion of disability by the Commission. *See id.*

This Court also upheld the Commission's finding of futility in *Johnson*, where there had been conflicting testimony before the Commission regarding futility. *Johnson*, 188 N.C. App. at 392, 656 S.E.2d at 615. In *Weatherford*, the treating physician testified that if the plaintiff had not retired, the plaintiff would not have been allowed to continue to work. *Weatherford*, 168 N.C. App. at 383, 607 S.E.2d at 352-53. Our Court upheld the Commission's finding of disability when the worker retired after unsuccessfully attempting to return to work due to knee pain. *Id.*

Unlike cases cited in the majority's opinion which all uphold and support the Commission's finding of futility, the majority's opinion disregards the standard of appellate review, shifts the burden to the employer to prove a double negative, re-weighs the evidence, and overrules the Commission's findings and conclusions.

Plaintiff testified to the background of how he had sustained his injury and his ability to continue working as a pipe fitter. Since his injury, Plaintiff continues to work with Defendant at the same hours and wages with his physician's approval. We all agree the Full Commission correctly found and concluded Plaintiff is not disabled and had made no efforts to obtain other employment. Nothing suggests Plaintiff searched for and cannot find a job. No evidence shows he would not be able to

find a job to fit his limitations, experience, and education after having been employed and working.

The majority's opinion unlawfully purports to shift and place a burden upon Defendant to prove competitive jobs exist in the market for which Plaintiff is qualified and can physically accomplish. This shifting of burden is error. Unless Plaintiff initially meets his *prima facie* case of proving disability, Defendant has no burden for production or proof. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Plaintiff continues to work for his same employer at the same pre-injury wages and hours with his physician's restrictions. We all agree Plaintiff failed to make any reasonable efforts to obtain other employment, and Plaintiff failed to carry and meet his burden to prove any disability.

III. Conclusion

Competent evidence in the whole record supports the Commission's unchallenged finding and conclusion that Plaintiff had not carried his burden to demonstrate disability or any futility to search for other suitable employment. The Commission's opinion and award is supported by undisputed facts: Plaintiff continues to work with his original employer, at his pre-injury hours, with his pre-injury schedule, and within his physician's restrictions. The Full Commission's findings of fact are unchallenged, and its conclusions and award is supported by competent evidence.

As the "sole judge of the weight and credibility of the evidence" the Commission's opinion and award is properly affirmed in its entirety. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The majority's opinion disregards the appellate standard of review of the Commission's order, shifts and imposes a burden of proof upon Defendant without proof of disability, re-weights the evidence, and misapplies controlling precedents. *See id.* I vote to affirm the Commission's opinion and award in its entirety and respectfully dissent.

IN THE MATTER OF THE ESTATE OF JOHNNIE EDWARD HARPER

Nos. COA19-326, COA19-327

Filed 7 January 2020

1. Estates—removal of representative—appeal—standard of review—on the record

On appeal from the clerk of superior court's order removing respondent as administratix of her father's estate pursuant to N.C.G.S. § 28A-21-4, the superior court properly applied the "on the record" standard of review that applies to estate proceedings (N.C.G.S. § 1-301.3(d)) rather than conducting a de novo hearing.

2. Estates—sale of decedent's real property—appeal—standard of review—de novo

On appeal from the clerk of superior court's order allowing the public administrator of an estate to sell the decedent's real property to pay the estate's debts, the superior court erred by failing to conduct a de novo hearing, where the proper standard of review for a special proceeding pursuant to N.C.G.S. § 1-301.2 was de novo.

Appeal by respondent from orders entered 4 December 2018 and 18 December 2018 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 2 October 2019.

Respondent-appellant Kim L. Harper, pro se.

Stone & Christy, P.A., by James M. Ellis, for petitioner-appellee.

ZACHARY, Judge.

In COA19-326, the Buncombe County Clerk of Superior Court ordered, *inter alia*, the removal of Respondent Kim L. Harper as administratrix of the Estate of Johnnie Edward Harper. Harper appealed the clerk's order to the superior court. The superior court dismissed Harper's case, and she appealed to this Court. In COA19-327, the Buncombe County Clerk of Superior Court entered an order authorizing the public administrator to sell the real property of the decedent Johnnie Edward Harper to make assets to pay debts of his estate. Again, Harper appealed the clerk's order to the superior court. The superior court dismissed Harper's case, and she appealed to this Court. On 16 April 2019, the

cases were consolidated for hearing pursuant to the provisions of N.C.R. App. P. 40 by this Court.

On appeal, Harper argues that the superior court utilized the incorrect standard of review in both of these cases. After careful review, we affirm the order of the superior court in COA19-326, and vacate the order of the superior court in COA19-327 and remand this matter to the superior court for further proceedings.

Background

Johnnie Edward Harper ("the Decedent") died intestate on 1 June 2015. He was survived by four children: Harper, Beth, Sonya, and Rochelle. Harper qualified as administratrix of her father's estate on 28 June 2016.

On 7 August 2018, the assistant clerk of superior court issued an order directing Harper to file an account for the estate, and on 15 August 2018, a deputy sheriff personally served Harper with a copy of the clerk's order. The order provided, *inter alia*, that Harper could be removed as fiduciary for failure to comply with the terms of the order. Harper failed to file the account. As a result, on 5 September 2018, the assistant clerk of superior court *sua sponte* issued and personally served Harper with an "Order to Appear and Show Cause for Failure to File Inventory/Account," due to her failure to file an accounting of estate assets during the two years following her qualification as administratrix. The Order to Appear and Show Cause noted that Harper could be held in contempt or removed as fiduciary, and provided a hearing date of 27 September 2018.

At the hearing of this matter, Harper produced an account for filing, but did not file a proper account: the account did not balance, and she provided no supporting documentation of the listed disbursements or the balance held. On the date of the hearing, the estate had $139.30, no saleable personal property, and numerous debts. Harper had also moved into the decedent's house, and admitted that she had spent money belonging to the estate on her personal expenses.

On 4 October 2018, the clerk removed Harper as administratrix of the estate, and appointed James Ellis, the public administrator of Buncombe County, to serve as successor administrator of the estate. Harper timely appealed this order to superior court, and on 4 December 2018, this matter came on for hearing before the Honorable Marvin P. Pope, Jr. After reviewing the case file and hearing arguments from both parties, Judge Pope entered an order dismissing the appeal. Harper timely appealed to this Court, and this appeal was designated as COA19-326.

On 19 November 2018, the public administrator petitioned the clerk of superior court to sell the real property owned by the Decedent at the time of his death. The public administrator asserted that it was necessary to sell the real property in order to make assets to pay debts of the estate, and thus it would be in the best interest of the estate to sell the real property. On 6 December 2018, the clerk entered an order granting the public administrator (1) possession, custody, and control of the Decedent's real property; (2) the authority to remove Harper from the Decedent's house; and (3) the authority to sell the real property.

Harper appealed the clerk's order to the superior court, and on 18 December 2018, this matter came on for hearing before Judge Pope. After hearing arguments and examining the court file, Judge Pope entered an order dismissing the appeal. Harper timely appealed to this Court, and this appeal was designated as COA19-327.

Discussion

I. Standard of Review

"On appeal to the [s]uperior [c]ourt of an order of the [c]lerk in matters of probate, the trial court judge sits as an appellate court." *In re Estate of Pate*, 119 N.C. App. 400, 402, 459 S.E.2d 1, 2, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995). Unchallenged findings of fact "are presumed to be supported by competent evidence and are binding on appeal." *In re Estate of Warren*, 81 N.C. App. 634, 636, 344 S.E.2d 795, 796 (1986).

II. COA19-326

[1] Harper contends that the superior court erred by failing to conduct a hearing *de novo* upon her appeal of the clerk's order removing her as fiduciary of her father's estate. After careful review, we disagree.

The clerk of superior court has "jurisdiction of the administration, settlement, and distribution of estates of decedents[.]" N.C. Gen. Stat. § 28A-2-1 (2017). Moreover, the clerk has "original jurisdiction of estate proceedings[,]" *id.* § 28A-2-4(a), as well as "jurisdiction over special proceedings[.]" *Id.* § 28A-2-5.

The personal representative of an estate "has the power to perform in a reasonable and prudent manner every act which a reasonable and prudent person would perform incident to the collection, preservation, liquidation or distribution of a decedent's estate," with the purpose and goal of "settling and distributing the decedent's estate in a safe, orderly, accurate and expeditious manner as provided by law[.]" *Id.* § 28A-13-3(a).

One significant duty of a personal representative is to file with the clerk of superior court a final account of estate receipts, disbursements, and distributions. The final account must be filed within one year following the personal representative's qualification, unless the clerk extends the filing period. *Id.* § 28A-21-2(a). The personal representative must provide supporting documentation for all receipts, disbursements, and distributions listed on the account. *Id.* § 28A-21-1.

"If any personal representative or collector fails to account . . . or renders an unsatisfactory account, the clerk of superior court shall . . . promptly order such personal representative or collector to render a full satisfactory account within 20 days after service of the order." *Id.* § 28A-21-4. Upon failure to submit a proper account in compliance with the order, "the clerk may remove the personal representative or collector from office or may issue an attachment against the personal representative or collector for a contempt[.]" *Id.* This is in contrast to revocation of the letters of a personal representative pursuant to section 28A-9-1.

The first consideration in determining the standard of review on appeal to superior court is whether an appeal from a proceeding pursuant to section 28A-21-4 is to be conducted as a special proceeding or an estate proceeding. The clerk of superior court has "original jurisdiction of estate proceedings." *Id.* § 28A-2-4(a). "Estate proceedings" are defined as "matter[s] initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding." *Id.* § 28A-1-1(1b). Certain matters are designated by statute as special proceedings, such as those initiated against the unknown heirs of a decedent, *id.* § 28A-22-3; others are initially heard before the clerk of superior court as estate proceedings, but then appealed to superior court as special proceedings, such as the resignation of a personal representative, *see id.* §§ 28A-10-1 – 28A-10-8.

Although similar in some ways, proceedings to remove a personal representative pursuant to section 28A-21-4 and proceedings to revoke letters of a personal representative pursuant to section 28A-9-1 are not subject to the same standard of review on appeal to superior court. The revocation of letters issued to a personal representative pursuant to section 28A-9-1 is appealed as a special proceeding. *Id.* § 28A-9-4. On appeal, the superior court shall conduct a "hearing de novo." *Id.* § 1-301.2(e). By contrast, our statutes do not provide that the removal of a personal representative pursuant to section 28A-21-4 shall be appealed as a special proceeding. Hence, removal of a personal representative pursuant to section 28A-21-4 is an estate proceeding. On appeal, the superior court

shall review the matter "on the record." *See In re Estate of Lowther*, 271 N.C. 345, 355, 156 S.E.2d 693, 701 (1967).

In the instant case, it is evident that the proceeding instituted by the clerk pursuant to section 28A-21-4 that culminated in Harper's removal as administratrix was an estate proceeding, which should have been reviewed on the record on appeal to superior court.

The superior court's order dismissing Harper's appeal states, in pertinent part:

> The Court, having reviewed the Order of the Clerk of Court, and upon further examination of the file and arguments of counsel, and based thereon, the Court makes the following **CONCLUSIONS OF LAW**:
>
> 1. The findings of fact in the Clerk of Court's October 4, 2018 Order are supported by the evidence.
>
> 2. The conclusions of law in the Clerk of Court's October 4, 2018 Order are supported by the findings of fact.
>
> 3. The October 4, 2018 Order of the Clerk of Court is consistent with the conclusions of law and applicable law.

The superior court's order clearly follows the language of N.C. Gen. Stat. § 1-301.3(d), which provides:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of fact.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

In that section 1-301.3(d) applies to estate proceedings, and the instant appeal is an estate proceeding, the superior court applied the correct standard of review to Harper's appeal of the clerk's order in COA19-326.

The superior court properly reviewed the clerk's order removing Harper as administratrix of this estate pursuant to section 28A-21-4

consistent with the "on the record" standard. However, the superior court's order indicates that it dismissed Harper's case rather than affirming the clerk's order. Accordingly, this matter is affirmed and remanded for the limited purpose of allowing the superior court to correct the disposition.

III. COA19-327

[2] Harper also contends that the superior court erred by failing to conduct a hearing *de novo* upon Harper's appeal from the clerk's order allowing the public administrator to sell the Decedent's real property to make assets to pay debts of the estate. We agree.

It is well settled that "[t]he title to [non-survivorship] real property of a decedent is vested in the decedent's heirs as of the time of the decedent's death[.]" *Id.* § 28A-15-2(b); *Swindell v. Lewis*, 82 N.C. App. 423, 426, 346 S.E.2d 237, 239 (1986). However, "[a]ll of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against the decedent's estate in the absence of a statute expressly excluding any such property." N.C. Gen. Stat. § 28A-15-1(a).

If the personal representative of the estate determines that "it is in the best interest of the administration of the estate to sell . . . real estate . . . to obtain money for the payment of debts and other claims against the decedent's estate, the personal representative shall institute a special proceeding before the clerk of superior court[.]" *Id.* § 28A-15-1(c); *see also id.* § 28A-17-1; *Badger v. Jones*, 66 N.C. 305, 307 (1872); *Hyman v. Jarnigan*, 65 N.C. 96, 97 (1871) (per curiam); *Holcomb v. Hemric*, 56 N.C. App. 688, 690, 289 S.E.2d 620, 622 (1982).

An aggrieved party may appeal the clerk's order permitting the sale of the decedent's real property to superior court as a special proceeding for a trial *de novo*. "Appeals in special proceedings shall be as provided in [N.C. Gen. Stat. §] 1-301.2." N.C. Gen. Stat. § 28A-2-9(b). Section 1-301.2(e) provides, in relevant part, that "a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal . . . for a hearing *de novo*." (Italics added).

This Court recently considered the meaning of a "hearing *de novo*" in the context of section 1-301.2(e). *In re Estate of Johnson*, __ N.C. App. __, __, 824 S.E.2d 857, 863, *disc. review denied*, 372 N.C. 292, 826 S.E.2d 701 (2019). We determined that this statute "expressly provides for a hearing *de novo* on appeal to the superior court, and not just *de*

novo or whole record review." *Id.* at ___, 824 S.E.2d at 863 (internal quotation marks omitted). Consequently, when sitting as an appellate court, the superior court shall proceed "as if no hearing had been held by the clerk and without any presumption in favor of the clerk's decision." *Id.* at ___, 824 S.E.2d at 863 (brackets and quotation marks omitted).

Here, the public administrator's action before the clerk to sell the Decedent's real property to make assets to pay debts was a special proceeding, and therefore, should have received a hearing *de novo* on appeal to superior court. The superior court's order dismissing Harper's appeal states, in pertinent part:

> The Court, having reviewed the Order of the Clerk of Court, and upon further examination of the file and arguments of counsel, and based thereon, the Court makes the following **CONCLUSIONS OF LAW**:
>
> 1. The findings of fact in the Clerk of Court's December 6, 2018 Order are supported by the evidence.
>
> 2. The conclusions of law in the Clerk of Court's December 6, 2018 Order are supported by the findings of fact.
>
> 3. The December 6, 2018 Order of the Clerk of Court is consistent with the conclusions of law and applicable law.

As in *Johnson*, the superior court's order "tracks the language of N.C. Gen. Stat. Section 1-301.3(d)." *Id.* at ___, 824 S.E.2d at 862.

N.C. Gen. Stat. § 1-301.3(d) provides, in relevant part:

> Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:
>
> (1) Whether the findings of fact are supported by the evidence.
>
> (2) Whether the conclusions of law are supported by the findings of fact.
>
> (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

In that section 1-301.3(d) does not apply to special proceedings that are "required in a matter relating to the administration of an estate," *id.* § 1-301.3(a), the superior court applied the incorrect standard of review.

On appeal of the clerk's order in this special proceeding, the superior court was required to conduct a hearing *de novo*, which it failed to do. Instead, the court appears to have mistakenly adopted the standard of review delineated in section 1-301.3(d), above. Although N.C. Gen. Stat. § 1-301.3(d) generally governs the trial court's review of "matters arising in the administration of trusts and of estates of decedents, incompetents, and minors[,]" subsection (a) explicitly provides that *section 1-301.2* shall apply "in the conduct of a special proceeding when a special proceeding is required in a matter relating to the administration of an estate." *Id.* § 1-301.3(a). "Ordinarily when a superior court applies the wrong standard of review . . . this Court vacates the superior court judgment and remands for proper application of the correct standard." *Johnson*, ___ N.C. App. at ___, 824 S.E.2d at 862 (quoting *Thompson v. Town of White Lake*, 252 N.C. App. 237, 246, 797 S.E.2d 346, 353 (2017)).

The superior court erred in failing to conduct a hearing *de novo* upon Harper's appeal of the clerk's order authorizing the public administrator to sell the Decedent's real property to make assets to pay debts of his estate. Accordingly, we vacate the trial court's order in COA19-327 and remand this matter to the superior court with instructions to conduct a *de novo* hearing.

COA19-326: AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

COA19-327: VACATED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

IN RE LOWE'S HOME CTRS., LLC

[269 N.C. App. 221 (2020)]

IN THE MATTER OF THE APPEAL OF LOWE'S HOME CENTERS, LLC

No. COA19-125

Filed 7 January 2020

Taxation—real property appraisals—in non-reevaluation year—correction of error—misapplication of schedules—misapprehension of facts

A county board of equalization and review was barred from changing the appraisal value of certain real property in a non-reevaulation year on the basis of correcting a misapplication of the schedule of values (N.C.G.S. § 105-287(a)(2)) where the board deemed that its reevaluation two years earlier—in which the board accepted the valuations that were suggested in the property owner's appeal from the board's initial evaluation—was based upon poorly selected comparison properties. The board's prior misapprehension of background facts was not a misapplication of the schedule of values.

Appeal by Union County from Final Decision entered 24 October 2018 of the Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 5 June 2019.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and Collier R. Marsh, and Perry, Bundy, Plyler & Long, L.L.P., by Terry Sholar and Ashley McBride, for Union County-appellant.

Bell, Davis & Pitt, P.A., by John A. Cocklereece and Justin M. Hardy, for Lowe's Home Centers, LLC-appellee.

MURPHY, Judge.

Our statutes bar county boards of equalization and review from changing the appraisal value of—i.e. revaluating—real property in years in which general reappraisal is not made, except under certain specifically defined circumstances. One such reason for revaluation is to "[c]orrect an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal." N.C.G.S. § 105-287(a)(2) (2017). The only genuine issue in this case is whether the Union County Board of Equalization and Review's revaluation of Lowe's property values in a non-reappraisal year was, in fact, for the purpose of correcting a misapplication of the schedule of values. The revaluation did not correct a misapplication of the schedule

of values and was not authorized under our statutes. We affirm the decision of the Property Tax Commission below in favor of Lowe's.

BACKGROUND

At the beginning of 2015, the Union County Board of Equalization and Review ("the Board") revaluated three properties belonging to Appellee Lowe's Home Centers, LLC ("Lowe's") during a countywide revaluation pursuant to N.C.G.S. § 105-286(a)(1). During the revaluation process, property values were appraised according to the "Cost Approach," one of three assessment methods allowed by Union County's 2015 Uniform Schedule of Values, Standards, and Rules ("Schedule of Values") to assess market price:

> 1. Cost Approach: (also known as Depreciated Replacement Cost). This approach is based on the proposition that the informed purchaser would not pay more than the cost of producing a substitute property with the same use as the subject property. This approach is particularly applicable when the property being appraised is utilized at its highest and best use. It also applies when unique or specialized improvements are located on a site for which there exist no comparable properties in the market.
>
> 2. Market Data Approach: (also known as the Comparative Approach). This appraisal method is used to estimate the value of real property through a market search to ascertain the selling prices of similar properties. In this process, the appraiser compares the subject property to those which have sold, and estimates the value of the property by using those selling prices as a comparison.
>
> 3. Income Approach: [Not discussed in this case.]

The Board evaluated the three properties owned in fee simple by Lowe's according to the Cost Approach at $12,362,100.00, $9,204,600.00, and $14,667,400.00, respectively, and reported the proposed values to Lowe's. This was the first evaluation relevant to this case, and we will refer to it hereinafter as "the Initial Evaluation."

Later that same year, Lowe's properly appealed the evaluations with the assistance of an appraiser. Utilizing the Market Data Approach, it submitted documentation evincing that the properties were worth approximately half as much as the Board's initial assessment

suggested—$6,492,000.00, $4,386,800.00, and $6,555,100.00, respectively. Lowe's presented comparisons of properties ostensibly similar to those owned by Lowe's, all of which were represented as "big box" retail properties owned in fee simple. Satisfied that the properties owned by Lowe's were, in fact, analogous to those in the appeal, the Board accepted the appeal at "face value" and revaluated the listed values to exactly those proposed by Lowe's ("the 2015 Revaluation"). From 8 April 2015 to 7 April 2017, the three properties belonging to Lowe's were taxed according to these amended assessed values.

In 2017, a non-revaluation year under N.C.G.S. § 105-286(a)(1), the Board discovered what it deemed to be an error in the Lowe's property revaluations. During a hearing in which a separate retailer appealed its property values by comparison with the Lowe's properties, the Board recognized that the values assessed according to the 2015 Revaluation were abnormally low. In a five-minute hearing on 4 April 2017, the Board voted to restore the three Lowe's properties to their values under the Initial Evaluation—calculated according to the Cost Approach—as a matter of equity ("the 2017 Revaluation"), notifying Lowe's of its decision several days later.

As the basis for the unseasonable 2017 Revaluation, the Board cited N.C.G.S. § 105-322(g)(1)(c), which it alleged "permits a change in value of any property that, in the board's opinion, has been listed and appraised at a figure that is below or above" true market value. It was later discovered that Lowe's had compared its properties in the appeal which led to the 2015 Revaluation with properties subject to deed restrictions severely impairing their market value, while the Lowe's properties themselves had no such restrictions.

After unsuccessfully challenging the 2017 Revaluation before the Board, Lowe's appealed the decision to the Property Tax Commission sitting as the State Board of Equalization and Review ("the Commission"). At the hearing's conclusion, the Commission found that the Board did not have the requisite statutory authority to adjust the values of the properties as it did in the 2017 Revaluation. The Commission concluded N.C.G.S. § 105-287(g)(2) only authorizes such an adjustment if the Board was correcting an error arising from a misapplication of the Schedule of Values. Since the Board took Lowe's evidence at face value and "assigned exactly the value it intended on the properties," the Commission held the 2015 Revaluation did not constitute a misapplication of the Schedule of Values. As such, the Commission concluded the 2017 Revaluation was improper and ordered the Board to restore the accepted appraised values set out in the 2015 Revaluation. Union County timely appeals.

ANALYSIS

Union County argues the Commission's order was erroneous in two ways: first, in concluding there was no evidence that the Schedule of Values was misapplied in the 2015 Revaluation; and, second, in concluding the Board was not statutorily authorized to adjust the Lowe's properties' values in the 2017 Revaluation. The core question on appeal, which underlies both of Union County's arguments, is whether the Board's use of the Market Data Approach to compare the Lowe's properties owned in fee simple to deed-restricted properties in the 2015 Revaluation constitutes a misapplication of the Schedule of Values. If the Board's 2015 Revaluation was a "misapplication" of the Schedule of Values, the 2017 Revaluation was a proper use of the Board's statutory authority to correct misapplications. If not, the Commission's Order must be affirmed because the Board acted outside its statutory authority to change the assessed values.

N.C.G.S. § 105-322(g)(1)(c) prevents the Board from adjusting the appraised value of real property "except in accordance with the terms of [N.C.]G.S. 105-286 [governing revaluation-year adjustments] and 105-287." N.C.G.S. § 105-322(g)(1)(c) (2017). N.C.G.S. § 105-287 states, in relevant part:

> (a) In a year in which a general reappraisal of real property in the county is not made under G.S. 105-286, the property shall be listed at the value assigned when last appraised unless the value is changed in accordance with this section. The assessor shall increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in the property's value resulting from one or more of the following reasons:
>
> . . .
>
> (2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal.

N.C.G.S. § 105-287(a)(2) (2017).

Union County contends the record before the Commission contained ample evidence that the Schedule of Values was misapplied in the 2015 Revaluation; namely that, in 2017, four witnesses attested to the variance between the three properties at issue and the properties Lowe's submitted for comparison under the Market Data Approach. However, the true issue on appeal is not whether evidence of the variance existed

but whether that variance between the Initial Evaluation and the 2015 Revaluation can be properly characterized under the statute as a "misapplication" of the Schedule of Values. Again, if the 2017 Revaluation was not to correct an error resulting from a "misapplication" in the 2015 Revaluation, the Board acted beyond its statutory authority by revaluating the appraised value of Lowe's properties. If, however, it was correcting a misapplication from the 2015 Revaluation, the 2017 Revaluation was made pursuant to the Board's statutory authority and the Commission erred in reaching a conclusion to the contrary. We hold the Board did not misapply the Schedule of Values in entering the 2015 Revaluation and affirm the Commission's decision.

The question of whether the 2015 Revaluation constituted a misapplication is an issue of law, which we review de novo. *In re Westmoreland-LG & E Partners North Carolina*, 174 N.C. App. 692, 696, 622 S.E.2d 124, 128 (2005) ("Appellate courts review all questions of law *de novo* and apply the 'whole record' test where the evidence is conflicting . . . .").

Union County advances two arguments as to why the Schedule of Values was "misapplied" in the 2015 Revaluation. First, because the properties used for comparison were deed-restricted such that they could not be used optimally as large retail stores, the Lowe's properties were not "similar" to the comparison properties under the Market Value Approach in the Schedule of Values. Second, the Commission improperly characterized the 2015 Revaluation as something other than a "misapplication," when it is most accurately classified as a misapplication arising from incorrect information.

In contrast, Lowe's argues at the time of the 2017 Revaluation "the County and Board were not aware of the [N.C.G.S. §] 105-287 limitation." Lowe's concludes, "[g]iven that the Board did not even discuss Section 105-287 or the Union County [S]chedule of [V]alues, the Commission properly concluded that the Board did not intend to 'correct an appraisal error resulting from a misapplication' of the [S]chedule of [V]alues" at the time of the 2017 Revaluation.

Our caselaw on this issue begins and ends with one case, *In re Ocean Isle Palms LLC*, 366 N.C. 351, 749 S.E.2d 439 (2013), in which our Supreme Court examined whether Brunswick County had corrected a misapplication of the schedule of values when it revaluated properties in a non-revaluation year to reflect new information. *Id.* at 358, 749 S.E.2d at 443. The new information before the board in *Ocean Isle* was twofold: (A) previously unknown market data indicating the properties

in question were more valuable than their revaluation-year assessments indicated, and (B) information that some of the market data used during the previous revaluation year had been inaccurate. *Id.* Based on this information, Brunswick County concluded that the "condition factor" test by which it had previously evaluated the properties no longer applied and changed the property values accordingly. *Id.*

Our Supreme Court reasoned that, despite Brunswick County's assertions to the contrary, the revaluation was not implemented to correct a misapplication of the Schedule of Values, but to apply a different standard altogether—a change that could only take place prospectively, not retroactively, under N.C.G.S. 105-287. *Id.* at 359, 749 S.E.2d at 444. Accordingly, the revaluation was not statutorily authorized. *Id.*

We are guided by *Ocean Isle* in addressing Union County's arguments on appeal. Brunswick County's basic contention in *Ocean Isle* was that, had it known during the evaluation year the information it learned later, it would have decided on different values for the properties. Thus, the schedule of values was misapplied. Union County's argument likewise suggests that the Board would not have relied upon the comparison properties submitted by Lowe's if it had had all the relevant information in 2015. There is no way to substantively differentiate this argument from that which our Supreme Court rejected in *Ocean Isle*. Here, as in *Ocean Isle*, the 2017 Revaluation was not implemented to correct a misapplication, but to retroactively adjust the property values to reflect newly discovered information.

Union County's only argument distinguishing this case from *Ocean Isle* is that, while Brunswick County had instituted a new revaluation system altogether in *Ocean Isle*, the Board in this case merely reinstated an evaluation system already used in the Initial Evaluation. In other words, it argues that where Brunswick County was attempting to impose a new standard onto a previous year, Union County simply corrected its previous evaluation consistent with its existing standards. This argument largely ignores the substance of the *Ocean Isle* decision and does not render the Commission's decision erroneous.

The manner in which the standard used in *Ocean Isle* differed from that of the foregoing revaluation year is the same manner in which the standard used in the 2017 Revaluation differs from that used in the 2015 Revaluation—the Board's understanding of the factual underpinnings changed and that resulted in a different assessment. Brunswick County's standard in *Ocean Isle* differed from that in the revaluation year because, with new information about the properties at issue and the surrounding market, its assessment of the properties' values changed. *Id.* at 358, 749

S.E.2d at 443. However, because there was no error in the application of its schedule of values to the facts as they were understood during the previous revaluation year, there was no misapplication. Consequently, Brunswick County lacked the statutory authority to adjust the property values. The same is true here.

Furthermore, our result is consistent with a plain reading of "misapplication." In common usage paralleling its use in N.C.G.S. § 105-287(a)(2), "apply" must take both a direct and an indirect object. The Schedule of Values was not just "applied," but applied to a set of facts as understood by the Board. For an assessment of a property's value to constitute a "misapplication of the schedules, standards, and rules," an error must have taken place in the manner the Schedule of Values was applied, not in the Board's apprehension of background facts. N.C.G.S. § 105-287(a)(2). The Schedule of Values here did not define "similar properties;" rather, it left the similarity of comparison properties to the discretion of the Board. The fact that the Board later came to consider the comparison property to which it applied the Schedule of Values unsuitable does not indicate that the Schedule of Values was "misapplied." It instead indicates poor discretion in selecting comparison properties—properties to which the Schedule of Values was properly applied—and lack of due diligence by the Board in accepting Lowe's contentions at "face value."

Additionally, Union County's argument that the issue at hand is merely an alternative type of misapplication ignores the plain meaning of the word misapplication. What occurred in this case was not a "misapplication" of the Schedule of Values, but a proper application of the Schedule of Values to poorly selected comparison properties. Consequently, the evidence does not support a conclusion that the Schedule of Values was misapplied during the 2015 Revaluation, and the Board lacked statutory authority to order the 2017 Revaluation.

CONCLUSION

The only genuine issue in this case is whether the Board, in fact, corrected a misapplication of the Schedule of Values in the 2017 Revaluation. We agree with the Commission's conclusion that it did not. The 2017 Revaluation of Lowe's properties was not authorized under N.C.G.S. §§ 105-322(g)(1) and 105-287, and we affirm the Commission's Order reversing the 2017 Revaluation.

AFFIRMED.

Judges TYSON and YOUNG concur.

IN THE MATTER OF S.C.

No. COA19-333

Filed 7 January 2020

1. Jurisdiction—petition for adult protective services—N.C.G.S. § 108A-105(a)—sufficiency of allegations

The Court of Appeals rejected an argument that, in order for a trial court to have jurisdiction over a petition filed by a county department of social services seeking authorization to provide protective services to a disabled adult who lacked capacity to consent, the petition must include as part of its "specific facts" (pursuant to N.C.G.S. § 108A-105(a)) allegations about other individuals able, responsible, and willing to perform or obtain for the adult essential services (a phrase forming part of the definition of "disabled adult" in N.C.G.S. § 108A-101(e)).

2. Disabilities—adult protective services—disabled adult—sufficiency of findings—AOC form order

The trial court's order determining that respondent was a disabled adult in need of protective services was supported by sufficient specific findings of the ultimate facts, and was not deficient even though the court included only one handwritten finding on the form used (AOC-CV-773) while the rest of the findings were typewritten.

Appeal by Respondent from order entered 10 October 2018 by Judge Brian DeSoto in Pitt County District Court. Heard in the Court of Appeals 15 October 2019.

The Graham.Nuckolls.Conner. Law Firm, PLLC, by Timothy E. Heinle, for the Petitioner-Appellee, Pitt County Department of Social Services.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for the Respondent-Appellant.

BROOK, Judge.

Stanley Corbitt ("Respondent") appeals from the trial court's order authorizing Pitt County Department of Social Services ("the Department") to provide or consent to the provision of protective services. The trial court concluded that Respondent was a disabled adult

who lacked capacity to consent to the provision of protective services. Respondent's appointed Guardian *ad Litem* counsel appeals. We affirm the order of the trial court.

I. Background

Respondent resides in Pitt County and presents a history of medical issues the treatment of which and his inability to follow recommended medical orders led to the involvement of the Department in his care. After receiving a report concerning Respondent's inability to care for himself and make decisions about his medical treatment in August 2018, the Department filed a petition on 3 October 2018 for an order authorizing the provision of protective services, alleging that Respondent lacked capacity to consent to the provision of protective services and was without a willing, able, and responsible person to perform or obtain these services.

At the 10 October 2018 hearing, District Court Judge Brian DeSoto heard testimony from Respondent and his brother, who had been his caretaker prior to the hearing, and a social worker employed by the Department. The social worker testified that Respondent suffered from numerous bacterial and fungal infections from wounds on his leg, arm, and skull, and was experiencing significant mental health issues. The social worker went on to testify that these issues had escalated while Respondent was hospitalized to the point where Respondent had taken "scissors and cut off tissue to the bone and the tendon [was] exposed." Respondent's brother testified that he believed Respondent could "pretty much take care of himself," explaining that he visited him at least once a week prior to his hospitalization. At the conclusion of the hearing the trial court found that Respondent was a disabled adult in need of protective services due to mental incapacity. The court entered an order to that effect the same day. Respondent's appointed Guardian *ad Litem* counsel entered timely written notice of appeal from that order.[1]

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1. Respondent argues that this appeal is not moot regardless of whether the conditions leading to entry of the 10 October 2018 order subsequently changed before this appeal could be heard by our Court because the appeal presents questions capable of repetition yet evading review. The Department does not argue that this appeal is moot and we agree that the questions presented by this appeal are capable of repetition yet evading review. "[C]ases which are 'capable of repetition[] yet evading review may present an exception to the mootness doctrine.' " *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, 241 N.C. App. 1, 8, 771 S.E.2d 920, 926 (2015) (quoting *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703 (2002)). Cases in this category must meet two requirements: "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* (internal

II. Analysis

Respondent raises two arguments on appeal, which we address in turn.

A. Subject Matter Jurisdiction

[1] Respondent first argues that the trial court lacked subject matter jurisdiction to authorize the Department to provide or consent to provide protective services. Specifically, Respondent contends that the absence of allegations in the petition about other individuals able, responsible, and willing to provide or assist him to obtain protective services rendered the petition fatally defective, depriving the trial court of subject matter jurisdiction. We disagree.

"Chapter 108A, Article 6, of the North Carolina General Statutes, entitled the 'Protection of the Abused, Neglected, or Exploited Disabled Adult Act,' sets out the circumstances and manner in which the director of a county department of social services may petition the district court for an order relating to provision of protective services to a disabled adult." *In re Lowery*, 65 N.C. App. 320, 324, 309 S.E.2d 469, 472 (1983). In October 2018, the time the petition at issue was filed, the Act defined "disabled adult" as follows:

> The words "disabled adult" shall mean any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

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marks and citation omitted). The 60-day order in this case meets these requirements. Appeals from 60-day orders authorizing protective services are in their "duration too short to be fully litigated prior to [their] cessation or expiration"; they also present "a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* Holding otherwise would render them unreviewable because of the standard timetable on which review by our Court is possible. This appeal, for example, was not heard until a year and five days after the trial court entered the order being appealed – 310 days after the expiration of Judge DeSoto's 10 October 2018 order.

N.C. Gen. Stat. § 108A-101(d) (2017).[2] Upon reasonable determination "that a disabled adult is being [] neglected . . . and lacks capacity to consent to protective services," N.C. Gen. Stat. § 108A-105(a) authorizes the Department to "petition the district court for an order authorizing the provision of protective services." N.C. Gen. Stat. § 108A-105(a) (2017). Subsection (a) goes on to require, "[t]he petition must allege *specific facts* sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them." *Id.* (emphasis added). Subsection (a) does not elaborate on what "specific facts" must be alleged in the petition. *See id.*

Subsection (c) then provides:

> If, at the hearing, the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services, he may issue an order authorizing the provision of protective services. This order may include the designation of an individual or organization to be responsible for the performing or obtaining of essential services on behalf of the disabled adult or otherwise consenting to protective services in his behalf. Within 60 days from the appointment of such an individual or organization, the court will conduct a review to determine if a petition should be initiated in accordance with Chapter 35A; for good cause shown, the court may extend the 60 day period for an additional 60 days, at the end of which it shall conduct a review to determine if a petition should be initiated in accordance

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2. This definition was amended in 2019 by Session Law 76 and went into effect on 1 October 2019. *See* S.L. 2019-76, § 14. The amended statute defines "disabled adult" as follows:

> The words "disabled adult" shall mean any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to *an intellectual disability*, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

N.C. Gen. Stat. § 108A-101(d) (2019) (emphasis added). Neither party suggests that the amendment to the definition of "disabled adult," which replaced the phrase "mental retardation," with "an intellectual disability," *see* S.L. 2019-76, § 14, is relevant to the disposition of this appeal.

> with Chapter 35A. No disabled adult may be committed to a mental health facility under this Article.

Id. § 108A-105(c).

"When the trial court sits without a jury, the standard of review for this Court is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Dunn*, 200 N.C. App. 606, 608, 685 S.E.2d 526, 528 (2009) (citation omitted).

Respondent suggests that the definition of "disabled adult . . . in need of protective services" in N.C. Gen. Stat. § 108A-101(e) offers guidance on the *specific facts* that must be alleged under § 108A-105(a) for a court to enter an order authorizing the provision of protective services under § 108A-105(c). Section 108A-101(e) provides:

> A "disabled adult" shall be "in need of protective services" if that person, due to his physical or mental incapacity, is unable to perform or obtain for himself essential services and if that person is without able, responsible, and willing persons to perform or obtain for his essential services.

N.C. Gen. Stat. § 108A-101(e) (2017). Respondent argues that the petition § 108A-105(a) authorizes the Department to file must contain "specific facts" indicating that he was "without able, responsible, and willing persons to perform or obtain for his essential services," quoting the language of § 108A-101(e).

Respondent goes further than arguing that read together, N.C. Gen. Stat. §§ 108A-105(a) and 108A-101(e) create a pleading requirement for petitions for authorization of the provision of protective services, however. Not only does § 108A-101(e) supply the standard against which the "specific facts" required to be alleged by § 108A-105(a) must be measured, according to Respondent; the statutes read together establish a standard that is a jurisdictional prerequisite to a trial court's disposition of a petition for protective services. Respondent thus contends that the definition in § 108A-101(e) of "disabled adult . . . in need of protective services" combined with the authorization in § 108A-105(a) of the Department to petition for authorization to provide protective services creates a jurisdictional prerequisite similar to the verification requirement of N.C. Gen. Stat. § 7B-1104, applicable to petitions for termination of parental rights under the Juvenile Code. *See*, *e.g.*, *In re C.M.H.*, 187 N.C. App. 807, 809, 653 S.E.2d 929, 930 (2007) (holding that trial court lacked subject matter jurisdiction where petition for termination of

parental rights failed to comply with verification requirement of N.C. Gen. Stat. § 7B-1104). Respondent posits that the absence of sufficient details in the petition about individuals "able, responsible, and willing [] to perform or obtain . . . essential services" for a disabled adult deprives the trial court of subject matter jurisdiction to find "that the disabled adult is in need of protective services and lacks capacity to consent to protective services," and enter "an order authorizing the provision of protective services." N.C. Gen. Stat. § 108A-105(c) (2017). We disagree.

"Determined to protect the increasing number of disabled adults in North Carolina who are abused, neglected, or exploited, the General Assembly enact[ed] [] [the Protection of Abused, Neglected, or Exploited Disabled Adult Act (the "Act")] to provide protective services for such persons." N.C. Gen. Stat. § 108A-100 (2017). Notably, the language of subsection (a) of N.C. Gen. Stat. § 108A-105, the provision of the Act requiring "specific facts" to be alleged in a petition for protective services before a court may "issue an order authorizing the provision of protective services," *id.* § 108A-105(c), does not contain a requirement that these allegations be verified, unlike a petition for termination of parental rights under N.C. Gen. Stat. § 7B-1104. *See* N.C. Gen. Stat. § 7B-1104 (2017) ("The petition . . . shall be verified by the petitioner[.]"). Instead, under § 108A-105(a), the petition need only contain allegations "sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them." *Id.* § 108A-105(a). Endorsing the rule advocated by Respondent would thus create a requirement unsupported by the text of § 108A-105.

Imposing such a requirement would also introduce practical challenges that undermine the Act's purpose. Grafting the definition provided by § 108A-101(e) onto the requirement of § 108A-105(a) to "allege specific facts" would impose a potentially more difficult to manage burden on the Department when petitioning for protective services under § 108A-105 than the Department bears when petitioning for termination of a parent's rights to a minor child under § 7B-1104. Rule 11(b) of the North Carolina Rules of Civil Procedure, the legal standard applicable to whether the verification requirement of § 7B-1104 has been met, *In re Triscari*, 109 N.C. App. 285, 287, 426 S.E.2d 435, 436-37 (1993), requires that the verification "state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true." N.C. Gen. Stat. § 1A–1, Rule 11(b) (2017). Determining whether the standard articulated in the definition of "disabled adult . . . in need of protective services" had been met

would be much less straightforward than comparing the verification of a petition for termination of parental rights to the language of Rule 11(b) to confirm compliance with § 7B-1104.

A comparison of § 108A-101(e) to a petition for protective services would not quickly resolve the question of whether there had been compliance with the rule advocated by Respondent because of the language used in § 108A-101(e), which contains certain indefinite terms. *See id.* § 108A-101(e) (referring to an indefinite number of "*persons* to perform or obtain . . . essential services" in defining "disabled adult . . . in need of protective services") (emphasis added). Compliance with such a rule would presumably require an undefined number of people to be identified and details about these people to be set out in allegations in a petition for protective services as a prerequisite to the disposition of the petition by the trial court. It is unclear how compliance with such a rule could be confirmed by a court disposing of a petition for protective services or a court reviewing such a disposition. What is more, compliance with this jurisdictional pleading requirement would be dependent upon the sufficiency of allegations to meet an indefinite standard, rendering the rule difficult to administer. Adopting such an interpretation of the rule is not only unsupported by the text of the relevant statute, N.C. Gen. Stat. § 108A-105, but also would undermine the purpose of the Act.

For a trial court to enter "an order authorizing the provision of protective services," N.C. Gen. Stat. § 108A-105(c), a petition for protective services need not specify facts about individuals "able, responsible, and willing [] to perform or obtain . . . essential services," *id.* § 108A-101(e). A fair reading of the provisions of Article 6 of Chapter 108A of the General Statutes do not support grafting the definition of "disabled adult . . . in need of protective services," *id.*, onto the requirement to "allege specific facts" in a petition for protective services, *id.* § 108A-105(a), or holding that such a requirement is jurisdictional. Accordingly, we overrule this argument.

B. Sufficiency of Findings

[2] Respondent next argues that the trial court failed to make sufficient findings of fact to support its conclusions that he was a disabled adult in need of protective services. Specifically, Respondent contends that use of the February 2012 version of form AOC-CV-773, developed by the North Carolina Administrative Office of the Courts, failed to satisfy the specificity required of factual findings for an order authorizing protective services where the order contained only one handwritten

factual finding by the trial judge and the rest of the findings were typewritten. We disagree.

As noted previously, § 108A-105(a) provides that

> [i]f the director [of the Department] reasonably determines that a disabled adult is being abused, neglected, or exploited and lacks capacity to consent to protective services, then the director may petition the district court for an order authorizing the provision of protective services. The petition must allege *specific facts* sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them.

N.C. Gen. Stat. § 108A-105(a) (2017) (emphasis added). The court may enter an order authorizing the provision of protective services "[i]f . . . the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services[.]" *Id.* § 108A-105(c). A trial court's order, however, need only include "specific findings of the ultimate facts," not the subsidiary or evidentiary facts whose proof may be required to establish the ultimate facts. *Kelly v. Kelly*, 228 N.C. App. 600, 606-07, 747 S.E.2d 268, 276 (2013) (citation omitted).

We hold that the trial court's order in this case contained specific findings of the ultimate facts to show that Respondent was a disabled adult in need of protective services who lacked capacity to consent to protective services. The trial court's order reads as follows:

> This matter comes on for hearing on the Petition for Order Authorizing Protective Services filed under the statutory authority of the director of the county department of social services. Based on the record, testimony and other evidence presented to the Court, the Court makes the following findings of fact by clear, cogent and convincing evidence:
>
> 1. The respondent is
>
> A resident of this county or can be found in this county.
>
> A disabled adult 61 years of age . . . present in the State of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
>
> 2. The petition was filed on [] 10/3/2018 and respondent was served pursuant to G.S. 1A-1, Rule 4(j) on [] 10/5/2018.

3. The respondent is in need of protective services due to physical or mental incapacity and unable to obtain essential services without a willing, able and responsible person to perform or obtain essential services. The respondent is in need of protective services in that: the Respondent lacks capacity and is unable to make a safe discharge plan.

4. The respondent lacks the capacity to consent to the provision of protective services.

Based on the findings of fact, the Court concludes that:

1. This matter is properly before the Court and the District Court has jurisdiction over the subject matter and over the respondent.

2. Respondent is a disabled adult in need of protective services and lacks the capacity to consent to such services as required by G.S. 108A-105.

3. It is in the best interest of the respondent that this order be entered.

It is ORDERED:

1. That Pitt County Department of Social Services is authorized to provide or consent to, without further orders of the Court, the essential services set out in G.S. 108A-1010(i).

2. That this order shall remain in effect for 60 days unless:

   a. Protective services are no longer needed;

   b. The respondent regains capacity to consent to the provision of protective services;

   c. A guardian of the person or general guardian has qualified; or

   d. For good cause shown the Court extends the order for up to 60 additional days at the end of which time the order expires.

3. This Matter shall be reviewed, unless previously dismissed, without further notice to the parties on [] 12/4/2018 at [] 2:00 pm in Courtroom DC04 to determine whether a petition should be filed for guardianship pursuant to G.S. Chapter 35A.

While it is true, as Respondent contends, that the trial court used form AOC-CV-773 developed by the North Carolina Administrative Office of the Courts in authorizing the Department to provide protective services, and only one of the factual findings of the trial court on this form was handwritten, we hold that the order contained ultimate findings of sufficient specificity to authorize the Department to provide protective services. This argument is overruled.

III. Conclusion

We hold that the trial court had subject matter jurisdiction to authorize the provision of protective services and that the trial court's order authorizing the provision of protective services contained ultimate factual findings of sufficient specificity to support its conclusions of law, which in turn justified the relief awarded by the court in the decretal portion of its order. We affirm the order of the trial court authorizing the provision of protective services.

AFFIRMED.

Judges BRYANT and TYSON concur.

JAMES B. MYERS, JR., PLAINTIFF
v.
CHARLOTTE K. MYERS, DEFENDANT

No. COA18-1210

Filed 7 January 2020

1. Evidence—expert witness—advance disclosure—Rule 26(b)(4) amendment—required even without discovery request—sanction discretionary

Under amended N.C.G.S. § 1A-1, Rule 26(b)(4)(a)(1), a wife was required to disclose in advance the expert witness she intended to have testify at an alimony trial even though the husband did not submit a discovery request asking about expert witnesses. However, where the statute did not include a timeframe or method for disclosure, the trial court's conclusion that it was required to exclude the wife's expert as a matter of law for lack of disclosure was improper because it did not exercise its inherent authority and discretion in determining whether exclusion was the appropriate remedy.

2. Divorce—alimony—N.C.G.S. § 50-16.3A factors—findings required

In an alimony action, the trial court failed to make findings addressing all the factors in N.C.G.S. § 50-16.3A for which evidence was presented. The trial court was required to make findings addressing evidence of the husband's marital misconduct, and to carefully consider the parties' accustomed standard of living developed during the marriage, as distinguished from the wife's actual expenses incurred after separation, including that they regularly saved and invested for retirement. Finally, where the trial court erroneously excluded the wife's evidence regarding tax ramifications of the alimony award, on remand the court was directed to determine whether to allow the evidence and if so, to address any bearing the evidence had on tax consequences.

3. Divorce—alimony—amount—basis—findings

The trial court failed to make sufficiently specific findings regarding how it determined the amount of an alimony award—the court failed to account for the reduction in the wife's income due to tax deductions, the husband's child support obligation, or the wife's accustomed standard of living during the marriage.

4. Divorce—alimony—retroactive—denial—findings

In an alimony action, the trial court failed to make sufficient findings to support its denial of the wife's claim for retroactive alimony—although there was some evidence that the husband paid support after the date of separation, it could not be determined from the record what the amounts were and whether they were sufficient to meet the husband's child support and alimony obligations, information necessary to calculate whether the wife was entitled to retroactive support.

Appeal by defendant from order entered 4 April 2018 by Judge Jena P. Culler in District Court, Mecklenburg County. Heard in the Court of Appeals 22 May 2019.

James, McElroy & Diehl, P.A., by Christopher T. Hood, Jonathan D. Feit and Haley E. White, for plaintiff-appellee.

Hamilton Stephens Steele + Martin, PLLC, by Amy E. Simpson, for defendant-appellant.

STROUD, Judge.

Defendant-Wife appeals from the trial court's Equitable Distribution Judgment and Alimony Order. Wife argues the trial court erred by excluding her expert witness's testimony regarding potential tax consequences of an alimony award, by failing to make sufficient findings to support the amount of prospective alimony awarded, and by failing to award retroactive alimony. Because the trial court erred in its legal determination that North Carolina General Statute § 1A-1, Rule 26(b)(4)(a)(1) required exclusion of Wife's expert witness, the trial court failed to exercise its discretion to decide whether to admit her testimony and we remand for further consideration. Because the trial court did not make sufficient findings to support the amount of alimony awarded or explain why it denied Wife's claim for retroactive alimony, we reverse and remand the order as to the amount of the prospective alimony and as to the denial of retroactive alimony.

I. Background

Husband and Wife were married in 1994 and separated on 26 July 2014. Two children were born to the marriage, in 2005 and 2007. After the first child was born, Wife stopped working outside the home to care for the children or worked only part-time, and Husband was the primary wage earner. On 6 November 2015, Husband filed a complaint with claims for child custody, child support, equitable distribution, and absolute divorce. On 21 January 2016, Wife filed her answer and counterclaims for child custody, child support, post-separation support, alimony, equitable distribution, and attorney fees. On 2 March 2016, the trial court entered a judgment of absolute divorce, reserving all other pending claims. On 22 March 2016, Husband filed his affirmative defenses and reply, alleging marital misconduct by Wife as a defense to alimony. On 23 January 2017, with leave of court, Wife filed her amended answer and counterclaims, adding allegations of marital misconduct by Husband. The parties engaged in discovery regarding all pending claims.

About a week before trial on the equitable distribution and alimony claims, the parties entered a Consent Order regarding permanent child custody and child support. Under the Consent Order, Husband was required to pay child support of $1,700.00 per month, starting on 1 September 2017, and 75% of the children's uninsured medical expenses and certain extracurricular activities. The Consent Order did not address how child support was calculated and did not mention retroactive or past prospective child support.

The trial court held a hearing on equitable distribution and alimony on 13 and 14 September 2017 and entered its order on these claims on 4 April 2018. The trial court granted an unequal distribution of the

marital property, granting Wife 52% of the net marital estate. In making the unequal distribution, the trial court specifically considered several factors under North Carolina General Statute § 50-20(c), including that Husband's income "greatly exceeded that of" Wife during the marriage and his "career growth potential is also far greater than" hers; Husband's higher expectations of pension or retirement benefits; Wife's contributions as a homemaker and primary parent; and Wife's support for Husband in advancing his career. Neither party challenges the equitable distribution provisions of the order on appeal.

On the alimony claim, the trial court made extensive findings of fact addressing Husband's allegations of marital misconduct by Wife early in their marriage but determined that he was aware of the incident and condoned it. Although Wife presented evidence regarding allegations of illicit sexual misconduct by Husband in support of her alimony claim, the trial court made no findings on this issue. The trial court also made detailed findings of fact regarding the parties' incomes and expenses and required Husband to make monthly alimony payments of $1,200.00. We will address the trial court's findings regarding alimony in more detail below. Wife timely appealed from the trial court's order.

II. Exclusion of Expert Testimony

A. Standard of Review

[1] Wife's first issue arises from the trial court's exclusion of testimony of her expert witness based upon her failure to disclose the identity of the witness sufficiently in advance of trial. As a general rule, we review the trial court's rulings regarding discovery for abuse of discretion. *See Miller v. Forsyth Mem'l Hosp., Inc.*, 174 N.C. App. 619, 620, 625 S.E.2d 115, 116 (2005) ("It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion. In addition, the appellant must show not only that the trial court erred, but that prejudice resulted from that error. This Court will not presume prejudice." (citations and quotation marks omitted)). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998). However, if the trial court makes a discretionary ruling based upon a misapprehension of the applicable law, this is also an abuse of discretion. *See State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) ("[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error

of law." (alterations in original) (quoting *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047) (1996))). And if the trial court's ruling depends upon interpretation of a statute, we review the ruling *de novo*. *Moore v. Proper*, 366 N.C. 25, 30, 726 S.E.2d 812, 817 (2012) ("[W]hen a trial court's determination relies on statutory interpretation, our review is de novo because those matters of statutory interpretation necessarily present questions of law."). Where the language of a statute is clear, we need not construe the statute and must simply apply the plain meaning of the statute. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). If the statute is ambiguous or unclear, we must consider the purpose of the statute and intent of the legislature as expressed in the statute.

> When the plain language of a statute proves unrevealing, a court may look to other indicia of legislative will, including: the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. The intent of the General Assembly may also be gleaned from legislative history. Likewise, later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute. Statutory provisions must be read in context: Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole. Statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each.

Insulation Sys., Inc. v. Fisher, 197 N.C. App. 386, 390, 678 S.E.2d 357, 360 (2009) (quoting *In re Proposed Assessments v. Jefferson-Pilot Life Ins. Co.*, 161 N.C. App. 558, 560, 589 S.E.2d 179, 181 (2003)). Where, as in this case, the Legislature has recently amended a statute, we also "presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts." *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992) (citing *Lumber Co. v. Trading Co.*, 163 N.C. 314, 317, 79 S.E. 627, 628-29 (1913)).

B. Motion to Exclude Expert Testimony

Wife contends the trial court erred by striking testimony and evidence from her expert witness, Victoria Coble. Wife attempted to

present evidence regarding the tax consequences of alimony, tax rates, "cash flow issues and hypothetical rates of return on cash investments." Wife hired Ms. Coble a week prior to the trial and did not disclose her as an expert witness until the afternoon of 12 September 2017, the day before the trial. Husband moved to exclude Ms. Coble's testimony at the start of the trial, but the trial court initially denied Husband's motion, ordered that all of Ms. Coble's materials be produced to Husband in the courtroom and directed that she could be called to testify on the second day of trial. On the second day, Husband renewed his objection to Ms. Coble's testimony and made additional arguments to the trial court based upon the 2015 amendments to Rule 26 of the North Carolina Rules of Civil Procedure, including a blog post on the issue published by Professor Ann Anderson of the University of North Carolina School of Government (hereinafter School of Government).

Although the parties had engaged in discovery, Husband had done no discovery requesting disclosure of expert witnesses. There was no discovery conference or pretrial conference addressing evidence or witnesses in the alimony portion of the case; the only pretrial order addressed the equitable distribution claim, and that order did not mention potential witnesses, including any expert witnesses. Wife argued that under North Carolina General Statute § 1A-1, Rule 26(a) and (e), Husband had not requested her to identify any expert witnesses and she thus had no duty to supplement any prior responses. In addition, we note that the Mecklenburg County Local Rules do not require disclosure of expert witnesses and do not require a pretrial order in an alimony claim. Both parties had timely produced financial affidavits and income information as required by the Local Rules.

Based upon the blog post, the trial court noted in open court that "Professor Anderson seem[s] to have a different opinion about how to interpret [Amended Rule 26]" than the trial court had the previous day. The trial court allowed Wife to proffer Ms. Coble's testimony in full but took the matter under advisement and contacted Professor Anderson by email. The trial court later disclosed Professor Anderson's response to the parties and allowed them to respond to this information. Ultimately, the trial court changed its ruling and determined Wife was required to disclose the identity of the expert witness under North Carolina General Statute § 1A-1, Rule 26(b)(4)(a)(1) in advance of trial, even with no interrogatories or other discovery by Husband. Although Rule 26(b)(4)(a)(1) did not set a particular time for identification of experts, the trial court determined Wife had failed to give sufficient or fair notice as "24 hours in advance would pretty much [be] under anyone's interpretation, not reasonably in advance" of the trial and excluded the testimony.

C. Trial Court's Communication with Disinterested Expert

The ruling in question on appeal depends upon the interpretation of North Carolina General Statute § 1A-1, Rule 26, and particularly Rule 26(b)(4)(1)(a). Upon Husband's request, the trial court considered a blog post by Professor Anderson published on 4 September 2015; it states in part as follows:

> The General Assembly has amended the rule of procedure in civil cases for discovery of information about another party's expert witness. North Rule of Civil Procedure 26(b)(4) has largely been unchanged since 1975. With the amendments made by House Bill 376, S.L. 2015-153, the rule updates the methods of disclosing and deposing experts and implements some explicit work-product-type protections. The Rule now looks more like the corresponding provisions in Federal Rule of Civil Procedure 26 (after that Rule's own significant round of changes in 2010). The changes to North Carolina Rule 26(b)(4) apply to actions commenced on or after October 1, 2015. The rule now provides the following:
>
> > **Expert witness disclosure.** A party is now required to disclose the identity of an expert witness that it may use at trial (that is, a witness that may be used to "present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence"). It appears that the other party is no longer required to first submit formal interrogatories requesting the disclosure, but, as discussed below, that party has the option of doing so.
> >
> > **Written report provision.** If the expert is one "retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony," the disclosing party has the option of submitting a written report prepared by the expert that includes: a complete statement of the witness's opinions and the bases and reasons for them; facts the witness considered in forming the opinions; exhibits that will be used to summarize or support them; the witness's qualifications and a list of certain publications; certain

> prior expert testimony by the witness; and a statement of the expert's compensation. (This report is *required* under the Federal rule.) In the absence of this report, the other party may discover through interrogatories the subject matter of an expert's expected testimony; the substance of the facts and opinions to which the expert is expected to testify; and a summary of the grounds for each opinion.
>
> **Time frames for disclosure.** The rule sets default time frames for submitting written reports of experts or interrogatory responses: 90 days before trial or, for rebuttals, 30 days after the opposing party's disclosure. These requirements may—and surely in many cases will be—altered by stipulation or court order.

Ann M. Anderson, "*North Carolina's Expert Witness Discovery Rule – Changes and Clarifications*," School of Gov't (4 Sept. 2015), https://civil.sog.unc.edu/north-carolinas-expert-witness-discovery-rule-changes-and-clarifications/.

This Court observes that the School of Government provides continuing education for many public officials in North Carolina, including District Court judges, Superior Court judges, the Court of Appeals, and the Supreme Court, as well as many other local and state elected and appointed officials. As noted on the School of Government's website,

> As the largest university-based local government training, advisory, and research organization in the United States, the School of Government offers up to 200 courses, webinars, and specialized conferences for more than 12,000 public officials each year.
>
> Faculty members respond to thousands of phone calls and e-mail messages each year on routine and urgent matters and also engage in long-term advising projects for local governing boards, legislative committees, and statewide commissions.
>
> In addition, faculty members annually publish approximately 50 books, manuals, reports, articles, bulletins, and other print and online content related to state and local government. Each day that the General Assembly is in session, the School produces Daily Bulletin Online, which reports on the day's activities for members of the

> legislature and others who need to follow the course of legislation.

School of Government, https://www.sog.unc.edu/about/mission-and-history (last visited 5 Dec. 2019).

Although a trial judge must always carefully consider any communications with a disinterested expert regarding a question arising in a trial, the trial court fully advised the parties of the communication in open court and gave them an opportunity to review the information and respond to it. This procedure is not required by any statute or rule and is not possible or practicable in every situation. The North Carolina Code of Judicial Conduct allows judges to consult "a disinterested expert on the law applicable to a proceeding before the judge," but it does not set out any parameters for the consultation:

> A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

North Carolina Code of Judicial Conduct Canon 3(A)(4).[1] Here, the trial court's disclosure of the communication to the parties eliminated any possibility of confusion or unfairness to the parties and provided a clear basis for appellate review, since the communication is addressed in the transcript.

D. Analysis of Rule 26(b)(4)(a)(1):

Under North Carolina General Statute § 1A-1, Rule 26(b), each party is required to disclose the identity of expert witnesses it may use at trial:

> (b) Discovery scope and limits.--Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

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1. In contrast, regarding consultation with a disinterested expert, the American Bar Association Model Code of Judicial Conduct requires a judge to "give[] advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited," and to "afford[] the parties a reasonable opportunity to object and respond to the notice and to the advice received." ABA Model Code of Judicial Conduct Canon 2, Rule 2.9(A)(2). North Carolina has *not* adopted the ABA Model Code of Judicial Conduct and does not require notice to the parties and an opportunity to respond.

. . . .

(4) Trial Preparation; Discovery of Experts. — Discovery of facts known and opinions held by experts, that are otherwise discoverable under the provisions of subdivision (1) of this subsection and acquired or developed in anticipation of litigation or for trial, may be obtained only as provided by this subdivision:

a. 1. In general. — In order to provide openness and avoid unfair tactical advantage in the presentation of a case at trial, a party must disclose to the other parties in accordance with this subdivision the identity of any witness it may use at trial to present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence.

N.C. Gen. Stat. § 1A-1, Rule 26(b) (2017).

This subsection of Rule 26 was substantially revised in an amendment adopted in 2015.[2] Before the amendment, it read:

1. A *party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness* at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

2. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to sub-subdivision (b)(4)b. of this rule, concerning fees and expenses as the court may deem appropriate.

N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a) (2013) (emphasis added).

Thus, before the 2015 Amendment, Rule 26(b)(4)(a)(1) provided that a party "may through interrogatories" require an opposing party to disclose expert witnesses[3] expected to testify at trial. *Id.* The 2015

2. The amended rule was effective on 1 October 2015. Husband filed his complaint on 6 November 2015.

3. Throughout this opinion, we will use the term "expert witness" to refer to a witness who may be used at trial to "present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence." N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1) (2017).

Amendment to this subsection removed the language regarding interrogatories and states instead that a party "must disclose" expert witnesses.[4] *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1) (2017).

As Professor Anderson's blog post correctly noted, subsection (b)(4)(a)(1) which requires disclosure is now more similar to Federal Rule of Civil Procedure 26. In addition, other amendments to Rule 26 adopted at the same time also made North Carolina's Rule 26 more similar to its federal counterpart. But since North Carolina has not adopted many of the other related provisions of the Federal Rules, the similarity is somewhat superficial. Regarding the 2015 amendments to Rule 26, Shuford's North Carolina Civil Practice and Procedure notes that North Carolina Rule 26 and Federal Rule 26 both deal "with substantive aspects of discovery," but they are

> fundamentally different in their respective approaches. Since 1993, when Federal Rule 26 was substantively rewritten, the discovery procedures were substantially changed to establish what amounts, through mandatory discovery requirements, to standing interrogatories and requests for disclosure and production. The matter must be produced no later than 14 days before a scheduled conference to formulate a joint written discovery plan. While the North Carolina Rule now lays out the framework for a discovery plan and conference to be creased, it is not mandatory unless one of the parties requests to have a discovery meeting.

Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 26:28 (2018).

Because the 2015 Amendments to Rule 26 incorporated the concept of required disclosure of expert witnesses but set no procedure or timing for the disclosure, Rule 26(b(4)(a)(1) is ambiguous. The trial court appreciated this ambiguity, noting, "I think the rule is clear as mud." We must therefore review the trial court's interpretation of the 2015 Amendment to Rule 26 *de novo*. *See Moore v. Proper*, 366 N.C. at 30, 726 S.E.2d at 817.

In conducting *de novo* review of the 2015 Amendment to Rule 26(b)(4)(a)(1),we must first "determine whether [the] amendment

4. The 2015 Amendment changed other portions of Rule 26 as well, as noted by Professor Anderson's blog. The other changes to Rule 26 are not directly relevant to the issue on appeal.

is clarifying or altering." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012). An "altering amendment" is intended to change the substance of the original statute, but a "clarifying amendment" is not intended to "change the substance of the law but instead [to give] further insight into the way in which the legislature intended the law to apply from its original enactment." *Id.* Even if the statutory language is plain, we consider the title of the act to assist in "ascertaining the intent of the legislature." *Id.* at 8, 727 S.E.2d at 681. The Bill which made these amendments is entitled, "An Act Amending the Rules of Civil Procedure to Modernize Discovery of Expert Witnesses and Clarifying Expert Witness Costs in Civil Actions." S.L. 2015-153 (H.B. 376) (original in all caps). "To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes." *Ray*, 366 N.C. at 10, 727 S.E.2d at 682 (quoting *Ferrell v. Dep't of Transp.*, 334 N.C. 650, 659, 435 S.E.2d 309, 315 (1993)). Considering the purpose of the amendment—"to modernize discovery of expert witnesses"—and the comparison of the original and amended statutes, the 2015 Amendment was an "altering amendment" which was intended to change the substance of Rule 26(b)(4)(a)(1).[5]

In seeking to construe Rule 26(b)(4)(a)(1), we have also considered it in the context of Rule 26 in its entirety and Rule 37, which provides for enforcement and sanctions for violations of Rule 26. We have also compared North Carolina's Rule 26 to Federal Rule 26, as the amendments do make North Carolina's rule somewhat more similar to the federal rule. Most relevant to the issue presented here, the 2015 Amendment to North Carolina's Rule 26 did not incorporate several related provisions of Federal Rule 26 addressing *how* and *when* experts must be disclosed. Federal Rule 26(a)(1)(C) directs that certain required disclosures be made and sets out when "initial disclosures" must be provided. *See* Fed. R. Civ. P. 26(a)(1)(A) ("Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, *without awaiting a discovery request*, provide to the other parties[.]"). North Carolina's Rule 26—in contrast to the required initial disclosures in the Federal rules—still requires the parties to ask for discovery.[6] *See*

5. This analysis does not apply to the portion of the amendments addressing expert witness costs. That portion of the rule is not an issue in this case and the title of the bill expressly characterizes those changes as a "clarifying" amendment.

6. "Discovery methods. — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission." N.C. Gen. Stat. § 1A-1, Rule 26(a).

N.C. Gen. Stat. § 1A-1, Rule 26(a). In addition, Federal Rule 26(a)(2)(B) also *requires* the parties to provide a written report from the expert witnesses identified, while in North Carolina providing a report is optional. *Compare* Fed. R. Civ. P. 26(a)(2)(B) *with* N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(2). Federal Rule 26(f) *requires*, unless exempted, a conference regarding discovery and a discovery plan. Fed. R. Civ. P. 26(f). The analogous provisions in North Carolina's Rules are optional. N.C. Gen. Stat. § 1A-1, Rule 26(f). Overall, unless the parties have agreed to exchange reports from expert witnesses, have stipulated to a schedule, or there is a discovery plan or order setting times for disclosure, North Carolina's Rule 26(b)(4)(a)(1) puts the parties in the difficult position of being bound by a vague requirement to disclose expert witnesses without any particular time or method set for making that disclosure.[7]

And even assuming Wife violated Rule 26(b)(4)(a)(1), our analysis cannot end there, as this Court has noted that Rule 37 sanctions "puts the teeth" in the other substantive rules governing discovery.

> The substantive law governing discovery is contained in N.C.G.S. § 1A-1, Rules 26-36. However, it is Rule 37 which governs discovery sanctions and which puts teeth in the other rules. As this Court stated in *Green v. Maness*, 69 N.C. App. 292, 299, 316 S.E.2d 917, 922, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 922 (1984):
>
> > Our courts and the federal courts have held consistently that the purpose and intent of [Rule 37] is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery . . . . In addition to its inherent authority to regulate trial proceedings, the trial court has express authority under G.S. 1A–1, Rule 37, to impose sanctions on a party who balks at discovery requests.
>
> Therefore, although the trial court found that Brown violated several discovery rules, we must first find a basis in Rule 37 to support the trial court's imposition of sanctions.

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7. Rule 26(b)(4)(f) sets a time for disclosure of testifying expert witnesses *if* the parties have agreed to "submission of written reports pursuant to sub-sub-subdivision 2. of sub-subdivision a. of this subdivision" *or* by interrogatories. N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(f). The time for disclosure may also be set by stipulation, discovery plan, or court order. *Id.*

Pugh v. Pugh, 113 N.C. App. 375, 378, 438 S.E.2d 214, 216 (1994) (alterations in original).

The interpretation of Rule 37 as described above has been followed by our appellate courts for many years. We must presume the Legislature was aware of this interaction between Rule 26 and Rule 37 when the 2015 amendment to Rule 26(b)(4)(a)(1) was adopted, without any related amendment to Rule 37.

> "The legislature's inactivity in the face of the Court's repeated pronouncements" on an issue "can only be interpreted as acquiescence by, and implicit approval from, that body." Such legislative acquiescence is especially persuasive on issues of statutory interpretation. When the legislature chooses not to amend a statutory provision that has received a specific interpretation, we assume lawmakers are satisfied with that interpretation.

Brown v. Kindred Nursing Centers E., L.L.C., 364 N.C. 76, 83, 692 S.E.2d 87, 91-92 (2010) (citation omitted). Assuming that Wife was required by Rule 26(b)(4)(a)(1) to disclose Ms. Coble as her expert witness sooner than she did, we will first attempt to "find a basis in Rule 37 to support the trial court's imposition of" the sanction of excluding the expert witness. *See Pugh*, 113 N.C. App. at 378, 438 S.E.2d at 216. The answer to this question would be simple under Federal Rule 37, entitled "Failure to Make *Disclosures* or to Cooperate in Discovery; Sanctions":

> Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) Failure to Disclose or Supplement. *If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless*. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and

> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Fed. R. Civ. P. 37(c) (emphasis added).

The Advisory Committee Notes to Federal Rule 37 note it was amended in 1993 "*to reflect the revision of Rule 26(a), requiring disclosure of matters without a discovery request.*" Fed. R. Civ. P. 37(emphasis added) (1993 Amendment Notes). The revisions to subdivision (c) provided a "self-executing sanction" for failure to provide disclosures required under Rule 26:

> The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A).
>
> Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence.
>
> Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: e.g., the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party.

Id.

The answer is not so simple under North Carolina's Rule 37; it has no "self-executing sanction" for failure to make a disclosure under Rule 26(b)(4)(a)(1). In fact, Rule 37 does not address any sort of disclosure

other than responses to discovery requests. *See* N.C. Gen. Stat. § 1A-1, Rule 37. North Carolina's Rule 37 is entitled "Failure to make discovery; sanctions." *Id.* As the title accurately implies, it addresses sanctions only for failure to respond to *discovery requests*. *Id.* It does not address sanctions for failure to disclose the identity of an expert witness under Rule 26(b)(4)(a)(1) in the absence of any discovery request, discovery plan, or court order requiring disclosure.[8] *See id.* North Carolina General Statute § 1A-1, Rule 37 was not amended to accommodate the changes to Rule 26(b)(4)(a)(1) in 2015, and it has not been amended since 2015.

North Carolina cases interpreting Rule 37 have generally held that a party seeking sanctions must first demonstrate a violation of a substantive rule of discovery, based upon Rules 26 through 36, obtain a court order to compel discovery, and *then* Rule 37 sanctions may be imposed.[9]

> Generally sanctions under Rule 37 are imposed only for the failure to comply with a court order. Rule 37(d), however, expressly contemplates a limited number of circumstances where a court order is not required before sanctions can be imposed.

Pugh, 113 N.C. App. at 379, 438 S.E.2d at 217 (citation omitted). Therefore, even assuming Wife did not timely identify Ms. Coble as an expert witness under Rule 26(b)(4)(a)(1), North Carolina's Rule 37 provides no specific authority for sanctions since Husband never propounded any

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8. "Motion for order compelling discovery. — A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows: . . . . (2) Motion. — If a deponent *fails to answer a question propounded or submitted* under Rules 30 or 31, or a corporation or other entity *fails to make a designation under Rule 30(b)(6) or 31(a)*, or a party *fails to answer an interrogatory* submitted under Rule 33, or if a party, in *response to a request for inspection* submitted under Rule 34, fails to respond that inspection will be permitted as requested or *fails to permit inspection as requested*, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question shall complete the examination on all other matters before the examination is adjourned, in order to apply for an order. If the motion is based upon an objection to production of electronically stored information from sources the objecting party identified as not reasonably accessible because of undue burden or cost, the objecting party has the burden of showing that the basis for the objection exists." N.C. Gen. Stat. § 1A-1, Rule 37(a) (emphasis added).

9. None of the prior cases interpreting Rule 37 sanctions in this context were decided after or based upon the 2015 disclosure provision of Rule 26(b), but they are still binding precedent as to the application of Rule 37 sanctions.

discovery on this issue and did not obtain a court order requiring Wife to disclose anything.

Recognizing the absence of authority for sanctions for a violation of rule 26(b)(4)(a)(1) under North Carolina's Rule 37, Husband argues that the "trial court properly exercised its inherent authority by granting [Husband's] motion and excluding Ms. Coble's expert testimony as a sanction for [Wife] violating the expert disclosure mandate of Amended Rule 26." Inherent authority has been defined as the court's power

> to do only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction. Inherent powers are limited to those powers which are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction.

Matter of Transp. of Juveniles, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citations and emphasis omitted).

In the context of discovery, prior cases indicate that the exercise of a trial court's inherent authority to impose sanctions for failure to comply with discovery rules first requires a violation of a particular rule—usually an intentional or repeated violation—or some behavior by counsel or a party which shows disrespect or defiance of the trial court's authority. *See generally Pugh*, 113 N.C. App. at 379, 438 S.E.2d at 217. Upon reviewing the cases cited by Husband to support the trial court's inherent authority to impose sanctions for abuse of discovery and other cases discussing a trial court's inherent authority in the context of discovery, we have been unable to find any instance of a sanction imposed based only upon inherent authority, without a clear and repeated failure of the party sanctioned to comply with a substantive rule of discovery. For example, Husband cites to *Cloer v. Smith*, where the Plaintiff repeatedly refused with no valid legal basis to answer deposition questions. 132 N.C. App. 569, 512 S.E.2d 779 (1999). This Court upheld the trial court's imposition of sanctions for discovery violations based upon Rule 30(c) and Rule 37; it also noted that "[t]he trial court also retains inherent authority to impose sanctions for discovery abuses beyond those enumerated in Rule 37." *Id.* at 573, 512 S.E.2d at 782. Husband also cites to *Telegraph Co. v. Griffin*, where the trial court held the plaintiff in contempt and sanctioned plaintiff for its repeated failure to respond to interrogatories and violation of an order compelling the plaintiff to respond. 39 N.C. App. 721, 251 S.E.2d 885 (1979). Although this Court noted generally that "Rule 37 allowing the trial court to impose sanctions is flexible, and a 'broad discretion must be given to the trial judge

with regard to sanctions[,]' " the holding was based upon the plaintiff's repeated failure to respond to interrogatories under the authority granted by Rule 37, not inherent authority alone. *See id.* at 727, 251 S.E.2d at 888. But all of these cases were decided prior to the 2015 amendments to Rule 26, and since Rule 37 does not address failure to disclose expert witnesses without a discovery request, enforcing the requirement of Rule 26(b)(4)(a)(1) is "reasonably necessary for the administration of justice within the scope of [the trial court's] jurisdiction," and thus it is within the inherent authority of the trial court to impose a sanction. *See Matter of Transp. of Juveniles*, 102 N.C. App. at 808, 403 S.E.2d at 559.

Here, on the first day of trial, the trial court initially ruled that Wife's expert witness would be permitted to testify because Husband had never asked Wife to identify any expert witnesses in written discovery or her deposition. Referring to Rule 26(b)(4) "in its entirety" and subdivision (b)(4)(a)(1), the trial court initially denied Husband's motion to exclude the testimony:

> Reading those in accordance with each other must disclose in accordance with this subdivision the identity of a witness tells me that they have to provide the answer and the interrogatories if they're asked.
>
> They weren't asked. Reading it as a whole, I don't think you can complain if you never asked.

On the second day of trial, after communication with Professor Anderson, additional argument by the parties, and further consideration of the meaning of the 2015 Amendment to Rule 26(b)(4)(a)(1), the trial court determined that the 2015 Amendment limited the trial court's discretion to allow Wife's expert testimony and required its exclusion.[10] The trial court therefore revised its ruling and excluded Ms. Coble's testimony.

On appeal, both parties argue the trial court had the discretion to either allow or exclude testimony by Ms. Coble. Both Wife's and Husband's arguments present factors the trial court may consider in exercising its discretion to exclude the expert testimony or to allow it. Wife argues the trial court abused this discretion, and Husband argues the trial court properly exercised its discretion. But examination of

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10. Husband argued, "The legislature has told us that Rule 26(a)(4), (a)(1), in particular has been amended, such that it now requires, *with no discretion*, when it says, 'In order to provide openness and avoid unfair tactical advantage in the presentation of a case at trial, a party must disclose to the other parties in accordance with this subdivision, the identity of any witness it may use at trial to present evidence under Rule 702, 703 or 705 of the North Carolina 3 Rules of Evidence.'" (Emphasis added.)

the transcript and the trial court's stated basis for its initial ruling to allow the testimony and later decision to exclude it demonstrates that the trial court's ultimate ruling was *not* a discretionary ruling. Instead, the trial court determined as a matter of law it did not have the discretion to allow Ms. Coble's testimony because Wife had not identified the expert prior to trial under Rule 26(b)(4)(a)(1), even with no discovery request for identification of expert witnesses. The trial court stated its concern that Rule 26(b)(4)(a)(1) lacked a time frame for disclosure but based upon interpretations of *Federal* Rule 26 determined the expert witness testimony must be excluded.[11]

Since North Carolina General Statute § 1A-1, Rule 26(b)(4)(a)(1) does not include a timeframe for voluntary disclosure and the North Carolina Rules of Civil Procedure do not include the other related rule provisions which give Federal Rule 26(a)(2)(D) clear time requirements and the Federal Rule 37 provisions which give it "teeth," North Carolina's Rule 26(b)(4)(a)(1) leaves the matter of a party's compliance and any sanction or remedy for noncompliance within the trial court's inherent authority and discretion.[12] The guiding purpose of disclosure in Rule 26(b)(4)(a)(1) is "to provide openness and avoid unfair tactical advantage in the presentation of a case at trial[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1). Thus, the trial court must make a discretionary determination of whether Wife's failure to disclose the expert sufficiently in advance of the trial gave her an "unfair tactical advantage" at trial or defeated the purpose of "providing openness" as contemplated by Rule 26(b). Since Rule 26 does not set a particular time or method for disclosure, the trial court must make this discretionary determination based upon the particular circumstances. Since Rule 37 does not address sanctions for failure to disclose, the trial court has inherent authority to grant a remedy for the failure to disclose, which may include exclusion of the testimony or other remedies or sanctions as appropriate to the circumstances. Here, the trial court's interpretation of Rule 26(b)(4)(a)(1) as *requiring* exclusion of Ms. Coble's testimony was in error. Essentially, the trial court misapprehended the law by

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11. Based upon her communication with Professor Anderson, the trial court noted, "this Federal Rule's interpretation has been that the interrogatories are not required."

12. Although Federal Rule 37 has a "self-executing" sanction for failure to disclose, it also allows the trial judge some discretion, since "the [non-disclosing] party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless*." Fed. R. Civ. P. 37(c)(1) (emphasis added). The trial court also has discretion to impose sanctions other than exclusion of the testimony. *Id.*

determining that it did not have the discretion to allow Ms. Coble's testimony, as demonstrated by the change in its ruling on the issue.[13] The trial court's failure to exercise its discretion was an abuse of discretion. *See Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) ("A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion.").

Upon *de novo* review of Rule 26(b)(4)(a)(1), we hold the Rule does require advance disclosure of expert witnesses who will testify at trial, even without a discovery request, discovery plan, or court order. The trial court had inherent authority to impose a sanction for failure to disclose sufficiently in advance of trial. The trial court also has discretion to allow or to exclude Ms. Coble's evidence or to impose another sanction for the failure to disclose, but the trial court failed to exercise this discretion and determined the testimony *must* be excluded based upon Rule 26(b)(4)(a)(1). We therefore reverse the trial court's ruling as to the admissibility of Ms. Coble's testimony and remand for reconsideration. On remand, the trial court should exercise its discretion either to allow or exclude Ms. Coble's testimony (or to impose some other sanction) upon consideration of whether the expert testimony gives Wife an "unfair tactical advantage" based upon the factors each party has argued on appeal in support of this discretionary decision and any other factors it deems appropriate.

III. Consideration of Factors Under North Carolina General Statute § 50-16.3A(b)

A. Standard of Review

"To support the trial court's award of alimony . . . the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award." *Wise v. Wise*, ___ N.C. App. ___, ___, 826 S.E.2d 788, 792 (2019). We review the trial court's determination of the amount of alimony for abuse of discretion." *Hill v. Hill*, ___ N.C. App. ___, ___, 821 S.E.2d 210, 224 (2018).

B. Analysis

[2] Wife argues the trial court erred by failing to consider each of the 16 factors under North Carolina General Statute § 50-16.3A(b) for

13. On the first day of trial, the trial court exercised its discretion to deny Husband's motion but also took into consideration the lack of relevant discovery requests, a discovery plan, and a pretrial order.

which evidence was presented in determining the amount of the alimony award.

> The term "alimony" is defined as "an order for payment of the support and maintenance of a spouse or former spouse." In determining the amount of alimony, the trial court "shall consider all relevant factors," including the sixteen (16) factors set forth in N.C. Gen. Stat. § 50-16.3A(b). "In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings."
>
> The factors set forth in N.C. Gen. Stat. § 50-16.3A are as follows:
>
> > (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
> >
> > (2) The relative earnings and earning capacities of the spouses;
> >
> > (3) The ages and the physical, mental, and emotional conditions of the spouses;
> >
> > (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
> >
> > (5) The duration of the marriage;
> >
> > (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
> >
> > (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
> >
> > (8) The standard of living of the spouses established during the marriage;

> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
>
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
>
> (11) The property brought to the marriage by either spouse;
>
> (12) The contribution of a spouse as homemaker;
>
> (13) The relative needs of the spouses;
>
> (14) The federal, State, and local tax ramifications of the alimony award;
>
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
>
> (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

Collins v. Collins, 243 N.C. App. 696, 707-09, 778 S.E.2d 854, 861 (2015) (citations and brackets omitted) (quoting N.C. Gen. Stat. 50-16.3A (2013)).

> "The requirement for detailed findings is thus not a mere formality or an empty ritual; it must be done." "Although the trial judge must follow the requirements of this section in determining the amount of permanent alimony to be awarded, the trial judge's determination of the proper amount is within his sound discretion and his determination will not be disturbed on appeal absent a clear abuse of that discretion."

Lamb v. Lamb, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991) (citation omitted).

Wife contends that the trial court failed to make findings on these factors for which evidence was presented: (1) marital misconduct of Husband; (2) the tax consequences of the alimony award, and (3) the "standard of living of the spouses established during the marriage."

(1) Marital Misconduct of Either Spouse

As to marital misconduct, Wife notes that the trial court did make findings of fact addressing her misconduct, a part of Husband's defense to her alimony claim, but did not address her contentions of marital misconduct by Husband. Husband contended Wife had committed marital misconduct early in their marriage. The trial court made findings regarding this evidence and determined Husband had known about the misconduct and condoned it. Wife presented evidence regarding Husband's marital misconduct during the marriage, but the trial court's findings do not address this evidence at all. It is possible the trial court determined that even if Husband committed marital misconduct as Wife alleged, the trial court determined it would not change Wife's entitlement to alimony or the amount awarded, but evidence was presented on this factor, so the findings should have addressed it.

(2) Federal, State, and Local Tax Ramifications of the Alimony Award

As to the tax consequences of the alimony award, the trial court is required to make findings on a factor only if evidence is presented on that factor. Wife sought to present evidence on this factor by Ms. Coble's expert testimony, but the trial court excluded this evidence for the reasons discussed above. Since we have determined the trial court erred by failing to exercise its discretion and excluding Ms. Coble's testimony based upon a misapprehension of the law, on remand the trial court must determine whether, in its discretion, it will consider Ms. Coble's evidence. If so, the trial court's findings on remand should address the evidence on this factor.[14]

(3) The Standard of Living of the Spouses Established During the Marriage

As to the standard of living during the marriage, Wife contends that she presented evidence of the "shared family expenses in three different ways: (1) the amount consistent with the standard of living of the parties while married ($5,138.67 per month); (2) the amount actually being

14. Wife's brief notes that since the trial, there have been changes in the income tax laws applicable to alimony. Any discussion of exactly how changes in the tax laws may affect the alimony award is beyond the scope of this appeal, but on remand the trial court may consider this issue. We also decline to address the potential relevance of Ms. Coble's testimony on remand as she discussed financial issues other than the taxable nature of alimony payment. For example, she testified regarding the tax ramifications of renting a home as compared to making mortgage payments and the amount of income Wife might earn from investing funds she received from the sale of the former marital home.

spent by [Wife] at the time of trial ($4,246.27); and (3) the amount [Wife] would need if she purchased a home (which is consistent with how the parties lived during the marriage) instead of continuing to rent (as she had been since separation) ($5,015.94)." Wife also presented evidence of her individual expenses based upon the standard of living during the marriage of $3,681.00, and the reduced amount she was actually spending at the time of trial, $3,174.51. She argues the trial court considered only her actual expenses as of the time of trial but did not consider the other values based upon the accustomed standard of living during the marriage. She also notes that the trial court found that Husband's reasonable expenses included many of types of discretionary expenses which both parties had enjoyed during the marriage, but, after separation, only Husband could afford, such as home ownership, entertainment and recreation, meals out, Christmas and birthday gifts, and home furnishings. Husband also had surplus funds even after continuing his pattern of saving and investing in retirement assets established during the marriage, but the trial court did not include savings or retirement as part of Wife's reasonable expenses, although the parties had saved for retirement during the marriage and she has no retirement plan at her new employment.

Husband contends that the trial court did not have to accept Wife's contentions regarding her reasonable expenses or the standard of living during the marriage. *See Nicks v. Nicks*, 241 N.C. App. 487, 501, 774 S.E.2d 365, 376 (2015) ("This Court has long recognized that the determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." (brackets and quotation marks omitted) (quoting *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982))). He also notes that the trial court made findings of fact in the equitable distribution portion of the order regarding the parties' "comfortable lifestyle;" the 3,700 square foot marital home which had net sales proceeds of $372,255.00, and the Lexus car Wife drove for several years. He also notes the distribution of various bank accounts, stock, and retirement assets, so Wife had the benefit of her portion of those assets—although Husband also received his portion of those assets. The parties had no marital debt mentioned in the order.

Our Supreme Court has made it clear that the "accustomed standard of living" established during the marriage is "more than a level of mere economic survival:"

> We think usage of the term accustomed standard of living of the parties completes the contemplated legislative meaning of maintenance and support. The latter phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed. For us to hold otherwise would be to completely ignore the plain language of G.S. 50-16.5 and the need to construe our alimony statutes *in pari materia*. This we are unwilling to do.

Rea v. Rea, ___ N.C. App. ___, ___, 822 S.E.2d 426, 432 (2018) (quoting *Williams v. Williams*, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980)).

Although the trial court made detailed findings as to the shared family expenses and reasonable individual expenses for Husband and Wife, these findings appear to be based upon the evidence of expenses for each party at the time of trial. Wife contends her actual living expenses after separation were reduced due to her inability to maintain the same standard of living as established during the marriage without assistance from Husband. No findings indicate any difference between Wife's *actual expenses* after separation as compared to the *accustomed standard of living* during the marriage as reflected in the equitable distribution portion of the order. The trial court does not have "to accept at face value the assertion of living expenses," *Nicks*, 241 N.C. App. at 501, 774 S.E.2d at 376, but it does have to consider the parties' accustomed standard of living during the marriage and not just Wife's actual expenses at the time of trial. Based upon the findings in the equitable distribution portion of the order as to the parties' "comfortable lifestyle," large home, luxury vehicle, and substantial savings and investments during the marriage, it appears Wife's standard of living on her own after separation was significantly reduced from the level established during the marriage. Even the trial court's findings of some of the parties' expenses show the difference between Husband's standard of living at the time of trial, which appears to be more similar to the accustomed standard during the marriage as alleged by Wife, and Wife's reduced standard. For example, the trial court found Husband had reasonable expenses for "activities" of $460.20 per month; Wife's expense is only $75.00. Husband was allowed $300 per month for "meals out;" Wife was allowed only $150.00. Husband

was allowed $200.00 per month for "home furnishings;" Wife was allowed only $45.00.[15] Husband's gross monthly income was $17,780.26; at the time of trial, Wife's gross income was $4,244.28. Certainly, there is no requirement that Wife enjoy the same lifestyle as Husband's current lifestyle, but the trial court must consider the accustomed standard of living developed during the marriage in determining Wife's reasonable need for support.

Wife also notes that Husband was continuing to save and invest for retirement and contends the parties had a pattern of saving during the marriage. Husband's affidavit showed he was investing $1,458.00 per month during the marriage, and he was investing $1,372.50 per month at the time of trial. Wife was either unemployed or worked part-time after the children were born, so their accumulation of retirement assets during the marriage was based largely upon Husband's contributions and his evidence would tend to show the accustomed level of retirement investment during the marriage. Based upon the equitable distribution findings, the parties accumulated substantial retirement savings and other investments during the marriage. Husband was continuing this pattern of savings, but after separation Wife was unable to do so. The trial court made no findings regarding this monthly expense.

Where the parties have established a pattern of saving for retirement as part of their accustomed standard of living during the marriage, this expense can be part of the standard of living and should be considered for purposes of alimony.

> This Court recently held in *Glass v. Glass*, 131 N.C. App. 784, 789-90, 509 S.E.2d 236, 239 (1998), that an established pattern of contributing to a retirement or savings plan may be considered by the trial court in determining the parties' accustomed standard of living. *Glass* cautioned, however, that a party's savings should not be used to "reduce his or her support obligation to the other by merely increasing his or her deductions for savings plans," nor should a spouse be able to "increase an alimony award by deferring a portion of his or her income

15. Husband's shared family expenses were based upon one-third of the total household expense since he has remarried and the trial court allocated a portion of the expenses to his wife, although Husband testified he was paying 100% of the expenses. Wife's shared family expenses were based upon one-half of the total household expense. Since Husband's expenses were one-third of his actual expenditures, he was actually spending $1380.00 per month on "activities;" $900.00 per month on meals out; and $600.00 per month on furnishings.

> to a savings account," emphasizing that "the purpose of alimony is not to allow a party to accumulate savings."
>
> Then, in *Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000), (a case which we note, was decided by this Court after the trial court in the case *sub judice* had entered its order denying alimony), we clarified our holding in *Glass*, finding that although the parties' pattern of savings may not be determinative of a claim for alimony, the trial court must at least consider this pattern in determining the parties' accustomed standard of living.

Vadala v. Vadala, 145 N.C. App. 478, 481, 550 S.E.2d 536, 539 (2001) (citation omitted).

We see no indication the trial court considered the parties' pattern of savings and investment for retirement as part of their accustomed standard of living during the marriage. We realize the trial court distributed the marital assets accrued during the marriage in the equitable distribution provisions of the order, but that distribution does not negate the need to consider the pattern of savings and investment as a part of the accustomed standard of living during the marriage for purposes of alimony.

IV. Basis for Amount of Alimony Awarded

[3] Wife also contends that the trial court findings of fact are not sufficient to support the award of $1200.00 per month. "To support the trial court's award of alimony . . . the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award." *Wise v. Wise*, ___ N.C. App. at ___, 826 S.E.2d at 792. Although the amount of alimony is in the trial court's discretion, based upon the findings of fact we are simply unable to determine how the trial court arrived at the amount of alimony of $1,200.00 per month. The trial court found that Wife's gross income was $4,244.28, which is "subject to deduction for federal tax, state tax, Medicare, and Social Security," but the trial court did not make a finding as to the amount of these deductions, although this information was in evidence.[16] The trial court found her total expenses, including shared family expenses and individual expenses, as $5,565.54. Under the Consent Order, Husband was paying $1,700.00 monthly in child support, but the order does not mention the child support payment

16. Even without Ms. Coble's testimony, the parties' financial affidavits, pay stubs, and income tax returns included evidence of tax deductions and net incomes.

at all. Even based upon the trial court's findings, it appears that Wife had greater reasonable needs than $1,200.00 per month, and Husband had the ability to pay substantially more. And if the trial court considers the standard of living during the marriage instead of Wife's reduced standard after separation, her needs may actually be higher. Based upon the trial court's findings, this is not a case where the trial court limited the alimony award because Husband lacked the ability to pay more alimony, nor was the alimony award reduced based upon any marital fault by Wife. The only issue was Wife's reasonable needs based upon the accustomed standard of living established during the marriage. We must therefore vacate the trial court' s order as to the amount of the monthly prospective alimony obligation and remand for additional findings of fact to address the issues noted and entry of a new order for prospective alimony. *See Collins*, 243 N.C. App. at 707, 778 S.E.2d at 861.

V. Retroactive Alimony

A. Standard of Review

"To support the trial court's award of alimony . . . the trial court's findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court's award." *Wise v. Wise*, ___ N.C. App. at ___, 826 S.E.2d at 792. If the trial court denies alimony, the findings must also set forth the reasons for the denial. N.C. Gen. Stat. § 50-16.3A(c) (2017) ("The court shall set forth the reasons for its award *or denial* of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. (emphasis added)).

B. Analysis

[4] Wife last argues that the trial court erred by denying her claim for alimony retroactive to either the date of separation or the date of filing of the claim for post-separation support and alimony because the findings do not address the reason for denial. The order on appeal does not include any findings regarding support Husband voluntarily paid after separation, either as child support or alimony, although the evidence showed that he did make house payments until sale of the marital home and he did pay some other support for the benefit of the children and Wife. The only finding in the order mentioning past alimony is finding of fact 91:

> In its discretion, the Court declines to find that [Husband] owes any arrears for PSS or alimony and this Order shall superseded and supplant any prior Order of this Court regarding spousal support.

This finding implies there *was* a prior order for alimony, since the term "arrears" normally refers to accrued payments owed under an order, and to the extent Husband failed to pay all sums required under the "prior order," the trial court did not award any "arrears." But the trial court never entered a "prior order" regarding post-separation support or alimony, nor was there a "prior order" to supersede or supplant. This finding is thus not supported by the record. The trial court did not enter an order for child support either, until the Consent Order entered just before the alimony and equitable distribution trial.

Husband agrees there was no prior order for alimony or child support but argues that he voluntarily paid "tax-free spousal support, in the absence of a court order, from the time the parties separated up through the alimony trial." He argues that he paid cash support of $1,000 or $1,100 twice each month and paid for groceries and car insurance as well as the mortgage and other expenses associated with the marital residence where Wife resided until it was sold in July 2015. After the sale of the marital residence, Husband contends that he continued to pay "tax-free cash support" in various amounts. Husband argues that "[o]ne may logically infer" that since the trial court ordered alimony of $1,200.00 per month, and he had paid more than that, the trial court did not err in failing to award retroactive alimony. Husband also argues that Wife did not preserve any claims for retroactive child support or child support arrears in their Consent Order.

This Court has held that a dependent spouse may be entitled to alimony from the date of separation forward:

> In construing the prior version of the statute governing alimony, N.C. Gen. Stat. § 50–16.3 (repealed by 1995 N.C. Sess. Laws ch. 319, § 1, effective 1 October 1995), this Court held that a dependent spouse may be entitled to alimony not merely from the date the claim for alimony is filed but rather from the date of the parties' separation.
>
> In 1995, the General Assembly "effected a 'wholesale revision' in North Carolina alimony law" by repealing § 50–16.3 and replacing it with § 50–16.3A. In *Brannock*, this Court held that the 1995 changes to the alimony statute were so extensive that a claim for alimony under the current statute is "fundamentally different" than a claim under the prior, now repealed, statute.
>
> Defendant relies on our holding in Brannock to argue that under the current statute – § 50–16.3A – alimony may

> not be awarded "retroactively." However, while Brannock does discuss the changes in North Carolina law regarding alimony, nothing in the opinion references any intent by the General Assembly to eliminate retroactive alimony or to abrogate our rulings in Austin and its progeny.

Smallwood v. Smallwood, 227 N.C. App. 319, 332-33, 742 S.E.2d 814, 823-24 (2013) (citations and brackets omitted).

Husband is correct there was evidence regarding payments he made after separation for the benefit of Wife and the children, but that evidence is not as clear as he contends. He testified that his Exhibit 27 was a chart showing "all the cash support that I provided since the date of separation." But in our record, Husband's Exhibit 27 is a bank statement; we have been unable to find a chart showing the cash support. Husband also testified about a "flash drive [with] all of the backup supporting documentation used to create this chart," but our record does not include a flash drive and does not indicate what documents were on the flash drive.

Even if we assume Husband presented the chart and "backup supporting documentation" as evidence of the payments, the trial court did not make any findings regarding support Husband may have paid after the date of separation, either as child support or alimony, and this Court cannot make findings of fact. *See Horton v. Horton*, 12 N.C. App. 526, 529, 183 S.E.2d 794, 797 (1971). We cannot determine that Husband paid any particular amounts after separation, and we have no way of determining how much of the sums he paid should be allocated to child support and how much to alimony, nor can we determine how much he should have paid as compared to what he actually paid. During much of the time after separation, Wife was not employed, or not employed full time, and when she did become employed, she testified that she would incur work-related child care costs. The amounts owed by Husband for child support alone would have varied over time based upon Wife's earnings, or lack thereof, at the time. At the time of trial, she was employed full-time and thus her ability to support herself and the children was greater than it had been at any time since separation.

As to Husband's argument of waiver, at the trial, there was some discussion of Wife's retroactive child support claim but no resolution. Near the beginning of the trial, Wife's counsel stated that retroactive child support was also an issue to be resolved at the trial, and the trial court noted that it believed the Consent Order had entirely resolved the child support claim. But the Consent Order specifically resolves only permanent

child custody and permanent prospective child support, effective from 1 September 2017 forward, in the amount of $1,700.00 per month. The Consent Order does not mention retroactive child support or waive any claim for retroactive child support. Wife's counsel argued that she could still pursue back child support since the Consent Order did not address anything prior to 1 September 2017. The trial court stated, "I don't know that there's an issue to take up--- . . . based on---[.]" Unfortunately, the trial court was interrupted and the discussion moved on to another topic. The question was never resolved, at least in our record.

Later in the trial, Husband argued that Wife's need for both retroactive child support and alimony was decreased after the marital home was sold and Wife received her portion of the proceeds since she could have invested the proceeds in the stock market and earned substantial returns from the investment. Husband even asked the trial court to take judicial notice of her potential returns from investing in stock market, which the trial court very appropriately declined to do.[17]

During arguments at the close of the trial, Husband noted that the Consent Order on child support had set support based upon the child support guidelines, but that there was no need to consider work-related day care because Husband was available to care for the children since he works mostly from home. Wife testified that she would need day care while working. Wife also noted that under the Consent Order, Husband would have more custodial time than he had since the parties' separation and the prospective child support was set based upon the new custodial schedule. In any event, we cannot determine any amounts or expenses the Consent Order as to child support was based upon because it has no findings of fact or explanation of how support was calculated. In fact, the trial court also noted that under the Child Support Guidelines, based upon the parties' incomes, "it doesn't calculate to $1700.00," the amount of child support in the Consent Order. The Consent Order does not include any findings of fact to explain how the child support was calculated. The order states, "The parties have waived the necessity of the Court making additional findings of fact and/or conclusions of law in support of the order except as set forth below." There are no findings of the parties' incomes or expenses in the Consent Order and no indication

17. Rule 201 of the North Carolina Rules of Evidence provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201(b).

that the Guidelines were actually used to set the amount of $1,700.00 per month.[18] In any event, the issues before us on appeal are not based upon the child support claim; the issue on appeal is the denial of Wife's claim for retroactive alimony, and the Consent Order surely did not waive that.

The trial court did not make sufficient findings to explain why it denied Wife's claim for retroactive alimony. Based upon the evidence, it appears Husband voluntarily paid Wife after their separation, but the amounts varied over time, and he had obligations for both child support and post-separation support. If he voluntarily paid sufficient amounts to meet *both* of these obligations, the trial court could deny Wife's claim for retroactive alimony, but the trial court did not make any findings of fact or conclusions of law to support denial of Wife's claim, as required by North Carolina General Statute § 50-16.3A(c).[19] The order does not "set forth the reasons for its . . . denial of alimony" from the period after the date of separation forward. N.C. Gen. Stat. § 50-16.3A(c). We must therefore vacate and remand for the trial court to make findings of fact and conclusions of law regarding Wife's entitlement to retroactive alimony and if the sums already paid by Husband were not sufficient to meet both his child support and alimony obligations, to determine how much retroactive support is due to Wife.

VI. Conclusion

We reverse the trial court's decision to exclude Wife's expert testimony and remand for reconsideration of whether to exclude Ms. Coble's proffered testimony and evidence. We also reverse and remand the 4 April 2018 order as to the amount of the prospective alimony and as to the denial of retroactive alimony. The portions of the order regarding Equitable Distribution were not a subject of Wife's appeal and thus those portions of the order stand. On remand, the trial court shall make additional findings of fact and conclusions of law to address the issues noted above. At the request of either party, the trial court shall allow the parties to present additional evidence and argument limited to the issues to be addressed on remand. If neither party requests additional hearing, the trial court may in its discretion either receive additional evidence and argument or may make its findings

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18. The order does provide for modification of the child support based upon the Guidelines when Husband has an obligation to support only one child.

19. We express no opinion on the issue of retroactive child support other than to note it appears to be a pending claim and is not resolved in either the Consent Order or the order on appeal.

and conclusions and enter a new order regarding retroactive and prospective alimony based upon the current record.

REVERSED IN PART AND REMANDED.

Judges HAMPSON and BROOK concur.

NANNY'S KORNER DAY CARE CENTER, INC., PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF CHILD DEVELOPMENT, DEFENDANT

No. COA19-416

Filed 7 January 2020

Statutes of Limitation and Repose—Tort Claims Act—three-year statute of limitations—exhaustion of administrative remedies—no tolling

A day care facility's claim under the Tort Claims Act against a state regulatory agency—for negligent failure to conduct an independent investigation of alleged child abuse at the facility prior to initiating disciplinary action—was barred by the Act's three-year statute of limitations, which was not tolled while plaintiff pursued administrative remedies under the N.C. Administrative Procedure Act (APA), because the facility sought monetary damages for its claim of negligence, a remedy which was not available under the APA.

Appeal by Plaintiff from order entered 21 December 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2019.

Ralph T. Bryant, Jr., for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Charles Whitehead, for Defendant-Appellee.

COLLINS, Judge.

Nanny's Korner Day Care Center, Inc. ("Plaintiff"), appeals from order entered on 21 December 2018 by the North Carolina Industrial Commission dismissing Plaintiff's claim against the North Carolina

Department of Health and Human Services, Division of Child Development ("Defendant"), under the North Carolina Tort Claims Act. Because Plaintiff's claim is barred by the statute of limitations, we affirm.

I. Factual and Procedural History

This is the third time the parties have been before this Court in the last five years. A detailed factual history of this case can be found at *Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Human Servs.*, 825 S.E.2d 34 (N.C. Ct. App. 2019) ("*Nanny's Korner II*"). The facts relevant to this case are as follows:

On 23 April 2010, Defendant notified Plaintiff that Defendant had decided to issue administrative disciplinary action based on substantiation by the Robeson County Department of Social Services that child abuse had occurred at Plaintiff's day care facility. Defendant then issued a notice of administrative action to Plaintiff on 15 June 2010, invoking disciplinary action. Plaintiff appealed Defendant's decision through the administrative appeal process, first to the Office of Administrative Hearings, then to Wake County Superior Court, and then to this Court. On 20 May 2014, this Court held that Defendant had violated Plaintiff's rights by not conducting an independent investigation into the alleged child abuse, and reversed Defendant's decision. *Nanny's Korner Care Ctr. v. N.C. Dep't of Health & Hum. Servs.*, 234 N.C. App. 51, 64, 758 S.E.2d 423, 431 (2014) ("*Nanny's Korner I*").

On 23 January 2017, Plaintiff filed a claim with the Industrial Commission under the Tort Claims Act, seeking $600,000 in compensatory and consequential damages due to Defendant's negligent failure to conduct an independent investigation prior to initiating disciplinary action. Defendant responded by filing a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the ground, inter alia, that Plaintiff failed to file the tort affidavit within three years of Defendant's 15 June 2010 administrative action, as required by the Tort Claims Act. After a hearing on 19 April 2017, Deputy Commissioner Robert J. Harris issued an order on 4 May 2017, dismissing Plaintiff's claim with prejudice because the claim was barred by the statute of limitations. Plaintiff appealed to the Full Commission (the "Commission").

The Commission conducted a hearing on 18 October 2017. On 21 December 2018, the Commission issued an order dismissing Plaintiff's claim with prejudice, holding that the claim was barred by the statute of limitations. The Commission concluded that "the time period for Plaintiff to bring a claim for damages under the Tort Claims Act began

on 15 June 2010 and its Affidavit, filed on 23 January 2017, fell outside of the Tort Claims Act's three-year statute of limitations."

Plaintiff timely filed notice of appeal to this Court.

II. Discussion

Plaintiff argues that the Commission erred by dismissing Plaintiff's claim as barred by the Tort Claims Act's three-year statute of limitations. Plaintiff contends that (1) the statute of limitations was tolled while Plaintiff exhausted administrative remedies; (2) the Court of Appeals' May 2014 decision in *Nanny's Korner I* signified Plaintiff's exhaustion of administrative remedies and, accordingly, marked the beginning of the three-year limitations period; and (3) therefore, Plaintiff's January 2017 claim was timely filed. We disagree.

We review a decision by the Commission under the Tort Claims Act "for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2018). When considering a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory . . . ." *Grant Const. Co. v. McRae*, 146 N.C. App. 370, 373, 553 S.E.2d 89, 91 (2001) (internal quotation marks and citation omitted). We review an order allowing a motion to dismiss for failure to state a claim de novo. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

"The statute of limitations may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action." *Laster v. Francis*, 199 N.C. App. 572, 576, 681 S.E.2d 858, 861 (2009) (citation omitted). After a defendant has raised this affirmative defense, the burden shifts to the plaintiff to prove that he commenced the action within the statutory period. *Id.*

The Tort Claims Act prescribes a three-year statute of limitations for negligence claims. N.C. Gen. Stat. §143-299 (2018).

> The accrual of the statute of limitations period typically begins when the plaintiff is injured or discovers he or she has been injured. However, when the General Assembly provides an effective administrative remedy by statute, that remedy is exclusive and the party must pursue and exhaust it before resorting to the courts. Nevertheless, the

> exhaustion of administrative remedies doctrine is inapplicable when the remedies sought are not considered in the administrative proceeding. Under those circumstances, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court.

Nanny's Korner II, 825 S.E.2d at 39-40 (internal quotation marks, brackets, and citations omitted). *See White v. Trew*, 217 N.C. App. 574, 579-80, 720 S.E.2d 713, 719 (2011) (holding that plaintiff's libel claim seeking monetary damages caused by false statements was not barred by the exhaustion doctrine because the statutory remedy was to remove statements from employee file, not to award damages), *rev'd on other grounds*, 366 N.C. 360, 736 S.E.2d 166 (2013). Money damages are not available under the North Carolina Administrative Procedure Act ("NCAPA"). *Nanny's Korner II*, 825 S.E.2d at 40.

In *Nanny's Korner II*, Plaintiff made a similar argument to the one it makes in this case, but in the context of a procedural due process claim filed in the trial court:

> Plaintiff argues the statute of limitations was tolled while Plaintiff exhausted its administrative remedies through the appeal of Defendant's final agency decision in *Nanny's Korner I*. Plaintiff contends the exhaustion of administrative remedies doctrine required Plaintiff to exhaust its remedy through the claim under the NCAPA before Plaintiff's right to bring a constitutional claim arose. Accordingly, Plaintiff argues that its cause of action for the alleged due process violation did not accrue until 9 June 2014, when this Court issued its mandate in *Nanny's Korner I*.

Id.

We disagreed and concluded that Plaintiff's constitutional procedural due process claim was properly dismissed under Rule 12(b)(6) because the statute of limitations on Plaintiff's constitutional claim was not tolled while Plaintiff exhausted its administrative remedies. *Id.* at 40-41. This Court held that

> the statute of limitations began to run on or about 15 June 2010, when Defendant issued the written warning to Plaintiff. Defendant's written warning was the "breach" that proximately caused—in Plaintiff's own words—a "real, immediate, and inescapable" injury. The statute of

> limitations began to run when Plaintiff was injured or discovered the injury, which in this case happened almost simultaneously. The statute of limitations was not tolled while Plaintiff pursued its administrative remedies in *Nanny's Korner I* because in that action, Plaintiff sought a remedy not available through the NCAPA—namely, monetary damages. In its complaint, Plaintiff acknowledges that the NCAPA "does not provide a remedy for . . . lost income and profits." Therefore, the statute of limitations was not tolled while Plaintiff pursued its administrative remedies, and the filing of the instant claim on 22 May 2017 fell outside the statute of limitations.

Id. at 40.

The same analysis is applicable in this case. Despite the fact that Plaintiff brought this action before the Commission under the Tort Claims Act, as opposed to the superior court with a constitutional claim in *Nanny's Korner II*, the statute of limitations began to run on or about 15 June 2010, when Defendant issued the written warning to Plaintiff. The statute of limitations was not tolled while Plaintiff pursued its administrative remedies in *Nanny's Korner I* because Plaintiff seeks monetary damages, a remedy not available under the NCAPA. Accordingly, the filing of the instant claim on 23 January 2017 fell outside the three-year statute of limitations prescribed in the Tort Claims Act. *See* N.C. Gen. Stat. §143-299.

Plaintiff argues that *Abrons Family Prac. & Urgent Care, PA v. N.C. Dep't of Health & Human Servs.*, 370 N.C. 443, 810 S.E.2d 224 (2018), demands application of the exhaustion of administrative remedies doctrine. In *Abrons*, plaintiffs—all of whom were health care providers—filed suit against DHHS and Computer Sciences Corporation ("CSC"). *Id.* at 444-45, 810 S.E.2d at 226. DHHS had entered into a contract with CSC to implement a new Medicaid Management Information System. *Id.* at 445, 810 S.E.2d at 226. After the system went live, plaintiffs began submitting claims to DHHS for Medicaid reimbursements. *Id.* However, glitches in the software resulted in delayed, incorrectly paid, or unpaid reimbursements to plaintiffs. *Id.* Plaintiffs filed claims—including claims for monetary damages—alleging that CSC was negligent in its design and implementation of the system and that DHHS breached its contracts with each of the plaintiffs by failing to pay Medicaid reimbursements. *Id.* Further, plaintiffs alleged that "they had a contractual right to receive payment for reimbursement claims and that this was 'a property right

that could not be taken without just compensation.' " *Id.* Moreover, plaintiffs "sought a declaratory judgment that the methodology for payment of Medicaid reimbursement claims established by DHHS violated Medicaid reimbursement rules." *Id.* at 445, 810 S.E.2d at 227.

After receiving adverse determinations on their reimbursement claims, plaintiffs failed to request a reconsideration review or file a petition for a contested case, as specifically required by DHHS procedures. *Id.* at 448, 810 S.E.2d at 228; *see also id.* at 446-47, 810 S.E.2d at 227-28 (discussing DHHS regulations and provisions of the NCAPA which specifically require Medicaid providers to request a reconsideration review and file a petition for a contested case hearing before obtaining judicial review). As a result, our Supreme Court held that the trial court correctly dismissed plaintiffs' claims because they failed to exhaust their administrative remedies and failed to demonstrate that such exhaustion would be futile. *Id.* at 453, 810 S.E.2d at 232. The Court explained: "Because resolution of the reimbursement claims must come from DHHS, simply inserting a prayer for monetary damages does not automatically demonstrate that pursuing administrative remedies would be futile. Notwithstanding the claims that are outside the relief that can be granted by an administrative law judge, the reimbursement claims 'should properly be determined in the first instance by the agenc[y] statutorily charged with administering' the Medicaid program." *Id.* at 452, 810 S.E.2d at 231 (quoting *Jackson ex rel. Jackson v. N.C. Dep't of Human Res.*, 131 N.C. App. 179, 188-89, 505 S.E.2d 899, 905 (1998)).

In this case, Plaintiff has filed a claim with the Commission under the Tort Claims Act, seeking compensatory and consequential damages due to Defendant's negligence. Unlike the relevant claims in *Abrons*, this claim is exclusively one for negligence and, therefore, it is not a mere "insertion of a prayer for monetary damages" into what is otherwise a claim that is primarily administrative. *Id. See Intersal, Inc. v. Hamilton*, 834 S.E.2d 404, 416 (N.C. 2019) (distinguishing *Abrons*: "Here, plaintiff has filed a claim against the State Defendants for their alleged violations of plaintiff's media rights under the 2013 Settlement Agreement. Unlike the relevant claims in *Abrons*, this claim is exclusively one for common law breach of contract and, therefore, it is not a mere 'insertion of a prayer for monetary damages' into what is otherwise a claim that is primarily administrative.") (citation omitted).

III. Conclusion

Because the statute of limitations on Plaintiff's claim began to run on or about 15 June 2010, the filing of the instant claim on 23 January

2017 fell outside the three-year statute of limitations prescribed by the Tort Claims Act. Accordingly, we affirm the Commission's order dismissing Plaintiff's claim with prejudice.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

JOSHUA D. PAYNICH, PLAINTIFF
v.
HOLLY B. VESTAL,[1] DEFENDANT

No. COA19-185

Filed 7 January 2020

1. Child Visitation—right to reasonable visitation—finding of unfitness—severe restrictions

The trial court was not required to find that defendant-mother was an unfit person to have reasonable visitation in its order allowing defendant unsupervised overnight visits with her child every other weekend, unsupervised daytime visits on special days, and supervised visits of up to five nights during school breaks for Thanksgiving and Christmas. The visitation parameters were not the type of severe restrictions that amounted to denial of the right of reasonable visitation.

2. Child Visitation—supervised visits—support by factual findings—stress and confusion caused by parent

The trial court's conclusion that it was in the child's best interests to allow defendant-mother supervised (rather than unsupervised) visitation during extended visits was supported by the findings of fact, including that the child's well-being had deteriorated ever since defendant had been allowed unsupervised visitation, that defendant continually persisted in causing unnecessary incidents that confused and stressed the child, and that the child would benefit from overnight visits with defendant if defendant could avoid actions that would cause the child psychological harm.

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1. The caption in the order on appeal erroneously lists DEFENDANT B. VESTAL, Defendant. All other orders and motions in the Record on Appeal before this Court reference HOLLY B. VESTAL, Defendant.

3. Child Custody and Support—access to medical and educational records—sufficiency of findings—risk of harm

In a child custody and visitation case, the trial court erred by prohibiting defendant-mother from accessing her child's medical, educational, and counseling records where there was no determination that her access to those records could harm her child or any third party helping the child.

Appeal by Defendant from order entered 13 August 2018 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 1 October 2019.

Siemens Family Law Group, by Jim Siemens, for Plaintiff-Appellee.

Michael E. Casterline for Defendant-Appellant.

COLLINS, Judge.

Defendant Holly B. Vestal appeals the trial court's 13 August 2018 child custody modification order allowing her certain visitation with her child and denying her access to the child's school, medical, and counseling records. Defendant argues that the trial court erred in awarding her unreasonable visitation without finding her unfit, and erred in denying her access to the child's records. We affirm the order for visitation and reverse the order denying her access to the child's records.

I. Procedural History and Factual Background

Plaintiff Joshua D. Paynich and Defendant Holly B. Vestal were married in 1997. Their daughter was born in March 2011, and the parties separated a year later. In June 2012, Plaintiff filed a complaint for child custody, seeking joint custody. Defendant filed an answer and counterclaim, seeking primary custody. The parties divorced in May 2013. The trial court found this case to be one of high conflict, and appointed Linda Shamblin, PhD, to act as parenting coordinator on 23 September 2013. The parties shared custody of the child until 18 June 2014, when the trial court entered an emergency custody order, placing sole care, custody, and control of the child with Plaintiff. On 16 September 2014, the Court entered an order for a parenting capacity evaluation. Pursuant to this order, Defendant was awarded supervised visitation. Smith Goodrum, PhD, was appointed to conduct the parenting capacity evaluation.

After a custody hearing on 15 January 2015, the trial court entered a child custody order on 30 January 2015, finding and concluding that Plaintiff is a fit parent; Defendant is "not presently fit to parent, except

under supervised conditions[;]" awarding Plaintiff sole care, custody, and control of the child; and awarding Defendant four hours of supervised visitation with the child two times per week, as well as opportunities for supervised visits on special days. Defendant was ordered to undergo additional mental health evaluation and engage in therapy two times per week. Both parents were allowed access to the child's medical, dental, and educational records.

In 2016, pursuant to a motion to modify custody filed by Defendant, the court conducted another custody hearing. The court found a substantial change of circumstances in that Defendant appeared to be parenting appropriately within the confines of periodic supervised visitation; Ms. Georgia Pressman, MA, LPC, was providing therapy for the child and should "be in a position to report to the parenting coordinator if the Defendant's visitation with the minor child is compromising the minor child's proper development[;]" and the child was then five years old. The trial court maintained the child's sole care, custody, and control with Plaintiff. Defendant was allowed unsupervised visits with the child on Tuesdays from 3 p.m. to 7 p.m., and every other Saturday from 10 a.m. to 6 p.m. Beginning in January 2017, absent a contrary recommendation from Ms. Pressman, Defendant could also have unsupervised visits on alternate Thursdays from 3 p.m. to 7 p.m. Defendant could request additional daytime visits on special occasions through the parenting coordinator. Defendant was also allowed to request supervised, extended visits of up to five overnights during the Thanksgiving and Christmas holidays.

In January 2018, Defendant filed an amended motion to modify custody. The hearing on Defendant's motion was conducted over four days in June 2018. On 13 August 2018, the trial court entered a child custody modification order. The trial court made numerous findings of fact, including that "Defendant's conduct and the minor child's deterioration since entry of the August 11, 2016 Order are causally related, and constitute substantial changes of circumstance adversely and substantially affecting and pertaining to the minor child." The trial court continued sole care, custody, and control of the child with Plaintiff. The trial court concluded that the child's visitation with Defendant should be restructured. Defendant was allowed unsupervised, overnight visitation with the child on alternate weekends from 11 a.m. on Saturday to 3 p.m. on Sunday. The court ordered that holidays would continue to be shared as set out in the August 2016 order, which allowed Defendant unsupervised, daytime visits on special days, such as the child's birthday and Mother's Day, and during school recesses for Thanksgiving and Christmas, but required Defendant to request such visits from the

parenting coordinator at least three weeks in advance. Extended holiday visits of up to five overnights would still require that Defendant be supervised.

The order denied Defendant access to the child's school, medical, and counseling records. It further denied her the right to attend school events and performances; to participate in making medical decisions involving the child; and to participate in the child's counseling, unless requested by the child's treatment provider. From the 13 August 2018 order, Defendant appeals.

II. Discussion

A. Visitation

[1] Defendant first argues that the trial court erred by denying her reasonable visitation without finding that she was an unfit person to have reasonable visitation, thus violating the mandate of N.C. Gen. Stat. § 50-13.5(i).

"The guiding principle to be used by the court in a custody hearing is the welfare of the child or children involved." *Brooks v. Brooks*, 12 N.C. App. 626, 630, 184 S.E.2d 417, 420 (1971). "While this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial [court]." *Id.* The trial court "has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not to be upset on appeal absent a clear showing of abuse of discretion." *Id.* (citation omitted). An abuse of discretion "is shown only when the court's decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Barton v. Sutton*, 152 N.C. App. 706, 710, 568 S.E.2d 264, 266 (2002) (internal quotation marks and citation omitted).

"A noncustodial parent's right of visitation is a natural and legal right which should not be denied 'unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child.' " *Johnson v. Johnson*, 45 N.C. App. 644, 646-47, 263 S.E.2d 822, 824 (1980) (quoting *In re Custody of Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971)). "In awarding visitation privileges the court should be controlled by the same principle which governs the award of primary custody, that is, that the best interest and welfare of the child is the paramount consideration." *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824 (citation omitted).

"However, a trial court's discretionary authority is not unfettered." *Hinkle v. Hartsell*, 131 N.C. App. 833, 838, 509 S.E.2d 455, 459 (1998).

N.C. Gen. Stat. § 50-13.5(i) provides, "In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." N.C. Gen. Stat. § 50-13.5(i) (2018). Thus, before the trial court may completely deprive a custodial parent of visitation, the statute requires a specific finding either (1) that the parent is an unfit person to visit the child or (2) that such visitation rights are not in the best interest of the child. *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824 (citing *King v. Demo*, 40 N.C. App. 661, 253 S.E.2d 616 (1979)). This Court in *Johnson* "construe[d] the statute to require a similar finding when the right of *reasonable* visitation is denied. Thus, where severe restrictions are placed on the right, there should be some finding of fact, supported by competent evidence in the record, warranting such restrictions." *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824.

This Court has consistently held that limiting a parent to supervised visitation is a severe restriction which effectively denies a parent the right to reasonable visitation, and thus requires a finding of fact supporting such restriction. *See Hinkle*, 131 N.C. App. at 838-39, 509 S.E.2d at 459 (defendant awarded only supervised visitation every other Saturday and Sunday from 9:00 a.m. to 3:00 p.m., and specified times on holidays, and "the trial court's findings [were] insufficient to support these severe restrictions on defendant's visitation rights"); *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) (defendant awarded visitation privileges in North Carolina at plaintiff's home with others present; these "severe restrictions" were supported by the trial court's findings of fact); *Johnson*, 45 N.C. App. at 647, 263 S.E.2d at 824 (respondent awarded only supervised visitation one weekend a month and the trial court failed to make sufficient finding to support such restriction); *Holmberg v. Holmberg*, No. COA19-52, 2019 WL 4453850, at *3 (N.C. Ct. App. Sept. 17, 2019) (unpublished) (plaintiff awarded only occasional supervised visitation and the trial court's findings failed to satisfy the statutory mandate).

In this case, Defendant was allowed unsupervised, overnight visits every other weekend from Saturday at 11 a.m. to Sunday at 3 p.m. She was also allowed unsupervised, daytime visits on special days, such as the child's birthday and Mother's Day, and during school recesses for Thanksgiving and Christmas. Defendant was additionally allowed supervised, extended visits of up to five overnights during school recesses for Thanksgiving and Christmas. Although Defendant's extended overnight

visits during school recesses for Thanksgiving and Christmas must be supervised, the vast majority of her time with the child is unsupervised.

Defendant argues that absent a finding that Defendant is unfit, "she should be receiving far more time with her daughter, even if the time is confined to weekends[,]" and "it is unreasonable and unlawful, under *Johnson v. Johnson*, . . . to require supervision of any of [Defendant's] visits with her daughter." However, we conclude that the parameters placed on Defendant's visitation are not the type of "severe restrictions" our case law has determined effectively deny the right of reasonable visitation. Accordingly, N.C. Gen. Stat. § 50-13.5(i)'s mandate, as interpreted by *Johnson*, is not applicable here, and the trial court did not err by entering the visitation order without finding that Defendant was an unfit person to have reasonable visitation.

[2] Defendant also argues that the supervised visitation ordered during Defendant's extended visits with the child is unsupported by the findings or the evidence. Defendant argues, "Having concluded that regular, unsupervised overnight weekend visits with [Defendant] are beneficial to the minor child, it is irrational for the trial court to require extended holiday visits – visits which are limited to five nights, by the previous order – to be supervised."

The trial court made the following relevant findings of fact:

> 11. The Court received testimony from Georgia Pressman, the minor child's therapist. . . . With respect to Ms. Pressman's testimony, the Court finds[:]
>
> a. Ms. Pressman's therapy with the minor child began in June of 2015 and has continued until recently.
>
> b. The minor child was 4 years old when therapy began. Ms. Pressman described that at the beginning of therapy, the minor child was "integrated" which the Court takes to mean developing appropriately.
>
> c. Ms. Pressman has seen, over the course of her treatment of the minor child, a gradual decline in the minor child's well-being. . . .
>
> . . . .
>
> g. The minor child commenced Kindergarten and commenced unsupervised visits with the Defendant in August of 2016. The Plaintiff shared with Ms. Pressman that the minor child was pushing limits and

behaving aggressively following unsupervised contact with the Defendant. The Court finds the Plaintiff's report credible.

. . . .

l. On December 16, 2016, the Plaintiff advised Ms. Pressman that the minor child was soiling her underpants several times a day, since visitation with the Defendant over the 2016 Thanksgiving holiday. Prior to the holiday, these accidents were happening only 1-2 times per month. The Court finds the Plaintiff's report to Ms. Pressman to be credible.

. . . .

o. On August 2, 2017, the minor child met with Ms. Pressman after an extended visit with the Defendant and maternal grandparents. In private session, Ms. Pressman noted the minor child's dollhouse play was aggressive and Ms. Pressman noted that play between imaginary children and Defendant was aggressive.

. . . .

x. Ms. Pressman stated that the minor child is traumatized by . . . Defendant's behaviors such as those witnessed by the minor child on February 1, 2018, more particularly described below.

. . . .

12. The minor child was developing appropriately, relatively healthy, and happy, and integrated, as testified to by Georgia Pressman, when the order of August 11, 2016 was entered. At the time of this hearing, the credible and competent evidence suggests that the minor child is struggling developmentally, mentally, emotionally, and physically.

. . . .

20. The Defendant was called as her own witness in this proceeding. From her testimony, the Court finds that:

. . . .

c. The Defendant has unnecessarily complicated the minor child's life and caused the minor child stress.

d. The Defendant admits that she played a game with the minor child that involved the child touching her breast, that it was funny to her and that the minor child laughed to the point that she wet herself. The Defendant is unwilling or unable to acknowledge that this degree of stimulation for the minor child is not healthy for the minor child and compromises the minor child to [sic] return to homeostasis following visits.

e. That the Defendant did testify that she respects the Plaintiff's religious beliefs and has no objection to the minor child being raised in a Christian home, however, she believes that her education should be separate and apart from that, as a considerable amount of school time is devoted to such studies and the child should be exposed to religion, but ultimately able to choose her own path.

f. The Defendant is unable or unwilling to follow the court Order with respect to picking up the minor child, dropping off the minor child and has consistent difficulty maintaining boundaries with the Plaintiff and others. Specific incidences of this behavior include, but are not limited to, the following:

i. On June 20, 2017, the Defendant vandalized the Plaintiff's truck during an exchange of [the child];

ii. On September 12, 2017, the Defendant was unable to follow directions in a car pick up line. The Defendant's behavior was angry and irrational and on full display to the minor child. This incident was unnecessary and confusing for the minor child.

iii. On February 1, 2018, the Defendant caused a scene in Ms. Dowdy's classroom in front of the minor child. At an exchange that night, the Defendant admits leaning against the Plaintiff's vehicle. The vehicle was again scratched, though the Defendant denies scratching the vehicle. The Defendant left the place of exchange and drove to the Plaintiff's house, parking in proximity to the Plaintiff's driveway. As the Plaintiff returned from the exchange to his home, with the minor child in

the car, the Defendant stood between the Plaintiff's vehicle and the Plaintiff's driveway. The Defendant stood in the headlights, in plain view of the minor child, and struck a pose, patting her posterior. The Defendant appears not to understand that this strange behavior traumatizes the minor child, who was traumatized. This incident was unnecessary and confusing for the minor child.

. . . .

v. On March 28, 2018, the Defendant refused to exchange the minor child on time and refused to exchange in the typical place of exchange. The Defendant and her friend Maria Curran hid the minor child from the Plaintiff, causing him to run back and forth between the typical place of exchange, and Hickory Tavern where the Defendant claimed to be. The Plaintiff ultimately found the Defendant and minor child on the street in vicinity to Hickory Tavern. This incident was unnecessary and confusing for the minor child.

vi. On April 1, 2018, the Defendant dropped the minor child off at the Plaintiff's house while the Plaintiff was waiting at the usual place of exchange. No one was at the Plaintiff's house, though the Defendant assumed otherwise. The Plaintiff left the place of exchange, returned to his home, and found the minor child walking on his driveway. This incident was unnecessary. This incident was unnecessary and confusing for the minor child.

. . . .

viii. All the foregoing incidents have occurred while the Defendant has been in regular therapy with Dr. Katy Flagler. Despite therapy, the Defendant has been unable to regulate her behavior in order to avoid unnecessary incidents that are confusing for the minor child. These behaviors appear to be overlooked by the Defendant's own therapist.

ix. All the 2018 incidents recited above have occurred since the Defendant filed her Motion to

> Modify custody, seeking additional time with the minor child. Despite knowing that her conduct would be explored in the course of a hearing on her motion to modify custody, the Defendant has persisted in unnecessary incidents that are confusing for the minor child.
>
> . . . .

24. While there have been several events in the minor child's life that have been unsettling to her since August 11, 2016, the Court finds that the minor child's relationship with the Defendant, and her visitations doing [sic] the school week, with the Defendant, have been deleterious to the minor child's well-being developmentally, mentally, emotionally, and physically.

25. In finding that the minor child's well-being has declined since August 11, 2016, the Court relies heavily on testimony received from Georgia Pressman, the minor child's therapist during the relevant period; testimony from Melanie Dowdy, the minor child's 1st grade teacher at Asheville Christian Academy; testimony from Susan Montgomery, Head of the Lower School at Asheville Christian Academy; and, from Dr. Deidre Christy, who performed the Psychoeducational Evaluation.

29. The Court finds that the Defendant has disrupted the minor child's education, and increased the minor child's stress level, unnecessarily.

30. The stress the Defendant has caused the minor child is evident in the records of Ms. Pressman, and a part of the environmental stress identified by Dr. Christy.

31. The stress the Defendant causes the minor child must be mitigated so that the minor child can learn, and so that any learning difference or disorder, if any, can be properly identified and so that further interventions, if any are required, can be implemented.

. . . .

35. That the child would benefit from having her time with the Defendant normalized and be able to spend an

> overnight at in [sic] the home of the Defendant, provided the Defendant can engage with the minor child in a manner that does not cause the minor child psychological harm.
>
> . . . .
>
> 38. The Defendant's conduct and the minor child's deterioration since entry of the August 11, 2016 Order are casually [sic] related, and constitute substantial changes of circumstance adversely and substantially affecting and pertaining to the minor child.

"In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Cox v. Cox*, 238 N.C. App. 22, 26, 768 S.E.2d 308, 311 (2014) (citation omitted). Any unchallenged findings are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Although Defendant asserts that "[t]here is no evidence that [Defendant] is engaged in any behavior which would create any risk to her daughter[,]" Defendant does not specifically challenge any findings of fact as unsupported by the evidence; they are thus binding on this Court. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Moreover, the findings are supported by record evidence, including the testimony of Ms. Pressman, Melanie Dowdy, Susan Montgomery, and Defendant herself. These findings specifically indicate that the child's well-being has declined since August 11, 2016; Defendant's behavior has caused the child stress; the child's relationship with Defendant has been deleterious to the child's well-being; numerous incidents of Defendant's misbehavior have occurred since Defendant filed her motion to modify custody, seeking additional time with the child, despite knowing that her conduct would be explored in the course of a hearing on her motion to modify custody; Defendant has been unable to regulate her behavior in order to avoid unnecessary incidents that are confusing for the child; Defendant has persisted in unnecessary incidents that are confusing for the child; the child behaved aggressively following unsupervised contact with Defendant; after an extended visit with Defendant, the child's play was aggressive; the child would benefit from being able to spend an overnight in the home of Defendant, provided that Defendant can engage with the child in a manner that does not cause the child psychological harm. These findings amply support the trial court's conclusion and decree that it is in the best interest of the child that Defendant be supervised for extended visits.

B. Access to Records

[3] Defendant next argues that the trial court erred by denying her access to her daughter's medical, educational, and counseling records, when there was no determination that her access to those records would negatively impact her daughter's welfare.

We review a trial court's order denying a parent access to a child's records involving the health, education, and welfare of the child under an abuse of discretion standard. *Brooks*, 12 N.C. App. at 630, 184 S.E.2d at 420 (a trial court's decision in a child custody matter "ought not to be upset on appeal absent a clear showing of abuse of discretion").

Pursuant to N.C. Gen. Stat. § 50-13.2(b), "each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child[,]" "[a]bsent an order of the court to the contrary[.]" N.C. Gen. Stat. § 50-13.2(b) (2018). It is well established that the fundamental principle underlying North Carolina's approach to controversies involving child custody is that "the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984).

In *Huml v. Huml*, 826 S.E.2d 532 (N.C. Ct. App. 2019), this Court affirmed the trial court's order prohibiting defendant from obtaining "any information concerning the minor child including, but not limited to, requesting information through third party care givers, teachers, medical professionals, instructors or coaches[,]" where the findings of fact supported a determination that such prohibition was in the child's best interest. *Id.* at 540. While "agree[ing] that it is unusual for a parent to have such limited rights regarding his child," *id.* at 548, this Court determined that the trial court did not abuse its discretion by eliminating his defendant's access to information based upon the specific facts of the case:

> In Finding of Fact 68, which has 23 subsections, the trial court noted the factual basis for the restrictions even to obtaining information from third parties. Father's actions and threats affected many third parties associated with the family, to the detriment of Susan. Mother's employer required her to "work from home because of safety concerns at her employer's office." At the time of the hearing, Mother had been working from home almost a year. Father's threats and actions made third-party professionals trying to help this family sufficiently concerned about their own safety they would not see him unless

another person was present and at one point the child's pediatrician stopped seeing her because of Father's actions. The trial court found that Father's "anger and rage" are disturbing and have "had a detrimental impact on not only the minor child to not feel safe around the Defendant but the Plaintiff, her parents, Plaintiff's friends, Plaintiff's co-workers and various professionals involved with this family."

The trial court also made detailed findings regarding Father's failure to follow the requirements of prior orders. Based upon the trial court's findings, if Father could continue to contact third parties such as teachers, physicians, and coaches to get information about the child, based upon his past behavior, it is likely that his anger and threats would make them fearful for their own safety, just as the third parties described in the order were. And to protect their own safety and the safety of their workplaces, these third parties may reasonably refuse to work with Susan, continuing to interfere with her ability to lead a normal life.

Besides endangering the third parties who deal with Susan, allowing Father to contact them to get information about Susan would endanger Mother and Susan directly. Some of Father's actions were unusual and disturbing, such as taking the child to sit in a rental car in a parking garage with him when he was supposed to be visiting in a public place. Father had a car of his own but rented a car and backed into a parking space for these visits, apparently to avoid detection; this surreptitious behavior raises additional concerns. And if he were allowed to get information from third parties, Father would necessarily learn the addresses and locations where Mother and Susan could be found. For example, if Father were permitted to obtain Susan's educational information, he would have to know the name and location of her school, and he would learn from the school records which classes Susan attends and her usual daily schedule; he could then easily find Mother's home simply by following Susan's school bus or following any person who picks her up from school.

Id. at 548-49. This Court determined that "[u]nder these circumstances, it is in Susan's best interest to prevent Father from having access to

information about her education and care because it protects Mother, Susan, and third parties who deal with them." *Id.* at 549. Thus, "[t]he trial court's detailed and extensive findings of fact support the decretal provisions, including barring Father from obtaining information from third parties." *Id.*

Although this Court did not tie its analysis to the provisions of N.C. Gen. Stat. § 50-13.2(b), we find its analysis instructive here. In the present case, the trial court made the following findings of fact relevant to its determination to deny Defendant access to the child's records:

> 15. The Court received testimony from Dr. Chris Mulchay, Clinical Psychologist.
>
> . . . .
>
> j. Dr. Mulchay did not identify any issues which give him concern as to the Defendant's risk as a parent.
>
> . . . .
>
> 17. The Court received testimony from Dr. Linda Shamblin, the parenting coordinator in this case. With respect to Dr. Shamblin's testimony, the Court finds that:
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> . . . .
>
> c. Dr. Shambling (sic) has encouraged the Defendant to communicate with the school and teachers but not with the minor child's therapist. That Dr. Shambling did so to protect the child/therapist relationship, with the hope that the child therapist would not get embroiled in the parent's relationship.
>
> d. Dr. Shamblin testified that the information sharing between the parents is not good. . . .
>
> . . . .
>
> u. Dr. Shamblin testified about her relationship with [Asheville Christian Academy] and denies having "set it up" in a way that was adverse to the Defendant. That the school asked what the Defendant had done to get such restrictive visitation and whether it involved drugs or criminal behavior. That the school was clearly trying to make sure that it was keeping its other students safe. That Dr. Shamblin did tell the school [Defendant] had

mental health issues however, Dr. Shamblin told the school authorities that she felt that the school would be safe and that the Defendant did not pose a threat to the safety of the other students.

v. That the Defendant's animosity toward Dr. Shamblin has compromised Dr. Shamblin's ability to effectively fulfill her role as the parenting coordinator.

w. Dr. Shamblin does not desire to stay in the case, but she is not asking to withdraw. Dr. Shamblin would prefer the Court make a decision to whether or not a new parenting coordinator would be ultimately, in the best interest of the minor child.

18. The Court received testimony from Melody Dowdy. Melody Dowdy was the minor child's First Grade Teacher at Asheville Christian Academy. With respect to Ms. Dowdy's testimony, the Court finds that:

. . . .

e. Ms. Dowdy has had conflict with the Defendant in her classroom. On February 1, 2018, the Defendant became visibly agitated in Ms. Dowdy's classroom, in front of the minor child, classmates and other parents, at pick up time. The Defendant abruptly left the classroom without taking the minor child then was heard to call out for "little Danika" in the hallway. Ms. Dowdy sent the minor child to her Defendant.

f. Ms. Dowdy had a second incident with the Defendant in her classroom on February 6, 2018 when the Defendant was expressing frustration related to not receiving information from the school. In front of the minor child, the Defendant advised Ms. Dowdy that she would be returning to Court to address her dissatisfaction with the level of information she was being provided. This second incident also made Ms. Dowdy uncomfortable. This second incident also occurred in front of classmates and other parents.

g. Ms. Dowdy has observed other unusual behaviors from the Defendant. These include the Defendant coming in Ms. Dowdy's classroom while class is in session while Ms. Dowdy is still teaching and sitting

in the hallway outside Ms. Dowdy's class with a raincoat over her head covering her person while Ms. Dowdy's class is in session. The minor child witnesses these incidents.

. . . .

19. The Court received testimony from Ms. Susan Montgomery who is the Head of the Lower School at Asheville Christian Academy. From Ms. Montgomery's testimony the Court finds:

. . . .

b. Ms. Montgomery has had several interactions with the Defendant that have been negative. The first coincided with the beginning of school when the Defendant detected an irregularity on [the child's] name card, which read Paynich rather than Vestal.

c. The second incident occurred in the school pick up line on September 12, 2017 when the Defendant was unable to follow directions. The Defendant became angry during this incident, using profanity to address Ms. Montgomery, in a lo[u]d voice, audible to parents, teachers, staff and students, including the minor child. Ms. Montgomery relayed a credible account of this incident, which could have been avoided by the Defendant.

d. After the September 12, 2017 incident, the February 1, 2018 incident and the February 6, 2018 incident, the Defendant was banned from school.

. . . .

g. Allowing the minor child to return to Asheville Christian Academy for Second Grade was a difficult choice for the school, but [the minor child] can return for Second Grade.

29. The Court finds that the Defendant has disrupted the minor child's education, and increased the minor child's stress level, unnecessarily.

Based upon these findings, the trial court ordered, adjudged, and decreed, in relevant part, as follows:

> 2. The Defendant shall not have a right to school records, nor shall the Defendant have a right to attend school events or performances at this time.
>
> 3. The Defendant shall not have a right to medical records of the minor child and shall not have a right to participate in making medical decisions at this time.
>
> 4. The Defendant shall not have a right to counseling records of the minor child and shall not have a right to participate in the minor child's counseling unless it is at the request of the minor child's counselor/treatment care provider.

The findings of fact do not support a conclusion that it was in the best interest of the child to prevent Defendant from accessing the child's school, medical, or counseling records. While the findings indicate that Defendant's behavior at the child's school was disruptive, caused the child unnecessary stress, caused the child's teacher discomfort, and resulted in the head of the lower school banning Defendant from the school property, unlike in *Huml*, the findings do not indicate that her behavior "made third-party professionals trying to help this family sufficiently concerned about their own safety[.]" *Huml*, 826 S.E.2d at 548. To the contrary, "Dr. Shamblin told the school authorities that she felt that the school would be safe and that the Defendant did not pose a threat to the safety of the other students." Moreover, the disruption, stress, and discomfort caused by Defendant's actions at the school were addressed by the school banning her from its premises and the trial court's order prohibiting her from attending school events and performances, and eliminating her weekday visitation thereby eliminating her responsibility to pick up her daughter from school.

Additionally, unlike in *Huml*, the findings do not indicate that Defendant's continued ability to contact teachers, physicians, and other third parties to get her child's records would make them fearful for their own safety, or have any other direct or indirect negative effect on the child. Most significantly, unlike in *Huml* where the findings showed that it was in the child's best interest to prevent Father from having access to information about her education and care because it protected the child, the child's mother, and third parties who dealt with them, no findings in the order before us show that Defendant's access to the information contained in the records would have a dangerous or even negative effect on the child or anyone dealing with the child, or that preventing Defendant from having access to the information contained in the records would protect the child or anyone dealing with the child.

As the trial court's findings of fact do not support a determination that it is in the child's best interest to prevent Defendant from having access to the child's school, medical, or counseling records, we reverse the decretal provisions denying her such access.

III. Conclusion

We affirm the 13 August 2018 order as it relates to Defendant's visitation and reverse the decretal provisions of the order denying Defendant access to the child's school, medical, and counseling records.

AFFIRMED IN PART and REVERSED IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

STATE OF NORTH CAROLINA, EX. REL., MICHAEL S. REGAN, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WASTE MANAGEMENT, PLAINTIFF

v.

WASCO, LLC, DEFENDANT

No. COA19-355

Filed 7 January 2020

1. Estoppel—estoppel by judgment—law of the case—mootness—action against landfill operator—failure to secure post-closure permit

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding defendant liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the Court of Appeals' holding in the prior action constituted the law of the case, and therefore the doctrine of estoppel by judgment precluded defendant from further challenging his liability for obtaining the permit. At any rate, where recent changes to regulations governing "generators" of hazardous waste had no bearing on defendant's responsibilities as a landfill "operator," the trial court properly denied defendant's motion to dismiss plaintiff's second action as moot.

2. Parties—necessary party—joint and several liability—action against landfill operator—failure to secure post-closure permit

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding defendant liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the trial court properly denied defendant's motion to dismiss for failure to join the facility's current owner as a necessary party. Defendant and the facility owner had joint and several liability for submitting the permit application, and therefore plaintiff could sue defendant individually.

3. Environmental Law—action against landfill operator—failure to secure post-closure permit—summary judgment—no genuine issue of material fact

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, where plaintiff sought to enforce a prior Court of Appeals decision holding the company liable for securing a Part B post-closure permit as the facility's "operator" under the Resource Conservation and Recovery Act, the trial court properly entered summary judgment in plaintiff's favor because no genuine issue of material fact remained as to defendant's liability to obtain the permit.

4. Injunctions—action against landfill operator—order to submit post-closure permit application—no impossibility defense

In an action between the Department of Environmental Quality (plaintiff) and a company (defendant) operating a closed textile facility that became a landfill, the trial court did not abuse its discretion by enjoining defendant to apply for a Part B post-closure permit under the Resource Conservation and Recovery Act because it was not impossible for defendant to comply with the injunction order. Despite evidence showing that the facility's current owner refused to sign any future permit applications—which, per the applicable regulations, would cause the application to be denied—defendant could still comply with the order by submitting an unsigned application because the order only required defendant to make good-faith efforts to submit the application in an approvable form.

5. Appeal and Error—appeal from unsuccessful motion for reconsideration—Rule 3(d)—jurisdictional default in notice of appeal

In an action between the Department of Environmental Quality (plaintiff) and the operator of a landfill (defendant), where the trial court entered summary judgment in plaintiff's favor and an injunction order against defendant, the Court of Appeals lacked jurisdiction to remand the case for an advisory opinion on defendant's motion for reconsideration, which defendant filed after the trial court no longer had jurisdiction in the case. Because the trial court did not enter any order or judgment denying defendant's motion, defendant's purported appeal was defective for failure to designate an "order or judgment from which appeal is taken," pursuant to Appellate Rule 3(d).

Appeal by Defendant from orders denying Defendant's motion to dismiss, entering summary judgment for Plaintiff, and permanently enjoining Defendant entered 27 November 2018 by Judge R. Gregory Horne in Buncombe County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorneys General Michael Bulleri and T. Hill Davis, III, for the State.

Troutman Sanders LLP, by Christopher G. Browning, Jr., Sean M. Sullivan, and Lisa Zak, for the Defendant.

BROOK, Judge.

WASCO, LLC, ("Defendant") appeals from trial court orders denying Defendant's motion to dismiss, entering summary judgment for the North Carolina Department of Environmental Quality, Division of Waste Management ("Plaintiff"), and permanently enjoining Defendant. Because this Court has previously held that Defendant is liable for submitting a Part B post-closure permit as the operator of a facility under the Resource Conservation and Recovery Act ("RCRA") in *WASCO LLC v. N.C. Dep't of Env't & Nat. Res.*, 253 N.C. App. 222, 799 S.E.2d 405 (2017) ("*WASCO I*"), we affirm.

I. Factual Background

The pertinent factual background is fully laid out in *WASCO I*, and we repeat only the facts necessary to decide the instant appeal.

The facility at issue is a former textile manufacturing facility located in Swannanoa, North Carolina ("the Facility"). *WASCO I*, 253 N.C. App. at 225, 799 S.E.2d at 408. Prior to Defendant's purchase of the Facility, underground tanks were used to store virgin and waste perchloroethylene ("PCE"), a dry-cleaning solvent. *Id.* PCE leaked from the tanks and contaminated the soil. *Id.* The tanks were removed, and the resulting pits were filled with the contaminated soil. *Id.*

In 1990, the then-operator of the facility, Asheville Dyeing & Finishing ("AD&F"), a division of Winston Mills, Inc., entered into an Administrative Order on Consent with Plaintiff that set forth a plan to close the Facility. *Id.* The Facility was certified closed in 1993. *Id.* In 1995, Winston Mills and its parent corporation, McGregor Corporation, sold the site to Anvil Knitwear, Inc. and provided Anvil Knitwear indemnification rights for "environmental requirements." *Id.* Culligan International Company ("Culligan") co-guaranteed Winston Mills's performance of indemnification for environmental liabilities. *Id.*

In 1998, Defendant's predecessor in interest, United States Filter Corporation, acquired stock of Culligan Water Technologies, Inc., which owned Culligan. *Id.* Defendant then provided Plaintiff with a trust fund to the benefit of Plaintiff as financial assurance on behalf of Culligan, as well as an irrevocable standby letter of credit for the account of AD&F. *Id.* In 2004, Defendant sold Culligan and agreed to indemnify the buyer as to identified environmental issues at the Facility. *Id.* at 225-26, 799 S.E.2d at 408. From that point forward, Part A permit applications signed by Defendant's director of environmental affairs identified Defendant as the operator of the facility. *Id.* at 226, 799 S.E.2d at 408.

In 2007, Defendant received a letter from Plaintiff indicating that the Facility required corrective action to develop a groundwater assessment plan to address the migration of hazardous waste in the groundwater. *Id.* Defendant, its hired consultant, and Plaintiff continued to develop a groundwater assessment plan. *Id.* The following year, in 2008, Anvil Knitwear sold the property to Dyna-Diggr, LLC.[1] *Id.* At that point, both Defendant and Anvil disclaimed responsibility for post-closure actions at the Facility. *Id.*

Litigation resulting from the disagreement regarding responsibility for post-closure actions resulted in the decision reached by this Court in *WASCO I*.

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1. In various filings in the record, the current owner of the facility is called "Dyna-Diggr," "Dyna Diggr," "Dyna-Digr," and "Dyna Digr."

II. Procedural Background

In *WASCO I*, this Court held that Defendant was liable for securing a post-closure permit as an operator of the Facility. *WASCO I*, 253 N.C. App. at 237, 799 S.E.2d at 415. After this Court's unanimous decision in *WASCO I*, Defendant filed a Petition for Discretionary Review under N.C. Gen. Stat § 7A-31 in the North Carolina Supreme Court. *WASCO LLC v. N.C. Dep't of Env't & Nat. Res., Div. of Waste Mgmt.*, 370 N.C. 276, 805 S.E.2d 684, 685 (2017). The Supreme Court denied review. *Id.*

Despite the decision of this Court, Defendant did not seek a post-closure permit as required by 40 C.F.R. § 270.10(b) and 40 C.F.R. § 270.1, incorporated by reference in 15A NCAC 13A.0113. Instead, Defendant filed a Petition for Rule Making before the Environmental Management Commission ("EMC"), seeking to change the definition of the term "operator" in the North Carolina Administrative Code. EMC denied Defendant's petition on 8 March 2018. Defendant then filed a Petition for Declaratory Ruling before the EMC on 8 December 2017, requesting a ruling that Plaintiff "lacks the authority to require WASCO to obtain a post-closure permit or a post-closure order for the Facility pursuant to 15A NCAC [13A].0113(a) (adopting 40 C.F.R. § 270.1(c))." Defendant amended this petition on 27 February 2018 seeking the same ruling. On 3 March 2018, Defendant filed a new Petition for Declaratory Ruling before the EMC, seeking the same ruling. Defendant withdrew the first amended Petition for Declaratory Ruling, and the new Petition was scheduled for hearing at the time Plaintiff commenced this action.

On 18 April 2018, Plaintiff filed a Complaint and Motion for Preliminary and Permanent Injunctive Relief. Plaintiff sought a mandatory injunction requiring Defendant to, among other things, "[s]ubmit, within 90 days of issuance of an Order, a complete application for a RCRA Part B post-closure permit in accordance with 40 CFR 270.10 addressing all of the applicable requirements of Chapter 40 of the Code of Federal Regulations and the State Hazardous Waste Program[.]"

Defendant filed a Motion to Dismiss on 9 July 2018, alleging that Plaintiff had "fail[ed] to join the current owner and operator of the Facility, Dyna-Diggr, LLC ('Dyna-Diggr') and Brisco, Inc. (an additional current operator of the Facility), as well as the former owners and operators of the Facility, as necessary parties."[2] Plaintiff then filed a Motion

2. At the hearing on the motion to dismiss and motion for summary judgment, Defendant argued that Dyna-Diggr only must be joined as a necessary party. Despite identifying Brisco, Inc. as a current operator in its Motion to Dismiss, Defendant has not raised

for Summary Judgment, alleging "that there are no disputed issues of material fact and that Plaintiff is entitled to judgment as a matter of law" because Defendant failed to comply with this Court's decision in *WASCO I* requiring Defendant to submit a Part B post-closure permit application under RCRA.

A hearing on the motions was held before Judge R. Gregory Horne on 31 October 2018. The trial court determined that Plaintiff had not failed to join any necessary parties and denied Defendant's motion to dismiss. The trial court made the following oral findings of fact and conclusions of law to support the denial of Defendant's motion to dismiss and the grant of Plaintiff's motion for summary judgment:

> THE COURT: All right, thank you. . . . the Court of Appeals and the Supreme Court often . . . talk about changing horses midstream in litigation. And oftentimes . . . they're talking about a situation in which there was not an issue raised in the trial courts, so as a result, the trial court didn't have an opportunity to consider or rule upon the issue. But prior to [] getting to the appellate courts and prior to hearing, [] the parties change horses or change legal theories, change legal strategies and bring up issues that were not brought up in trial court. Of course, appellate cases indicate that that is not allowed to be done.
>
> Now, I must again say that . . . I'm far from an expert in the area of the EPA . . . . This is an area that clearly is a specialty, even folks who are specialized in it, I think, would have frequent updates and interpretations throughout.
>
> However, initially, when I looked at it it appeared to me that the defendant WASCO, the plaintiff in the original case before the Court of Appeals, was changing horses midstream in that, although somewhat differently, . . . it was heard first with an administrative law judge, went through the trial court, and then went to the Court of Appeals and then not receiving relief, changed horses and repackaged and attempted to relitigate. I hear from WASCO that, in fact, they are looking at some new regulations that have come out that weren't present at the time.

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this argument with regard to any party other than Dyna-Diggr in its brief. Therefore, we deem this argument abandoned regarding any parties other than Dyna-Diggr. N.C. R. App. P. 28(a).

> What this Court does understand is that this Court is bound by the decision of the North Carolina Appellate Courts, and the decision as I read it is clear. I had underlined and underscored a number of cases, the State has quoted some, but indicated it's WASCO's responsibility to obtain a postclosure permit for the site that is at issue in the present case. And there's a quote—additionally, Part A permit – it's on page six. (As read) Application signed by WASCO's director of environmental affairs identified WASCO as the operator, and WASCO continued to pay consultants and take action at the site.
>
> The [C]ourts in their conclusion indicate, (as read) We hold WASCO as an operator of a landfill for purposes of the postclosure permitting requirement at the site.
>
> So it is the Court's belief and, indeed, that . . . upon petition for discretionary review, the North Carolina Supreme Court denying that, Court believes it is the law of the case at this time.
>
> So that brings us to the present action in 18 CVS 1731 in which the department is seeking a motion for summary judgment. Court having considered the submissions, having respectfully considered the arguments of counsel, the Court would find and conclude that there remains no genuine issue of material fact, and that Plaintiff, then, the department and the division are entitled to judgment as a matter of law. Court therefore grants the summary judgment motion and requires WASCO to submit to [sic] this Part B postclosure permit application within 90 days of signing and filing of this order.

Following the hearing, the trial court entered an order denying Defendant's motion to dismiss on 12 December 2018 and an order entering summary judgment for Plaintiff. The order denying Defendant's motion to dismiss included the following findings and conclusions:

> 1. On April 18, 2017, the Court of Appeals issued a unanimous decision holding that Defendant "WASCO was the party responsible for and directly involved in the postclosure activities subject to regulation" at the former Asheville Dyeing & Finishing Plant located at 850 Warren Wilson Road, Swannanoa ("the Facility") in Buncombe County. *WASCO LLC v. N.C. Dep't of Env't and Natural*

Res., No. COA 16 414 (N.C. Ct. App. Apr. 18, 2017). The Court of Appeals framed the issue as follows: "It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case." *Id* at page 5. The Court of Appeals opinion affirmed the final order and judgment of the trial court and held that "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site". *Id* at page 22.

2. WASCO was the only party to this Court of Appeals' decision other than the Department of Environmental Quality.

3. On November 1, 2017, the North Carolina Supreme Court denied WASCO's petition for discretionary review of the decision of the Court of Appeals.

4. WASCO remains the operator of the Facility and, as the issue was framed in the Court of Appeals' decision, is responsible for post-closure care and for obtaining a post-closure permit for the Facility.

5. In the present action, the State is seeking to enforce the decision of the Court of Appeals against WASCO. WASCO has not obtained the required permit and has ceased performing any post-closure activities at the Facility.

6. WASCO's responsibilities as an operator are distinct from the responsibilities of the Facility's owner, or of past owners or operators. The owner of the Facility has its own responsibilities under the State Hazardous Waste Rules that arise from its status as owner of the Facility, which are not affected by the present action.

7. Liability under the State Hazardous Waste Rules is joint and several.

8. Enforcing the Court of Appeals' decision against WASCO will not directly affect the interests of any person who is not a party to this action.

Upon these findings and conclusions, the trial court denied Defendant's motion to dismiss.

The order granting summary judgment included the following findings and conclusions:

1. On April 18, 2017, the Court of Appeals issued a unanimous decision holding that Defendant "WASCO was the party responsible for and directly involved in the post-closure activities subject to regulation" at . . . ("the Facility") in Buncombe County. . . . The Court of Appeals framed the issue as follows: "It is WASCO's responsibility to obtain a post-closure permit for the Site that is at issue in the present case." . . . The Court of Appeals opinion affirmed the final order and judgment of the trial court and held that "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." . . . Thus, the Court of Appeals' ruling obligated WASCO to comply with the post-closure permitting obligations at the Facility under the Resource Conservation and Recovery Act ("RCRA"), as incorporated and adopted by the North Carolina Solid Waste Management Act, Chapter 130A, Article 9 of the North Carolina General Statutes, and the rules promulgated thereunder and codified in Subchapter 13A of Title 15A of the North Carolina Administrative Code (collectively, "the State Hazardous Waste Program").

2. The North Carolina Supreme Court denied WASCO's Petition for Discretionary Review of the Court of Appeals' decision on November 1, 2017, establishing the Court of Appeals' decision as the final ruling in this matter.

3. In the year since, WASCO has not submitted a Part B permit application for a post-closure permit for the Facility pursuant to 40 CFR 270.1 and 40 CFR 270.10, adopted by reference at 15A NCAC 13A.0113. WASCO has since entry of the order ceased all activity at the Facility. WASCO has stated in its briefing in response to the instant motion that "WASCO is not now—nor does it have any intention of—taking any further action of any kind at the Facility."

4. All of the arguments raised by WASCO in response to the Department's motion were raised, or could have been raised, in the prior litigation culminating in the decision of the Court of Appeals. WASCO's arguments are therefore barred by the doctrines of res judicata, estoppel, and the law of the case.

5. Recent changes in the rules governing generators of hazardous waste have no bearing on WASCO's status and

> responsibilities as an operator of the Facility. Moreover, these new rules do not retroactively alter the fact that the Facility was closed as a landfill and is subject to post closure regulation, including permitting requirements, under RCRA and the State Hazardous Waste Program. This too is res judicata and the law of the case, and WASCO is estopped from relitigating these issues.
>
> 6. WASCO remains the operator of the Facility and, as the issue was framed in the Court of Appeals' decision, is responsible for post-closure care and for obtaining a post-closure permit for the Facility.

On these findings and conclusions, the trial court granted Plaintiff's motion for summary judgment.

The court then issued an injunction requiring that "[w]ithin ninety (90) days of entry of this Order, WASCO shall submit a RCRA Part B post-closure permit application for the Facility to the Department." The injunction required that "WASCO shall in good faith make best efforts to submit this application in an approvable form" and that "WASCO shall work diligently and in good faith, using best efforts, to correct as expeditiously as possible any deficiencies identified by the Department in the permit application submitted[.]"

Defendant properly noticed appeal from the denial of its motion to dismiss, the grant of summary judgment, and the injunction on 27 December 2018. The same day Defendant noticed appeal, it filed a motion for reconsideration and motion to stay with the trial court "request[ing] that the Court reconsider the Orders and stay their effectiveness while such reconsideration occurs, or, alternatively, stay the effectiveness of the Orders pending WASCO's appeal of the same." On 23 January 2019, the trial court denied Defendant's motion to stay. It also denied Defendant's motion for reconsideration for lack of jurisdiction. On 1 August 2019, Plaintiff submitted a supplement to the appellate record, and Defendant filed a Motion to Strike Appellee's Record Supplement on 19 August 2019.

III. Jurisdiction

Jurisdiction lies with this Court as an appeal from a final judgment under N.C. Gen. Stat. § 7A-27(b)(1).

IV. Analysis

Defendant argues that the trial court erred in failing to dismiss Plaintiff's claim as moot, in failing to dismiss the claim for failure to

join Dyna-Diggr as a necessary party, in granting summary judgment for Plaintiff, and in issuing an injunction ordering that Defendant secure a post-closure permit. We address each claim in turn.

A. Denial of Motion to Dismiss

i. Standard of Review

The denial of a motion to dismiss for failure to join a necessary party is reviewed as a question of law. *Merrill v. Merrill*, 92 N.C. 657, 660 (1885). "[W]e review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Rooks*, 196 N.C. App. 147, 150, 674 S.E.2d 738, 740 (2009) (citation omitted). "We review the trial court's findings of fact to determine whether they are supported by competent record evidence[.]" *Id.* (internal marks and citation omitted).

ii. Merits

1. Mootness

[1] Defendant argues that because EMC promulgated new regulations affecting generators of hazardous waste, Plaintiff's "directive that [Defendant] must apply for a RCRA Part B Permit became moot[,]" and that the superior court erred in failing to dismiss Plaintiff's action as moot. However, Defendant's liability as an operator was decided by this Court in *WASCO I*, and nothing about Defendant's liability as an operator has changed subsequent to that opinion. Therefore, we reject Defendant's argument according to the doctrine of the law of the case and judgment by estoppel, explained in *Poindexter v. First Nat'l Bank of Winston Salem*, 247 N.C. 606, 101 S.E.2d 682 (1958): "[W]hen a fact has been agreed on or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed[.]" *Id.* at 618, 101 S.E.2d at 691.

"Owners and operators of . . . landfills . . . must have post-closure permits . . . for the 'treatment,' 'storage,' and 'disposal' of any 'hazardous waste' as identified or listed in [the statute]." 40 C.F.R. § 270.1(c) (2018). In *WASCO I*, this Court held "WASCO is an operator of a landfill for purposes of the post-closure permitting requirement at the Site." 253 N.C. App. at 237, 799 S.E.2d at 415. The Facility "was certified closed as a landfill in 1993." *Id.* at 231, 799 S.E.2d at 411. Therefore, as an operator of a landfill, Defendant "must have [a] post-closure permit[]" for the Facility. *Id.* (quoting 40 C.F.R. § 270.1(c) (incorporated by reference in 15A NCAC 13A.01139a)).

Generators are separately defined as "any person, by site location, whose act, or process produces 'hazardous waste' identified or listed in 40 CFR part 261." 40 C.F.R. § 270.2(b)(2) (2018). Defendant points to the Hazardous Waste Generator Improvements Rule, 81 Fed. Reg. 85732 (Nov. 28, 2016), adopted by EMC as of 1 March 2018, in arguing its responsibilities have somehow changed. 32 N.C. Reg. 738 (rule submitted for approval by Rules Review Commission); 32 N.C. Reg. 1803 (approval of Rule by Rules Review Commission). The Hazardous Waste Generator Improvements Rule was promulgated

> to improve compliance and thereby enhance protection of human health and the environment[;] . . . revise certain components of the hazardous waste *generator* regulatory program; . . . provide greater flexibility for hazardous waste *generators* to manage their hazardous waste in a cost-effective and protective manner; reorganize the hazardous waste *generator* regulations to make them more user-friendly and thus improve their usability by the regulated community[.]

81 Fed. Reg. 57918 (emphasis added).

In *WASCO I*, this Court did not determine Defendant's liability as a hazardous waste *generator* but rather as an *operator* of a landfill. 253 N.C. App. at 237, 799 S.E.2d at 415. It made this determination under 40 C.F.R. § 270.1(c), which remains in effect in the same form as when *WASCO I* was decided. The Hazardous Waste Generator Improvements Rule has no bearing on Defendant's liability as an operator of a landfill under a distinct statute.

Our conclusion in *WASCO I* is the law of the case. That doctrine provides that "once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question both in subsequent proceedings in a trial court and on subsequent appeal." *Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994); *see also 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, . . . a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Defendant "therefore is foreclosed from relitigating the question of [its liability as an operator] in this or any other subsequent proceeding. Furthermore, under general rules of estoppel by judgment, [Defendant] is similarly precluded from relitigating an issue adversely determined against him." *Weston*, 11 N.C. App. at 418, 438 S.E.2d at 753. Finally, the recently promulgated generator rule does nothing to change these legal realities.

2. Failure to Join Necessary Party

[2] Defendant also contends that the trial court erred in failing to dismiss the complaint for failure to join a necessary party, Dyna-Diggr, the current owner of the Facility. North Carolina Rule of Civil Procedure 19 provides that "those who are united in interest must be joined as plaintiffs or defendants[.]" It provides also that

> [t]he court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

N.C. Gen. Stat. § 1A-1, Rule 19(b) (2017). "A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party." *Law Offices of Mark C. Kirby, P.A. v. Indus. Contractors, Inc.*, 130 N.C. App. 119, 124, 501 S.E.2d 710, 713 (1998); *see also Boone v. Rogers*, 210 N.C. App. 269, 270-71, 708 S.E.2d 103, 105 (2011) (explaining that necessary parties have "material interests . . . [that] will be directly affected by an adjudication of the controversy." (citation omitted)); *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) ("Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined." (citation omitted)).

The relevant regulation provides that "[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application." 40 C.F.R. § 270.10(b) (2018) (incorporated by reference at 15A NCAC 13A.0113(b)). Defendant asserts that because Dyna-Diggr, as the current owner of the Facility, "must also sign the permit application[,]" it is a necessary party to a suit regarding Defendant's duties to obtain a permit as the operator of the facility. Defendant, however, fails to grapple with the impact that joint and several liability has on the current controversy. Accordingly, we disagree.

First, federal courts interpreting RCRA generally "impose[] . . . joint and several liability" on responsible parties such as owners and operators. *United States v. Ne. Pharm. & Chem. Co., Inc.*, 810 F.2d 726, 732 n.3 (8th Cir. 1986); *see also United States v. Ottati & Goss, Inc.*, 630 F.

Supp. 1361, 1396 (D.N.H. 1985) (holding multiple defendants jointly and severally liable under RCRA); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 199 (W.D. Mo. 1985) ("Congress . . . has authorized the imposition of joint and several liability to ensure complete relief [under RCRA.]"). Defendant cannot prevail in asserting that Dyna-Diggr is a necessary party because, in cases of joint and several liability, "the matter can be decided individually against one defendant without implicating the liability of other defendants." *Harlow v. Voyager Commc'ns V*, 348 N.C. 568, 571, 501 S.E.2d 72, 74 (1998). Here, Defendant's liability as an operator has been settled by *WASCO I*, and Dyna-Diggr was not a party to that case. Additionally, because Defendant's and Dyna-Diggr's liability is joint and several, Dyna-Diggr's "interests [will not] be directly affected by the adjudication of the controversy" between Defendant and Plaintiff such that Dyna-Diggr is a necessary party. *Durham Cty. v. Graham*, 191 N.C. App. 600, 604, 663 S.E.2d 467, 470 (2008).

We also note that granting a defendant's request for dismissal without prejudice is the appropriate remedy only where a necessary party cannot be joined; where the trial court identifies a necessary party, "the court shall order such other parties summoned to appear in the action." N.C. Gen. Stat. § 1A-1, Rule 19(b); *see Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 453 183 S.E.2d 834, 838 (1971) (reviewing trial court order joining necessary party). In other words, dismissal would have been an appropriate remedy only had the trial court determined Dyna-Diggr to be a necessary party and that Dyna-Diggr could not be joined as a party.

We hold the trial court did not err in denying Defendant's motion to dismiss for failure to join a necessary party.

B. Grant of Summary Judgment

[3] Defendant also contends that the trial court erred in granting Plaintiff's motion for summary judgment because there are unsettled factual issues in dispute. We disagree.

i. Standard of Review

We review an order granting a motion for summary judgment *de novo*. *Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 366 N.C. 43, 47, 727 S.E.2d 866, 869 (2012). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (internal marks and citation omitted).

ii. Merits

A trial court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen Stat. §1A-1, Rule 56(c) (2017). Here, the only issue of material fact was whether Defendant's "failure to obtain a post-closure permit [wa]s a violation of 40 CFR 270.1(c) and 15A NCAC 13A .0113(a)." This issue was decided in *WASCO I*. *See WASCO I*, 253 N.C. App. at 231-32, 799 S.E.2d at 411-12 (holding that WASCO is an operator of a landfill and therefore required by 40 C.F.R. § 270.1(c) (incorporated by reference in 15A NCAC 13A.0113(a)) to acquire a post-closure permit). As we have already explained, this holding is the law of the case, and the trial court correctly granted Plaintiff's motion for summary judgment because no issue of material fact remained to be settled.

C. Order to Submit Permit Application

[4] Defendant next argues that the trial court's order "requires WASCO to undertake something that cannot possibly be achieved in compliance with applicable law and EPA guidance[.]" Defendant specifically contends that because Dyna-Diggr may not live up to its obligation to "sign the permit application," *see* 40 C.F.R. § 270.10(b) ("When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application."), Defendant will be subject to contempt sanctions. Defendant misconstrues the breadth of the trial court's order, which is narrower and more mindful of these particular circumstances than Defendant suggests. Accordingly, we disagree.

i. Standard of Review

We review grants of equitable relief such as injunctions for an abuse of discretion. *Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 401, 474 S.E.2d 783, 788 (1996). "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). Indeed, "[a] ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

ii. Merits

Nothing in these facts or the law on point supports Defendant's argument of impossibility. Plaintiff cites *South Carolina v. United*

States, 907 F.3d 742, 765 (4th Cir. 2018) in support of its argument that the trial court did not abuse its discretion in granting the injunction, in part because it is not impossible for Defendant to comply with the order. In that case, the U.S. Court of Appeals for the Fourth Circuit reviewed a district court's order requiring the Department of Energy ("DOE") to remove a metric ton of defense plutonium from South Carolina. *Id.* at 764. In determining that the district court did not abuse its discretion, the Fourth Circuit considered that "DOE failed to produce any evidence showing that its compliance with a two-year removal deadline was truly impossible." *Id.*

The same is true here. Defendant claims it would be impossible to comply with the order, presenting evidence of Dyna-Diggr's preemptive refusal to sign the permit application. But submitting an application without Dyna-Diggr's signature, in and of itself, would not violate the order which requires only that Defendant act "in good faith [to] make best efforts to submit th[e] application in an approvable form."

Defendant's argument that it may face contempt sanctions is similarly unavailing. In *South Carolina*, the Fourth Circuit held that the lower court "did not abuse its discretion in ruling that DOE could raise its impossibility argument at a later time—if necessary—after the [i]njunction was entered." *Id.* at 765 (explaining that courts can compel compliance with statutory obligations and that parties may raise impossibility defenses at any subsequent contempt proceedings); *see Robertson v. Jackson*, 972 F.2d 529, 535 (4th Cir. 1992) ("In the event that a contempt order should be issued against the [defendant], the defense of impossibility of compliance would be available if he had done everything within his power to comply with the district court's order."). Relatedly, should Dyna-Diggr refuse to sign the application as the current owner of the Facility, Defendant will not be subject to contempt sanctions so long as it has "in good faith made best efforts to submit th[e] application in an approvable form." Further, should Defendant in good faith submit an RCRA Part B permit application absent Dyna-Diggr's signature, and should that application be denied, Defendant would be in compliance with the court's order should it continue to act in good faith and cooperate with Plaintiff, "work[ing] diligently . . . using best efforts[] to correct as expeditiously as possible any deficiencies identified by the Department[.]"

Finally, Defendant acknowledges that "North Carolina's environmental regulations provide a process when the owner of the facility refuses to cooperate—the issuance of an administrative order requiring appropriate action." *See* 42 U.S.C. § 6928(h) (2018). Should Defendant's

permit application be denied for lack of Dyna-Diggr's signature, Plaintiff could initiate separate proceedings against Dyna-Diggr, proceedings which would not involve Defendant.

In short, only Defendant's refusal to comply with the court order, not Dyna-Diggr's inaction, could result in contempt sanctions against Defendant per the trial court order at issue. As such, we cannot hold that the injunction is "manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833 (1985).

D. Motion for Reconsideration

[5] Defendant argues, in the alternative, that this Court should remand this matter to the superior court for an advisory opinion on Defendant's motion for reconsideration.

Proper notice of appeal requires a party to "designate the judgment or order from which appeal is taken." N.C. R. App. P. 3(d). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). "A jurisdictional default [] precludes the appellate court from acting in any manner other than to dismiss the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008).

Here, the trial court did not enter a judgment or order on Defendant's motion for reconsideration because jurisdiction was no longer vested with the trial court at the time Defendant filed its motion. As such, Defendant did not appeal from the denial of its Rule 60(b) motion. Therefore, jurisdiction is not properly with this Court to consider remand.

V. Conclusion

The trial court correctly determined that this Court's decision in *WASCO I* settled the question of Defendant's liability as an operator of the Facility as the law of the case. No intervening developments have changed this reality; thus, we hold that the trial court did not err in failing to dismiss Plaintiff's complaint as moot. Nor did the trial court err in failing to dismiss Plaintiff's suit for failure to join a necessary party; Defendant's liability as the operator is separate from Dyna-Diggr's liability as the owner of the Facility. The trial court similarly did not err in entering summary judgment for Plaintiff because no genuine issues of material fact remained to be resolved; Defendant's liability as the operator of the Facility had been decided by this Court in *WASCO I*. Finally, its issuance of the injunction was within the trial court's discretion and

does not require anything "impossible" of the Defendant. The trial court orders are affirmed.[3]

AFFIRMED.

Judges TYSON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
ARTHRYSIA BRASWELL, DEFENDANT

No. COA19-434

Filed 7 January 2020

Sentencing—prior record level—section 15A-1340.14(f) factors—burden of proof—not met

The State failed to meet its burden of proving defendant's prior record level by a preponderance of the evidence by any of the methods listed in N.C.G.S. § 15A-1340.14(f) where defendant did not stipulate to the prior record level and the State did not submit either originals or copies of prior convictions or other records that would satisfy its burden. Further, neither defendant's acknowledgment of her "criminal record" during a colloquy with the court nor her notation of the roman numeral "IV" on her transcript of plea (next to all the felonies to which she pled guilty) were sufficient to constitute a stipulation to or otherwise establish the accuracy of the twelve prior record level points or level IV for sentencing. The matter was remanded for resentencing on the charges subject to the guilty plea.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered upon plea of guilty on 12 December 2018 by Judge Walter H. Godwin, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 30 October 2019.

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3. We dismiss as moot Defendant's Motion to Strike Appellee's Record Supplement because, as the preceding illustrates, our decision does not require reliance upon the material Defendant requests be stricken.

Attorney General Joshua H. Stein, by Assistant Attorney General Marie Hartwell Evitt, for the State.

Attorney Meghan Adelle Jones, for Defendant.

BROOK, Judge.

Arthrysia Braswell ("Defendant") appeals from judgment entered upon her guilty plea. Defendant argues the State failed to establish her prior record level by a preponderance of the evidence. We agree. We therefore reverse and remand for resentencing.

I. Background

Defendant was arrested for felony malicious conduct by a prisoner, felony possession of a controlled substance on jail premises, driving while impaired, and driving while license revoked on 8 March 2018. On 27 July 2018, she was arrested and charged with first-degree burglary. Defendant was also charged with larceny of a motor vehicle, possession of a stolen motor vehicle, and misdemeanor hit and run on 21 September 2018. She was subsequently indicted for driving while impaired, driving while license revoked, malicious conduct by a prisoner, possession of a controlled substance on prison or jail premises, and first-degree burglary. An information was also filed charging her with larceny of a motor vehicle.

On 12 December 2018, Defendant entered a plea of guilty to felonious breaking and entering, malicious conduct by a prisoner, driving while impaired, and larceny of a motor vehicle. As part of the plea agreement, the State dismissed the other charges against her, including first-degree burglary, driving while license revoked, and possession of a controlled substance on jail premises; the agreement did not countenance a particular sentence.

Judge Walter H. Godwin, Jr., accepted her plea and entered judgment upon the plea. The State submitted a prior record level worksheet for sentencing purposes. The worksheet alleged Defendant to have 12 record level points, placing her in sentencing category level IV. The State did not proffer a stipulation by the parties, an original or copy of the court record of any of the prior convictions, or a copy of records maintained by the Department of Public Safety or the Administrative Office of the Courts. Neither Defendant nor defense counsel signed the prior record level worksheet to indicate Defendant stipulated to the information set out in the worksheet or agreed to the prior record level included therein.

The trial court sentenced Defendant to 24 months in the misdemeanant confinement program on the charge of driving while impaired,[1] 25 to 39 months' imprisonment on the charge of felony breaking and entering, and 9 to 20 months' imprisonment on the charge of larceny of a motor vehicle, the sentences to run consecutively. The trial court referenced Defendant's alleged record level only while announcing the sentence, stating:

> [A]s to the felonious breaking and entering, the Class H, I'm going to consolidate that with the malicious conduct by a prisoner to Class F, therefore, Class F, she is Record Level IV for purposes of punishment. The Court is going to make no findings in aggravation or mitigation. Going to impose a sentence within the presumptive range. She's hereby sentenced to not less than 25, no more than 39 months in the North Carolina Department of Corrections.
>
> Then in the larceny of a motor vehicle case, Class H—I mean, yeah, Class H Felon, she is Record Level IV[.]

The trial court did not ask the State or defense counsel to respond to the sentence before adjourning the sentencing hearing, and defense counsel did not object to this statement.

Defendant noticed appeal on 13 December 2018 but failed to list this Court as the court to which the appeal was being made. N.C. R. App. P. 4(b) (2019). Appeal from a final judgment entered upon a plea of guilty lies of right with this Court under N.C. Gen. Stat. § 15A-1444(a2)(1) where the defendant alleges an incorrect finding of her prior record level or prior conviction level under N.C. Gen. Stat. § 15A-1340.14. *See*, *e.g.*, *State v. Riley*, 159 N.C. App. 546, 555, 583 S.E.2d 379, 386 (2003). Appellate counsel was appointed on 25 January 2019, and Defendant thereafter filed a petition for writ of *certiorari*. This Court has the discretion to grant a petition for writ of *certiorari* and hear an appeal.[2] *See State v. McCoy*,

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1. The trial court determined Defendant to be a record Level I for purposes of DWI sentencing, and Defendant does not challenge this determination. We address here only Defendant's claim that the State did not meet its burden of proving her 12 record level points or Level IV category for purposes of her remaining charges.

2. The petitioner need not show it is certain to prevail on the merits if *certiorari* is granted. Indeed, our appellate courts commonly grant such writs only to affirm the underlying judgment of the trial court. *See*, *e.g.*, *State v. Green*, 350 N.C. 400, 514 S.E.2d 724 (1999); *In re Kirkman Furniture Co.*, 258 N.C. 733, 129 S.E.2d 471 (1963); *State v. Hamrick*, 110 N.C. App. 60, 428 S.E.2d 830 (1993); *State v. McNeil*, ___ N.C. App. ___, 822 S.E.2d 317 (2018).

171 N.C. App. 636, 638, 615 S.E.2d 319, 320-21 (2005) ("While this Court cannot hear defendant's direct appeal [for failure to comply with Rule 4], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*[.]"). Accordingly, we exercise that discretion here.

II. Standard of Review

The determination of a defendant's prior record level for sentencing purposes is subject to *de novo* review. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). We review for "whether the competent evidence in the record adequately supports the trial court's" determination of Defendant's prior record level. *Id.*

III. Analysis

Defendant argues that the State did not prove her prior record level by a preponderance of the evidence. While Defendant did not object to the record level at sentencing, "[i]t is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.*

"The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction[s]." *Id.* at 634, 681 S.E.2d at 804 (citation omitted). Under the Structured Sentencing Act, the State may prove a defendant's prior convictions and thereby establish the defendant's prior record level through any of the following methods:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2017). On one hand, a prior record level worksheet submitted by counsel for the State, standing alone, is never sufficient to meet the State's burden. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). On the other hand, an explicit stipulation by the defendant is not necessary for the State to carry its burden. *See id.* at 828, 616 S.E.2d at 917. Our case law provides useful guidance on what suffices to establish a defendant's prior record level.

In *State v. Alexander*, the trial court asked defense counsel "whether he had anything 'to say' with respect to sentencing." *Id.* at 826, 616 S.E.2d at 916. Defense counsel directed the court to the worksheet, telling the trial court that "up until this particular case [the defendant] had no felony convictions, as you can see from his worksheet." *Id.* The Court held that this "exchange between the trial judge and defense counsel constituted a stipulation," *id.* at 827-28, 616 S.E.2d at 917, because it "indicate[d] not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it," *id.* at 830, 616 S.E.2d at 918. The Court in *Alexander* considered also that the plea agreement between the defendant and the State included an agreement to a particular sentence, evidencing knowledge of and an agreement to a prior record level. *Id.* at 825, 616 S.E.2d at 915.

In coming to this conclusion, the Court instructed that "a stipulation need not follow any particular form, [but] its terms must be definite and certain[.]" *Id.* at 828, 616 S.E.2d at 917 (citation omitted). Indeed, "[s]ilence, under some circumstances, may be deemed assent." *Id.* (citation omitted). For example, silence can constitute a stipulation where either counsel for the State or the trial judge has mentioned the defendant's prior record points or record level before turning explicitly to defense counsel for an opportunity to object. *See State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 85-86 (2007) (trial judge stated defendant's prior record level before offering defense counsel opportunity to object); *State v. Hurley*, 180 N.C. App. 680, 684, 637 S.E.2d 919, 923 (2006) (prosecutor stated defendant's prior convictions and record level before defense counsel had opportunity to be heard); *State v. Mullinax*, 180 N.C. App. 439, 444, 637 S.E.2d 294, 298 (2006) (trial judge stated defendant's prior record level and asked defendant and defense counsel to review worksheet); *State v. Eubanks*, 151 N.C. App. 499, 504-05, 565 S.E.2d 738, 742 (2002) (trial judge stated defendant's prior record level before offering defense counsel opportunity to object).

Riley illustrates the circumstances under which silence does not suffice to constitute a stipulation. In *Riley*, counsel for the State referenced the defendant's prior record level, and defense counsel did not object but "asked for mercy with regard to any sentence imposed[.]" *Id.* at 557, 583 S.E.2d at 387. Additionally, in *Riley*, the prosecutor and the trial court exchanged the following colloquy:

> [Prosecutor]: The first thing I would like to do is hand up a prior record worksheet (handing). This obviously is pertaining to the four charges that don't have a mandatory sentence, that being three counts of assault with a deadly

> weapon with intent to kill, and possession of a firearm by a felon.
>
> I'm showing the worksheet which shows some prior felonies, three prior—actually, four prior felonies, some though—two of them on the same day, basically possession of schedule I and possession with intent to sell and deliver schedule II. Those were the subject of the prior felony. These were from 1999, and were the subject of the firearm by felon case that we have.
>
> Also, in September of last year the defendant was convicted of assault with a deadly weapon inflicting serious injury; also possession of a firearm by a felon. So by the time you add the points, plus the extra point for having the same offense, the firearm by a felon, I'm showing seven points. That would make him a Level III offender for sentencing on those cases.
>
> THE COURT: So he's a Level III on three of the cases, and he's a Level what on the other?
>
> [Prosecutor]: Well, actually he's a Level III for everything but the first-degree murder. First-degree murder, he would technically be a Level III as well, but since there's a mandatory statutory sentence, it really doesn't matter what the record level is.

Id. at 556, 583 S.E.2d at 386-87 (alterations in original). Defense counsel did not object to these calculations. *Id.* at 557, 583 S.E.2d at 387. Neither defense counsel's lack of objection to these statements, nor the prior record level worksheet, alone or in combination, were sufficient to meet the State's burden. *Id.*

Additionally, this Court held in *State v. Jeffery*, 167 N.C. App. 575, 605 S.E.2d 672 (2004), that the "[d]efendant's agreement to six presumptive range sentences [wa]s not a 'definite and certain' indication that defendant ha[d] a prior record level III. It [wa]s merely indicative of the bargain into which he entered with the State." *Id.* at 581, 605 S.E.2d at 676. Simply put, the mere fact of a plea agreement does not necessarily amount to a stipulation of a prior record level. *See id.*; *Alexander*, 359 N.C. at 828, 616 S.E.2d at 917.

Here, the State failed to meet its burden. Defense counsel did not stipulate to Defendant's prior record level. In fact, neither the trial judge nor the prosecutor mentioned Defendant's prior record level, prior

record level points, or the fact of each of her prior convictions in a manner that offered defense counsel any opportunity to object to the same. The first and only time the trial judge stated Defendant's prior record level was immediately before adjourning the hearing. And, as in *Riley*, "the State submitted no records of conviction [and] no records from the agencies listed in N.C.G.S. § 15A- 1340.14(f)(3)[.]"[3] 159 N.C. App. at 557, 583 S.E.2d at 387.

The State points to the plea transcript as a stipulation of Defendant's prior record level. The State contends that in the column labeled "Pun. Cl." for "Punishment Class," Defendant listed "IV" next to the felony offenses to which she was pleading guilty, that is, felony breaking and entering, malicious conduct by a prisoner, and larceny of a motor vehicle. The State submits that "Defendant clearly contemplated being sentenced as a level IV for sentencing by including the roman numerals in the 'Pun. Cl.' Column" and that "[t]he inclusion amounts to a stipulation by [D]efendant and counsel[.]" This Court should assume, the State suggests, that Defendant stipulated to being sentenced at a Level IV because "this column should [instead] contain a letter, to identify a felony punishment, or 1, 2, 3, or A1 to identify the appropriate misdemeanor punishment." However, it was the State's burden to prove by a preponderance of the evidence that these roman numerals on the plea transcript indicated that Defendant stipulated to the sentencing level, and we cannot find here that this ambiguous evidence amounts to a "definite and certain" stipulation, as required. *Alexander*, 359 N.C. at 828, 616 S.E.2d at 917 (citation omitted).

The State points also to a colloquy between the trial court and Defendant in which the trial court asked Defendant whether she had "anything [she]'d like to say to the Court[.]" In response, Defendant stated:

> I apologize to the Court, to the man whose fence it was . . . . I also apologize to the person [] whose residence I entered. I was, I've had a lot taken from me actually and since I got a criminal record everytime [sic] I report something happens to me it's threw out of court without even going before a judge.

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3. The trial court referenced a prior DWI conviction and a corresponding case number during the sentencing hearing. However, no copy of records maintained by the Department of Motor Vehicles ("DMV") appears in the record, and the State does not contend that the submission of a DMV record proved Defendant's prior convictions by a preponderance of the evidence, as required by N.C. Gen. Stat. § 15A-1340.14(f).

The State, citing *Alexander*, contends that this reference by Defendant to her criminal record amounts to a stipulation by Defendant that she had 12 prior record level points and a stipulation to being sentenced at Level IV. In *Alexander*, however, defense counsel explicitly referenced the prior record level worksheet, drawing the trial court's attention to Defendant's lack of any prior felony convictions, 359 N.C. at 826, 616 S.E.2d at 916, and, in so doing, tacitly endorsed its accuracy, *id.* at 830, 616 S.E.2d at 918. In contrast, the exchange between Defendant and the trial court here in which she referenced having a "criminal record" does not suggest that Defendant "was cognizant of the contents of the worksheet . . . [and] had no objections to it[,]" that she stipulated to being sentenced at a Level IV, or that she stipulated to the 12 record level points. *Id.*

The colloquy between Defendant and the trial court here shares more characteristics with *Riley* than it does with *Alexander*. Defendant's reference to her criminal record resembles the colloquy in *Riley* in which the "[d]efendant asked for mercy with regard to any sentence imposed and did not object to the information on the worksheet or the statements made by the prosecutor in reference to defendant's prior record level." 159 N.C. App. at 557, 583 S.E.2d at 387. In fact, in *Riley*, counsel for the State had a more extensive colloquy with the trial court regarding the calculation of the defendant's points and prior record level. *Id.* at 556, 583 S.E.2d at 386-87. Defense counsel in *Riley* did not object to the State's explanation of the record level calculation, and this Court still found that the State had not met its burden of proving the defendant's prior record level by stipulation. *Id.* at 557, 583 S.E.2d at 387.

The State points also to the following exchange between Defendant and the trial court to support its assertion that Defendant "clearly contemplated being sentenced as a level IV for felony sentencing":

> THE COURT: Do you understand that you're pleading to felonious breaking and entering carrying a maximum punishment of 39 months; pleading guilty to malicious conduct by a prisoner which is a Class F Felon [sic] carrying a maximum punishment of 59 months; driving while impaired, which is a misdemeanor, maximum punishment three years; and larceny of a motor vehicle which is a Class H misdemeanor carrying a maximum punishment of 39 months for a total maximum punishment of 137 months, plus three years. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

However, as in *Jeffery*, Defendant's acknowledgement of her "sentence[] is not a 'definite and certain' indication that [D]efendant has a prior record level [IV]." 167 N.C. App. at 581, 605 S.E.2d at 676. Indeed, the above colloquy does not reflect Defendant's actual sentence; it reflects the total potential maximum permitted by statute and therefore cannot be interpreted to constitute a stipulation by Defendant that she should be sentenced at a Level IV. This colloquy does no work toward furthering the State's burden of proving Defendant's prior convictions.

Moreover, the State submitted neither originals nor copies of records of prior convictions nor records from agencies listed in N.C. Gen. Stat. § 15A-1340.14(f). Defendant did not stipulate to the prior record level explicitly. Further, the roman numerals listed on the plea, Defendant's reference to the existence of her criminal record, and her acknowledgment of the statutory maximum sentence, considered either individually or in combination, do not amount to an implicit stipulation to or otherwise serve to reliably establish her record level.[4]

IV. Remedy

Where an error occurs during the sentencing phase of a proceeding, the appropriate remedy is generally to remand for resentencing. This is true in criminal proceedings involving jury trials. *See*, *e.g.*, *Riley*, 159 N.C. App. at 557, 583 S.E.2d at 387 (remanding solely for resentencing where State did not carry its burden to establish prior record level after conviction upon jury verdicts). It is also true in proceedings involving guilty pleas and plea agreements. *See*, *e.g.*, *State v. Murphy*, ___ N.C. App. ___, ___, 819 S.E.2d 604, 609 (2018) (remanding solely for resentencing after concluding trial court erred in ordering defendant to pay restitution where defendant had pleaded guilty to underlying charges); *State v. Bright*, 135 N.C. App. 381, 383, 520 S.E.2d 138, 140 (1999) (remanding solely for resentencing after concluding trial court erred in varying from presumptive sentence where defendant had pleaded guilty); *State v. Jones*, 66 N.C. App. 274, 280, 311 S.E.2d 351, 354 (1984) (remanding solely for resentencing after concluding trial court erred in varying from presumptive sentence where defendant had pleaded

4. We note that our colleague in dissent finds pertinent that "[a]t no point in her brief or petition for *certiorari* does Defendant . . . argue prejudice, assert the record level calculation is incorrect, or that she would be eligible to receive a different or lower sentence." Tyson, J., dissenting *infra*. While this fact has been noted in cases in which our appellate courts have found a stipulation has occurred, neither these cases, nor the more similar cases in which no such stipulation occurred, nor our governing statutes suggest that a defendant must show prejudice in order to receive the benefit of a fair process in which the State meets its burden under N.C. Gen. Stat. § 15A-1340.14(f).

guilty to underlying charges). Consistent with this binding precedent, we remand for resentencing.[5]

V. Conclusion

Having held that the State failed to meet its burden of proving Defendant's prior record level by a preponderance of the evidence, we must vacate and remand for a resentencing hearing on the charges of felonious breaking and entering, malicious conduct by a prisoner, and larceny of a motor vehicle.

VACATED AND REMANDED.

Judge COLLINS concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's form-over-substance ruling places Defendant at risk of losing a very beneficial plea bargain on the four charges she pled guilty to committing and allows the State to reinstate all the other nineteen charges that were dismissed. Defendant fails to argue or show any error or prejudice or that she is entitled to receive any sentence other than what she received.

Defendant's petition does not allege or demonstrate any prejudice and her arguments are wholly without merit. The majority's opinion erroneously issues our writ, reaches the merits of Defendant's purported appeal and reverses the judgments entered upon Defendant's knowing guilty plea pursuant to a plea agreement. I respectfully dissent.

I. Presumption of Correctness

The Supreme Court of North Carolina has held the defendant carries the burden to overcome the presumption of correctness and to

5. The dissent asserts we must instead set aside the entire plea agreement. The cases cited in support of this contention, however, are readily distinguishable. Defendant does not seek to repudiate any portion of her plea agreement. *State v. Green*, ___ N.C. App. ___, ___, 831 S.E.2d 611, 618 (setting aside plea agreement). And our opinion does not render any plea agreement terms unfulfillable. *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (2012) (Steelman, J., concurring in part and dissenting in part), *rev'd for the reasons stated in the dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012) (same). There was no agreement to a particular sentence in the plea agreement here; thus, the commensurate remedy is remand for resentencing.

demonstrate prejudicial error to warrant any relief. "The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused his discretion. When the validity of a judgment is challenged, the burden is on the defendant to show error amounting to a denial of some substantial right." *State v. Bright*, 301 N.C. 243, 261, 271 S.E.2d 368, 379-80 (1980).

> The defendant, attacking a sentence, however, is confronted by the presumption that the trial judge acted fairly, reasonably, and impartially in the performance of the duties of his office. Our entire judicial system is based upon the faith that a judge will keep his oath. Unless the contrary is made to appear, it will be presumed that judicial acts and duties have been duly and regularly performed.

State v. Harris, 27 N.C. App. 385, 386-87, 219 S.E.2d 306, 307 (1975) (citations, ellipses and internal quotation marks omitted).

The "presumption of lower court correctness and the wide discretion afforded our trial judges in rendering judgment" is based upon the view the trial judge participated in the disposition of the case and is in "the best position to determine appropriate punishment for the protection of society and rehabilitation of the defendant." *Id.* at 387, 219 S.E.2d at 307 (citation and internal quotation marks omitted).

These presumptions are not overcome in Defendant's petition and Defendant shows no prejudice. The trial court received and reviewed the signed plea arrangement between Defendant and the State and the sentencing worksheet. The trial court heard from Defendant's counsel, Defendant, and the State before it imposed a sentence within the presumptive range for a level IV offender. At no point does Defendant argue that her sentence was incorrect, her prior record level was calculated incorrectly, or she was entitled to a different sentence.

Defendant has not demonstrated how she was prejudiced by the trial court's acceptance of her plea arrangement and subsequent presumptive sentence. The majority's opinion ignores the presumption of correctness and relieves Defendant of her burden to show prejudice to reverse the trial court's judgment. She demonstrates no merit and is not entitled to this Court's discretionary writ.

II. N.C. Gen. Stat. §§ 15A-1442 and 1444

Contrary to the majority opinion's assertion, Defendant does not have any appeal of right under these facts. Defendant voluntarily pled guilty and was sentenced within the presumptive range for the felonies

to which she committed and knowingly admitted. *See* N.C Gen. Stat. § 15A-1444(a1) (2017). She asserts, despite her in-court acknowledgement of her past criminal record, her signed Transcript of Plea, and her colloquy with the trial court, that she did not agree or stipulate to her prior record level.

Defendant failed to and cannot assert her prior record level was incorrectly calculated or that points for prior convictions were attributed incorrectly. *See* N.C. Gen. Stat. § 15A-1444 (a2)(1). She never asserts either an erroneous record level or any prejudice she has suffered.

Under N.C. Gen. Stat. § 15A-1442, "Grounds for correction of error by appellate division," Defendant meets none of the statutory criteria.

> The following constitute grounds for correction of errors by the appellate division.
>
> . . . .
>
> (5b) Violation of Sentencing Structure.–The sentence imposed:
>
> > a. Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;
> >
> > b. Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or
> >
> > c. Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class or offense and prior record or conviction level.
>
> (6) Other Errors of Law.–Any other error of law was committed by the trial court *to the prejudice of the defendant*.

N.C. Gen. Stat. § 15A-1442 (2017) (emphasis supplied).

III. Petition for Writ of Certiorari

It is uncontested that Defendant filed a defective notice of appeal. Subsequently, Defendant filed a petition for a writ of certiorari. To warrant consideration, Defendant's "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 [1935]. *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 [1927]." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). Without an allegation of prejudice, review by certiorari is not available to either by statute or by precedent to Defendant. N.C. Gen. Stat. § 15A-1442; N.C. Gen. Stat. § 15A-1444(g); *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

To warrant issuance of the writ, Defendant's petition must show the purported issue on appeal has potential merit and, if meritorious, that she suffered prejudice. While her petition is not required to show she is certain to *prevail* on the merits, it alleges no *potential* of merit, asserts no prejudice or probability of a different sentence on remand. I vote to deny the meritless petition.

The majority's opinion does not state any basis to allow the petition or invoke Rule 2, but nonetheless grants Defendant's petition and addresses the merits. As such, I address lack of demonstrated merit or prejudice in the underlying issue and the substantial risks to Defendant on remand.

IV. Stipulation

It is undisputed Defendant voluntarily and knowingly entered a guilty plea. Consistent with her plea, Defendant was sentenced as a prior record level IV within the presumptive range for felonious breaking and entering, malicious conduct by a prisoner, driving while impaired, and larceny of a motor vehicle.

In exchange for Defendant's guilty plea to these four charges, the State dismissed the following *nineteen* additional charges: (1) first-degree burglary; (2) driving with license revoked; (3) resisting a public officer; (4) felony possession of a schedule II substance; (5) misdemeanor child abuse; (6) possession of a controlled substance in jail premises; (7) possession of a stolen vehicle; (8) *three* counts of hit and run; (9) failure to maintain lane control; (10) driving while license revoked due to impaired driver's license revocation; (11) aggressive driving; (12) driving while impaired; (13) malicious conduct by a prisoner; (14) larceny of a motor vehicle; (15) larceny of a dog; (16) driving without liability insurance; and, (17) transporting a child not in rear seat.

During Defendant's plea colloquy and sentencing hearing, the State submitted a Transcript of Plea, *signed* by Defendant *and* her counsel. Also a prior record level worksheet and a copy of Defendant's driving record were presented without objection. The sentencing worksheet

indicated Defendant had accrued twelve prior conviction sentencing points. Four of those points came from two prior class H felony convictions and eight points derived from a combination of multiple Class A1 and Class 1 misdemeanors. The majority's opinion correctly notes Defendant does not challenge the record level determination for her driving while impaired conviction.

Defendant's sole argument asserts only she did not sign the stipulation in Section III of her prior record level/conviction level worksheet. Defendant's petition does not deny any of the underlying convictions nor argue her twelve prior record points were not correctly computed. She does not assert that she is entitled to a different sentence if the judgment on her plea is reversed. After hearing from both parties, including Defendant individually, the trial court sentenced Defendant in the presumptive ranges as a prior record level IV on the felony counts.

The State bears the burden of proving by a preponderance of the evidence that a prior conviction exists. *See State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). The State can prove a defendant's prior convictions and establish the defendant's prior record level under the statute by any of the following:

> (1) Stipulation of the parties.
>
> (2) An original or copy of the court record of the prior conviction.
>
> (3) A copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
>
> (4) Any other method found by the court to be reliable.

N.C. Gen. Stat. § 15A-1340.14(f) (2017).

Defendant's express, explicit or signed affirmation is not necessary for the State to carry its burden. *Alexander*, 359 N.C. at 829, 616 S.E.2d at 917. The Supreme Court of North Carolina stated "a stipulation need not follow any particular form, [but] must be definite and certain[.]" *Id.* at 828, 616 S.E.2d at 917 (citation omitted). "Silence, under some circumstances, may be deemed assent." *Id.* (citation omitted).

A. *State v. Riley*

The majority's opinion cites this Court's opinion in *State v. Riley* to support its conclusion to reverse. *State v. Riley*, 159 N.C. App. 546, 583 S.E.2d 379 (2003). In *Riley*, the State submitted the defendant's prior

record worksheet and asserted the defendant was a prior record level III offender for sentencing after the jury had convicted him. *Id.* at 556, 583 S.E.2d at 387. The State asserted the crimes were committed for the benefit of gang activity and sought a sentence within the aggravated range. *Id.*

In response, the "[d]efendant asked for mercy with regard to any sentence imposed and did not object to the information on the worksheet or the statements made by the prosecutor in reference to defendant's prior record level." *Id.* at 557, 583 S.E.2d at 387. This Court held that the sentencing worksheet filled out by the prosecutor and unsupported statements about the defendant's prior record level were insufficient to carry the State's burden to show the prior convictions. *Id.*

Riley is inapposite to these facts and does not support the majority's conclusion. The defendant in *Riley* did not plead guilty, and no voluntary and knowing plea bargain was made. No Transcript of Plea, signed by both defense counsel and the defendant, containing a listed and correct punishment level was produced in *Riley*. No plea colloquy occurred as was done in the present case. The majority opinion's reliance upon *Riley* to support its outcome is without foundation.

B. *State v. Alexander*

The majority's opinion also misapplies and discounts the holding in *State v. Alexander*. In *Alexander*, our Supreme Court held that the dialogue between the trial court and defense counsel constituted a stipulation. *Id.* at 828, 616 S.E.2d at 917. After the plea colloquy, the defendant Alexander stipulated to a factual basis for his plea. *Id.* at 825, 616 S.E.2d at 916. Our Supreme Court was persuaded by the defense counsel's directing the trial court to the sentencing worksheet, the trial court's reliance on defense counsel's statements about defendant's prior offenses, and the trial court's knowledge of the plea agreement as proof of the defendant's stipulation and the accuracy of the record level calculation. *Id.* at 832, 616 S.E.2d at 919.

The Court noted its "previous decisions make it clear that counsel need not affirmatively state what a defendants prior record level is for a stipulation with respect to that defendants prior record level to occur." *Id.* at 830, 616 S.E.2d at 918 (citing *State v. Albert*, 312 N.C. 567, 579-80, 324 S.E.2d 233, 241 (1985)).

Here, as in *Alexander*, Defendant and her counsel both signed the Transcript of Plea. The Transcript includes numerous sections, one of which is labeled "Pun. CL.," an abbreviation for "punishment conviction

level." Defendant's Transcript noted a roman numeral "IV" next to all the felonies to which she pled guilty.

In addition to the signed Transcript of Plea, the trial court and Defendant engaged in the plea colloquy. Defendant acknowledged she understood the terms and conditions of her plea arrangement and agreed there was factual basis for her guilty pleas. The trial court then asked for Defendant's driving record. While the prosecutor sought the record, defense counsel provided the court with information about Defendant. The court offered Defendant the opportunity to be heard and she apologized for her criminal conduct and acknowledged having "a criminal record."

C. *State v. Wade*

Many opinions by this Court provide precedents to affirm the judgment in the present case. Where a sentencing worksheet is the only proof of previous convictions submitted to the trial court, this Court will look to the record and dialogue between the parties to determine if a defendant stipulated to prior convictions. *State v. Wade*, 181 N.C. App. 295, 298, 639 S.E.2d 82, 86 (2007).

In *Wade*, the defendant failed to object to his sentencing worksheet. *Id.* at 299, 639 S.E.2d at 86. At sentencing, defense counsel spoke on behalf of the defendant and described mitigating factors to the trial court. *Id.* This Court held the defendant's failure to object, when he had the opportunity to do so, constituted a stipulation to the prior offenses. *Id.*

D. *State v. Eubanks*

In *State v. Eubanks*, 151 N.C. App. 499, 504-05, 565 S.E.2d 738, 742 (2002), after defendant Eubanks was convicted by a jury, the State submitted a sentencing worksheet that was not signed by the defendant or defense counsel. The trial court asked defense counsel if he had seen the worksheet and counsel answered affirmatively. *Id.* Further the court asked if he had any objections. *Id.* This Court held that the defendant's opportunity to object and his failure to do so clearly constituted his stipulation to his unsigned prior record level worksheet. *Id.* at 506, 565 S.E.2d at 742.

E. *State v. Hurley*

In *State v. Hurley*, 180 N.C. App. 680, 685, 637 S.E.2d 919, 923 (2006), the defendant was convicted by a jury of committing robbery. He failed to object to the convictions on his sentencing worksheet at sentencing. Instead of objecting to his sentencing worksheet, defense counsel

asked for the defendant to be placed on work release. *Id.* This Court held defense counsel's conduct constituted defendant's stipulation to his prior convictions. *Id.*

F. *State v. Mullinax*

In *State v. Mullinax*, 180 N.C. App. 439, 440, 637 S.E.2d 294, 295 (2006), the defendant pled guilty to second-degree murder. At the plea hearing, "after determining that there was no maximum sentence listed on the plea transcript, the trial court explained that it would calculate the sentence for defendant." *Id.* at 444, 637 S.E.2d at 297. The trial court asked the prosecutor and defense counsel if "two hundred and ninety-four months on the Level 2 sounded correct?" *Id.*, 637 S.E.2d at 298 (emphasis omitted). Both counsels answered affirmatively. *Id.*

This Court held the statements made defense counsel were to be "construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet." *Id.* at 445, 637 S.E.2d at 298. This Court further noted the numerous opportunities for the defendant and his counsel to interject: "(1) when the trial court asked if [the sentence term] was accurate; (2) when they reviewed and *defendant signed the Transcript of Plea*; (3) after the State's summary of the evidence; (4) during their *statements at the factual basis*; and (5) during the sentencing phase." *Id.* at 445-46, 637 S.E.2d at 298 (emphasis supplied). This Court also noted, as here, the defendant did not contest the prior convictions as listed on his worksheet. *Id.*

The majority opinion's attempt to explain away or diminish these precedents, all of which support affirming the trial court's judgment, is unpersuasive.

V. Set Aside Plea Arrangement

The majority's opinion concludes to "reverse and remand for a resentencing hearing on the charges of felonious breaking and entering, malicious conduct by a prisoner, and larceny of a motor vehicle." This mandate itself is error and is not supported by precedents.

"Although a plea agreement occurs in the context of a criminal proceeding, it remains contractual in nature. A plea agreement will be valid if both sides voluntarily and knowingly fulfill every aspect of the bargain." *State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993). As a bilateral contract where one party rejects the terms or breaches the performance, the proper mandate under the majority's conclusion is to vacate and set aside the plea arrangement. *State v. Green*,___ N.C. App. __, __ 831 S.E.2d 611, 618 (2019). This returns

the parties to status quo and results in Defendant facing all the original charges. *See id.* Rescission of the agreement by the non-breaching party and the parties' return to status quo is the remedy available in every contract. *Gilbert v. West*, 211 N.C. 465, 466, 190 S.E. 727, 728 (1937) ("When a court, in the exercise of its equitable jurisdiction, cancels a contract or deed, it should seek to place the parties in status quo[.]").

In *Green*, this Court held that the defendant's stipulation was invalid. This Court further held that since the sentence was imposed as part of a plea agreement, the "plea agreement must be set aside in its entirety, and the parties may either agree to a new plea agreement or the matter should proceed to trial on the original charges in the indictments." *Green*, __ N.C. App. at __ 831 S.E.2d at 618.

Green and its predecessor, *State v. Rico*, are controlling. *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting) (concluding plea agreement must be set aside and judgment must be vacated and remanded for disposition of original charge where trial court erroneously imposed aggravated sentence based solely upon defendant's plea agreement and stipulation to aggravating factor), *rev'd per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012).

The defendants in *Green* and *Rico* struck plea bargains with the State. *Green*, __ N.C. App. at __, 831 S.E.2d at 613; *Rico*, 218 N.C. App. at 111, 720 S.E.2d at 802. The issue in those cases is the same as here: was the plea bargain legally correct and binding? Once the appellate determinations were made, defendants Green and Rico were returned to the trial court to re-negotiate a new plea bargain with the State or proceed to trials on the original charges. *Green*, __ N.C. App. at __, 831 S.E.2d at 618; *Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809.

The results of *Green* and *Rico* are consistent with our Court's longstanding precedent of affording the defendant and the State the opportunity to re-negotiate a plea arrangement or proceed to trial where the plea arrangement was rejected or ruled invalid.

Ten years after this Court's formation, *State v. Fox* was decided. *State v. Fox*, 34 N.C. App. 576, 239 S.E.2d 471 (1977). In *Fox*, the defendant was charged by warrant with two counts of felony breaking and entering and larceny. *Id.* at 576, 239 S.E.2d at 472. The defendant pled guilty to two misdemeanor counts pursuant to plea arrangement in district court and then appealed for trial *de novo* in superior court. *Id.* at 577, 239 S.E.2d at 472. The superior court refused to allow a trial. *Id.*

This Court held that the defendant was entitled to trial *de novo* in superior court. *Id.* at 578, 239 S.E.2d at 473. However, the defendant at his new trial would be subject to the possibility of being tried on indictments for the original felonies. *Id.* at 579, 239 S.E.2d at 473. In the opinion authored by Chief Judge Brock, the Court held: "*Where a defendant elects not to stand by his portion of a plea agreement, the State is not bound by its agreement to forego the greater charge.*" *Id.* (emphasis supplied).

The cases cited in the majority's opinion, *State v. Murphy*, *State v. Bright* and *State v. Jones* do not support the majority's outcome. In those cases, the trial court, not a party, had erroneously veered from the plea arrangements, rather than the situation present here. Defendant has elected to challenge her own undisputed agreement, after she received everything the State had agreed to, and without showing any potential prejudice.

In *Murphy*, the trial court ordered restitution outside of the plea arrangement. *State v. Murphy*, __ N.C. App. __, 819 S.E.2d 604 (2018). The trial court had ordered restitution for victims of cases which had been dismissed. This Court held, "As defendant never agreed to pay restitution as part of the plea agreement, the invalidly ordered restitution was not an 'essential or fundamental' term of the deal. Accordingly, we hold the proper remedy here is not to set aside defendant's entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution." *Id.* at __, 819 S.E.2d at 609.

In *Bright*, the plea arrangement allowed the defendant to plead to a lesser included offense with sentencing in the trial court's discretion. *State v. Bright*, 135 N.C. App. 381, 382, 520 S.E.2d 138, 139 (1999). The court failed to make the required written findings of aggravation and mitigation. *Id.* In its brief, the State conceded the error. *Id.* at 383, 520 S.E.2d at 140. This was not a case of either party challenging their agreement. The judgment in *Bright* was properly remanded for resentencing. *Id.*

In *State v. Jones*, 66 N.C. App. 274, 280, 311 S.E.2d 351, 354 (1984), the trial court erroneously considered an additional aggravating factor in sentencing. This Court held "that the trial judge made numerous errors in his findings of factors in aggravation, and the defendant's sentence must be vacated and the case remanded for resentencing." *Id.*

The present case is also distinguishable from the facts of *Rodriguez*, where this Court allowed a defendant to be re-sentenced upon remand of his appeal of his plea arrangement. *Rodriguez*, 111 N.C. App. at 148, 431 S.E.2d at 792. In *Rodriguez*, the prosecutor violated the terms of the

plea arrangement. This Court held the prosecutor's actions constituted a due process violation and the only relief available was to abandon the arrangement and allow the defendant's sentencing hearing to be conducted before a different trial judge. *Id.*

Rodriguez and the factual and procedural backgrounds of the cases cited in the majority's opinion are wholly different from the present case. The State and Defendant each honored their agreement with a guilty plea and the State dismissed nineteen charges as a condition of the plea. Here, where Defendant seeks to undo the arrangement in an unmeritorious, but allowed petition before this Court, the only proper remedy is rescission and to vacate the plea arrangement and the judgment and return the parties to where they stood prior to the plea.

VI. Conclusion

Defendant has: (1) no right to appeal; (2) failed to preserve appellate review when she knowingly and voluntarily entered her guilty pleas; (3) failed to forecast, any basis to allow her petition for writ of certiorari; (4) presented no meritorious argument; and, (5) failed to demonstrate any prejudice.

The majority's opinion does not cite any basis to allow Defendant's petition and issue the writ or invoke Rule 2. Defendant pled guilty, she and her counsel both signed the Transcript of Plea, engaged in a plea colloquy with the trial judge, and she had ample opportunities to object to her sentencing calculation at her sentencing hearing.

Defendant and her counsel presented her prior history and her counsel discussed potential treatments for Defendant while she would serve her sentence. Defendant acknowledged her own prior criminal history to the Court. Defendant received the full benefit of her plea bargain, has not shown any prejudice, or that a different result will occur by setting aside her sentence.

The dialogue, colloquy, the conduct of counsel and Defendant, Defendant's failure to object to her sentencing calculation at the trial court, and her and counsel's signed Transcript of Plea and notation of "IV" at the punishment conviction level on the transcript are sufficient to sustain the State's burden that Defendant stipulated to her sentencing level. N.C. Gen. Stat. § 15A-1340.14(f)(1). Defendant's petition is entirely without merit. At no point in her brief or petition for certiorari does Defendant show merit, argue prejudice, assert the prior record level calculation is incorrect, or that she would be eligible to receive a different or lower sentence.

Defendant's plea bargain and prior record level calculation can be sustained under "[a]ny other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(4). I vote to affirm the trial court's judgment and sentencing of Defendant as a level IV offender. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
DIANNA MICHELLE CARTER, DEFENDANT

No. COA19-44

Filed 7 January 2020

1. Appeal and Error—preservation of issues—motion to dismiss—only some charges—different argument on appeal

In a prosecution for credit card fraud, where defendant used two different cardholders' information in six transactions, but where defense counsel only moved to dismiss two of defendant's six identity theft charges at trial for insufficient evidence, defendant's argument that the trial court should have denied all six charges was not preserved for appellate review. Moreover, with respect to the two charges that defense counsel moved to dismiss, defendant improperly raised a different argument on appeal than what defense counsel raised at trial.

2. Identity Theft—involving credit card fraud—fraudulent intent—sufficiency of evidence—effective assistance of counsel

In a prosecution for credit card fraud, where defendant used two different cardholders' information in six transactions, defendant did not receive ineffective assistance of counsel where her attorney did not move to dismiss all six charges of identity theft for insufficient evidence of fraudulent intent. Even if defendant's attorney had made that motion at trial, it would have been unsuccessful because the State presented substantial evidence (including defendant's confession, receipts from each transaction, and testimony from those she transacted with) showing that, even though defendant never stated the cardholders' names during these transactions or signed any receipts in their names, defendant intended to represent that she was either cardholder when she used their credit card information.

3. Identity Theft—involving credit card fraud—jury instructions—false or contradictory statements by defendant

In a prosecution for credit card fraud, where defendant used two different cardholders' information in six transactions, the trial court did not err by instructing the jury on defendant's prior false or contradictory statements to law enforcement about these transactions (at first, she told police that her ex-boyfriend and his girlfriend committed the identity theft, but she later admitted to police, both in person and in a handwritten confession, that she had done it). These statements were relevant to proving that defendant committed the charged crimes and provided "substantial probative force" tending to show she had a guilty conscience.

Appeal by Defendant from judgments entered 1 February 2018 by Judge Joshua W. Willey, Jr., in Duplin County Superior Court. Heard in the Court of Appeals 17 September 2019.

Attorney General Joshua H. Stein, by Deputy General Counsel Blake W. Thomas and Duplin County Assistant District Attorney Michele-Ellen Morton, for the State-Appellee.

Kimberly P. Hoppin for Defendant-Appellant.

COLLINS, Judge.

Defendant Dianna Michelle Carter appeals from judgments entered upon jury verdicts of guilty of financial card fraud, obtaining property by false pretenses, identity theft, and attaining habitual felon status. On appeal, Defendant argues that the trial court erred by denying her motion to dismiss the charges of identity theft for insufficient evidence and by instructing the jury on false or conflicting statements. We discern no error.

I. Procedural History

A jury found Defendant guilty in July 2017 of financial card fraud, obtaining property by false pretenses, identity theft, and attaining the status of habitual felon.[1] The trial court entered judgments upon the jury's

1. The charges were brought in two file numbers: 15 CRS 52497 (included four counts of identity theft involving the use of credit card information of two victims) and 17 CRS 111 (included two counts of identity theft involving the use of credit card information of one of the victims).

verdicts on 1 February 2018, sentencing Defendant to consecutive prison terms of 133 to 172 months and 96 to 128 months. Defendant gave oral notice of appeal in court.

II. Factual Background

The State's evidence at trial tended to show: On 29 August 2015, Corporal Jerry Wood of the Wallace Police Department received a phone call from the regional manager of Aaron's Rental ("Aaron's"), reporting suspected fraud by Defendant. Aaron's had been charged back for four credit card transactions wherein Defendant provided payment to Aaron's by credit card over the phone, and payment to the credit card companies was subsequently refused by the credit card holders. Wood learned in telephone interviews with the regional manager and the sales manager that Defendant called Aaron's on 8 June 2015 and 7 July 2015 to make payments on her own account at Aaron's, and on her daughter's account. Each time, Defendant identified herself as Dianna Carter and gave the sales manager a credit card number, expiration date, and security code for payment. The sales manager recognized Defendant's voice during the phone calls because the sales manager had spoken on the phone with Defendant several times before. The regional manager was also familiar with Defendant, as he had met with Defendant in person and spoken with her several times by phone.

Lieutenant James P. Blanton, Jr., took over as the lead investigator on the case. During his first interview with Defendant at the police station, Defendant told Blanton that "she didn't do it, that it was her exboyfriend and his girlfriend" who were responsible. When Defendant returned to the police station a few days later, she told Blanton that "she was the one that did it" and specifically admitted to the four transactions at Aaron's. Defendant explained that she had obtained credit card information through an online customer service job. Upon Blanton's request, Defendant returned to the station a couple of days later with a hand-written confession. In the signed statement, Defendant admitted that she had obtained other people's credit card information about a year earlier "through an at-home job." Although she intended when she obtained the information to use it right away, she did not do so until she later felt "backed into a corner" in June and July 2015, when she conducted the fraudulent transactions.

Blanton's investigation revealed that Defendant used the credit card information of Kathryn L. Griffin for two of the transactions at Aaron's and that of Janice K. Mooney for the other two transactions.

Blanton also learned that Defendant used Mooney's credit card information to make two purchases in person on 6 June 2015 at First Class Tanning in Wallace.[2] Defendant gave the credit card information, which Defendant had written on a piece of paper, verbally to the sales attendant and signed her own name on the receipts. First Class Tanning was charged back for both of these purchases when payment was refused by the credit card holder. The employees at First Class Tanning were familiar with Defendant because she had been a customer there for about five years.

At trial, the State presented evidence including Defendant's handwritten confession, testimony of Aaron's and First Class Tanning employees involved in the transactions, receipts for payments made at Aaron's, chargeback documents for the four Aaron's transactions, credit card statements and receipts for Griffin, bank records and a fraud statement for Mooney, and testimony by the investigating officers. Defendant did not present any evidence.

III. Discussion

A. Motion to Dismiss for Insufficient Evidence

Defendant contends that the trial court erred by denying her motion to dismiss the six charges of identity theft for insufficient evidence that Defendant "intended to represent that she was either Janice Mooney or Kathryn Griffin, or anyone other than herself, in any of these transactions."

Preservation of Argument for Appellate Review

[1] As a preliminary matter, we address the State's contention that Defendant's argument is not properly before us because Defendant's motion at trial only challenged the two counts of identity theft related to Kathryn Griffin and presented a different argument than Defendant now raises on appeal.

"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). A general motion to dismiss for insufficient evidence

2. File number 15 CRS 52497 included four counts of identity theft (two counts for using Griffin's credit card information at Aaron's and two counts for using Mooney's credit card information at Aaron's). File number 17 CRS 111 included two counts of identity theft for using Mooney's credit card information at First Class Tanning.

preserves a defendant's arguments on all elements of all charged offenses, even if the defendant proceeds to specifically argue about fewer than all of the elements or charges. *State v. Pender*, 243 N.C. App. 142, 153, 776 S.E.2d 352, 360 (2015). If, however, a defendant's motion to dismiss does not present a general challenge, and instead only challenges the sufficiency of the evidence of specific elements of specific offenses, the defendant preserves for appellate review only those arguments as to the specified elements of the specified offenses. *State v. Walker*, 252 N.C. App. 409, 413, 798 S.E.2d 529, 532 (2017).

Moreover, "the law does not permit parties to swap horses between courts in order to get a better mount before an appellate court." *Geoscience Grp., Inc. v. Waters Constr. Co.*, 234 N.C. App. 680, 691, 759 S.E.2d 696, 703 (2014) (internal quotation marks and citation omitted). "Consequently, when a defendant presents one argument in support of her motion to dismiss at trial, she may not assert an entirely different ground as the basis of the motion to dismiss before this Court." *State v. Chapman*, 244 N.C. App. 699, 714, 781 S.E.2d 320, 330 (2016) (citation omitted).

In this case, at the close of the State's evidence, Defendant moved to dismiss the two charges of identity theft which pertained to Kathryn Griffin, based on the argument that there was no evidence that those transactions were not authorized by Ms. Griffin, stating:

> Well, I think, at this time, it would be appropriate for me to make a motion. I don't know that I wish to be heard on all of the charges in the indictments, but there are some of them I would like to specifically . . . talk to the Court about.
>
> . . . .
>
> . . . . And those charges would deal with – in 15 CRS 52497, Ms. Carter is charged with numerous counts that deal with a Wells Fargo Bank Visa card that Ms. Kathryn Griffin was the holder of. . . .
>
> . . . .
>
> So the counts I pointed out there in 15 CRS 52497, financial card fraud being one; obtaining property being one; identity theft being one; I don't think any evidence about obtaining property by false pretense. I don't think there's been any evidence, if you take it in the light most favorable to the State, that those transactions

> weren't authorized by Ms. Griffin. And we would ask the Court to dismiss those. I don't wish to be heard as to the other charges.

Defendant renewed her motion to dismiss at the close of all of the evidence, "rel[ying] upon [her] earlier arguments," and her motion was denied.

Defendant does not raise the same argument on appeal, however. Instead, Defendant now argues that the trial court erred by denying her motion to dismiss the six charges of identity theft for insufficient evidence that Defendant "intended to represent that she was either Janice Mooney or Kathryn Griffin[.]" Defendant failed to preserve any argument as to the four charges of identity theft pertaining to Mooney. Likewise, Defendant failed to preserve the specific argument—that there was insufficient evidence that Defendant intended to represent that she was Griffin—which she now seeks to make on appeal. We thus decline to reach the merits of her argument. *See Chapman*, 244 N.C. App. at 714, 781 S.E.2d at 330.

Defendant argues that "[t]he interest of justice would be served if this Court reviewed the sufficiency of the evidence in this case" by invoking Rule 2 of the Appellate Rules to suspend or vary the preservation requirements.

An appellate court may address an unpreserved argument "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. However, "the authority to invoke Rule 2 is discretionary, and this discretion should only be exercised in exceptional circumstances in which a fundamental purpose of the appellate rules is at stake." *Pender*, 243 N.C. App. at 148-149, 776 S.E.2d at 358 (internal quotation marks, citations, and ellipsis omitted). This case does not involve exceptional circumstances, and we, in our discretion, decline to invoke Rule 2.

Ineffective Assistance of Counsel

[2] Alternatively, Defendant argues that her trial counsel provided ineffective assistance of counsel ("IAC") by failing to preserve this argument for appellate review.

Claims of ineffective assistance of counsel generally should be considered through motions for appropriate relief. *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, we may decide the merits of this claim because the trial transcript reveals that no further investigation is required. *See State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001)) ("[IAC] claims brought on direct review will be decided

on the merits when the cold record reveals that no further investigation is required . . . .").

To prevail on a claim for IAC, a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Banks, 367 N.C. 652, 655, 766 S.E.2d 334, 337 (2014) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To establish whether an attorney's error satisfies the first prong of *Strickland*, a defendant must overcome the strong presumption that defense counsel's conduct falls within the wide range of reasonable professional assistance. *State v. McNeill*, 371 N.C. 198, 219, 813 S.E.2d 797, 812-13 (2018) (internal quotation marks and citation omitted).

Defendant argues on appeal that Defendant's motion to dismiss would have been granted at trial because the State did not put on evidence that Defendant used the names of the two credit card holders, Griffin and Mooney, when she used their credit card information to make purchases. We disagree.

Denial of a motion to dismiss is proper if there is substantial evidence of each essential element of the offense and that the defendant was the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Jones*, 367 N.C. 299, 304, 758 S.E.2d 345, 349 (2014) (internal quotation marks and citation omitted) (explaining that evidence may be direct, circumstantial, or both). When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and give the State the benefit of "every reasonable inference supported by that evidence." *Id.*

A person is guilty of identity theft when she (1) "knowingly obtains, possesses, or uses identifying information of another person, living or

dead," (2) "with the intent to fraudulently represent that [she] is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences . . . ." N.C. Gen. Stat. § 14-113.20(a) (2015). Identifying information includes credit card numbers. N.C. Gen. Stat. § 14-113.20(b)(5) (2015).

"[I]ntent is seldom provable by direct evidence and ordinarily must be proved by circumstances from which it may be inferred." *State v. Hardy*, 299 N.C. 445, 449, 263 S.E.2d 711, 714 (1980). In *Jones*, the Supreme Court applied this well-settled principle to determining fraudulent intent for identity theft: "Based upon the evidence that [defendant] had fraudulently used other individuals' credit card numbers, a reasonable juror could infer that he possessed [the victims'] credit card numbers with the intent to fraudulently represent that [defendant] was those individuals for the purpose of making financial transactions in their names." *Id.* at 305, 758 S.E.2d at 350 (internal quotation marks and citation omitted).

Our Supreme Court also specifically addressed in *Jones* whether a literal interpretation of the "in the other person's name" language in the identity-theft statute is required to establish fraudulent intent. *See id.* at 306, S.E.2d at 350; N.C. Gen. Stat. § 14-113.20(a) ("with the intent to fraudulently represent that [she] is the other person for the purposes of making financial or credit transactions *in the other person's name*") (emphasis added). The defendant gave merchants fictitious names that were different from the card holders' names when making purchases with victims' credit card numbers. *Jones*, 367 N.C. at 305-06, 758 S.E.2d at 350. The defendant argued that N.C. Gen. Stat. § 14-113.20(a) required the State to prove that the defendant intended to represent to the merchants *that he was* each of the victims, "and not some other individual or an authorized user." *Id.* at 306, 758 S.E.2d at 350. The Court rejected this argument, explaining:

> We generally construe criminal statutes against the State. However, this does not require that words be given their narrowest or most strained possible meaning. A criminal statute is still construed utilizing common sense and legislative intent. Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. We cannot conclude that the Legislature intended for individuals to escape criminal

> liability simply by stating or signing a name that differs from the cardholder's name. Such a result would be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information.

Id. (internal quotation marks and citation omitted). "Because the State's evidence was sufficient to raise an inference of [the defendant's] fraudulent intent in possessing [the victims'] credit card numbers, the trial court did not err by denying [the defendant's] motion to dismiss the charge of identity theft." *Id.*

This case is analogous to *Jones*. Here, Defendant argues that this Court must strictly construe the statute and require the State to present evidence that Defendant intended to fraudulently represent that she *was* Griffin and Mooney for the purposes of making financial or credit transactions *in their names*. Defendant contends that she did not purport to the merchants to be Griffin or Mooney when she presented their credit card information, as Defendant did not verbalize or sign the victims' names when making the purchases. Defendant bolsters her argument by emphasizing that the Aaron's and First Class Tanning employees who processed the transactions were familiar with Defendant personally.

Notwithstanding the merchants' familiarity with Defendant, the State presented evidence that Defendant presented credit card information belonging to Griffin and Mooney in order to conduct transactions with the merchants. The State's evidence included Defendant's hand-written confession, testimony of Aaron's and First Class Tanning employees involved in the transactions, receipts for payments made at Aaron's, chargeback documents for the four Aaron's transactions, credit card statements and receipts for Griffin, bank records and a fraud statement for Mooney, and testimony by the investigating officers.

In light of this evidence that Defendant fraudulently used Griffin's and Mooney's credit card information, a reasonable juror could infer from the circumstances that Defendant possessed this information with the intent to fraudulently represent that she was Griffin and Mooney for the purpose of making financial transactions in their names, *see Hardy*, 299 N.C. at 449, 263 S.E.2d at 714, even if Defendant did not explicitly state the card holders' names or sign the credit card receipts in their names, *see Jones*, 367 N.C. at 306, 758 S.E.2d at 350. As the Supreme Court explained in *Jones*, a literal interpretation of the "in the other person's name" language in the identity-theft statute is not required, and demanding it here would lead to an absurd result—a person who fraudulently uses identifying information could "escape criminal liability

simply by stating or signing a name that differs from the cardholder's name." *Jones*, 367 N.C. at 306, 758 S.E.2d at 350.

Because the State presented substantial evidence of fraudulent intent, the trial court would have denied Defendant's motion to dismiss for insufficient evidence even if presented with this argument. Accordingly, defense counsel did not commit error, much less a serious error falling below the reasonableness standard set forth in *Strickland*, by failing to assert this futile argument. Defendant's argument that she was denied effective assistance of counsel is meritless.

B. Jury Instruction

[3] Defendant argues that the trial court committed reversible error by instructing the jury on Defendant's prior false or contradictory statements. Defendant contends that the instruction impugned her character and on this basis requests a new trial.

This Court reviews challenges to a trial court's decisions regarding jury instructions de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Under a de novo review, this Court "considers the matter anew and freely substitutes its judgment" for that of the lower court. *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973). Generally, a new trial is required if an error in jury instructions is prejudicial. *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009). Prejudice is established by a showing that " 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *Id.* (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

"Our Supreme Court has held that false, contradictory, or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate himself." *State v. Scercy*, 159 N.C. App. 344, 353, 583 S.E.2d 339, 344 (2003) (citations omitted). "The probative force of such evidence is that it tends to show consciousness of guilt." *Id.* (citation omitted).

A trial court may only use a jury instruction to this effect if the defendant's statement is relevant to proving that she committed the crime

and indeed provides "substantial probative force, tending to show consciousness of guilt." *State v. Walker*, 332 N.C. 520, 537, 422 S.E.2d 716, 726 (1992). "The instruction is proper not only where defendant's own statements contradict each other but also where defendant's statements flatly contradict relevant evidence." *Id.* at 537-38, 422 S.E.2d at 726. The instruction is inappropriate if it fails to make clear to the jury that the falsehood does not create a presumption of guilt. *State v. Myers*, 309 N.C. 78, 88, 305 S.E.2d 506, 512 (1983).

In Defendant's first statement to Blanton at the police station, she initially denied the crime and blamed it on her ex-boyfriend. However, in her second, hand-written statement, Defendant expressly stated:

> [T]o whom it may concern, I would like to admit to the fraudulent transactions . . . . These transactions were completed . . . by myself . . . . I obtained these numbers through an at-home job I was working. I have had these two numbers for about a year and never used. At the time of getting these, I had intentions of using them but never did because I rethought my actions. Then I was backed into a corner and didn't think – I am very sorry for my actions and will do what is necessary to keep from being prosecuted.

Thus, the trial court did not err in determining that Defendant made two conflicting statements. The trial court gave the following pattern jury instruction on false, contradictory, or conflicting statements by the defendant:

> The State contends, and the defendant denies, that the defendant made false, contradictory, or conflicting statements. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience seeking to divert suspicion or exculpate the person, and you should consider that evidence, along with all other believable evidence in this case. However, if you find that the defendant made such statements, they do not create a presumption of guilt and such evidence standing alone is insufficient to establish guilt.

See N.C.P.I.—Crim. 105.21 (2017).[3]

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3. North Carolina Pattern Jury Instruction 105.21 contains the following note: *NOTE WELL: This instruction is ONLY proper where the defendant's statements and/or trial testimony is contradictory to highly relevant facts proven at trial. HOWEVER, this*

In this case, it was proper for the jury to consider the existence of Defendant's false, contradictory, and conflicting statements as "a circumstance tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [her] self." *Scercy*, 159 N.C. App. at 353, 583 S.E.2d at 344. In her first statement to police, Defendant sought to exculpate herself by blaming her ex-boyfriend. Not only was Defendant's second statement contradictory to the first, but it was relevant to proving that she committed the crime, and it indeed provided "substantial probative force, tending to show consciousness of [her] guilt." *Walker*, 332 N.C. at 537, 422 S.E.2d at 726. Use of this jury instruction on these facts is consistent with the Supreme Court's application of the instruction because Defendant's own statements contradicted each other and they flatly contradicted evidence presented at trial. *See id.* at 537-38, 422 S.E.2d at 726. Moreover, the trial court made clear in the jury instruction that the statements "d[id] not create a presumption of guilt[,] and such evidence standing alone is insufficient to establish guilt." *Myers*, 309 N.C. at 88, 305 S.E.2d at 512. For these reasons, we conclude that the instruction was proper.

IV. Conclusion

We conclude that the trial court did not err by denying Defendant's motion to dismiss for insufficient evidence of identity theft or by instructing the jury regarding false or contradictory statements.

NO ERROR.

Judges BRYANT and YOUNG concur.

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instruction should NOT be used if the statements are completely irrelevant and without substantial probative force in tending to show a consciousness of guilt. EXTREME care should be used in first degree murder cases as such evidence may not be considered as tending to show premeditation and deliberation. . . . EXTREME care should also be taken to insure that the defendant's Fifth Amendment right to remain silent is not used against the defendant. N.C.P.I.—Crim. 105.21 (2017) (emphasis in original). As explained in Discussion, Part B, Defendant's contradictory statements are highly relevant to proving Defendant's "possess[ion] of a guilty conscience seeking to divert suspicion and to exculpate [her]self." *Scercy*, 159 N.C. App. at 353, 583 S.E.2d at 344. Thus, the jury instruction does not run afoul of the prohibitions or cautions contained in this note.

STATE OF NORTH CAROLINA
v.
THOMAS EUGENE CRANE, DEFENDANT

No. COA19-369

Filed 7 January 2020

Appeal and Error—waiver—invited error—admission of testimony—prosecution for driving while impaired

In a prosecution for driving while impaired after defendant crashed his moped into a car on the highway, defendant waived appellate review of his argument that the trial court committed plain error by admitting an officer's testimony about how and where the accident occurred. Defendant elicited the officer's testimony on cross-examination and even gave similar testimony when he took the witness stand, so any resulting error was invited error.

Appeal by Defendant from judgment entered 23 October 2018 by Judge William H. Coward in Macon County Superior Court. Heard in the Court of Appeals 17 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Heidi Reiner, for Defendant-Appellant.

COLLINS, Judge.

Defendant Thomas Eugene Crane raises one evidentiary issue on appeal from judgment entered upon a jury verdict of guilty of driving while impaired. Because Defendant has waived appellate review of this issue due to invited error, we dismiss the appeal.

I. Procedural History

Defendant was issued a citation for driving while impaired on 28 November 2015. He pled no contest to the offense in Macon County District Court on 17 January 2017 and was sentenced to 12 months' imprisonment, suspended for 36 months' probation. Defendant appealed to Macon County Superior Court. After a jury trial, the jury found Defendant guilty of driving while impaired. The trial court sentenced

Defendant to 10 months' imprisonment. Defendant gave notice of appeal in open court.

II. Factual Background

The State's evidence tended to show that Defendant was driving a moped on U.S. Highway 23 on 28 November 2015 at around 8:30 p.m., when he was struck by a car. When North Carolina State Highway Patrol Trooper Jonathan Gibbs arrived at the scene of the accident, emergency personnel were talking with Defendant and preparing to place him in an ambulance. The moped was in the grass to the right side of the road and was inoperable. Gibbs spoke with Defendant after he had been placed in the ambulance and noted that Defendant's eyes were red and glassy and that he had a strong odor of alcohol on his breath. When Gibbs asked Defendant if he had been drinking, Gibbs admitted to having "some drinks throughout the day." Defendant refused to take a portable breath test.

Gibbs also interviewed the driver of the car, who explained that he was driving about 40 miles per hour in the right lane of the highway when he came upon "a dim red light" that he believed was a tail light "all of the sudden in the right-hand lane." Although the driver of the car braked and swerved to the left, his car struck the moped.

Gibbs investigated the crash, making observations of the road and the vehicles and taking measurements that he later used to create a diagram and a crash report. Gibbs visited Defendant at the hospital, again detecting an odor of alcohol on his breath. When Gibbs asked Defendant for the second time if he had been drinking, Defendant admitted to having "some mixed drinks" and that he "did not stop drinking until after dark that night." Gibbs issued Defendant a citation for driving while impaired. Based upon results of a blood test performed at the hospital, it was later determined that Defendant's blood alcohol concentration was 0.16 grams of alcohol per 100 milliliters of whole blood.

III. Discussion

Defendant argues that the trial court plainly erred by admitting into evidence Gibbs' testimony about how and where the accident occurred. Defendant contends that this was improper lay opinion testimony because Gibbs did not witness the accident, and it was not admissible as expert testimony because Gibbs was not qualified as an expert in accident reconstruction.

The State argues that Defendant has waived his right to appellate review of this issue due to invited error. We agree.

"A defendant is not prejudiced by . . . error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443 (2018). "Thus, a defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review." *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001). "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *State v. Gobal*, 186 N.C. App. 308, 319, 651 S.E.2d 279, 287 (2007) (citation omitted). Moreover, where a defendant himself offered testimony that is similar to the testimony from the witness that defendant challenges on appeal, the defendant has waived his right to appellate review of any error that may have resulted from the admission of the challenged testimony. *State v. Steen*, 226 N.C. App. 568, 576, 739 S.E.2d 869, 876 (2013).

In this case, Defendant challenges the following testimony by Gibbs: (1) the moped was being driven in the right-hand lane at the time of the collision, and (2) the tire marks Gibbs observed indicated the point of impact. However, Gibbs did not give this challenged testimony on direct examination. Gibbs' testimony on direct examination about the observations and measurements he made at the scene of the accident included the following:

> [State]: And what happened when you got that call?
>
> [Gibbs]: I received a call from our communications center about a motor vehicle accident involving a moped and a car. When I arrived there was first responders, EMS, was already on the scene. Whenever I got out I noticed the moped was off to the right of the road, over in the grass. And a car was on up the road past that with its flashers on. When I exited the vehicle, my vehicle, I went up and was talking to EMS. At that time they was working with [Defendant] trying to get him into the ambulance.
>
> . . . .
>
> [State]: And after you spoke with the other driver, what happened?
>
> [Gibbs]: After that I got the measurements and everything I needed for that wreck. I got the wrecker to come for the moped. The driver of the vehicle 1, Mr. Warner, his vehicle was still -- he was going to have the other, the tow company, Ridgecrest Towing, it was still drivable. He was going to be able to get it to where he could still drive

home and not need a wrecker. Once that took place, I left there and went to the hospital to see [Defendant].

. . .

[State]: And the vehicle, this moped, could you kind of describe it for the jury?

[Gibbs]: At the time it was laying, the moped, was laying on its side over in the grass. It was a small, small moped. I think it was a TaoTao 2012 moped. Yes, 2012. And the moped itself would not be drivable in the condition that it was in from the wreck.

During cross-examination, defense counsel questioned Gibbs more about his observations and measurements at the scene of the accident:

[Defense Counsel]: Okay. And did you at some point then create some sort of diagrams that describe in effect the collision?

[Gibbs]: A diagram, yes, we -- yes.

[Defense Counsel]: And you do one just by hand basically?

[Gibbs]: We got one that we do which is – what that's for is it's at scene measurements diagram, yes.

[Defense Counsel]: And do you take the same information to create something on some sort of true graphic using some sort of software or something?

[Gibbs]: Yes.

[Defense Counsel]: And that's the same data that goes into both graphic depictions of the collision?

[Gibbs]: That would be correct. We would use the measurement sheet that we do on the side of the road, it's just a sketch to, you know, have all the like road width measurements and that stuff to later be entered into the what's called eCrash. It's a crash site that we use.

[Defense Counsel]: Okay. *And was it your conclusion that at the time of the collision the moped was in the middle of the right-hand lane traveling north?*

[Gibbs]: It was in the right-hand lane, yes, traveling north.

It is apparent from the transcript that the first challenged item of Gibbs' testimony—that the moped was being driven in the right-hand land at the time of the collision—was elicited by defense counsel during cross-examination. As a result, even if it would otherwise have been error to allow Gibbs to testify to the location of the vehicles in an accident without being tendered as an expert, the error was invited by Defendant, and thus Defendant cannot be prejudiced as a matter of law. *See Gobal*, 186 N.C. App. at 319, 651 S.E.2d at 287. *See State v. Rivers*, 324 N.C. 573, 575-76, 380 S.E.2d 359, 360 (1989) (citation omitted) (holding that defendant waived appellate review of a challenge to the admissibility of testimony because defense counsel elicited the testimony during cross-examination of the witness and failed to object to the testimony at trial). As a result of Defendant's invited error, he has waived appellate review of this testimony, including plain error review. *See Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416.

The State then asked Defendant on cross-examination about the testimony that Gibbs had already provided, as elicited by defense counsel:

> [State]: And you heard Trooper Gibbs testify that based on his investigation he believed your moped to be in the middle of the lane at the time of the impact, correct, you heard him say that?
>
> [Defendant]: That what he said on the stand but that's not . . . what he told my daughter and I. . . .
>
> . . . .
>
> The only conclusion I can draw from why he hit me is that he said he jerked it when he seen me. He had to be over on the shoulder when he first seen me. Because when he jerked it back, that's when he just barely missed me walking and hit the scooter.
>
> [State]: So to be clear, you're saying that he had to have been off over the white line in order to hit you?
>
> [Defendant]: Yes.
>
> [State]: Okay.
>
> [Defendant]: I'm not saying he had to be but that's the most logical conclusion that – because I know where I was at. Mr. Gibbs met my daughter and I out at the accident scene after I was released from the hospital. He helped us look

> for my keys that had flown out of the scooter for an hour, for about a good hour. At that point in time he showed me exactly *where the impact had taken place* because there was *two big black marks* right out to the side like that. And I couldn't understand why they were out to the side. *And he said that was where the tire exploded when the impact was made.* And it was that far from the white line, not nowhere near the middle of the road.

Thus, it is also apparent from the transcript that Defendant offered testimony about Gibbs' identification of the point of impact based on the tire marks. On rebuttal, the State echoed Defendant's testimony when asking Gibbs about his observation of tire marks:

> [State]: Trooper, when you conducted your wreck investigation did you see any tire marks in the roadway at the point of impact?
>
> [Gibbs]: Yes, sir.
>
> [State]: Where were those tire marks?
>
> [Gibbs]: In the center lane, as I diagram[m]ed on a HP-49A that is done at the scene of the investigation.

Defendant cannot now challenge Gibbs' rebuttal testimony regarding the point of impact based on the tire marks because Defendant himself had already offered testimony of similar character. *See Steen*, 226 N.C. App. at 576, 739 S.E.2d at 876. Defendant has thus waived appellate review of any error that may have resulted from the admission of this challenged testimony. *See id.*

IV. Conclusion

Because any error in admitting the officer's testimony was invited error, Defendant waived all review, including plain error review. Accordingly, Defendant's appeal is dismissed.

DISMISSED.

Judges ARROWOOD and HAMPSON concur.

STATE v. HOQUE

[269 N.C. App. 347 (2020)]

STATE OF NORTH CAROLINA
v.
EHTASHAM M. HOQUE, DEFENDANT

No. COA19-134

Filed 7 January 2020

1. Motor Vehicles—driving while impaired—sufficiency of evidence—signs of intoxication and odor of alcohol—controlled substances in blood—refusal to submit to intoxilyzer test

The State presented sufficient evidence to convict defendant of driving while impaired where a police officer found defendant slumped over and apparently sleeping in his car, which was idling in the middle of the road; officers detected a strong odor of alcohol on defendant's breath and observed other signs of intoxication; and defendant failed field sobriety tests. In addition, the presence of controlled substances in defendant's blood and defendant's refusal to submit to an intoxilyzer test each separately constituted sufficient evidence of impairment.

2. Police Officers—resisting a public officer—sufficiency of evidence—driving while impaired—blood draw

The State presented sufficient evidence to convict defendant of resisting a public officer where defendant resisted officers while they were attempting to investigate whether defendant had been driving while impaired, while they were arresting him for driving while impaired, and while they were attempting to execute a warrant to draw his blood.

3. Alcoholic Beverages—possession of an open container—sufficiency of evidence—open vodka bottle between driver's legs

The State presented sufficient evidence to convict defendant of possessing an open container of alcohol where officers observed an open bottle of vodka between defendant's legs while defendant was slumped over and apparently sleeping in the driver's seat of a running car that was idling in the middle of the road. The amount of alcohol missing from the container was irrelevant, and the fact that the officer poured out the container's contents went to the weight of the evidence rather than its sufficiency.

4. Search and Seizure—driving while impaired—blood draw—use of force—reasonableness

Police officers' use of force—pinning defendant to a hospital bed—to assist a nurse in taking a blood sample from defendant pursuant to a search warrant, when defendant refused to comply, was objectively reasonable and did not violate his Fourth Amendment rights.

5. Motor Vehicles—driving while impaired—blood draw—qualified person

In a driving while impaired case, the trial court's findings that police officers had a search warrant to obtain a blood sample from defendant, took defendant to the emergency room, and witnessed a nurse perform the blood draw were sufficient to support the conclusion that a qualified person (pursuant to N.C.G.S. § 20-139.1(c)) drew defendant's blood—even though the officers could not identify the nurse by name or offer evidence to prove her qualifications.

6. Appeal and Error—abandonment of issues—no citation to legal authority

Defendant's argument, that the trial court abused its discretion by admitting a vodka bottle that police officers had poured out, was deemed abandoned because defendant cited no legal authority in support of his argument.

7. Police Officers—body cameras—failure to use—during forced blood draw—due process rights

In a driving while impaired case, police officers' failure to use their body cameras, pursuant to department policy, during defendant's forced blood draw did not deny defendant his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). It could not be said that the State suppressed body camera evidence where none existed in the first place; further, defendant could not show that a body camera recording of the blood draw would have been favorable to him.

Appeal by Defendant from judgments entered 5 September 2018 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 22 August 2019.

Attorney General Joshua H. Stein, by Assistant Attorneys General Kathryne E. Hathcock and Jonathan E. Evans, for the State-Appellee.

Arnold & Smith, PLLC, by Paul A. Tharp, for Defendant-Appellant.

COLLINS, Judge.

Defendant Ehtasham Hoque appeals from judgments entered upon jury verdicts of guilty of driving while impaired and resisting a public officer, and responsible for possessing an open container of alcoholic beverage. Defendant argues that the trial court (1) erred by denying his motion to dismiss; (2) erred by denying his motion to suppress; (3) abused its discretion by admitting certain evidence; and (4) erred in determining that law enforcement officers did not violate his constitutional rights. We discern no error or abuse of discretion.

I. Procedural History

On 16 April 2018, Defendant was indicted for driving while impaired ("DWI"), resisting a public officer, and driving a motor vehicle on a highway with an open container of alcoholic beverage after drinking. A trial commenced on 4 September 2018. On the second day of the trial, Defendant filed a motion to suppress the results of a chemical analysis of Defendant's blood and requested special jury instructions on spoliation of evidence, specifically a vodka bottle and body-camera recordings. The trial court denied Defendant's motion to suppress the blood test results, agreed to give a spoliation instruction for the vodka bottle, and refused to give a spoliation instruction for the body-camera recordings. At the close of the State's evidence, Defendant made a motion to dismiss all charges for insufficient evidence. The trial court granted the motion as to misdemeanor possessing an open container after drinking, allowing an infraction charge of possession of an open container to go forward. The trial court denied the motion to dismiss as to the charges of DWI and resisting a public officer. On 5 September 2018, the jury found Defendant guilty of DWI and resisting a public officer, and responsible for possessing an open container.

The trial court entered judgment upon the jury's verdicts. Defendant timely appealed.

II. Factual Background

The State's evidence tended to show the following: At around 6:00 a.m. on 20 February 2018, Officer Joshua Richard of the Shelby Police Department was dispatched in response to a call reporting a stationary car in the middle of Earl Street. Upon his arrival, Richard observed a beige Toyota Prius in the "dead middle of the roadway" with its headlights turned on and the engine running. Richard approached the car and observed a male, later identified as Defendant, "slumped over appearing

to be asleep in the driver's seat." Richard did not see any other passengers in the car. When Richard knocked on the driver's side window, Defendant would not speak to him. Richard asked Defendant to roll down his window, but Defendant refused. Richard opened the door, asked Defendant his name, and engaged Defendant in conversation. Richard observed that Defendant was "groggy" and his breath smelled of alcohol.

While waiting for other officers to arrive, Richard tried to determine Defendant's name. Defendant produced a bank card as his only form of identification. Richard saw an open New Amsterdam vodka bottle in between Defendant's legs. Defendant then "revved his engine very high" and "pressed the gas." After Richard turned the engine off by depressing the keyless push-button, Defendant tried to restart the car several times. Richard realized he had not turned on his chest-mounted body camera, so he activated it at that time.

Defendant asked if he could pull the car forward and attempted to start the car "a couple more times," despite Richard telling him to stop. Defendant also stated that he was at home; Richard explained to Defendant that he was actually in the middle of the road. Richard observed that Defendant appeared "disheveled" and that his "eyes were very glossy and bloodshot-appearing."

Officers Smith, Kallay, Torres, and Hill arrived on the scene and activated their body cameras. Smith observed Defendant sitting in the driver's seat of the car and engaged Defendant in conversation. Defendant told Smith that "he had just a few sips [of alcohol] just a couple hours ago." Smith smelled a "very strong odor of alcohol" on Defendant's breath and noticed that Defendant's eyes were red and glassy, and that his movements were slow and labored. Smith thought Defendant's movements were labored due to alcohol consumption. Upon Smith's request, Defendant got out of the car for field sobriety testing. Smith performed a horizontal gaze nystagmus test; Defendant failed, showing all six signs of impairment. Defendant also failed a vertical gaze nystagmus test, which led Smith to believe that Defendant was "significantly high."

While Smith was performing the field sobriety tests, Torres observed that Defendant was "very slow to react" and had "red, glassy eyes" and "slurred speech." Defendant did not understand where he was or what time it was, and he had a hard time answering questions. Torres saw the open alcohol bottle between Defendant's legs.

Smith asked Defendant to provide a breath sample on the portable alcosensor. Although Defendant initially agreed, he refused 10 to 12 times when asked to give a sample. Defendant repeatedly placed

his hands in his pockets, which Smith told him not to do. Because Defendant was making Smith feel concerned for his own safety, Smith grabbed Defendant's right wrist to pull it out of Defendant's pocket and said, "The games are over. We're not going to put our hands back in our pockets anymore." After Defendant refused one last opportunity to provide a breath sample, Smith began to arrest him.

Because Defendant "tensed up" and "pulled his arms back," Richard and Torres assisted Smith in placing Defendant under arrest. Defendant continued to struggle with the officers, fell down to his knees, and began shouting and crying. Smith and Torres adjusted Defendant's handcuffs, and Defendant stopped shouting and crying. When Smith and Torres tried to place Defendant into the patrol car, Defendant was uncooperative and would not put his legs in the car. Torres grabbed Defendant's legs, placed them inside the car, and shut the door. Torres smelled alcohol on Defendant's breath. Kallay retrieved the vodka bottle and gave it to Smith. Smith poured the liquid out of the bottle in accordance with the police department's common practice and placed the bottle in the patrol car. After Defendant was in the back of the patrol car, Smith turned off his body camera.

Smith transported Defendant to the Law Enforcement Center annex for a chemical analysis of his breath and explained Defendant's implied consent rights to him. Smith did not have his body camera turned on while at the Law Enforcement Center annex, in violation of his department's policy. Defendant refused to sign the implied rights form and did not request an attorney. Smith gave Defendant one more opportunity to submit a breath sample. Defendant did not put his mouth on the intoxilyzer machine or attempt to blow. After Smith marked Defendant as refusing to provide a breath sample, Smith obtained a search warrant for Defendant's blood from the magistrate.

Smith transported Defendant to the hospital to have a blood sample taken. At the hospital, Defendant told the nurse that she did not have his permission to take his blood. Hospital staff told Smith that Defendant would need to be held down for the blood draw, because he was refusing to cooperate, despite the search warrant. Smith and Kallay placed Defendant in handcuffs and placed him on his stomach. Because Defendant was "somewhat combative and did not want his blood drawn," two nurses assisted the officers in holding Defendant down, and a nurse was able to draw Defendant's blood.

Defendant testified that he did not refuse to provide a blood sample but was only asking to see the search warrant. He also testified that a doctor and a nurse were in the hospital room with him when his blood

was collected. He said, "They forced me to the table. Not forced. They asked me to lay down." He also testified that unknown persons got on top of him, forced his head into a pillow, and forcibly drew his blood.

A chemical analysis of Defendant's blood by technicians at the North Carolina State Crime Laboratory revealed a blood alcohol concentration of 0.07 and the presence of the following substances: cannabinoids (specifically the substances tetrahydrocannabinol ("THC") and tetrahydrocannabinol carboxylic acid ("THCA")), amphetamine, and methamphetamine.

III. Issues Presented

Defendant presents the following issues on appeal: (1) the trial court erred by denying his motion to dismiss for insufficient evidence of each offense; (2) the trial court erred by denying his motion to suppress the results of the blood test; (3) the trial court abused its discretion by allowing into evidence the vodka bottle that police officers had emptied at the scene of the arrest; and (4) the trial court erred in determining that the officers' "intentional suppression" of body-camera recording evidence did not violate Defendant's constitutional rights.

IV. Discussion

A. Motion to Dismiss

Defendant first argues that the trial court erred by denying his motion to dismiss for insufficient evidence of each charge.

Upon a motion to dismiss for insufficient evidence, the trial court must determine whether the State presented "substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Worley*, 198 N.C. App. 329, 333, 679 S.E.2d 857, 861 (2009) (internal quotation marks and citation omitted). The trial court must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Fritsch*, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455 (2000). This Court reviews a trial court's denial of a motion to dismiss de novo. *State v. Moore*, 240 N.C. App. 465, 470, 770 S.E.2d 131, 136 (2015) (citation omitted).

1. Driving While Impaired

[1] Defendant argues that the trial court erred by denying his motion to dismiss the DWI charge, because the State failed to present sufficient evidence that Defendant drove a vehicle and was impaired.

Under N.C. Gen. Stat. § 20-138.1(a):

> A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or
>
> (3) With any amount of a Schedule I controlled substance, as listed in [N.C. Gen. Stat. §] 90-89, or its metabolites in his blood or urine.

N.C. Gen. Stat. § 20-138.1(a) (2018).

A person "drives" within the meaning of the statute if he is "in actual physical control of a vehicle which is in motion or which has the engine running." N.C. Gen. Stat. § 20-4.01(7) and (25) (2018) (noting that the terms "operator" and "driver" are synonymous). *See State v. Fields*, 77 N.C. App. 404, 406, 335 S.E.2d 69, 70 (1985) (holding that defendant sitting behind the wheel of a car in the driver's seat with the engine running drove within the meaning of the statute, even though defendant claimed that the car was running only to heat the car). An individual who is asleep behind the wheel of a car with the engine running is in actual physical control of the car, thus driving the car within the meaning of the statute. *State v. Mabe*, 85 N.C. App. 500, 504, 355 S.E.2d 186, 188 (1987).

In this case, when Richard responded to a call reporting a stationary vehicle on the road, he found Defendant in the driver's seat of the vehicle with the headlights on and the engine running. Initially, Defendant appeared to be asleep. When Richard was able to engage Defendant in conversation, Defendant asked if he could pull his car forward and repeatedly revved the engine. No other passengers were in the car. When Richard asked Defendant to exit the car, Defendant exited from the driver's side. This evidence was sufficient to establish that Defendant drove the car within the meaning of the statute. *See Fields*, 77 N.C. App. at 406, 335 S.E.2d at 70; *Mabe*, 85 N.C. App. at 504, 355 S.E.2d at 188.

Defendant also argues that the State did not provide sufficient evidence that he was impaired, because his blood alcohol concentration

was less than 0.08, and he only failed the horizontal gaze nystagmus test due to a medical problem.

The acts of driving while under the influence of an impairing substance, driving with a blood alcohol concentration of 0.08, and driving with a controlled substance or its metabolites in one's blood or urine are three "separate, independent[,] and distinct ways by which one can commit the single offense of [DWI]." *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984) (emphasis omitted). The trial court only instructed the jury on the driving while under the influence of an impairing substance prong. Thus, the State need not have presented evidence that Defendant had a blood alcohol concentration of 0.08 or above in order to have presented sufficient evidence of DWI. *See id.*

"The opinion of a law enforcement officer . . . has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol." *State v. Mark*, 154 N.C. App. 341, 346, 571 S.E.2d 867, 871 (2002) (citations omitted). Additionally, a defendant's blood alcohol concentration or the presence of any other impairing substance in the defendant's body, as shown by a chemical analysis, and a defendant's refusal to submit to an intoxilyzer test are admissible as substantive evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(a) (2018) (chemical analysis); N.C. Gen. Stat. § 20-139.1(f) (2018) (intoxilyzer refusal). An impairing substance is defined as alcohol, a controlled substance, "any other drug or psychoactive substance capable of impairing a person's physical or mental faculties," or any combination of these substances. N.C. Gen. Stat. § 20-4.01(14a) (2018). Amphetamine, methamphetamine, marijuana, and tetrahydrocannabinols are controlled substances, *see* N.C. Gen. Stat. §§ 90-89, 90-94 (2018), and are thus impairing substances within the meaning of the statute.

Here, Richard testified that he found Defendant slumped over and apparently sleeping in the driver's seat. Richard, Smith, and Torres detected a strong odor of alcohol on Defendant's breath and observed that Defendant's speech was slurred and that his eyes were red, watery, glassy, and bloodshot. Richard and Torres saw an alcohol bottle between Defendant's legs. Defendant was confused and disoriented, and he admitted that he had consumed alcohol. Smith observed that Defendant's movements were labored. Smith conducted horizontal and vertical nystagmus tests, which Defendant failed. Smith testified that Defendant mentioned having eye trouble but also displayed erratic behavior, leading Smith to believe that Defendant was impaired. Because the officers' opinions that Defendant was impaired were not based solely on the odor

of alcohol, they were sufficient evidence of impairment. *See Mark*, 154 N.C. App. at 346, 571 S.E.2d at 871.

Additionally, the State presented a chemical analysis of Defendant's blood, which indicated that it contained alcohol, THC, THCA, amphetamine, and methamphetamine. This was sufficient evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(a). Moreover, the State also presented evidence that Defendant refused to submit to an intoxilyzer test, which was also sufficient evidence of impairment. *See* N.C. Gen. Stat. § 20-139.1(f).

Viewed in the light most favorable to the State, this evidence was sufficient to support the conclusion that Defendant was "under the influence of an impairing substance" at the time of the arrest. *See* N.C. Gen. Stat. § 20-138.1(a)(1). Because the State presented sufficient evidence of each element of the DWI offense, the trial court properly denied Defendant's motion to dismiss.

2. Resisting a Public Officer

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of resisting a public officer for insufficient evidence. Defendant contends that any negative interactions he had with the police were due to his confusion and pain at the time of his arrest.

"If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of" the offense of resisting a public officer. N.C. Gen. Stat. § 14-223 (2018). "The conduct proscribed under [N.C. Gen. Stat. §] 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in the discharge of his duties." *State v. Lynch*, 94 N.C. App. 330, 332, 380 S.E.2d 397, 398 (1989) (holding that defendant resisted officers by "continu[ing] to struggle after the officers apprehended him" for the purpose of identifying him). *See also State v. Burton*, 108 N.C. App. 219, 225, 423 S.E.2d 484, 488 (1992) (explaining that obstruction may be direct or indirect opposition or resistance to an officer lawfully discharging his duty, and holding that defendant resisted officers when he spoke in a "loud and hostile manner" while standing beside an officer's patrol car, because defendant's behavior interfered with the officer's attempt to use his radio to check the vehicle registration). The State "does not have to prove that the officer was permanently prevented from discharging his duties by defendant's conduct." *Id.*

In this case, Defendant impeded the officers' attempts to fulfill their duties at three different points. First, when Richard approached Defendant's car and asked Defendant to roll down his window so Richard could speak with him, Defendant refused. Defendant also attempted to start the car several times and revved the engine after Richard ordered him to stop. Defendant would not provide a breath sample when asked 10 to 12 times to do so. When Smith conducted the horizontal gaze nystagmus test, Defendant continued to place his hands in his pockets after being told several times to keep his hands down by his sides. Through these actions and his inaction, Defendant directly opposed the officers in their efforts to discharge their investigative duties of identifying him, speaking with him, and performing field sobriety tests. Thus, Defendant resisted the officers within the meaning of the statute, *see Lynch*, 94 N.C. App. at 332, 380 S.E.2d at 398, even though the officers were eventually able to fulfill their investigative duties, *see Burton*, 108 N.C. App. at 225, 423 S.E.2d at 488.

Defendant also resisted the officers while being arrested. Defendant "tensed up" and refused to cooperate when Smith tried to handcuff him, which required Smith, Richard, and Torres to work together to gain control of Defendant. Defendant then fell to the ground and started shouting and crying when the officers tried to move him to the patrol car. Defendant refused to place his legs inside the patrol car, so Torres had to grab Defendant's legs and put them inside the car in order to close the door. Thus, Defendant also resisted, delayed, and obstructed officers in their efforts to place him under arrest and put him in the patrol car. *See Lynch*, 94 N.C. App. at 332, 380 S.E.2d at 398.

Finally, Defendant resisted, delayed, and obstructed officers at the hospital when they attempted to execute a search warrant to draw blood. Defendant refused to give a nurse permission to draw his blood, so Smith placed Defendant on his stomach while Defendant was handcuffed. Because Defendant was still resisting the blood draw and was combative, Smith, Kallay, and two nurses held Defendant down in order to collect a blood sample. Thus, Defendant also resisted, obstructed, and delayed officers in their efforts to execute the search warrant. *See id.*

Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence that Defendant resisted, obstructed, and delayed public officers as they attempted to discharge their duties of investigation, arrest, and execution of a search warrant. Accordingly, the trial court did not err by denying Defendant's motion to dismiss this charge.

3. Possessing an Open Container

[3] Defendant also argues that the trial court erred by denying his motion to dismiss for insufficient evidence the offense of possessing an open container, because Richard testified that the bottle did not have a significant amount of alcohol missing from it, and Smith admitted pouring out the bottle's contents.

"No person shall possess an alcoholic beverage other than in the unopened manufacturer's original container, or consume an alcoholic beverage, in the passenger area of a motor vehicle while the motor vehicle is on a highway or the right-of-way of a highway." N.C. Gen. Stat. § 20-138.7(a1) (2018). In *State v. Squirewell*, 256 N.C. App. 356, 808 S.E.2d 312 (2017), this Court affirmed the denial of a defendant's motion to dismiss for insufficient evidence of possessing an open container. The Court based its holding on the following:

> Besides the evidence that there was an open can of beer near the console area of the vehicle defendant was driving, which was visible to the state trooper upon his approach to the driver's side of the vehicle, the evidence also showed that defendant initially provided the state trooper a false name, defendant's eyes were red and glassy, there was a strong odor of alcohol coming from the vehicle, and defendant's speech was slurred. The state trooper further testified that he had defendant come back to his patrol car for further questioning. At that time, the trooper noticed an odor of alcohol on defendant's breath . . . .

Id. at 363, 808 S.E.2d at 318.

The evidence in this case is similarly sufficient. Richard and Torres testified that they saw an opened bottle of New Amsterdam vodka in between Defendant's legs while Defendant was seated in the driver's seat of a running car parked on Earl Street. The officers testified that the bottle contained liquid, which Smith poured out at the scene of the arrest. Richard testified that he found Defendant slumped over and apparently asleep in the driver's seat. Richard, Smith, and Torres detected a strong odor of alcohol on Defendant's breath and observed that Defendant's speech was slurred and that his eyes were red, watery, glassy, and bloodshot. Smith observed that Defendant's movements were labored. Defendant was confused and disoriented, and he admitted that he had consumed alcohol.

Defendant argues that, because Richard testified that the bottle did not have a significant amount of alcohol missing when he found it, and Smith admitted pouring out the contents, that the State failed to present substantial evidence of the offense. However, the amount of alcohol missing from the container is irrelevant for purposes of this offense, because a container is opened "[i]f the seal on [the] container of alcoholic beverages has been broken." N.C. Gen. Stat. Section 20-138.7(f) (2018). Additionally, the fact that Smith poured out the contents of the container goes to the weight of the evidence, not its sufficiency.

Viewed in the light most favorable to the State, this was sufficient evidence that Defendant "possess[ed] an alcoholic beverage other than in the unopened manufacturer's original container." *See* N.C. Gen. Stat. § 20-138.7(a1). Accordingly, the trial court did not err by denying Defendant's motion to dismiss this offense.

B. Motion to Suppress

Defendant next argues that the trial court erred by denying his motion to suppress the results of the blood test.

As a threshold issue, the State argues that Defendant failed to preserve this issue for appellate review, because Defendant failed to move for suppression prior to trial. Although Defendant did not move for suppression prior to trial, the trial court, in its discretion, heard the motion and denied it on its merits. Defendant's argument is thus properly before us. *See State v. Detter*, 298 N.C. 604, 619, 260 S.E.2d 567, 579 (1979) (reviewing a constitutional question presented in defendant's motions to suppress despite their untimeliness, because the trial court considered and overruled them on their merits).

This Court reviews a trial court's ruling on a motion to suppress to determine whether the "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 . . . ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We review a trial court's conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

1. Officers' Use of Force

[4] Defendant first argues that the trial court erred by denying his motion to suppress the results of the blood test, because Defendant's blood was drawn by excessive and unreasonable force, in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.

In its written order denying the motion to suppress, the trial court included 72 paragraphs of interspersed findings of fact and conclusions of law. Findings relevant to the force used in connection with obtaining Defendant's blood sample include:

> 3. Officer Smith asked [Defendant] 10-12 times to blow into the alcosensor device.
>
> 4. [Defendant] never provided a sample for the portable breath test.
>
> 5. When officers attempted to handcuff [Defendant], he tensed up and the officers forced him onto the hood of a patrol vehicle.
>
> 6. [Defendant] was placed in handcuffs and put into a patrol car.
>
> 7. [Defendant] started screaming after he was handcuffed. Once the handcuffs were adjusted, he stopped screaming.
>
> 8. [Defendant] was transported to the law enforcement annex for an intoxilyzer test.
>
> 9. After being advised of his rights, [Defendant] refused to sign the rights form.
>
> 10. [Defendant] did not provide a breath sample. He never put his mouth on the tube or attempted to blow into the machine.
>
> 11. After asking [Defendant] multiple times to provide a breath sample, [O]fficer Smith recorded the result of the intoxilyzer test as a "Refusal."
>
> 12. Smith then prepared an application for a search warrant to take a blood sample from [Defendant].
>
> 13. After the magistrate issued the search warrant, Smith took [Defendant] to the hospital in order to obtain the blood sample.
>
> 14. At the emergency room, Smith advised the charge nurse that he had a search warrant for a blood sample.
>
> 15. Smith also advised [Defendant] that he had a search warrant to take a blood sample.
>
> 16. Officer Smith read the search warrant to [Defendant].

17. Officer Smith did not indicate whether he gave [Defendant] a copy of the search warrant.

18. Officer Smith took [Defendant] to a room in the emergency room and they waited for a nurse.

19. Smith indicated that a nurse came to perform the blood draw.

20. [Defendant] also indicated that a nurse was in the room.

21. Smith observed the blood draw and the nurse signed on the rights form.

22. Officer Smith did not recall the name of the nurse and he could not read the signature on the rights form.

23. Hospital personnel obtained an EKG from [Defendant] prior to taking the blood sample to check on his medical condition.

24. The nurse asked [Defendant] if he minded if she took his blood and [Defendant] replied that she could not have his blood.

25. [Defendant] advised the nurse that she could not take his blood.

26. [Defendant] tensed up and told the nurse that she was not going to take his blood.

27. [Defendant] was handcuffed as he sat on a bed in the room waiting to have his blood drawn.

28. [Defendant] was combative and would not allow his blood to be drawn.

29. [Defendant] testified that he would not agree for his blood to be taken without a search warrant.

30. [Defendant] testified that he was never given a copy of the search warrant.

31. [Defendant] testified that he did not object to giving a blood sample and that he was willing to provide the sample. The Court does not find these statements to be credible.

> 32. The officers pinned [Defendant] to the bed in order to take his blood.
>
> 33. [Defendant] in this case does not challenge the validity of the search warrant to take samples of his blood. Instead, [Defendant] challenged the use of force to take these samples despite [Defendant's] resistance to the execution of the search warrant.

Defendant argues that findings of fact 16 and 21 are not supported by competent evidence.[1] We disagree. Smith's testimony indicating that he read the search warrant to Defendant at the hospital and that Smith was present and aware that a nurse was drawing Defendant's blood provide competent evidence to support both findings of fact. The remaining, unchallenged findings of fact are binding on appeal. *State v. Taylor*, 178 N.C. App. 395, 412-13, 632 S.E.2d 218, 230 (2006) (citation omitted).

Defendant also argues that that the findings of fact do not support the trial court's conclusion of law 57: "The force used to execute the search warrant in this instance was not unreasonable under the Fourth Amendment."

Schmerber v. California, 384 U.S. 757 (1966), is the seminal case involving the forced extraction of blood from an accused. In *Schmerber*, the Court held that blood alcohol evidence could be taken without a driving-under-the-influence suspect's consent and without a warrant when probable cause and exigent circumstances existed, e.g., rapid elimination of blood alcohol content by natural bodily functions. *Id.* at 770-771. However, the *Schmerber* Court emphasized that a blood draw remains subject to Fourth Amendment standards of reasonableness. *Id.* at 768. Specifically, the procedure must be conducted without unreasonable force and in a medically acceptable manner. *Id.* at 771.

In *Graham v. Connor*, 490 U.S. 386 (1989), the Court clarified that "all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* at 395. "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth

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1. Defendant also argues that "[t]he trial court's findings and conclusions in Paragraphs 34 through 45 of its Order are not supported by competent evidence, and the findings fail to support the court's legal conclusions." However, Paragraphs 34 through 45 contain no findings of fact, but consist mainly of recitation of legal rules from applicable case law.

Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* at 396 (citation omitted). "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' " *id.* (citation omitted), its application

> requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Courts have likewise analyzed claims of excessive force in effectuating a blood draw under a reasonableness standard. *See Schmerber*, 384 U.S. at 768.

Defendant cites no published North Carolina case law analyzing an officer's use of force in effectuating a search warrant to draw a defendant's blood, and our research reveals none.[2] The trial court relied upon *United States v. Bullock*, 71 F.3d 171 (5th Cir. 1995), wherein that court considered whether the force used during a blood draw authorized by a search warrant was excessive. In *Bullock*,

> the FBI obtained a search warrant to obtain samples of [the defendant's] blood and hair for DNA and other analysis. [The defendant] refused to comply with the warrant, so a seven member "control team" was used to subdue him and get the blood and hair samples. [The defendant] was cuffed and shackled between two cots that were strapped together. He physically resisted by kicking, hitting and attempting to bite the agents. A towel was placed on [the defendant's] face because he was spitting on the agents. A registered nurse took blood from [the defendant's] hand and then combed and plucked twenty hair samples from his scalp.

Id. at 174.

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2. In an unpublished opinion, this Court determined that the findings of fact supported the trial court's conclusion that the defendant's blood draw was performed pursuant to a valid search warrant, which was executed in a reasonable manner. *State v. Davis*, 243 N.C. App. 675, 779 S.E.2d 787 (2015).

The *Bullock* court concluded that "[t]he use of force in taking the samples was caused by [the defendant's] refusal to comply with a lawful warrant and was reasonable." *Id.* at 176. "When [the defendant] resisted the sample-taking, the agents used the force necessary to restrain him while samples were taken." *Id.* Noting that the defendant "had no right to resist execution of a search warrant [and i]n fact, his actions may even have risen to the level of criminal conduct [under] . . . 18 U.S.C. § 111 (assaulting or resisting a federal agent carrying out duties punishable by up to three years in prison)[,]" *id.* at 176 n.4, the court explained that the defendant "was given multiple opportunities to comply with the warrant; he was the one who decided that physical force would be necessary." *Id.* at 176. It was the defendant's "refusal to comply with a lawful warrant which forced the situation." *Id.* at 177. The court explained that a defendant "cannot resist a lawful warrant and be rewarded with the exclusion of evidence." *Id.*

In this case, the officers were authorized to require Defendant to provide a blood sample, because they possessed a valid search warrant. *See* N.C. Gen. Stat. § 15A-241 (2018) ("A search warrant is a court order and process directing a law-enforcement officer to search designated . . . persons for the purpose of seizing designated items and accounting for any items so obtained to the court which issued the warrant."). Defendant's blood was drawn by medical personnel, *see* § III.B.2., *infra*, in a hospital, which the U.S. Supreme Court has identified as a reasonable manner in which to draw blood. *See Schmerber*, 384 U.S. at 771 (emphasizing the importance of defendant's health and safety by contrasting the described acceptable conditions—by medical personnel in a hospital—with unreasonable conditions that threaten "personal risk of infection and pain," such as police officers drawing blood in the privacy of a police station). Regarding the officers' use of force, we are persuaded by the reasoning in *Bullock* and conclude that the use of force in taking the blood sample in this case was caused by Defendant's refusal to comply with a lawful warrant and was reasonable.

Defendant admitted that he was initially asked to lie down so that his blood could be drawn. When Defendant refused and resisted the blood draw, the officers used the force necessary to restrain him while the sample was taken. Defendant had no right to resist execution of a search warrant and, in fact, his actions rose to the level of criminal conduct under N.C. Gen. Stat. § 14-223, for resisting a public officer. *See* § III.A.2., *supra*. As in *Bullock*, Defendant was given multiple opportunities to comply with the warrant, and it was his "refusal to comply with a lawful warrant which forced the situation." *See Bullock*, 71 F.3d at 177.

Defendant "cannot resist a lawful warrant and be rewarded with the exclusion of evidence." *See id.*

In summary, the trial court's findings of fact support a conclusion that the officers' use of force was objectively reasonable in light of the facts and circumstances confronting the officers at the time they executed the search warrant. *See Graham*, 490 U.S. at 395-97. Therefore, the trial court's findings of fact support its legal conclusion that the force used to execute the search warrant was not unreasonable under the Fourth Amendment. Accordingly, the trial court did not err by denying Defendant's motion to suppress the results of the blood test on this ground.

2. Qualifications of Medical Professional

[5] Defendant also argues that the trial court erred by denying his motion to suppress the results of the blood test, because the State did not meet its burden to demonstrate that the person who drew the blood was qualified.

When a law enforcement officer requires a blood test to be administered, "a physician, registered nurse, emergency medical technician, or other qualified person shall withdraw the blood sample." N.C. Gen. Stat. § 20-139.1(c) (2018). An officer's trial testimony regarding the qualifications of the person who withdrew the blood is sufficient evidence of the person's qualifications. *See, e.g.*, *State v. Hinchman*, 192 N.C. App. 657, 663, 666 S.E.2d 199, 203 (2008) (holding that an officer's testimony that the person who drew defendant's blood worked in a restricted area in a blood lab and wore a lab technician's uniform was sufficient to establish qualification under the statute); *Richardson v. Hiatt*, 95 N.C. App. 196, 199, 381 S.E.2d 866, 868 (1989) (holding that an officer's testimony that a nurse authorized to draw blood in fact drew blood satisfied the State's burden to show qualification); *State v. Watts*, 72 N.C. App. 661, 664, 325 S.E.2d 505, 507 (1985) (holding that an officer's testimony that a blood technician at a hospital drew the blood sample was sufficient to show that blood was drawn by a qualified person).

The trial court made the following relevant findings of fact:

> 14. At the emergency room, Smith advised the charge nurse that he had a search warrant for a blood sample.
>
> . . . .
>
> 18. Officer Smith took [Defendant] to a room in the emergency room and they waited for a nurse.

> 19. Smith indicated that a nurse came to perform the blood draw.
>
> 20. [Defendant] indicated a nurse was in the room.
>
> 21. Smith observed the blood draw and the nurse signed on the rights form.
>
> 22. Officer Smith did not recall the name of the nurse and he could not read the signature on the rights form.
>
> . . . .
>
> 24. The nurse asked [Defendant] if he minded if she took his blood and [Defendant] replied that she could not have his blood.
>
> 25. [Defendant] advised the nurse that she could not take his blood.
>
> . . . .
>
> 60. The individual who drew [D]efendant's blood was not identified by name and no evidence was offered to prove this individual's qualifications.

Defendant does not challenge any of these findings; they are thus binding upon us. *See Taylor*, 178 N.C. App. at 412-13, 632 S.E.2d at 230.[3] These findings support the trial court's conclusion that that "[t]he evidence offered in this case was sufficient to prove that a qualified person drew [Defendant's] blood." *See*, *e.g.*, *Hinchman*, 192 N.C. App. at 663, 666 S.E.2d at 203; *Richardson*, 95 N.C. App. at 199, 381 S.E.2d at 868; *Watts*, 72 N.C. App. at 664, 325 S.E.2d at 507.

As the State met its burden to demonstrate that the person who drew the blood was qualified within the meaning of N.C. Gen. Stat. § 20-139.1(c), the trial court did not err by denying Defendant's motion to suppress the results of the blood test on this ground.

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3. Defendant argues that "[t]he trial court's findings that 'a law enforcement officer testified that the sample was drawn by a blood technician at the hospital' and 'the only evidence before the trial court was that a nurse was present to withdraw the blood, and there was no evidence to the contrary,' were not supported by competent evidence." Defendant's challenge is misguided as the trial court made no such findings; the challenged statements were portions of conclusions of law citing supporting authority.

C. Admission of Evidence

[6] Defendant next asserts that "[t]he trial court abused its discretion when it admitted into evidence, over [Defendant's] objection, a bottle purporting to have contained some quantity of vodka, which the State's officers admitted to destroying prior to [Defendant's] trial."

Defendant notes that "[a]t trial, the trial court overruled [Defendant's] objections to the admission of a vodka bottle found in a vehicle on the grounds that the contents of the bottle had been destroyed and the chain-of-custody of the bottle had not been properly established." Defendant's sole argument on appeal is that he is entitled to a new trial as a result of the trial court's admission of the bottle into evidence, because it was prejudicial, i.e., there was "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" *See State v. Hawk*, 236 N.C. App. 177, 180, 762 S.E.2d 883, 885 (2014) (internal quotation marks and citation omitted).

However, as we would only reach a prejudice analysis after determining that the admission of the evidence was erroneous, and Defendant cites no legal authority on appeal as to why the trial court's admission of the bottle into evidence was erroneous, Defendant's argument is thus deemed abandoned. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned. . . . The body of the argument . . . shall contain citations of the authorities upon which the appellant relies.").

D. Officers' Use of Body Cameras

[7] In his final argument, Defendant presents the following issue on appeal: "The trial court erred in its determination that the intentional suppression of body-camera recording evidence did not violate [Defendant's] rights under the Sixth and Fourteenth Amendments to the Constitution of the United States." Citing *State v. Williams*, 362 N.C. 628, 669 S.E.2d 290 (2008), Defendant "respectfully requests that the Court of Appeals dismiss the prosecution against him or, in the alternative, award him a new trial."

We first address the State's contention that this issue is not properly before us. The sole legal argument advanced on appeal is that "[t]he intentional decisions of Officers Richard and Smith not to employ their body cameras in a manner consistent with police policy . . . served to deny [Defendant] his due process rights under *Brady v. Maryland*[,]" 373 U.S. 83 (1963). Due process rights are Fourteenth Amendment rights. *See* U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any

person of life, liberty, or property, without due process of law . . . ."). As Defendant makes no Sixth Amendment argument on appeal, that portion of Defendant's issue is deemed abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Turning to Defendant's Fourteenth Amendment argument on appeal, Defendant has not preserved for appellate review any argument that the trial court erred by failing to dismiss the prosecution against him due to a *Brady* violation, because Defendant failed to move to dismiss the case for such a violation. In *Williams*, which Defendant cites in support of his argument, our Supreme Court affirmed the Court of Appeals, which had affirmed a trial court's order allowing the defendant's motion to dismiss a criminal charge for prosecutorial misconduct under N.C. Gen. Stat. § 15A-954(a)(4). *Williams*, 362 N.C. at 639-40, 669 S.E.2d at 298-99. Pursuant to that section,

> The court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that: . . . [t]he 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) (2018). In a pretrial hearing in *Williams*, the State "admitted to the existence, possession, and destruction of material evidence favorable to defendant and acknowledged that it was impossible to produce the evidence at that time or, by implication, at any future trial." *Williams*, 362 N.C. at 629, 669 S.E.2d at 292. Based on these circumstances, the Court concluded that "the State flagrantly violated defendant's constitutional rights and irreparably prejudiced the preparation of his defense." *Id.* Accordingly, the Court found the requirements of N.C. Gen. Stat. § 15A-954(a)(4) satisfied and affirmed the order allowing the motion to dismiss. *Id.*

Unlike in *Williams*, Defendant in this case did not move to dismiss the charges in the trial court pursuant to N.C. Gen. Stat. § 15A-954(a)(4). We are therefore precluded from reviewing any denial of such motion, and Defendant's request that this Court "dismiss the prosecution against him" is itself dismissed.[4]

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4. Defendant also argued at trial that he was entitled to a spoliation of the evidence instruction based on the officers' failure "to record the entire encounter." Defendant does

However, Defendant did argue at the suppression hearing that the officers' failure "to record the forcible withdrawal of blood [was] . . . a due process violation, and it's a violation of departmental policy." Defendant now argues on appeal that the officers' failure to record the encounter "served to deny [Defendant] his due process rights under *Brady v. Maryland*." We thus address whether the trial court erred by denying his motion to suppress, such that he may be entitled to a new trial, because Richard's and Smith's failure to employ their body cameras in a manner consistent with police policy denied Defendant his due process rights under *Brady*.

This Court reviews alleged violations of constitutional rights de novo. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

In *Brady*, the Supreme Court of the United States determined that the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires in state criminal cases "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." *Brady*, 373 U.S. at 87. Evidence favorable to an accused can be either impeachment evidence or exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is "material if there is a reasonable probability of a different result had the evidence been disclosed." *State v. Berry*, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (internal quotation marks and citation omitted).

First, we cannot conclude that the State "suppressed" the body-camera video, because the State never possessed it; it never existed. Under *Brady*, the State is required "to disclose only those matters in its possession." *State v. Thompson*, 187 N.C. App. 341, 353, 654 S.E.2d 486, 494 (2007) (internal quotation marks and citation omitted). Defendant essentially asks this Court to extend *Brady's* holding to include evidence not collected by an officer, which we decline to do.

Moreover, Defendant cannot show that video of the blood draw, if collected, would have been favorable to him; it may have corroborated the officers' testimony. Although the officers' failure to record the interaction violated departmental policy, such violation did not amount to a denial of Defendant's due process rights under *Brady* in this case.

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not argue on appeal that the trial court erred in refusing to give this instruction, and it is therefore deemed abandoned. *See* N.C. R. App. P. 28.

Accordingly, the trial court did not err in denying Defendant's motion to suppress.

V. Conclusion

We conclude that the trial court did not (1) err by denying Defendant's motion to dismiss; (2) err by denying Defendant's motion to suppress; (3) abuse its discretion by admitting certain evidence; or (4) err in determining that law enforcement officers did not violate Defendant's constitutional rights.

AFFIRMED IN PART; NO ERROR IN PART.

Judges BERGER and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
LEONARD SCHALOW, DEFENDANT

No. COA19-215

Filed 7 January 2020

1. Criminal Law—vindictive prosecution—after successful appeal—presumption of vindictiveness

The State violated defendant's due process rights by vindictively prosecuting him after he successfully appealed a conviction by charging him with new crimes for the same underlying conduct. Defendant was entitled to a presumption of prosecutorial vindictiveness because the new charges carried significantly increased potential punishments and the same prosecutor had tried the prior case; the State failed to overcome the presumption where the prosecutor stated that his charging decision was conditioned on the outcome of defendant's appeal of his original conviction and that he would do everything he could to ensure that defendant remained in custody for as long as possible.

2. Criminal Law—joinder—failure to join charges—prosecutor's awareness of evidence—same evidence in second trial

The State impermissibly failed to join related charges—based on the same alleged conduct—against defendant as required by N.C.G.S. § 15A-926 where the prosecutor was aware during the first trial of substantial evidence that defendant had also committed the

crimes for which he was later indicted (in a second trial, after he successfully appealed his original conviction) and where the State's evidence at the second trial would be the same as the evidence presented at the first. Because the State offered no good explanation for its failure to join all of the charges in one trial, the Court of Appeals concluded that the prosecutor withheld the later indictments in order to circumvent section 15A-926 and that defendant was entitled to dismissal of the charges.

Appeal by Defendant from order entered 7 August 2018 by Judge W. Robert Bell in Henderson County Superior Court. Heard in the Court of Appeals 17 September 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant-Appellant.

COLLINS, Judge.

Defendant Leonard Schalow appeals from the trial court's 7 August 2018 order denying his motion to dismiss the charges against him. Defendant contends that the trial court erred by denying his motion to dismiss because: (1) the State violated his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution by bringing the charges against him; (2) the State violated his rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution by vindictively prosecuting the charges against him; and (3) the State impermissibly failed to join the charges in his earlier prosecution as required by N.C. Gen. Stat. § 15A-926. Because we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness that the State has failed to overcome and that the charges brought against him should have been dismissed pursuant to N.C. Gen. Stat. § 15A-926, we reverse and remand.

I. Background

In late February 2014, warrants issued for Defendant's arrest for the alleged commission of various acts of violence against his wife, Erin Schalow. These warrants found probable cause to arrest Defendant for (1) assault on a female (N.C. Gen. Stat. § 14-33(C)(2)), (2) assault

inflicting serious injury with a minor present (N.C. Gen. Stat. § 14-33(D)), (3) assault with a deadly weapon (N.C. Gen. Stat. § 14-33(C)(1)), (4) assault by strangulation (N.C. Gen. Stat. § 14-32.4(B)), and (5) assault inflicting serious bodily injury (N.C. Gen. Stat. § 14-32.4).

Defendant was indicted on 10 March 2014 under file number 14 CRS 50887 for "ATTEMPT [sic] FIRST DEGREE MURDER" for "unlawfully, willfully and feloniously . . . attempt[ing] to murder and kill Erin Henry Schalow" (the "First Prosecution"). The State subsequently dismissed the other charges pending against Defendant.

Following the empanelment of a jury and the presentation of evidence on the "ATTEMPT [sic] FIRST DEGREE MURDER" charge, the trial court noted that the indictment failed to allege malice aforethought, a required element of attempted first-degree murder under the short-form indictment statute, N.C. Gen. Stat. § 15-144. Over Defendant's objection that the indictment sufficiently alleged attempted voluntary manslaughter under N.C. Gen. Stat. § 15-144 and that jeopardy had attached once the jury was empaneled, the trial court declared a mistrial and dismissed the indictment as fatally defective.

On 18 May 2015, Defendant was re-indicted under file number 15 CRS 50922, again for "ATTEMPT [sic] FIRST DEGREE MURDER[,]" this time for "unlawfully, willfully and feloniously . . . with malice aforethought attempt[ing] to murder and kill Erin Henry Schalow by torture" (the "Second Prosecution"). Defendant moved to dismiss on 22 May 2015 arguing, *inter alia*, that because jeopardy had attached in the First Prosecution on the dismissed indictment for attempted voluntary manslaughter, the Double Jeopardy Clause prohibited the State from prosecuting him for the greater offense of attempted first-degree murder. Following a hearing, the trial court denied Defendant's motion. Defendant was subsequently tried, convicted, and sentenced to 157 to 201 months' imprisonment.

Defendant appealed to this Court. In *State v. Schalow*, 251 N.C. App. 334, 354, 795 S.E.2d 567, 580 (2016) ("*Schalow I*"), *disc. review improvidently allowed*, 370 N.C. 525, 809 S.E.2d 579 (2018), we held that Defendant's indictment, prosecution, trial, and conviction in the Second Prosecution violated Defendant's double-jeopardy rights, and accordingly vacated the conviction and underlying indictment.

On 4 January 2017, the State obtained additional indictments against Defendant for 14 counts of felony child abuse (N.C. Gen. Stat. § 14-318.4(a5)). The following day, the State petitioned our Supreme Court to review *Schalow I*. On 9 January 2017, Henderson County

District Attorney Greg Newman was quoted in the press saying: "If . . . the Supreme Court refuses to take up the case, then I have a plan in place to address that circumstance and will take additional action to see that [Defendant] is held accountable for his actions. . . . I will do everything that I can to see that [Defendant] remains in custody for as long as possible."

On 6 March 2018, after our Supreme Court determined discretionary review had been improvidently allowed in *Schalow I*, Newman was quoted on Facebook as saying that "things do not always go our way, so I will make my adjustments and prosecute [Defendant] again" and that "[Defendant] will not get out of custody, but will instead be sent back to the Henderson County jail where new felony charges await him. My goal is to have [Defendant] receive a comparable sentence to the one originally imposed" in the Second Prosecution. On 19 March 2018, Defendant was indicted for three counts of assault with a deadly weapon with intent to kill inflicting serious injury (N.C. Gen. Stat. § 14-32(a)) ("ADWIKISI"), two counts of assault inflicting serious bodily injury (N.C. Gen. Stat. § 14-32.4(a)) ("AISBI"), and one count of assault by strangulation (N.C. Gen. Stat. § 14-32.4(b)) ("ABS"). Like the charges at issue in the First and Second Prosecutions, the new child abuse and assault charges are all based upon various acts of violence that Defendant allegedly committed against his wife in 2014.

On 19 July 2018, Defendant moved to dismiss the new charges on grounds of, *inter alia*, double jeopardy, vindictive prosecution, and statutory joinder. Following a hearing, the trial court denied Defendant's motion. Defendant filed a petition for a writ of certiorari seeking immediate review of the order denying his motion to dismiss, which we allowed.

II. Discussion

Defendant contends that the trial court erred by denying his motion to dismiss because (1) the State violated his double-jeopardy rights by bringing the new charges; (2) the State violated his due-process rights by vindictively prosecuting the new charges against him; and (3) the State impermissibly failed to join the new charges as required by N.C. Gen. Stat. § 15A-926.

A. Vindictive Prosecution

[1] In *North Carolina v. Pearce*, 395 U.S. 711 (1969), limited by *Alabama v. Smith*, 490 U.S. 794 (1989), the United States Supreme Court reviewed the constitutionality of a sentence given upon reconviction to a criminal defendant after the defendant had successfully appealed from his initial

conviction. An issue in *Pearce* was whether, because he was subjected upon reconviction to a greater punishment than that imposed following the first trial, the defendant's due-process rights under the Fourteenth Amendment to the United States Constitution had been violated. *Pearce*, 395 U.S. at 723-26. The Court said that an "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." *Id.* at 724. Noting that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial," the Court held that an increased sentence could not be imposed following retrial unless the sentencing judge made findings in the record providing objective justification for the increased punishment "so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.* at 725-26.

The Court later extended *Pearce*'s holding that defendants must be freed from apprehension of retaliation by sentencing judges to retaliation by prosecutors:

> A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.
>
> Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process.

Blackledge v. Perry, 417 U.S. 21, 28 (1974) (internal citation omitted). The *Blackledge* Court clarified that a defendant need not show that the prosecutor actually acted in bad faith; instead, where the reviewing court determines that "a realistic likelihood of 'vindictiveness' " exists, a presumption of vindictiveness may be applied. *Id.* at 27-29.

This Court has articulated the test for prosecutorial vindictiveness under *Pearce* and its progeny as follows:

> in cases involving allegations of prosecutorial vindictiveness, a defendant is constitutionally entitled to relief from judgment if he can show through objective evidence that either:
>
> (1) his prosecution was actually motivated by a desire to punish him for doing what the law clearly permits him to do, or

> (2) the circumstances surrounding his prosecution are such that a vindictive motive may be presumed and the State has failed to provide affirmative evidence to overcome the presumption.

State v. Wagner, 148 N.C. App. 658, 661, 560 S.E.2d 174, 176 (emphasis omitted), *rev'd in part on other grounds*, 356 N.C. 599, 572 S.E.2d 777 (2002). Thus, if a defendant shows that his prosecution was motivated by actual vindictiveness or that the presumption of vindictiveness applies and is not overcome by the State, the charges against the defendant and any resulting convictions must be set aside. *See Blackledge*, 417 U.S. at 28-29. We review Defendant's allegations of prosecutorial vindictiveness, like any alleged violation of constitutional rights, under a *de novo* standard. *See State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

This is the third time that District Attorney Newman has attempted to try Defendant for crimes based upon the same alleged conduct. Each time, Defendant has been charged with offenses carrying "significantly increased potential period[s] of incarceration," *Blackledge*, 417 U.S. at 28, relative to the charges he faced before:

- In the First Prosecution, Defendant was indicted for a single count of attempted voluntary manslaughter, a Class E felony, without alleged aggravating factors, which corresponds to a maximum presumptive-range sentence (at Prior Record Level I) of **42 months' imprisonment**.
- In the Second Prosecution, Defendant was indicted for a single count of attempted first-degree murder, a Class B2 felony, without alleged aggravating factors, which corresponds to a maximum presumptive-range sentence (at Prior Record Level I) of **201 months' imprisonment**.
- In the instant case, Defendant has been indicted for the following offenses, corresponding to a cumulative maximum sentence (at Prior Record Level I) of **627 months' imprisonment**:[1]
    - 14 counts of child abuse, a Class G felony, without alleged aggravating factors, resulting in a cumulative

1. These calculations are based upon N.C. Gen. Stat. § 15A-1340.17, and the calculation of the cumulative maximum sentence for the new charges involves the reduction of the sentence contemplated by N.C. Gen. Stat. § 15A-1354(b)(1).

maximum presumptive-range sentence 350 months' imprisonment;

- Three counts of ADWIKISI, a Class C felony, including alleged aggravating factors, resulting in a cumulative maximum aggravated-range sentence of 369 months' imprisonment;
- Two counts of AISBI, a Class F felony, including alleged aggravating factors, resulting in a cumulative aggravated-range sentence 66 months' imprisonment; and
- One count of ABS, a Class H felony, including aggravating factors, resulting in a maximum aggravated-range sentence of 19 months' imprisonment.

Therefore, the "increased potential period of incarceration" Defendant now faces relative to what he potentially faced in the Second Prosecution is *more than 35 years of incarceration* in aggregate. *Id.* And were Defendant to be convicted of the new charges and sentenced to the longest prison term legally-supportable by the indictments—i.e., as a Prior Record Level VI, at the high end of the aggravated range, for all charges—Defendant would be sentenced to a maximum of 1331 months for the new charges, relative to a maximum sentence of 592 months for the attempted first-degree murder charge, a difference of *more than 60 years of incarceration*. *See State v. Lucas*, 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001) ("[U]nless the statute describing the offense explicitly sets out a maximum sentence, the statutory maximum sentence for a criminal offense in North Carolina is that which results from: (1) findings that the defendant falls into the highest criminal history category for the applicable class offense and that the offense was aggravated, followed by (2) a decision by the sentencing court to impose the highest possible corresponding minimum sentence from the ranges presented in the chart found in [N.C. Gen. Stat.] § 15A-1340.17(c)."), *overruled on other grounds by State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005).

Blackledge and *Wagner* stand for the proposition that where a defendant is indicted on charges carrying a "significantly increased potential period of incarceration" after the defendant "do[es] what the law clearly permits him to do"—here, appealing from the judgment in the Second Prosecution—a reviewing court may apply a presumption of vindictiveness. *Blackledge*, 417 U.S. at 28; *Wagner*, 148 N.C. App. at 661, 560 S.E.2d at 176. Such a presumption is particularly appropriate here, where the same prosecutor issued all of the relevant indictments, giving the

prosecutor a "personal stake in the outcome" of defendant's prosecution writ large that raises the prospect that the prosecutor was motivated by "self-vindication" in seeking the new indictments. *Cf. Wagner*, 148 N.C. App. at 663, 560 S.E.2d at 177 (distinguishing *Pearce* and *Blackledge* and declining to apply a presumption of prosecutorial vindictiveness, in part, because the prosecutor in *Wagner* had not previously prosecuted the defendant). Therefore, based upon the decades of additional incarceration Defendant potentially faces from the indictments in the instant case relative to what he faced from the indictment in the Second Prosecution—upon which Defendant was tried and convicted, and from which Defendant successfully exercised his statutory right to appeal—we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness.

The State relies extensively upon this Court's decision in *State v. Rodgers*, 68 N.C. App. 358, 315 S.E.2d 492 (1984), to support its argument that a presumption of vindictiveness is not warranted where the State seeks merely to remedy "pleading defects[.]" For several reasons, *Rogers* does not help the State. First, the relevant change in the charging decision here—from a single attempted first-degree murder charge to 20 child-abuse and assault charges—did not merely amount to the clarification of "pleading defects[.]" And second, we declined to apply a presumption of vindictiveness in *Rogers*, in part, because the defendant showed "neither an increase in the number of charges brought against him nor an increase in his potential punishment under the superseding indictment." *Id.* at 379, 315 S.E.2d at 507. Here, where the State has brought 19 more charges and dramatically increased the potential punishment Defendant faces, *Rogers* is clearly distinguishable.

We therefore turn to the question of whether the State has provided affirmative evidence in rebuttal which overcomes the presumption, as contemplated by *Wagner*, 148 N.C. App. at 661, 560 S.E.2d at 176. The State has failed to provide such evidence. In fact, the only affirmative evidence in the record concerning the rationale for the prosecutor's charging decisions makes clear that the charging decisions were (1) expressly conditioned upon the outcome of the State's appeal from *Schalow I* and (2) influenced by the prosecutor's stated determination to "do everything that [he] can to see that [Defendant] remains in custody for as long as possible." While the State argues, citing *State v. Van Trussell*, 170 N.C. App. 33, 612 S.E.2d 195 (2005), that "seeking to ensure that the defendant suffers some consequences for his criminal conduct is a sufficient—not vindictive—justification for praying judgment when a separate conviction is set aside on appeal[,]" there is nothing

in the record indicating that this case involves a Prayer for Judgment Continued such as was at issue in *Van Trussell*, and the State's argument is therefore misguided.

Even assuming *arguendo* that the record evidence described above fails to show *actual* vindictiveness on behalf of the prosecutor—which we need not decide because we hold that Defendant has shown entitlement to a presumption of vindictiveness—and instead demonstrates an intent to punish Defendant for suspected criminal activity, to hold such evidence can be sufficient to overcome a presumption of vindictiveness would effectively eviscerate the presumption altogether, and thereby render *Pearce* and its progeny nugatory. *See United States v. Goodwin*, 457 U.S. 368, 372-73 (1982) ("The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is an impermissible response to noncriminal, protected activity" such as appealing from a conviction). This we of course cannot do. *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (when interpreting federal constitutional rights, "a state court should exercise and apply its own independent judgment, treating, of course, decisions of the United States Supreme Court as binding"). We therefore reject the State's argument.

Because we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness and that the State has failed to overcome the presumption, dismissal of the new charges is required.

B. Statutory Joinder

[2] N.C. Gen. Stat. § 15A-926 ("Section 926") provides as follows, in relevant part:

> (a) Joinder of Offenses. – Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. . . .
>
> . . . .
>
> (c) Failure to Join Related Offenses.
>
> . . . .

> (2) A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made prior to the second trial,[2] and must be granted unless
>
> > a. A motion for joinder of these offenses was previously denied, or
> >
> > b. The court finds that the right of joinder has been waived, or
> >
> > c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted.

N.C. Gen. Stat. § 15A-926(a), (c)(2) (2018).

In *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924 (1977), our Supreme Court entertained a challenge to indictments that the defendant argued should have been dismissed as joinable offenses under Section 926. Noting that the indictments at issue had not been returned before the prior trial purportedly requiring dismissal had begun, the *Furr* Court held that the indictments could not have been joined with the offense previously tried. *Id.* at 724, 235 S.E.2d at 201. Because it found "nothing whatever in the record to indicate that the state held the [challenged] charges in reserve pending the outcome of the [previous] trial[,]" the *Furr* Court held Section 926 was not applicable in that case, and overruled the defendant's argument. *Id.*

Several years later, in *State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985), the Court elaborated upon the language above, and set forth what we will call the "*Warren* exception":

> If a defendant shows that the prosecution withheld indictment on additional charges solely in order to circumvent the statutory joinder requirements, the defendant is entitled under [N.C. Gen. Stat. §] 15A-926(c)(2) to a dismissal of the additional charges. The defendant must bear the burden of persuasion in such cases. . . .

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2. Where, as here, a second trial has already taken place, and the anticipated trial on the offenses at issue will therefore be the defendant's third or subsequent trial, the motion to dismiss contemplated by Section 926(c)(2) must be made prior to the anticipated trial that has yet to take place.

> If a defendant can show, for example, that during the first trial the prosecutor was aware of substantial evidence that the defendant had committed the crimes for which he was later indicted, this would be some evidence that the delay in bringing the later indictment was for the purpose of circumventing the statute. A showing that the State's evidence at the second trial would be the same as the evidence presented at the first would also tend to show that the prosecutor delayed indictment on the additional crimes for such purpose. A finding of either or both circumstances would support but not compel a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute.

Id. at 260, 328 S.E.2d at 261 (emphasis omitted). The *Warren* Court added that "[w]hen reviewing the trial court's denial of the defendant's motion to dismiss . . . we may only consider the evidence before the trial court when it made its ruling at the conclusion of the pretrial hearing." *Id.*

Defendant argues that he showed both of the circumstances that the *Warren* Court said "would support but not compel a determination by the trial court that the prosecutor withheld the additional indictment[s] in order to circumvent" Section 926, *id.*, and that the trial court accordingly erred by denying his motion to dismiss. In support of his argument, Defendant points to (1) the charges the State previously dismissed in the case and (2) certain concessions the State made at the hearing on Defendant's motion to dismiss regarding the evidence to be presented to prove the new charges.

As mentioned above, Defendant was charged by arrest warrant in early 2014—before the State obtained the initial indictment in the First Prosecution for "ATTEMPT [sic] FIRST DEGREE MURDER"—with (1) assault on a female, (2) assault inflicting serious injury with a minor present, (3) assault with a deadly weapon, (4) assault by strangulation, and (5) assault inflicting serious bodily injury. These arrest warrants indicate that a magistrate found probable cause to arrest Defendant for those offenses based upon the same conduct for which Defendant is currently charged.

First, the new indictments charging Defendant with ADWIKISI are based upon the grand jury's finding that Defendant attacked his wife with a crutch and a knife, and two of the dismissed warrants charged Defendant with assault with a deadly weapon based upon probable cause that Defendant attacked his wife with a crutch and a knife. Second,

the new indictments charging Defendant with AISBI are based upon the grand jury's finding that Defendant hit his wife in the face, struck her in the mouth, ripped her ear, kicked her in her body, and caused her a ruptured spleen, broken ribs, broken facial bones, and severe bruising on her body, and two of the dismissed warrants charged Defendant with assault on a female and AISBI based upon probable cause that Defendant hit and punched his wife in the face, struck her in the mouth, ripped her ear, kicked her in her body, and caused her a ruptured spleen, broken ribs, broken facial bones, and severe bruising to her body. Third, the new indictments charging Defendant with ABS are based upon the grand jury's finding that Defendant used his hands to squeeze his wife's throat, and one of the dismissed warrants charged Defendant with ABS for forcibly placing his hands around his wife's neck and squeezing. Finally, the new indictments charging Defendant with child abuse are based upon the grand jury's finding that Defendant committed unspecified "grossly negligent acts in the omission of caring for [his son], show[ing] a reckless disregard for human life and . . . result[ing] in serious mental injury to" his son, and two of the dismissed warrants charged Defendant with assault on a female and assault inflicting serious injury with a minor present for attacking his wife in the presence of his son.[3]

The prosecutor's dismissal of the arrest warrants prior to the trial in the Second Prosecution indicates that the prosecutor was at least constructively aware of evidence sufficient to convince a magistrate that there was probable cause to believe that Defendant had engaged in the conduct described therein before the prosecutor took that case to trial. And the State told the trial court that there had been no additional steps taken to develop evidence in the case since the trial in the Second Prosecution ended in 2015:

> THE COURT: 2015. All right. Since that time has there been any additional investigation, interviews of witnesses or anything done in the case, Mr. Mundy or Mr. Newman?

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3. While the child-abuse indictments do not specifically allege what the "grossly negligent acts" were, because (1) the child-abuse indictments are based upon purported mental injury to Defendant's son, (2) the dismissed warrants charged Defendant with committing a number of assaults on his wife in the presence of his son, (3) Defendant's previous prosecution for attempted first-degree murder was based upon alleged attacks by Defendant on his wife, and (4) as described below, the prosecutor represented at the hearing on Defendant's motion to dismiss that there would be no new non-opinion evidence introduced regarding the child-abuse charges that the State had not previously introduced in support of its attempted first-degree murder prosecution, we conclude that the State's theory of mental injury to Defendant's son must be based upon the child's purported presence at the time of the alleged attacks upon Defendant's wife, which the dismissed warrants described.

> MR. NEWMAN: There has not been, Your Honor. The only thing new is the addition of Dr. Mumpower that we would add at trial in terms of information.

These considerations convince us that Defendant has shown the first *Warren* circumstance, i.e., that "during the first trial the prosecutor was aware of substantial evidence that the defendant had committed the crimes for which he was later indicted[.]" *Warren*, 313 N.C. at 260, 328 S.E.2d at 261 (emphasis omitted).

Furthermore, the State represented at the hearing on Defendant's motion to dismiss that the State would seek to introduce no new non-opinion evidence to prove the new charges that had not been introduced in support of its attempted first-degree murder prosecution:

> [The] defense has everything that we have. And this goes back to the, you know, time, I guess, in 2014 and '15, thereabouts. And so they have all of the reports. That's what we are going to us[e] again. Of course, the same witnesses. They have examined all of these witnesses. They have seen the documents. The[y] have disks of interviews. There -- I mean, there's a trial transcript. I think they have that. There are [Department of Social Services] documents that were not used at the first trial. I don't think we would use those now, but give some insight to our case here. . . .
>
> So everything that we would present on any of these cases the defense has had and has had [sic] for quite sometime [sic]. But we -- I understand -- but they have the discovery in the case. And we -- I don't think they are going to see or hear anything particularly new from us.

Indeed, as mentioned above, the State told the trial court that "[t]he only thing new is the addition of Dr. Mumpower that we would add at trial in terms of information." The State told the trial court that Mumpower is a psychologist who "examined nothing with respect to the case" and did not prepare an expert report, but that the State wished to put Mumpower on the stand to testify regarding a hypothetical, i.e., to "give him some facts and ask him to — see if he has an opinion on that basis." Pursuant to the State's concession that it only seeks to add unspecified hypothetical testimony from a witness who knows nothing about the case, we conclude that Defendant has also shown the second *Warren* circumstance, i.e., "that the State's evidence at the second trial would be

the same as the evidence presented at the first[.]"[4] *Warren*, 313 N.C. at 260, 328 S.E.2d at 261.

That Defendant has shown both *Warren* circumstances does not end the inquiry, however. In *Warren*, our Supreme Court specifically said that "[a] finding of either or both circumstances would *support but not compel* a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute." *Id.* (emphasis added). Defendant directs us to no case in which our courts have applied *Warren* to overturn a denial of a motion to dismiss, and we are aware of no such case.

In *Warren* itself, our Supreme Court found that the trial court was not compelled to determine that the prosecutor withheld the indictments there at issue to circumvent Section 926 because, *inter alia*, the State at the hearing on the defendant's motion to dismiss forecast new, "much stronger evidence" of the defendant's guilt on the new charges than was previously available at the time of the first trial. *Id.* at 263, 328 S.E.2d at 263. *Warren* is therefore distinguishable from this case, where the State has said that no new evidence will be presented besides certain unspecified expert-opinion testimony. And in the lone case we have found that appears to have applied *Warren* in the context of a Section 926 challenge, this Court rejected the defendant's Section 926 argument without analyzing either *Warren* circumstance, and did not provide any other analysis applicable here. *State v. Tew*, 149 N.C. App. 456, 459-60, 561 S.E.2d 327, 330-31 (2002).

We are thus left with no precedent regarding what, beyond the two *Warren* circumstances, a defendant needs to show in order to implicate the *Warren* exception. Accordingly, in our view, because (1) Defendant has shown that both *Warren* circumstances are present, (2) the State has had multiple previous opportunities to join the offenses on which it now seeks to try Defendant, and (3) the State has neither argued that it was somehow unable to try the offenses at an earlier time nor proffered any explanation for why the offenses were not tried along with the earlier charge, we hold that the *Warren* exception should apply.

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4. A holding that *Warren*'s second circumstance is not shown where the State forecasts unspecified hypothetical opinion testimony from a witness who knows nothing about the case would effectively render that part of *Warren* meaningless, and we cannot make such a holding. *See Andrews v. Haygood*, 188 N.C. App. 244, 248, 655 S.E.2d 440, 443 (2008) ("[T]his Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions until otherwise ordered by our Supreme Court." (quotation marks, ellipsis, brackets, and citation omitted)).

We therefore conclude that Defendant has made a showing that should have compelled a determination by the trial court that the prosecutor withheld the indictments here at issue in order to circumvent Section 926, and that Defendant is entitled to dismissal of the new charges under Section 926(c)(2), as well.

C. Double Jeopardy

Because we conclude that Defendant's motion to dismiss should have been granted on both vindictive-prosecution and statutory-joinder grounds, we do not address Defendant's double-jeopardy arguments.

III. Conclusion

Because we conclude that Defendant is entitled to a presumption of prosecutorial vindictiveness which the State has failed to overcome and that the charges brought against him should have been joined pursuant to Section 926(c)(2), we reverse the 7 August 2018 order and remand to the trial court with instructions to dismiss the charges against Defendant.

REVERSED AND REMANDED.

Judges BRYANT and YOUNG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JANUARY 2020)

CHAPPELL v. CHAPPELL No. 19-11	Burke (12CVD1555)	Affirmed in Part, Reversed in Part, and Remanded
CLEMENT v. CUMBERLAND CNTY. No. 19-414	Cumberland (18CVS4649)	Reversed
CONDE v. JESSUP No. 19-16	Union (17CVS3144)	Reversed and Remanded
CROP PROD. SERVS., INC. v. PEARSON No. 19-260	Randolph (16CVS1372)	Affirmed in Part, Reversed in Part and Remanded
IN RE A.D.S. No. 19-258	Wayne (18JB104)	Affirmed
IN RE D.B. No. 19-387	Wake (18SPC5553)	Affirmed
IN RE K.A. No. 19-455	Person (17JB63)	Affirmed
KANISH, INC. v. TAYLOR No. 19-482	Mecklenburg (17CVS14152)	NO ERROR, JNOV AND NEW TRIAL RULING AFFIRMED, AWARD OF ATTORNEY FEES VACATED AND REMANDED.
LEFTWICH v. MORRIS No. 19-656	Robeson (17CVS1950)	Dismissed
MARTIN v. IRWIN No. 19-559	Surry (17CVM583) (18CVD1147)	Affirmed
SIKES v. FARRELL No. 19-238	Mecklenburg (18CVS7024)	Affirmed
STATE v. COLLIER No. 19-174	Vance (16CRS85)	NO ERROR IN PART, REMANDED FOR RESENTENCING.
STATE v. CURLEE No. 19-451	Davidson (17CRS2618) (17CRS56168)	No Error

STATE v. DAVIS No. 19-227	Carteret (12CRS52930) (12CRS52934)	No Error
STATE v. GARCIA No. 19-360	Wake (17CRS219732)	No Error
STATE v. HAZELWOOD No. 19-121	Wake (04CRS88496-97)	Affirmed
STATE v. HERNANDEZ-GONZALEZ No. 19-448	Buncombe (16CRS81849-51)	Reversed and Remanded
STATE v. HERRING No. 19-221	Wake (16CRS200507) (16CRS200824-25)	No Error
STATE v. HEWITT No. 19-382	Wilson (16CRS53737)	No plain error; remanded for correction of clerical error
STATE v. JONES No. 19-14	Wake (17CRS211949)	No Error
STATE v. LITAKER No. 19-189	Rowan (16CRS51603) (16CRS51634)	No Error
STATE v. LITTLEJOHN No. 19-347	Cleveland (17CRS56086)	Dismissed
STATE v. LOCKLEAR No. 19-487	Robeson (17CRS52801)	Affirmed
STATE v. LOFTON No. 17-716-2	Wayne (15CRS50319)	No Error
STATE v. MARTIN No. 19-130	Davidson (17CRS51965) (17CRS51966)	Dismissed in part; Vacated and remanded in part.
STATE v. McCORD No. 19-517	Wake (17CRS2362)	Affirmed; remanded for correction of judgment
STATE v. MIDGETTE No. 19-463	Wayne (13CRS55207)	NO PREJUDICIAL ERROR
STATE v. MIZE No. 19-161	Catawba (16CRS50126-27)	No Error

STATE v. MOORE No. 19-301	Onslow (17CRS53747) (17CRS53749)	NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.
STATE v. MOORE No. 19-183	Wake (16CRS210610-11) (16CRS210612)	Affirmed
STATE v. MYERS No. 19-173	Cherokee (16CRS396-398)	NO ERROR; NO PLAIN ERROR.
STATE v. PATRICK No. 19-571	Mecklenburg (16CRS221987) (17CRS13742)	Affirmed
STATE v. PHOEUN No. 19-190	Guilford (17CRS68022)	Affirmed
STATE v. SIMMONS No. 19-519	Forsyth (16CRS60434) (16CRS60970)	No Error
STATE v. WEBSTER No. 19-257	Wake (15CRS222446)	No Error
STATE v. WHEELER No. 18-1272	Catawba (16CRS1890)	Affirmed
STATE v. WHITMIRE No. 19-550	McDowell (16CRS727)	Affirmed
STATE v. WILLIAMS No. 18-1130	Iredell (14CRS4302) (14CRS54550)	Affirmed
STEELE-CORRELL v. PRICE No. 19-551	Rowan (17CVS1395)	Affirmed
SUMMIT & CROWNE CAP. PARTNERS, LLC v. KORTH DIRECT MORTG., LLC No. 19-413	Mecklenburg (18CVS11381)	Affirmed in part; Reversed and Remanded in part.
TR. FOR TRADEWINDS AIRLINES, INC. v. SOROS FUND MGMT LLC No. 19-356	Guilford (16CVS5433)	Affirmed

COMMON CAUSE v. FOREST

[269 N.C. App. 387 (2020)]

COMMON CAUSE, DAWN BALDWIN GIBSON, ROBERT E. MORRISON, CLIFF MOONE, T. ANTHONY SPEARMAN, ALIDA WOODS, LAMAR GIBSON, MICHAEL SCHACHTER, STELLA ANDERSON, MARK EZZELL, AND SABRA FAIRES, PLAINTIFFS

v.

DANIEL J. FOREST, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, DEFENDANTS

No. COA18-870

Filed 21 January 2020

1. Constitutional Law—North Carolina—legislative action—Right to Instruct—scope of right

The legislature did not violate the Right to Instruct clause in Art. I, sec. 1 of the North Carolina Constitution when it convened an extra legislative session without providing advance notice of the subject matter of the laws to be considered and passed bills after only two days of deliberations. The constitutional right—which allows people to be informed about government action and to express views on that action—was protected where the session was publicly announced, the bills under debate were publicly available and covered widely in the news, and a large number of people made their views known by attending the session, protesting, or contacting legislators directly.

2. Constitutional Law—North Carolina—legislative action—Law of the Land—due process

The legislature did not violate either the substantive or procedural due process protections of the North Carolina Constitution by convening an extra session—without providing advance notice of the subject matter of the laws to be considered—and passing bills after only two days of deliberations. Since the public was given notice of the session and a meaningful opportunity to be heard, which met the requirements of the Right to Instruct clause, the legislature's actions were not unconstitutional under the Law of the Land clause.

Appeal by plaintiffs from order entered 29 May 2018 by Judges Wayland J. Sermons, Martin B. McGee, and Todd Pomeroy in Wake County Superior Court. Heard in the Court of Appeals 9 May 2019.

Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh, and Paul E. Smith, for plaintiffs-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Matthew Tulchin, for defendants-appellees.

DIETZ, Judge.

In late 2016, Hurricane Matthew struck North Carolina and devastated many communities along our coast and our State's eastern interior. On 13 December 2016, following a proclamation from the governor calling a special session, our General Assembly gathered in Raleigh for a third extra session and, within twenty-four hours, enacted the Disaster Recovery Act of 2016. Then, not long after that special session adjourned, the General Assembly convened a fourth extra session, this time taking on matters far more politically controversial than helping fellow citizens recover from natural disasters. Two days later, the legislature passed bills from that fourth extra session.

The plaintiffs in this case contend that, although the General Assembly had the authority to convene that fourth extra session, the speed with which the legislature enacted those controversial bills violates Article I, Section 12 of our State Constitution, which provides that "the people have a right . . . to instruct their representatives."

As explained below, the unanimous three-judge panel properly rejected this argument and granted summary judgment in favor of the State. The right to instruct is part of a provision in the Declaration of Rights that guarantees the people the right to assemble, to instruct their representatives, and to petition the government for redress of grievances. The right protected is one of open access to the law-making process and of open communication with one's representatives in that process. The courts have the power to defend that right.

But the decision of how quickly particular laws, on particular subjects, must be enacted is a political question reserved for another branch of government. The plaintiffs in this case believe the two-day deliberations during the fourth extra session, without any advance notice of the topics to be addressed, were insufficient for them to fully convey their views to their legislators. But citizens who received insufficient funding, or were left out entirely, from the disaster relief act might feel the same of the one-day deliberation over that bill. And there are countless examples of legislative proposals, important to some constituency, that are added to, or cut from, a final bill with even less notice than that.

We reject the plaintiffs' claim that our State Constitution permits the courts to wade into this legislative process and dictate how much time

our General Assembly must spend contemplating legislative action. The record in this case demonstrates that the General Assembly provided public notice and access to the fourth extra session and that no portion of the official deliberations occurred in secret. Indeed, this fourth extra session generated *far more* public and media attention than many other last-minute legislative acts of our General Assembly throughout its history.

To be sure, there will be times when citizens believe that the legislature's decision to move quickly on a particular bill, even though lawful public notice and access is provided, is nevertheless imprudent and that the opportunity to publicly oppose that bill, or rally opposition to it, has been frustrated. The remedy for these concerns is not with the courts; it is at the ballot box.

Accordingly, the three-judge panel properly rejected the plaintiffs' Right to Instruct Clause challenge and accompanying Law of the Land Clause challenge. We affirm the trial court's judgment.

Facts and Procedural History

On 14 December 2016, shortly after our General Assembly concluded a third extra session to enact hurricane relief, the legislature announced that it was convening a fourth extra session based on the request of three-fifths of the members of the two houses "to consider bills concerning any matters the General Assembly elects to consider." It is undisputed that the General Assembly had the constitutional authority to convene this fourth extra session and to do so without announcing the subject matter of the bills that legislators planned to consider.

Defendants scheduled the fourth extra session to be held at 2:00 p.m. that day and members introduced twenty-one bills in the House and seven in the Senate, including the two bills ultimately enacted and challenged in this lawsuit, House Bill 17 and Senate Bill 4. As is customary for abbreviated extra sessions, the General Assembly immediately passed several procedural changes to their chamber rules to permit bills to move more quickly than in a regular session.

Within forty-eight hours after convening the fourth extra session, the General Assembly passed House Bill 17 and Senate Bill 4, and the Governor signed both bills into law. It is undisputed that, despite the speed of passage, all bills introduced during this special session, including those enacted into law, were publicly available and posted on the General Assembly's website along with up-to-date information about the progress on those bills as they made their way through the approval process described in our Constitution.

Since 1940, this is the first extra session in which the General Assembly chose not to announce in advance the subject matter of the laws they would consider during the session. Although unusual, that choice was not unlawful—as noted above, the State Constitution does not require the legislature to explain the purpose of a special session before convening it.

According to documents included in the record on appeal, the suddenness of the fourth extra session received widespread state and national news coverage, generated an "email blitz" by thousands of frustrated citizens, and prompted hundreds of protestors to come to the General Assembly and loudly object to the process and the proposed bills while the legislature convened.

On 19 April 2017, Plaintiffs sued the leaders of the General Assembly in their official capacities,[1] alleging that the passage of the challenged laws during the fourth extra session violated the Right to Instruct Clause of Article I, Section 12 of the North Carolina Constitution, which provides that "the people have a right . . . to instruct their representatives," as well as corresponding rights in the Law of the Land Clause of Article I, Section 19 of the Constitution.

After some early procedural motions, the case was transferred to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1. On 21 February 2018, the three-judge panel heard arguments on Plaintiffs' motion for summary judgment and the State's motion to dismiss and for judgment on the pleadings, which the trial court converted into a cross-motion for summary judgment. On 29 May 2018, the unanimous three-judge panel granted summary judgment in favor of the State with an accompanying memorandum opinion explaining the panel's reasoning. Plaintiffs timely appealed.

Analysis

We review a trial court's ruling on state constitutional questions *de novo*. *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 110–11 (2018). "When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the constitution. If constitutional requirements are met, the

1. "A suit against defendants in their official capacities, as public officials . . . is a suit against the State." *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990). We therefore refer to the Defendants collectively as the State in this opinion for ease of reference.

wisdom of the legislation is a question for the General Assembly." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

"In performing our task, we begin with a presumption that the laws duly enacted by the General Assembly are valid." *Id.* Thus, "a law will be declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt." *Id.*

When interpreting our State Constitution, "provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption." *State v. Webb*, 358 N.C. 92, 94, 591 S.E.2d 505, 509 (2004). "To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished." *Id.*

I. Right to Instruct Clause

[1] We begin with Plaintiffs' challenge under the Right to Instruct Clause. Article I, Section 12 of the North Carolina Constitution provides that "the people have a right . . . to instruct their representatives":

> **Sec. 12. Right of assembly and petition**. The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

This "right to instruct" language has existed since our State Constitution was first framed in 1776. Although nearly two-and-a-half centuries have passed, no appellate court has ever interpreted what this right means.

We begin by examining what the words of this provision meant in 1776. We are, of course, no longer governed by our State's 1776 Constitution. North Carolina has had several constitutions through its history. We are now on our third. It took effect in 1971 after being ratified by the people of this State. *See* 1969 N.C. Sess. Laws 1461, ch. 1258, *ratified* Nov. 3, 1970. But the language of the Right to Instruct Clause has never changed, and the framers of the 1971 Constitution gave no indication that the meaning of those words had changed when they chose to re-adopt them.

Thus, we examine what the words of the Right to Instruct Clause meant in 1776, at the time of their adoption. Dictionaries from this time period define the word "instruct" as "to teach; to form by precept;

to inform authoritatively" and "to teach, train, or bring up." Samuel Johnson, *A Dictionary of the English Language* (3d ed. 1768); Nathan Bailey, *An Universal Etymological English Dictionary* (1775). Thus, the word "instruct" appears to have had generally the same meaning then that it does today. To instruct one on some issue, in ordinary usage, generally means to teach them what you think about it.

It is not quite so easy, though, because the word "instruct" also can mean to tell someone they *must* do something. And although dictionaries at the time did not include this meaning, the concept of "instructing" one's representatives in Eighteenth Century usage sometimes conveyed that meaning: it meant a binding order telling a representative *how* to vote. For example, the three-judge panel's memorandum opinion references debates about including a "right to instruct" in the Bill of Rights in the United States Constitution, and concerns from framers at the time that this would produce an unwieldly "direct democracy." *Common Cause v. Forest*, No. 17 CVS 4642, Mem. Op. at 11 (N.C. Super. Ct. 2018).

As one scholar explained, examining the wording of a "right to instruct" provision in the Massachusetts Constitution, adopted around the same time as North Carolina's original constitution, "[t]he right to instruct legislators is distinct from the right to present petitions and otherwise express opinions. Petitions and opinions are advisory; instructions are binding." *Rediscovering the Right to Instruct Legislators*, 26 New Eng. L. Rev. 355, 355 (1991).

The Right to Instruct Clause in our Constitution does not convey this alternative meaning. In this Court's research of legislative practice in our State, we could find no example *ever* of legislators being compelled to vote in the manner that the people they represent commanded them to. Moreover, each time our State enacted a new Constitution—first in 1868 and again in 1971—they included the same right to instruct clause although, at the time, it was universally understood that legislators were elected to act as representatives and to use their judgment to vote in ways that best reflected the will of their constituents. *See generally* John V. Orth & Paul Martin Newby, The North Carolina State Constitution 58 (2d ed. 2013). We therefore interpret the "right to instruct" using the ordinary meaning of these words at the time of adoption.

Having concluded that the words in the Right to Instruct Clause reflect a right of the people to "teach" or "advise" their representatives, not to bind them, we must determine the scope of that right. One common tool for illuminating the meaning of a phrase in a constitution is to examine it "contextually and to compare it with other words

and sentences with which it stands connected." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989).

Here, the people's right "to instruct their representatives" is nestled between two other clauses expressly guaranteeing the people's rights to "assemble together to consult for their common good" and "to apply to the General Assembly for redress of grievances." N.C Const. art. 1, § 12. This structure confirms that the right involves the ability of our citizenry to be informed about government action and to express their views about that action. We thus agree with the trial court that the Right to Instruct protects the ability of the people to contact their elected representatives and convey their views about the decisions those representatives are tasked with making on their behalf.

Having interpreted the meaning of the Right to Instruct, we now turn to the heart of this case: whether the State violated that right. The plaintiffs argue that, because they received no advance notice of the legislative topics to be introduced in the fourth extra session, and because the bills introduced in that session were debated and enacted in less than forty-eight hours, the plaintiffs were denied "the meaningful opportunity to inform their representatives about legislation during the legislative process." We reject this argument.

At the outset, it is important to note that "the people" in a general sense—that is, the public overall—unquestionably had notice of the session and the opportunity to instruct their legislators both that they opposed *any* action in the special session and that they opposed particular bills introduced during that session. The record on appeal shows (and plaintiffs do not dispute) that the fourth extra session was convened through a joint proclamation in accordance with constitutional requirements and that the session was publicly announced. Likewise, the record shows (and plaintiffs do not dispute) that the bills introduced during this special session were publicly available in the same manner as other bills introduced during legislative sessions. There were audio broadcasts of the House and Senate sessions and other official meetings and proceedings of legislative deliberations.

Moreover, the record indicates that this special session, and the bills introduced during it, received widespread public attention while the legislature convened to debate, including extensive state and national news coverage. Many of those news reports discussed the subject matter of the proposed laws. In addition, the State's legislative services officer testified in an affidavit that "hundreds of people" were present in the chambers as the General Assembly debated the bills, far more than

are typically present during a legislative session. News reports released while the session was in progress, and submitted as part of the record on appeal, describe "widespread protest" organized by the opponents of the bills during the session and even an "email blitz from thousands asking legislators not to enact the moves."

Simply put, the plaintiffs' argument is not that *the people*, or even these plaintiffs individually, were not given notice of the special session or notice of the bills under consideration, or an opportunity to contact their legislators to convey their views. Their argument, as they explain in their briefing, is that they needed more time to "mobilize" opposition to the bills and to attempt to "persuade their representatives."

To be sure, as plaintiffs establish in a series of affidavits, the lawmaking process ordinarily moves far more slowly, giving observers plenty of time to rally support for or opposition to proposed legislation. But not always. Take, for example, the third extra session that convened the day before. During that session, which lasted less than twenty-four hours, the General Assembly enacted the Disaster Recovery Act of 2016. *See* N.C. Session Law 2016-124. That Act contains many pages of complicated appropriations for relief from Hurricane Matthew and other natural disasters. It allocated hundreds of millions of dollars to various agencies and organizations ranging from the State Fire Marshal to the nonprofit corporation Golden L.E.A.F. *Id.*

If forty-eight hours was a constitutionally insufficient time to enact the laws from the fourth extra session, twenty-four hours could not be sufficient for a two hundred million dollar appropriations bill. This disaster relief act, and countless other acts of our General Assembly, would be rendered unconstitutional were we to accept the plaintiffs' argument that all legislative action must be done slowly enough to accommodate those who seek to oppose it politically.

Nor is there anything constitutionally significant about the challenged bills' passage during the fourth extra session, as opposed to a regular session. The plaintiffs repeatedly point out that there was no "advance notice" of the topics to be addressed in the special session. But our Constitution does not require that notice, just as it does not require the General Assembly to provide advance notice of the matters it will take up when it begins a regular session. *See* N.C. Const. art. II, § 11(1), (2). Indeed, the public record of our General Assembly's deliberations discloses countless examples of bills that were introduced without any "advance notice" to the public that a bill on that subject matter would be introduced. And, likewise, there are countless examples of bills that

substantially changed in one form or another—often as the result of a sudden amendment—and were enacted just days later, again with no "advance notice" that this might occur.

The framers could have included time restrictions in Article II, for example by requiring that when bills are "read three times in each house" that it must happen on different days, or consecutive weeks. *See* N.C. Const. art. II, § 22. Instead, the framers left to the judgment of the legislative branch how quickly to move a bill through the law-making process. The Right to Instruct Clause does not change that. It simply requires that the process, however quickly it moves, must be open to the public, and that the people must have ways to contact their representatives to convey their views during that process.

In sum, the plaintiffs have not shown that they were denied the right to instruct their representatives. They have shown, at most, that their representatives chose not to listen to them. That may be a reason not to vote for those representatives in the future; it is not a constitutional violation.

The plaintiffs also argue, apparently in the alternative, that the General Assembly has the authority to act quickly to debate and pass certain laws consistent with the Right to Instruct Clause, but that when the legislature engages in this "abridged" law-making, it must "provide a valid justification for that departure from historical precedent." This argument goes far beyond the conceivable requirements of the right to instruct.

The judicial branch has no constitutional authority to demand from the legislative branch an explanation of why a particular bill must move quickly to enactment, much less the authority to review whether that explanation is "valid." *See Cooper*, 370 N.C. at 407, 809 S.E.2d at 107. The political question doctrine, which stems from our State's express guarantee of the separation of powers, "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* at 408, 809 S.E.2d at 107. In other words, the courts cannot inquire about why the legislature moves quickly on some bills but not others. That political decision is solely for the legislative branch.

Having found that the State did not violate the Right to Instruct Clause, we hold that the trial court properly entered summary judgment in favor of the State on this constitutional claim.

II. Law of the Land Clause

[2] Plaintiffs next contend that the State violated the Law of the Land Clause—our State's equivalent of the Due Process Clause in the U.S. Constitution. *In re Moore's Sterilization*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976). They assert both a "substantive" and a "procedural" due process argument.

Plaintiffs' substantive due process argument turns entirely on the alleged violation of their right to instruct their representatives—they contend that the State "deprived plaintiffs of their liberty interest under Article I, Section 12 of the North Carolina Constitution 'to instruct their representatives.'" As discussed above, the State did not violate the Right to Instruct Clause and thus we reject the plaintiffs' substantive due process argument as well.

Plaintiffs also argue that the State violated their procedural due process rights by "convening the Fourth Extra Session with no notice and providing citizens no meaningful opportunity to be heard." But again, this argument collapses into their claim under the Right to Instruct Clause, which provides the contours of the procedural right to notice and opportunity to be heard. And, for the same reasons we rejected that argument, we reject this one. The State provided public notice of both the fourth extra session and the bills introduced during that session. The General Assembly's actions during that special session complied with the Constitution, state law, and that body's own rules. The plaintiffs had notice of the special session; access to the bills proposed in this special session; the ability to contact their representatives through various means; and, as a result, the opportunity to convey their views about the proposed legislation. That is all the procedural component of the Law of the Land Clause requires. *Johnston v. State*, 224 N.C. App. 282, 307–10, 735 S.E.2d 859, 877–78 (2012).

Accordingly, we hold that the trial court properly entered summary judgment in favor of the State on the plaintiffs' Law of the Land Clause claim.

Conclusion

We affirm the trial court's judgment.

AFFIRMED.

Judges MURPHY and COLLINS concur.

HAMPTON v. HEARN

[269 N.C. App. 397 (2020)]

DEBBIE THOMPSON HAMPTON; AS EXECUTRIX OF THE ESTATE OF DELACY BEATRICE THOMPSON MILES, DECEASED
v.
ANDREW TAYLOR HEARN, M.D., DEFENDANT

No. COA19-378

Filed 21 January 2020

1. Medical Malpractice—jury instruction—intervening negligence—separate and heightened evidentiary showing—unnecessary

In a medical negligence action arising from plaintiff's injuries after a stent that defendant doctor inserted near her innominate vein (for dialysis access) fractured and migrated into her heart when a second doctor placed a catheter near the stent, the trial court properly instructed the jury to consider whether the second doctor's intervening negligence was a superseding cause of plaintiff's injuries. Intervening negligence is an extension of a plaintiff's burden of proof on proximate cause, and therefore defendant was not required to offer evidence of the second doctor's standard of care and breach thereof before requesting the instruction on intervening negligence. Moreover, the evidence at trial was sufficient to support the instruction, and the trial court did not prejudice defendant by using the pattern jury instruction for intervening negligence.

2. Medical Malpractice—expert witness on causation—testimony regarding standard of care—limiting instruction—no prejudice

In a medical negligence action arising from plaintiff's injuries after a stent that defendant doctor inserted near her innominate vein (for dialysis access) fractured and migrated into her heart when a second doctor placed a catheter near the stent, the trial court did not abuse its discretion by allowing defendant's expert witness on causation to testify about defendant's positioning of the stent. The trial court gave a limiting instruction directing the jury not to consider that testimony as evidence of whether defendant breached the applicable standard of care, thereby preventing any prejudice to defendant.

Appeal by plaintiff from judgment entered 25 April 2018 by Judge A. Graham Shirley, II in Alamance County Superior Court. Heard in the Court of Appeals 29 October 2019.

Wake Forest University School of Law Appellate Clinic, by John J. Korzen, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by G. Gray Wilson, Linda L. Helms, and Lorin J. Lapidus, for defendant-appellee.

BERGER, Judge.

Debbie Thompson Hampton ("Plaintiff"), as Executrix of the Estate of Delacy Beatrice Thompson Miles ("Ms. Miles"), appeals from a judgment entered after a jury returned a verdict finding Dr. Andrew Taylor Hearn ("Dr. Hearn") not liable for negligence. Plaintiff contends the trial court erroneously instructed the jury on intervening negligence and erroneously admitted expert witness testimony. We disagree and find no error.

Factual and Procedural Background

On March 8, 2011, Ms. Miles was treated by Dr. Hearn at Alamance Regional Medical Center for angioplasty and stent placement in her innominate vein related to her dialysis treatments. Angioplasty is "the dilatation [*sic*] of a vessel." The innominate vein runs from the collarbone across the chest and then "enters the superior vena cava, which is the main blood vessel entering the heart on the right side." Dr. Hearn inserted the stent to unblock the vein, which was likely blocked from previous catheter placements in dialysis treatments.

Dr. Hearn first performed the angioplasty, or "balloon" insertion, to expand the vein. He then implanted a stent. The stent was about 60 millimeters, or about 2.5 inches, in length. The manufacturers put metallic markers on the ends of the stents so its location can be easily identified radiologically. In Ms. Miles' case, the stent was to be placed at the junction of the left innominate vein and the superior vena cava.

Three days later, on March 11, 2011, Ms. Miles needed a "permacath placement" in her right internal jugular vein to establish new access for her ongoing dialysis. In order to establish access, Dr. Gregory Schnier ("Dr. Schnier"), passed a catheter from the right jugular vein through the superior vena cava to the right atrium of the heart. No evidence tended to show Dr. Schnier knew or had been informed that the stent Dr. Hearn placed on March 8 was obstructing the superior vena cava.

During the procedure, Ms. Miles experienced ventricular tachycardia. Providers at Alamance Regional Medical Center placed Ms. Miles

on medication for the arrhythmia, and discovered there was a "foreign body" in the right ventricle. Ms. Miles was transferred to Duke Hospital on March 12, 2011, and the foreign stent was removed on March 14, 2011. The Duke pathology report revealed that "a foreign body" was found in the right ventricle. The foreign body was determined to be a 30 millimeter "self-expanding stent which had a fracture on one portion of it." It was part of the stent that Dr. Hearn had placed in Ms. Miles.

Ms. Miles remained in the hospital from March 14, 2011 until March 23, 2011. She returned to Duke from March 29 to April 3, 2011 due to bleeding from the dialysis site. After her release from Duke Hospital, Ms. Miles entered a nursing home in Georgia. Ms. Miles subsequently died from other causes.

Plaintiff filed a complaint against Hearn Vascular Surgery, P.A.; Alamance Regional Medical Center, Inc.; Dr. Hearn; and Dr. Schnier. Plaintiff alleged her complaint was "an action for medical negligence resulting in severe and permanent disabling injuries to [Ms. Miles] as a result of injuries sustained when a stent improperly placed in [Ms. Miles'] vein for better dialysis access, was broken during a subsequent procedure and went into [Ms. Miles'] heart causing severe, permanent and disabling injuries." At trial, before the opening statements, Plaintiff took a voluntary dismissal without prejudice against Dr. Schnier, leaving Dr. Hearn as the sole defendant in the suit.

During trial, Plaintiff's expert witness regarding the standard of care, Dr. Michael Dahn ("Dr. Dahn"), testified Defendant had placed the stent "too far into the superior vena cava." He acknowledged that it was acceptable medical practice for a vascular stent to extend into the superior vena cava, but he testified that extending "beyond one to two millimeters" is problematic. He further opined that Dr. Hearn's final positioning of the stent "set the stage for it . . . being sheared in half causing it to migrate." Dr. Dahn concluded that Dr. Hearn's placement of the stent breached the applicable standard of care. Dr. Dahn also testified that Dr. Schnier's failure to recognize the position of the stent when he performed his procedure breached the standard of care.

Two expert witnesses retained by Dr. Hearn, Dr. Steve Powell ("Dr. Powell") and Dr. Ray Workman ("Dr. Workman"), testified that Dr. Hearn had complied with the standard of care when he performed the angioplasty and stent placement procedures. Dr. Hearn also presented deposition testimony by Dr. Jack Dawson and Dr. Michel Rinaldi ("Dr. Rinaldi"). Dr. Rinaldi was specifically retained to testify as an expert witness on causation.

During the charge conference, the trial court informed the parties of the proposed jury instructions, which included Dr. Hearn's requested instruction on intervening negligence. Plaintiff's objection to the instruction on intervening negligence was overruled. The intervening negligence instruction stated in pertinent part:

> In this case, the defendant, Dr. Hearn, contends that, it [*sic*] he was negligent, which he denies, such negligence was not a proximate cause of the Plaintiff's injury because it was insulated by the negligence of Dr. Gregory S[c]hnier. You will consider this matter only if you find that Dr. Hearn was negligent. If you do so find, Dr. Hearn's negligence would be insulated and Dr. Hearn would not be liable to the Plaintiff, if the negligence of Dr. S[c]hnier, was such to have broken the causal connection or sequence between Dr. Hearn's negligence and the Plaintiff's injury; thereby excluding Dr. Hearn's negligence as a proximate cause.

After deliberation, the jury determined that Dr. Hearn was not negligent. Plaintiff appeals, contending the trial court erred by instructing the jury on intervening negligence, and that the jury likely would have reached a different result but for the instruction. She further contends the trial court erred by allowing one of Dr. Hearn's expert witnesses on causation to opine on standard of care. We disagree and find no error.

Analysis

I. Jury Instructions on Intervening Negligence

[1] Plaintiff first contends the trial court erred when it instructed the jury on intervening negligence because that instruction was not supported by the evidence. Plaintiff's main argument asserts an instruction on intervening negligence should not have been given because no expert witness directly established the standard of care Dr. Schnier owed; that he breached that standard of care; and that his breach of the standard of care was the proximate cause of Ms. Miles' injury. As a result, she argues insufficient evidence that Dr. Schnier's negligence insulated Dr. Hearn's negligence, thereby rendering an instruction on intervening negligence erroneous.

We conclude direct expert testimony establishing those elements against Dr. Schnier was not required for an instruction on intervening negligence to be given.

> When charging a jury in a civil case, the trial court has the duty to explain the law and apply it to the evidence

> on the substantial issues of the action. The trial court is permitted to instruct a jury on a claim or defense only if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense.

Estate of Hendrickson ex rel. Hendrickson v. Genesis Health Venture, Inc., 151 N.C. App. 139, 151-52, 565 S.E.2d 254, 262 (2002) (citations and quotation marks omitted). "This Court is required to consider and review jury instructions in their entirety. Under the applicable standard of review, the appealing party must show not only that error occurred in the jury instructions but also that such error was likely, in light of the entire charge, to mislead the jury." *Id.* at 150-51, 565 S.E.2d at 262 (citation omitted).

"A plaintiff asserting medical negligence must offer evidence that establishes the following essential elements: (1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff." *Hawkins v. Emergency Med. Physicians of Craven Cnty., PLLC*, 240 N.C. App. 337, 341, 770 S.E.2d 159, 162 (2015) (internal citations and quotation marks omitted). Proximate cause is defined as:

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Id. at 341-42, 770 S.E.2d at 162-63 (citation and quotation marks omitted).

> Proximate cause is an inference of fact, to be drawn from other facts and circumstances. If the evidence be so slight as not reasonably to warrant the inference, the court will not leave the matter to the speculation of the jury.
>
> It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case. Hence, "what is the proximate cause of an injury is ordinarily a question for the jury. . . . It is to be determined as a fact, in view of the circumstances of fact attending it."

Conley v. Pearce-Young-Angel Co., 224 N.C. 211, 214, 29 S.E.2d 740, 742 (1944) (citation omitted).

Proximate cause is "an established element of negligence, the burden rests upon a plaintiff to prove 'by the greater weight of the evidence' that a defendant's conduct was the proximate cause of the injuries alleged in an action for negligence." *Clarke v. Mikhail*, 243 N.C. App. 677, 686, 779 S.E.2d 150, 158 (2015) (citation omitted). "The doctrine of insulating negligence is an elaboration of a phase of proximate cause." *Id.* at 686, 779 S.E.2d at 158 (*purgandum*). "The burden of proof does not shift to the defendant when an instruction on superseding negligence is requested. Superseding or insulating negligence is an extension of a plaintiff's burden of proof on proximate cause." *Id.* at 686, 779 S.E.2d at 158.

Although "intervening negligence" is also referred to as "superseding or insulating negligence" in our case law, *Barber v. Constien*, 130 N.C. App. 380, 383, 502 S.E.2d 912, 914 (1998), "negligence" in any of those three names originates from "cause." In *Harton v. Tel. Co.*, 141 N.C. 455, 54 S.E. 299 (1906), our Supreme Court explained the concept of intervening cause as follows:

> An efficient intervening *cause* is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. . . . If, however, the intervening responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention. The intervening *cause may be culpable, intentional, or merely negligent.*

141 N.C. at 462-63, 54 S.E. at 301-02 (citation omitted) (emphasis added); *Balcum v. Johnson*, 177 N.C. 213, 216, 98 S.E. 532, 534 (1919) (noting that the new independent cause "must be in itself negligent *or at least culpable*" (emphasis added)).

In order to warrant an instruction on intervening negligence, there needs to be evidence tending to show an intervening cause, whether culpable, intentional, or negligent, broke the connection of the original wrongdoer and that the original wrongdoer had no reasonable ground to anticipate it.

In a medical malpractice case, a *prima facie* evidentiary showing of the standard of care, breach of the standard of care, proximate causation, and damages is required. *Clark v. Perry*, 114 N.C. App. 297, 305, 442 S.E.2d 57, 61 (1994); *Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006); *Hawkins*, 240 N.C. App. at 341, 770 S.E.2d at 162. However, intervening negligence is an *extension* of proximate cause. Plaintiff points to no case that states a *separate and heightened* evidentiary showing is required regarding an alleged insulating cause. Instead, our case law demonstrates that if the evidence at trial, whether plaintiff's own evidence or other evidence, reveals that a cause may have been a sufficient intervening cause of the injuries alleged, an instruction on intervening negligence is proper. As long as the intervening cause is "an independent force, entirely superseding the original action and rendering its effect in the causation remote," an instruction may be warranted.

In *Clarke v. Mikhail*, the plaintiff filed a wrongful death and medical malpractice action against Dr. Mikhail, Ms. Hardin, and Coastal Carolina Neuropsychiatric Center on behalf of Ms. Bohn. 243 N.C. App. at 678-79, 779 S.E.2d at 153. Ms. Bohn was first seen by Dr. Mikhail, who diagnosed her with paranoid schizophrenia and generalized anxiety disorder. *Id.* at 679, 779 S.E.2d at 154. Ms. Hardin, under Dr. Mikhail's supervision was responsible for Ms. Bohn's direct treatment thereafter. *Id.* at 679, 779 S.E.2d at 154. In April 2010, Ms. Hardin prescribed Lithium, a mood stabilizer for her depression and anxiety, to Ms. Bohn. *Id.* at 680, 779 S.E.2d at 154. In a subsequent appointment, Ms. Hardin prescribed Lamictal, which had a warning stating the drug carries the risk of a severe rash, to Ms. Bohn. *Id.* at 680-81, 779 S.E.2d at 154-55. Ms. Bohn continued to see Ms. Hardin until June 2010. *Id.* at 681, 779 S.E.2d at 155.

In June 2010, Ms. Bohn went to Onslow Urgent Care with a sore throat, yeast infection, blisters on her lips, and a rash. *Id.* at 681, 779 S.E.2d at 155. Onslow Urgent Care did not advise Ms. Bohn to stop taking Lamictal and diagnosed her with herpes simplex 2, bacterial conjunctivitis, leukoplakia of her oral mucous membrane, yeast infection, and canker sores. *Id.* at 682, 779 S.E.2d at 155. Two days later, she was transported to the hospital from her home and treated for the rash she had developed. *Id.* at 682, 779 S.E.2d at 155. Ms. Bohn eventually passed away two months later of ventilator-acquired pneumonia. *Id.* at 682, 779 S.E.2d at 156.

In her complaint, the plaintiff "alleged Ms. Hardin was negligent in prescribing and dosing a drug, Lamictal, to treat [Ms. Bohn's] severe mental illness." *Id.* at 679, 779 S.E.2d at 153. At trial, defendants presented

two experts whom both "opined Lamictal was an appropriate medication for Ms. Bohn's condition." *Id.* at 683, 779 S.E.2d at 156. The defendants also presented two causation experts who testified that "in their expert opinion, if Ms. Bohn had been properly diagnosed on the date she sought care at Onslow Urgent Care and had discontinued the Lamictal, more likely than not the rash would have resolved and she would have survived." *Id.* at 683, 779 S.E.2d at 156. The trial court instructed the jury on intervening negligence and stated it should consider Onslow Urgent Care's negligence as superseding and intervening. *Id.* at 685, 779 S.E.2d at 157-58. The jury returned a verdict in favor of the defendants. *Id.* at 685, 779 S.E.2d at 157-58.

On appeal, the plaintiff argued, among other things, the trial court erred by "submitting the issue of superseding and intervening negligence to the jury" and "submitting a jury instruction on superseding and intervening negligence, which was unsupported by the evidence and misstated the law." *Id.* at 684, 779 S.E.2d at 157. This Court, concluded:

> The trial court's instruction to the jury did not require Plaintiff to *disprove* superseding or intervening negligence by Onslow Urgent Care. The trial court's jury instruction properly informed the jury of the following: (1) Plaintiff carries the burden "to prove by the greater weight of the evidence" that Defendants' negligence was a proximate cause of Ms. Bohn's injury and death; (2) Defendants did *not* carry the burden of proving their negligence, if any, was insulated by Onslow Urgent Care's negligence; and, (3) the issue of superseding negligence was to be addressed only if the jury first found Defendants were negligent in the course of Ms. Bohn's medical treatment.

Id. at 687, 779 S.E.2d at 159.

This Court did not state an expert witness was required to establish a separate and heightened evidentiary showing of Onslow Urgent Care's standard of care, that it had breached its standard of care, or that its breach was the proximate cause of Ms. Bohn's injuries. The trial court relied on the evidence presented at trial in determining whether an instruction on intervening negligence was proper. Based on the evidence, this Court determined that the defendants' conduct and Onslow Urgent Care's conduct could be the proximate causes of Ms. Bohn's injuries. This Court emphasized: "The burden of proof remained with Plaintiff to prove Defendants' negligence, if any, was a proximate cause of Ms. Bohn's injury and death. The trial court's jury instruction did not

improperly shift the burden of proof or misstate the law." *Id.* at 688, 779 S.E.2d at 159.

Thus, it follows to reason that, even if a third-party is not a party at trial, an instruction on intervening negligence may be given if the evidence at trial shows that the third-party's conduct was a sufficient "intervening *cause*." *Id.* at 688, 779 S.E.2d at 159; *see Barber*, 130 N.C. App. at 382, 502 S.E.2d at 914. Therefore, Plaintiff's contention that an expert witness was required to first establish Dr. Schnier's standard of care and whether he breached that standard of care in order to warrant an instruction on intervening negligence is without merit.

Our task on appeal is to determine whether sufficient evidence was presented for the jury to decide whether any negligence on Dr. Hearn's part was insulated by a superseding cause.

> The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. Put another way, in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it.

Adams v. Mills, 312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984) (citation omitted).

However,

> the law of proximate cause does not always support the generalization that the misconduct of others is unforeseeable. The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates. In the absence of anything which should alert him to the danger, the law does not require a defendant to anticipate specific acts of negligence of another.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984) (citation omitted).

"[R]easonable unforseeability is the critical test for determining when intervening negligence relieves the original tortfeaser of liability." *Barber*, 130 N.C. App. at 385, 502 S.E.2d at 916 (awarding new trial after

first determining the trial court's instruction on intervening negligence was supported by the evidence but erroneously failed to reference foreseeability); *see Pope ex rel. Pope v. Cumberland Cnty. Hosp. Sys., Inc.*, 171 N.C. App. 748, 752, 615 S.E.2d 715, 718 (2005) (reversing entry of directed verdict for the medical negligence claims relating to the defendant hospital's labor and delivery nurses because the plaintiff's evidence, that the intervening cause alleged by the defendants was foreseeable in causing the decedent's injuries, was "sufficient to create an inference of causation for the jury").

Here, sufficient evidence demonstrates that Dr. Hearn could not anticipate Dr. Schnier's subsequent conduct. Two of Dr. Hearn's witnesses were tendered as experts in vascular surgery, and both testified that Dr. Hearn complied with the statutory standard of care. Both expert witnesses opined that the fracture of the stent was unforeseeable. Dr. Powell testified that it was "totally not foreseeable in any way" that the stent placed by Dr. Hearn would be fractured during a subsequent procedure performed by Dr. Schnier. Dr. Workman testified that after Dr. Hearn performed his surgery it was not reasonably foreseeable that a stent fracture would occur during the subsequent procedure performed by Dr. Schnier.

While Dr. Dahn testified that Dr. Hearn could anticipate subsequent procedures being needed or performed on a patient like Ms. Miles, who was receiving dialysis treatment, it was not foreseeable that the stent Dr. Hearn placed would be fractured. Dr. Dahn testified it was permissible for the stent to extend one or two millimeters into the superior vena cava. After being asked the significance of the stent extending beyond one to two millimeters, he replied, "I think it's problematic. The likelihood that it'll result in a major problem is low, but, I think it's [a] problematic situation because now it sets the patient up for subsequent complication with the passage of any other device."

Although Dr. Dahn testified that Dr. Hearn's "final positioning of the stent set the stage for it's being sheared in half causing it to migrate," this statement merely opines the stent created a risk for some subsequent injury. It is not a concession Ms. Miles' injury could not have been the result of some insulating cause.

Moreover, on re-cross, Dr. Dahn affirmed his pre-trial deposition testimony that Dr. Schnier breached the standard of care by failing to recognize the position of the stent during his procedure. Dr. Dahn also opined that "the likelihood of having a sheared off stent is low, but, still significant." Dr. Dahn further testified that had Dr. Schnier performed his procedure properly, "the likelihood of having a sheared off stent is low."

Dr. Hearn's expert witnesses and Plaintiff's own expert witness provided sufficient testimony demonstrating that Dr. Schnier's intervening conduct was of such nature that Dr. Hearn "had no reasonable ground to anticipate it." *Adams*, 312 N.C. at 194, 322 S.E.2d at 173. Moreover, viewing the evidence in the light most favorable to Plaintiff, "[t]he well-settled rule in this jurisdiction is that except in cases so clear that there can be no two opinions among men of fair minds, the question should be left for the jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act." *Hairston*, 310 N.C. at 238, 311 S.E.2d at 567; *Floyd v. McGill*, 156 N.C. App. 29, 41, 575 S.E.2d 789, 797 (2003) ("The trial court properly permitted the jury to draw inferences from these facts and decide the issue of proximate cause. Since more than one inference could be drawn from the evidence, submission of the issue to the jury was appropriate."). Because two theories of proximate cause were presented at trial, the trial court did not err in instructing the jury to determine whether Dr. Schnier's intervening conduct insulated Dr. Hearn's alleged original negligence.

Plaintiff also contends she was prejudiced by the trial court's instruction on intervening negligence. Plaintiff specifically argues the trial court's "heavy emphasis on intervening negligence in its instructions" likely influenced the jury's decision in finding Dr. Hearn not negligent. We disagree.

The use of the North Carolina Pattern Jury Instruction is "the preferred method of jury instruction" unless a pattern instruction misstates the law. *Barber*, 130 N.C. App. at 385, 502 S.E.2d at 915 (citation and quotation marks omitted). In the present case, the trial court utilized N.C.P.J.I. 102.65, insulating/intervening negligence, and did not alter it substantively when it instructed the jury. "It cannot be said that it was error for the judge to state the law correctly to the jury . . . ." *Boykin v. Kim*, 174 N.C. App. 278, 286, 620 S.E.2d 707, 713 (2005). Accordingly, Plaintiff's argument regarding prejudice is overruled.

II. Evidentiary Rulings

[2] Plaintiff also argues the trial court erred when it allowed Dr. Hearn's expert witness on causation of permanent injury to opine on the applicable standard of care. Plaintiff specifically contends Dr. Rinaldi's testimony about placement of the stent was not admissible as a matter of law and, even if it were, the trial court's admission of his testimony was prejudicial. We disagree.

In reviewing evidentiary rulings by the trial court, "we defer to the trial court and will reverse only if the record shows a clear abuse of discretion." *Gray v. Allen*, 197 N.C. App. 349, 352, 677 S.E.2d 862, 865 (2009). "A court has abused its discretion where its ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 353, 677 S.E.2d at 865 (internal citation and quotation marks omitted). "[A]dmission of incompetent evidence, even though it is not withdrawn, is no ground for a new trial unless prejudice is shown." *Smith v. Perdue*, 258 N.C. 686, 690, 129 S.E.2d 293, 297 (1963).

Here, a videotape of Dr. Rinaldi's deposition was played at trial. Plaintiff contends the following colloquy between defense counsel and Dr. Rinaldi "was inadmissible because it clearly went to the standard of care issues of whether [Dr. Hearn] improperly placed the stent, an issue on which Dr. Rinaldi was not designated":

> Q. And where was the stent placed in this case as you understand it from your review of the medical records?
>
> A. Yes. It was extending from the innominate vein or brachiocephalic vein into the superior vena cava.
>
> Q. Okay. And is there anything unusual about the placement of that stent in that location?
>
> A. I don't think so. That is done frequently. And, in fact, stents can be placed in the superior vena cava when people have narrowings [sic] in the superior vena cava. I've personally done it myself, and it is a normal procedure.

Plaintiff's main contention is that the jury likely attached great significance to Dr. Rinaldi's testimony because the position of Dr. Hearn's placement of the stent was the crux of the issue at trial. However, providing a limiting instruction to the jury following the admittance of erroneous testimony may cure an alleged error in the admittance of such testimony. *See Chamberlain v. Thames*, 131 N.C. App. 705, 711, 509 S.E.2d 443, 447 (1998). "A jury is presumed to follow the court's instructions." *Nunn v. Allen*, 154 N.C. App. 523, 541, 574 S.E.2d 35, 46 (2002).

The trial court provided the following limiting instruction prior to playing the remainder of Dr. Rinaldi's testimony on the videotape:

> All right, members of the jury, before we go on, I want to instruct you and remind you that this witness is not offering any opinion as to whether Dr. Hearn's conduct adhered

> to or failed to adhere to the standard of care and you are not to consider his testimony for that purpose.

Any purported error in the admission of Dr. Rinaldi's testimony on standard of care did not prejudice Plaintiff because it was cured by the trial court's limiting instruction. Plaintiff has failed to show the trial court abused its discretion.

Conclusion

The trial court did not err in instructing the jury on intervening negligence. Plaintiff was not prejudiced by the admittance of Dr. Hearn's expert witness testimony.

NO ERROR.

Judges TYSON and INMAN concur.

IN THE MATTER OF H.D.H.

No. COA19-490

Filed 21 January 2020

Juveniles—probation extension—Section 7B-2510(c)—findings of fact—required

In an appeal from an order extending an undisciplined juvenile's one-year probation for an additional six months, the Court of Appeals concluded that N.C.G.S. § 7B-2510(c) required the trial court to enter written findings that the extension was "necessary to protect the community or to safeguard the welfare of the juvenile." Consequently, the trial court erred by failing to make any findings of fact or conclusions of law supporting the extension.

Appeal by juvenile from order entered 3 January 2019 by Judge Angela G. Hoyle in District Court, Gaston County. Heard in the Court of Appeals 4 December 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sharon Patrick-Wilson, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for juvenile-appellant.

STROUD, Judge.

Helen[1] appeals from an order extending her probation for an additional six months. Helen argues the trial court's findings of fact were insufficient to support the extension. Because the trial court's order extending Helen's probation is not supported by sufficient findings, we reverse and remand for the trial court to add written findings in accordance with North Carolina General Statute § 7B-2510(c).

I. Background

On 13 September 2017, an undisciplined juvenile petition was filed alleging Helen had fifteen unexcused absences from school and was in violation of "NC GS 7B-1501(27)(a) Truancy." Helen admitted the allegations of the petition and was placed "under the protective supervision of a court counselor" for three months. The conditions of Helen's supervision required her to: (1) attend school regularly, not have any unexcused absences, tardies, in school or out of school suspensions; (2) maintain passing grades; (3) remain on good behavior; (4) report to a court counselor; (5) not possess any alcoholic beverages or illegal drugs and submit to random drug screens; and (6) have no contact with certain individuals identified by the court.

On 27 November 2017, a petition was filed alleging Helen violated a contempt warning by having two unexcused absences, receiving a three-day out-of-school suspension, and refusing to stay after school for a meeting. At a hearing on 14 December 2017, Helen admitted to indirect contempt. The trial court imposed a level one disposition and placed Helen on twelve months of probation. The terms of the order required Helen to: (1) comply with a curfew; (2) not associate with two individuals identified by the court; (3) spend five days in secure custody; (4) fully cooperate with all mental health recommendations, including therapy, a substance abuse program, medication management, and out of home placement; (5) cooperate with the Port Program; (6) attend school, each and every day, with no unexcused absences, tardies, in school or out of suspensions; and (7) abide by all school rules and regulations.

A motion for review was filed on 3 December 2018. The motion stated that while Helen had abided by the terms of her probation and made great progress overall, the State requested her probation be "extended for six months to allow Juvenile Justice Staff to monitor the juvenile's attendance, and behaviors until the end of this school year."

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

At the review hearing, the State explained Helen had recently transitioned back to living with her mother and extending probation would "get her to the end of the school year." The State was also concerned that Helen was struggling with one class. The State noted Helen's therapist recommended extending probation because she was participating in a six-month program that had only recently begun. Helen asked for her probation supervision to be terminated. The trial court stated at the hearing, "I want you to move off probation quickly but I also want you to continue to do well. And I think you've done well partly because you've come in, you got to talk to us, and we put services in place." The trial court extended Helen's probation for six months but failed to include written findings or conclusions in its order. Helen timely appealed.

II. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Malone v. Hutchinson-Malone*, 246 N.C. App. 544, 546, 784 S.E.2d 206, 208 (2016) (alteration in original) (quoting *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011)).

The parties disagree on whether North Carolina General Statute § 7B-2510(c) requires the trial court to make written findings. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *Thomas v. Williams*, 242 N.C. App. 236, 239, 773 S.E.2d 900, 902 (2015) (quoting *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009)).

III. Review Hearing Order

Helen argues

> [t]he trial court committed reversible error by extending Helen's probation for six months because the trial court's findings of fact were insufficient to support the extension. The court made no oral or written findings that the extension was necessary to protect the community or necessary to safeguard the welfare of the juvenile, as required by N.C.G.S. § 7B-2510(c).

The State argues that the trial court was not required to make written findings in this case and cites to several cases in which this Court has found some findings to be sufficient. However, this case is distinct from the cases cited by the State because those cases were not based upon North Carolina General Statute § 7B-2510(c), with the exception of

In re D.L.H., 198 N.C. App. 286, 296, 679 S.E.2d 449, 456 (2009), *rev'd*, 364 N.C. 214, 694 S.E.2d 753 (2010), and, here, the trial court made *no* findings of fact or conclusions of law in the order on appeal.

North Carolina General Statute § 7B-2510 provides for extending a juvenile's probation:

> An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the court may extend it for an additional period of one year after notice and a hearing, if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile.

N.C. Gen. Stat. § 7B-2510(c) (2017).

"When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute." *Matter of B.O.A.*, ___ N.C. ___, ___, 831 S.E.2d 305, 311 (2019) (quoting *Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N. Carolina Dep't of Health & Human Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)). North Carolina General Statute § 7B-2510(c) states the trial court "may" extend Helen's probation if it "finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile." N.C. Gen. Stat. § 7B-2510(c). The use of the word may, which is permissive, applies to the trial court's decision to extend Helen's probation. *See Anthony v. City of Shelby*, 152 N.C. App. 144, 147, 567 S.E.2d 222, 225 (2002) ("As a general rule, 'when the word "may" is used in a statute, it will be construed as permissive and not mandatory.'" (quoting *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978))). The trial court has the discretion to extend Helen's probation as allowed by the statute. *See* N.C. Gen. Stat. § 7B-2510(c). However, North Carolina General Statute § 7B-2510(c) requires the trial court to find either that the probation extension is "necessary to protect the community or to safeguard the welfare of the juvenile." N.C. Gen. Stat. § 7B-2510(c).

We note that the problem in this case may have arisen because the trial court used an apparently outdated form entitled "Order for Motion for Review Hearing," MCCS Form JV-MCCS 100 (12/00) for entry of the order.[2] This form has preprinted language directed to *an admission*

2. Based upon our research, the form used was a Mecklenburg County form and not a standard form adopted by the Administrative Office of the Courts. The notation at the bottom of the form indicates it was adopted in December 2000. The relevant statutory provisions have been amended several times since 2000. *See* N.C. Gen. Stat. § 7B-2510 (history).

of a violation of "probation or protective supervision." But Helen had not violated her probation; the matter was on for review for an extension of probation. The current juvenile court form normally used in this situation would be AOC-J-481, Rev. 12/17, entitled "Juvenile Order on Motion for Review (Other than Violation)" based upon North Carolina General Statutes §§ 7B-2510, -2600. This form includes blanks and information based upon the type of review motion presented, and the language tracks the required findings as required by North Carolina General Statute § 7B-2510(c). The form also includes a notation as follows: "NOTE: Pursuant to G.S. 7B-2510, the juvenile's probation may not be extended beyond one year. If the juvenile's probation is extended, the Court must find that the extension is necessary to protect the community or to safeguard the welfare of the juvenile."

We conclude that North Carolina General Statute § 7B-2510 requires the trial court to make written findings regarding the statutory factor supporting extension of the juvenile's probation. *See In re D.L.H.*, 198 N.C. App. at 296, 679 S.E.2d at 456, *rev'd on other grounds*, 364 N.C. 214, 694 S.E.2d 753. The evidence *could* support findings of fact supporting an extension of probation as necessary to safeguard Helen's welfare, but this Court cannot make findings of fact.

> When the trial court is the trier of fact, the court is empowered to assign weight to the evidence presented at the trial as it deems appropriate. In this situation, the trial judge acts as both judge and jury, thus resolving any conflicts in the evidence. If there is competent evidence to support the trial court's findings of fact and conclusions of law, the same are binding on appeal even in the presence of evidence to the contrary.

In re Oghenekevebe, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397-98 (1996) (citations omitted).

Based on the transcript, the trial court indicated that continuing Helen's probation was in her best interest, although the trial court did not specifically find that the extension was "necessary . . . to safeguard the welfare of the juvenile." *See* N.C. Gen. Stat. § 7B-2510(c). Because there was information before the trial court which could support findings of fact as required by North Carolina General Statute § 7B-2510(c) to support extending Helen's probation, but the trial court did not make any findings in the order, we reverse and remand for entry of a new order.

IV. Conclusion

Because the trial court did not include any findings in the motion for review order, we reverse and remand for the trial court to enter a new order, including findings of fact as required by North Carolina General Statute § 7B-2510(c), based upon the existing record. It is within the trial court's discretion to determine whether "the extension is necessary to protect the community or to safeguard the welfare of the juvenile." *Id.*

REVERSED AND REMANDED.

Judges ARROWOOD and BROOK concur.

LOUISE LAWRENCE, PETITIONER
v.
CHARLES LAWRENCE, RESPONDENT

No. COA19-668

Filed 21 January 2020

1. Statutes of Limitation and Repose—equity—reimbursement of expenses from co-tenant

In a case involving a partition by sale of real property, the trial court properly determined that the ten-year statute of limitations (N.C.G.S. § 1-56) applied where petitioner asserted a substantive right of reimbursement of expenses out of the proceeds of the partition sale, based upon equity, representing her co-tenant's share of the property taxes and mortgage payments.

2. Intestate Succession—proof of marriage—marriage certificate—summary judgment

In a property dispute between a mother and son where the father died intestate, the mother established by competent evidence the validity of her marriage to the father at the time of his death—through an out-of-state marriage certificate and other documents—and shifted the burden to her son to show the invalidity of the marriage. The son's conclusory statements did not create a genuine issue of material fact to survive summary judgment.

3. Appeal and Error—preservation of issues—affirmative defenses —laches—failure to raise in responsive pleading

Respondent waived his argument regarding the affirmative defense of laches in a property dispute by failing to raise the defense in his responsive pleading.

Appeal by respondent from order entered 24 May 2019 by Judge Josephine Kerr Davis in Franklin County Superior Court. Heard in the Court of Appeals 8 January 2020.

McFarlane Law Office, P.A., by Steven H. McFarlane, for petitioner-appellee.

Tickle Law Office, PLLC, by Lawrence Edward Tickle, Jr., for respondent-appellant.

TYSON, Judge.

Charles Lawrence ("Respondent") appeals from an order entered 24 May 2019 granting Louise Lawrence's ("Petitioner") motion for summary judgment and denying his motion to dismiss and motion for summary judgment. We affirm the trial court's judgment.

I. Background

Petitioner and Charles D. Lawrence ("Lawrence") were married in Beacon, New York on 20 December 2000. Their union produced three children: Lawanna, Kalonji, and Respondent. Lawrence was found dead on 12 May 2006. Lawrence died intestate. The death certificate identified Lawrence as "married" and listed Petitioner as his surviving spouse.

Lawrence owned real property ("the Property") located in Franklin County. Following his death, Lawanna and Kalonji Lawrence conveyed their respective interests in the Property to Petitioner via quitclaim deed on 21 January 2008. Other than the mortgagee, Petitioner and Respondent are the only individuals with an ownership interest in the Property.

Petitioner initially filed a petition to partition the Property on 15 August 2018. Respondent did not answer or appear before the clerk of superior court. The clerk entered the order to sell for partition and notice of sale of real property on 5 September 2018. The property was offered for public sale on 26 September 2018, and the highest bid was $20,000. An upset bid for $30,000 was entered on 27 September 2018.

Respondent filed a motion to set aside the order to sell on 28 September 2018, alleging errors in listing the interests of the parties. The parties agreed to a consent order, which vacated the order to sell and was filed on 4 October 2018.

Petitioner filed an amended petition to sell for partition against Respondent on 28 November 2018. Petitioner sought not only partition by sale but also reimbursement of expenses from Respondent for her paying the *ad valorem* property taxes and making mortgage payments on the Property.

The court ultimately approved and confirmed a final upset bid of $75,477.15 for the Property on 4 April 2019. Petitioner moved for summary judgment on the issues of ownership interests and reimbursement. Respondent moved for summary judgment on these same issues on 22 April 2019.

The trial court ruled in favor of Petitioner, as communicated to the parties via email on 15 May 2019, and requested her counsel draft a proposed order to that effect. Petitioner's counsel sent a proposed order to Respondent's counsel that afternoon. Respondent's counsel confirmed the draft order reflected the trial court's ruling. The trial court entered the order granting Petitioner's motion for summary judgment and denying Respondent's motions to dismiss and for summary judgment on 24 May 2019. Respondent filed his notice of appeal on 6 June 2019.

II. Jurisdiction

Respondent appeals the trial court's order as of right pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

Respondent argues: (1) Petitioner's action should have been time-barred by a three-year statute of limitations; (2) summary judgment was inappropriate because genuine issues of material fact exist; and, (3) Petitioner should be barred from recovering any reimbursement under the doctrine of laches.

IV. Statute of Limitations

[1] Respondent argues the trial court erred by determining, as a matter of law, that the ten-year statute of limitations under N.C. Gen. Stat. § 1-56 (2019) applies to this case, rather than barring Petitioner's reimbursement action under the three-year statute of limitations of N.C. Gen. Stat. § 1-52(1) (2019).

A. Standard of Review

The issue of which is the applicable statute of limitations is a question of law. *See Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010). "Alleged errors of law and questions of statutory interpretation are reviewed *de novo*." *Id.* (citation omitted).

B. Analysis

N.C. Gen. Stat. § 1-52(1) provides a three-year statute of limitations to an action upon any "obligation or liability arising out of a contract, express or implied." N.C. Gen. Stat. § 1-52(1). N.C. Gen. Stat. § 1-56 provides a ten-year statute of limitations to any action "not otherwise limited" by our General Statutes. N.C. Gen. Stat. § 1-56.

"When determining the applicable statute of limitations, we are guided by the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs." *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 84, 772 S.E.2d 143, 146 (2015) (citation omitted). In *Martin Marietta*, one co-tenant of real property located in Virginia sued the other for reimbursement of *ad valorem* property taxes it had paid on the other's behalf. *Id.* at 82, 772 S.E.2d at 144.

This Court interpreted the plaintiff's claim for relief as "setting forth either of two distinct, legally cognizable claims under Virginia law: (1) a claim for contribution; or (2) a claim for an accounting in equity." *Id.* at 87, 772 S.E.2d at 148.

> While Plaintiff would be entitled under either legal theory to reimbursement from Defendant for its share of the property taxes, a contribution claim would be governed by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(1) because the substantive right underlying such a claim is derived from an implied contract whereas a claim for equitable accounting — grounded in equity and arising from a trust relationship — would be subject to the ten-year limitations period set out in N.C. Gen. Stat. § 1-56.

Id.

Respondent cites *Martin Marietta* to argue the statute of limitations applicable to a reimbursement action depends upon the type and legal source of the relationship between the co-tenants. Respondent argues that claims of reimbursements among co-tenants arising from

quasi-contract are subject to the three-year statute of limitations of § 1-52(1), while claims for reimbursements among co-tenants arising from a trust or fiduciary relationship are subject to the ten-year statute of limitations of § 1-56. Respondent argues § 1-56 does not apply to the case at bar because he and Petitioner do not share a fiduciary relationship. This argument overstates this Court's opinion in *Martin Marietta*.

Applying "the principle that the statute of limitations is not determined by the remedy sought, but by the substantive right asserted by plaintiffs," *id*. at 84, 772 S.E.2d at 146, the trial court correctly determined the ten-year period in § 1-56 to be the applicable statute of limitations in this case. In her Amended Petition, Petitioner alleged:

> Respondent has failed to contribute any sums toward the ad valorem property taxes or mortgage payments due on the property, and *Petitioner is entitled to an equitable adjustment* of Petitioner's and Respondent's share of the net proceeds of the sale of the subject property corresponding to the amount Respondent should have contributed based on Respondent's interest in the subject property.

(emphasis supplied).

Petitioner clearly asserted a substantive right of reimbursement based upon equity from the allocation of the proceeds of the partition sale. "Petitions for partition are equitable in their nature . . . . The rule is that in a suit for partition a court of equity has power to adjust all equities between the parties with respect to the property to be partitioned." *Henson v. Henson*, 236 N.C. 429, 430, 72 S.E.2d 873, 873-74 (1952) (citations omitted). Petitioner's action arises in equity and not from a contract, express or implied. The trial court did not err in concluding the ten-year statute of limitations applied in this case. Respondent's argument is overruled.

V. Summary Judgment

A. Standard of Review

[2] "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). "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." *Id*. (citation and internal quotation marks omitted).

B. Analysis

Respondent argues the trial court erred in granting Petitioner's motion for summary judgment and asserts a genuine issue of material fact exists of whether Petitioner was married to Lawrence at the time of his death.

"There is no presumption that persons are married. A person claiming property of a deceased person by reason of marriage to deceased has the burden of proof of the marriage, and the personal representative, lawful heirs or devisees of deceased do not have the burden of proving non-marriage." *Overton v. Overton*, 260 N.C. 139, 144, 132 S.E.2d 349, 353 (1963) (citations omitted).

> If a ceremonial marriage is in fact established by evidence or admission it is presumed to be regular and valid, and the burden of showing that it was an invalid marriage rests on the party asserting its invalidity. It is presumed that a marriage entered into in another State is valid under the laws of that State in the absence of contrary evidence, and the party attacking the validity of a foreign marriage has the burden of proof.

Id. at 143-44, 132 S.E.2d at 352 (citations omitted).

Petitioner asserts she survived Lawrence as his wife in her amended petition. To corroborate her assertion, she proffered a copy of her New York state license and certificate of her marriage to Lawrence. *See Witty v. Barham*, 147 N.C. 479, 481, 61 S.E. 372, 373 (1908) (a copy of a license and certificate of marriage is competent evidence to corroborate a witness' assertion of marriage). She further proffered copies of the application for letters of administration of Lawrence's estate, in which she is listed as his wife; and also Lawrence's death certificate, in which he is listed as "Married" and Petitioner is listed as his surviving spouse. Petitioner established her marriage to Lawrence by competent and substantial evidence, giving Respondent the burden of proof to show that marriage was invalid or had been terminated prior to Lawrence's death. *See Overton* at 144, 132 S.E.2d at 352.

Respondent asserts in his brief in support of his motion for summary judgment and also his affidavit opposing Petitioner's motion for summary judgment that he "was informed by his mother and father that his parents were in fact divorced." No judgment or certificate of divorce is attached to his motion or affidavit.

In light of the unrebutted presumption arising from the New York certificate of marriage and Petitioner's other supporting documentary evidence, Respondent's "conclusory statement without any supporting facts is insufficient to create a genuine issue of material fact." *United Cmty. Bank v. Wolfe*, 369 N.C. 555, 559-60, 799 S.E.2d 269, 272 (2017).

"It is well settled that a [party] must offer some factual evidence to show that his or her theory is more than mere speculation." *Peerless Ins. Co. v. Genelect Servs., Inc.*, 187 N.C. App. 124, 127, 651 S.E.2d 896, 897 (2007), *aff'd*, 362 N.C. 282, 658 S.E.2d 657 (2008). Respondent offers no factual evidence beyond the "conclusory statement" in his own affidavit.

The supporting assertions Respondent makes are: (1) that Petitioner "never states in her petition that she was married to [Lawrence] at the time of his death"; and, (2) that the letters of administration she proffered, which state Lawrence "was survived by his wife, [Petitioner]," were not signed by Petitioner but rather by the court-appointed administrator. Neither assertion is sufficient evidence to carry Respondent's shifted burden of showing invalidity or termination of the marriage at the time of Lawrence's death or to create or show a disputed genuine issue of material fact.

Viewing the evidence in the light most favorable to Respondent, the nonmoving party, he has not carried his burden to show a genuine issue of material fact exists to reverse summary judgment. Petitioner has established by competent evidence the validity of her marriage to Lawrence and shifted the burden to Respondent to show invalidity of the marriage at the time of Lawrence's death. *See Overton*, 260 N.C. at 144, 132 S.E.2d at 353. Respondent has failed to carry that burden. His argument is overruled.

VI. Laches

[3] Respondent argues Petitioner should be barred from recovering any reimbursement from him under the doctrine of laches.

> Laches is the negligent omission for an unreasonable time to assert a right enforceable in equity. In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied.

Builders Supplies Co. v. Gainey, 282 N.C. 261, 271, 192 S.E.2d 449, 456 (1972) (citations and internal quotation marks omitted).

Laches is an affirmative defense. *Johnson v. N.C. Dep't of Cultural Res.*, 223 N.C. App. 47, 55, 735 S.E.2d 595, 600 (2012) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 8(c) (2019). A party must raise any affirmative defenses it has in its responsive pleadings, or else the defense is generally waived. *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998).

Respondent argues Petitioner has waited ten years to assert her claim for reimbursement, from her assumption of financial responsibility for the Property in December 2008 until after Respondent moved to set aside the order to sell on 28 September 2018. Respondent did not raise the affirmative defense of laches in his answer to Petitioner's amended petition. His first invocation of laches was asserted in his brief in support of his motions to dismiss and for summary judgment.

As Respondent did not raise his affirmative defense in his first responsive pleading, he has waived the defense. *Robinson*, 348 N.C. at 566, 500 S.E.2d at 717; *see also* § 1A-1, Rule 8(c). Respondent's argument is dismissed.

VII. Conclusion

This petition for partition and reimbursement is equitable in nature and does not arise from a contract, express or implied, between the parties to implicate the three-year statute of limitations under N.C. Gen. Stat. § 1-52(1). The trial court correctly determined, as a matter of law, that the ten-year statute of limitations under N.C. Gen. Stat. § 1-56 applies to this case, rather than barring Petitioner's reimbursement action under the three-year statute of limitations of § 1-52(1). *See Martin Marietta*, 241 N.C. App. at 84, 772 S.E.2d at 146.

Petitioner established her valid marriage to Lawrence by competent evidence and shifted the burden to Respondent to show its invalidity at the time of Lawrence's death. Respondent has not carried that burden and his bare assertions or conclusions do not create a genuine issue of material fact. *See United Cmty. Bank*, 369 N.C. at 559-60, 799 S.E.2d at 272. Further, Respondent has waived the affirmative defense of laches by not raising the defense in his responsive pleading. *Robinson*, 348 N.C. at 566, 500 S.E.2d at 717; *see also* § 1A-1, Rule 8(c).

The trial court's judgment, granting of summary judgment in favor of Petitioner and denying of Respondent's motions to dismiss and for summary judgment is affirmed. *It is so ordered.*

AFFIRMED.

Judges DILLON and MURPHY concur.

TODD E. MANESS, PETITIONER
v.
THE VILLAGE OF PINEHURST, NORTH CAROLINA, EMPLOYER, AND
NORTH CAROLINA DEPARTMENT OF COMMERCE, DIVISION OF
EMPLOYMENT SECURITY, RESPONDENTS

No. COA19-157

Filed 21 January 2020

Unemployment Compensation—disqualification—employee left work—equivocal actions—reasonable person standard

A determination that a law enforcement officer was ineligible for unemployment benefits, which was based on conflicting subjective findings regarding the officer's intent when he turned in his badge and stated he was "done," was reversed and remanded for further findings of fact as to whether the officer's equivocal actions (by knowingly disobeying an order from his superiors), when viewed under an objective reasonable person standard, could be viewed as having left work without good cause attributable to his employer.

Appeal by petitioner from order entered 27 August 2018 by Judge Thomas H. Lock in Moore County Superior Court. Heard in the Court of Appeals 16 October 2019.

The McGuinness Law Firm, by J. Michael McGuinness, for petitioner-appellant.

Van Camp, Meacham & Newman, PLLC, by Michael J. Newman, for respondent-appellee The Village of Pinehurst.

North Carolina Department of Commerce, Division of Employment Security Legal Services Section, by Regina S. Adams and R. Glen Peterson, for respondent-appellee North Carolina Department of Commerce Division of Employment Security.

DIETZ, Judge.

Under our State's unemployment benefits program, an employee is not entitled to benefits if she quit or resigned—or, more specifically, if she "left work for a reason other than good cause attributable to the employer." N.C. Gen. Stat. § 96-14.5.

Todd Maness, a long-serving law enforcement officer and the petitioner in this unemployment case, knowingly disobeyed an order from his superiors. He did so because he was unwilling to disclose his personal medical history to an outside company hired by the police department to conduct medical screenings of its officers. Knowing that his refusal would result in immediate disciplinary suspension, Maness told his superiors that he would not comply, turned in his badge, and went home.

The Employment Security Division's Board of Review found that Maness did not intend to quit and instead turned in his badge because he believed he was suspended. But the Board also found that Maness's superiors within the police department believed that Maness had resigned. The Board of Review then found that Maness "left work for a reason other than good cause attributable to the employer" and was not entitled to unemployment benefits. The trial court affirmed the Board of Review's ruling.

We reverse the trial court's order and remand this case with instructions for the trial court to vacate the Board of Review's decision and remand for additional findings. When an employee's statements or actions are equivocal, the question of whether the employee "left work" must be decided objectively, by examining whether a reasonable person under the circumstances would have viewed the employee's actions as quitting or resigning. The Board of Review did not make the necessary findings under this standard and therefore this matter should be remanded to the Board for additional findings.

Facts and Procedural History

Petitioner Todd Maness worked for more than ten years as a law enforcement officer for the Village of Pinehurst. In late March 2017, Pinehurst's Chief of Police directed all officers to submit to mandatory urine and blood screenings. The screenings were to take place on 19 April 2017.

SiteMed, the private firm hired by Pinehurst to administer the screenings, required anyone submitting to the screening to complete a medical history form that requested detailed, personal medical history.

Maness was not scheduled to work on the day of the screenings. Before his screening, he came to the workplace and met with his superiors, including the Chief of Police. He explained that he was concerned about disclosing his personal medical information to a private company

like SiteMed. He asked for permission to use his personal physician to conduct the screening instead.

The Chief of Police rejected this request and told Maness that all personal information disclosed to SiteMed would "remain confidential." Maness decided that he would not disclose his personal medical information on the screening form and, as a result, would not be screened by SiteMed along with his fellow officers that day. Because Maness knew that an officer's refusal to follow his superiors' commands resulted in immediate disciplinary suspension, Maness, "on his own accord, concluded that he was on a disciplinary suspension which required him to turn in his badge and credentials." He turned in his badge and credentials to his superiors, stated "that he was 'done' and was going home," and then left the workplace.

Shortly after leaving work, Maness sent a text message to the Chief of Police "inquiring of possible disciplinary action for his refusal to comply with the required health screening." The Chief of Police did not respond because "the matter had been reported to human resources and human resources would make the decision regarding [Maness's] employment."

Maness was scheduled to report for duty two days after the screening day. But the day after the screening, on 20 April 2017, someone in "human resources" contacted Maness and told him that "he should take compensatory time or vacation time and not report to work." Maness later met again with the Chief of Police, who told Maness that the police department had determined that Maness quit his job and thus was no longer employed as an officer there.

On 4 June 2017, Maness filed a claim for unemployment compensation benefits and the claim made its way through the administrative process in the Employment Security Division of the North Carolina Department of Commerce. Following a hearing, an Appeals Referee ruled that Maness "is not disqualified for unemployment benefits." Pinehurst appealed that decision to the Employment Security Division's Board of Review.

On 13 November 2017, the Board of Review reversed the decision of the Appeals Referee and ruled that Maness is disqualified from receiving unemployment benefits because he "left work without good cause attributable to the employer." Maness then petitioned for judicial review in Superior Court. Following a hearing, the trial court entered an order affirming the Board of Review's decision. Maness timely appealed to this Court.

Analysis

Maness challenges the determination by the Board of Review that he is ineligible for unemployment benefits. The standard of review in appeals from the Board of Review, both to the superior court and to this Court, is whether competent evidence supports the findings of fact, and whether those findings, in turn, support the conclusions of law. N.C. Gen. Stat. § 96-15(i); *In re Enoch*, 36 N.C. App. 255, 256–57, 243 S.E.2d 388, 389–90 (1978). "[I]n no event may the reviewing court consider the evidence for the purpose of finding the facts for itself. If the findings of fact made by [the Board of Review], even though supported by competent evidence in the record, are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding should be remanded to the end that [the Board] made proper findings." *In re Bolden*, 47 N.C. App. 468, 471, 267 S.E.2d 397, 399 (1980) (citations omitted).

Under N.C. Gen. Stat. § 96-14.5(a), "[a]n individual . . . is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer." This Court has long held that the term "left work" in this context means the employee "quit his job," as opposed to being fired by the employer. *In re Clark*, 47 N.C. App. 166, 166, 266 S.E.2d 854, 856 (1980). But no previous case squarely addresses the question presented here: when an employee's statements or actions are equivocal, how does one determine if the employee actually "left work"?

Maness argues that, when examining whether an employee has left work, "it is the employee's intent that governs." Thus, Maness argues, an employee cannot leave work unless the decision to do so was a knowing and voluntary one.

Respondents, by contrast, argue that the decision is, in effect, a unilateral one by the employer. In their view, what matters is whether the employer *perceived* the employee's conduct or statements as a resignation, not what the employee actually intended.

Both of these proposed standards are flawed. With either approach, the determination turns on the *subjective* viewpoint of either the employer or employee. This runs counter to the general principle that, unless the General Assembly states otherwise, a factual determination is made objectively, not subjectively. *See, e.g.*, *Walker v. North Carolina Coastal Resources Comm'n*, 124 N.C. App. 1, 5–6, 476 S.E.2d 138, 141 (1996); *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 8, 367 S.E.2d 372, 376 (1988).

Consistent with this principle, we hold that when there is a fact dispute concerning whether an employee's statements or conduct amounted to "leaving work" under the statute, the dispute must be resolved by determining whether a reasonable person would have believed the employee left work.

Applying that standard here, we must remand this matter for further findings by the Board of Review. The Board found that, when Maness turned in his badge and credentials and stated he was "done," Maness did not intend to quit his job, but instead believed he was suspended from active duty:

> As a sergeant and due to his knowledge and experience in the department, claimant was aware of the employer's procedure that he would be subjected to disciplinary suspension for his failure to obey an order of his superior. *Claimant, on his own accord, concluded that he was on a disciplinary suspension which required him to turn in his badge and credentials.* (Emphasis added).

The Board also found that, when Maness turned in his badge and credentials and stated he was "done," his employer subjectively believed that he had quit his job:

> After claimant left the worksite, Chief Phipps and Deputy Chief Gooch concluded that the claimant had quit work and they subsequently informed Angela Kantor, human resources director, regarding the matter.

In its final finding of fact, the Board then found that Maness "left work and was not discharged by the employer." But the Board did not state that it made this finding by applying a reasonable person standard. In its evidentiary findings, the Board made two conflicting, subjective findings—that Maness did not believe he had left work and that his employer believed he did.

The Board also made a number of evidentiary findings that conflict with its ultimate finding. For example, the Board found that Maness texted the Chief of Police shortly after turning in his badge and credentials to inquire about what disciplinary action he would receive—an act inconsistent with having quit. Likewise, the Board found that, the day after Maness turned in his badge and credentials, a human resources employee told him that "he should take compensatory time or vacation time and not report to work" as scheduled. Taking compensatory or vacation time instead of reporting for work would be unnecessary if Maness already had resigned and no longer worked there.

Accordingly, we reverse the trial court's order affirming the Board of Review and remand with instructions for the trial court to vacate the Board of Review's decision and remand this matter to the Board for further fact finding concerning whether, based on its existing findings, a reasonable person would have interpreted Maness's actions as having "left work." The Board of Review may, in its discretion, enter a new decision on the existing record or conduct any further proceedings it deems necessary to make the findings required by our holding. *See* N.C. Gen. Stat. § 96-15.

We decline to address Maness's remaining legal challenges, which may be mooted by the Board's decision on remand.

Conclusion

We reverse the trial court's order and remand for the trial court to vacate the Board of Review's decision and remand this matter to the Board of Review for further proceedings.

REVERSED AND REMANDED.

Judges INMAN and YOUNG concur.

STATE OF NORTH CAROLINA
v.
ANTIWUAN TYREZ CAMPBELL

No. COA18-998

Filed 21 January 2020

1. Appeal and Error—appellate record—Batson claim—failure to include transcript of jury selection—minimally sufficient for review

The Court of Appeals denied the State's motion to dismiss defendant's appeal (from a conviction for first-degree murder), filed on the basis that defendant failed to include a verbatim transcript of the jury selection proceedings, because resolution of a *Batson* claim does not require a transcript so long as some evidence in the record pertains to the factors deemed relevant for establishing a prima facie case of discrimination. Here, the record contained minimally sufficient information to permit review, including a narrative summary of the voir dire proceedings.

2. Jury—selection—Batson claim—prima facie case—limited appellate record

Based on the record presented on appeal, which did not include a verbatim transcript of the jury selection proceedings or information about the victim's race, the prosecutor's questions and statements, and the final racial composition of the jury, the Court of Appeals upheld the trial court's determination that defendant failed to make a prima facie showing of racial prejudice in the State's use of peremptory challenges during jury selection in a first-degree murder prosecution. The trial court's order was not deficient for failing to address steps two and three of the *Batson* analysis because the trial court was required to make findings only for the stage reached in its inquiry. Finally, the State's race-neutral reasons for its challenges could not be considered on appeal because they were provided after the trial court determined defendant did not meet his burden.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 2 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 Assistant Attorney General Peter A. Regulski, for the State.

Geeta N. Kapur for defendant-appellant.

ARROWOOD, Judge.

Antiwuan Tyrez Campbell ("defendant") appeals from judgment entered against him for first-degree murder. On appeal, defendant argues that the trial court erred by concluding that he failed to establish a *prima facie* case of racial discrimination in jury selection, as set forth by *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The State has filed a motion to dismiss defendant's appeal. We deny the same and review defendant's appeal on the merits. For the reasons that follow, we find no error.

I. Background

On 15 April 2015, defendant was indicted for the first-degree murder of Allen Wilbur Davis, Jr., as well as the second-degree kidnapping of

K.J.[1] The case came on for trial in Columbus County Superior Court before the Honorable Douglas B. Sasser on 24 July 2017. On that date, the trial court addressed several pretrial motions filed by defense counsel, including "a motion for a complete recordation of all the proceedings." Counsel specifically noted that she was "not requesting that [complete recordation] include jury selection," and that her motion was "[j]ust for appeal purposes." The trial court granted the motion for recordation. Jury selection commenced the following day. However, as requested by defense counsel, those proceedings were not recorded.

On the second day of jury selection, as the parties were seating alternate jurors, defense counsel objected to the State's use of peremptory challenges, alleging that they were exercised in a racially discriminatory manner in violation of *Batson*. By this point in the proceedings, the State had exercised four peremptory challenges, three of which were used to strike African American prospective jurors: Ms. Vereen, Ms. Holden, and Mr. Staton. Defense counsel asserted that "the State . . . has tried extremely hard for every African-American, to excuse them for cause[,]" adding that "the last two alternate [African American] jurors . . . excused showed no leaning one way or the other or indicated that they would not be able to hear the evidence, apply the law, and render a verdict." Defense counsel further noted that

> [w]e had Ms. Vereen on the front, who the State stayed on her over and over again, trying to get her removed for cause, and they finally used a peremptory on her. And then we move to our alternate, Mr. Staton. [The prosecutor] tried twice to get him removed for cause.

After considering defense counsel's argument, the trial court denied defendant's *Batson* challenge.

Later that day, however, Judge Sasser stated that "upon further reflection, although I do not find that a *prima facie* case has been established for discrimination pursuant to *Batson*, in my discretion, I am still going to order the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges[.]" The State then offered the following bases for the exercise of its peremptory challenges for each of the stricken African American prospective jurors:

1. The first juror, Ms. Vereen, had indicated that she knew Clifton Davis ("Davis") and had dated his brother, both of whom were potential

1. A pseudonym is used to protect the juvenile's privacy.

witnesses at defendant's trial. Davis was a friend of defendant, and was allegedly at the scene with him at the time of the crimes.

2. The second juror, Mr. Staton, was challenged because he "made several conflicting statements during the State's questioning to try to ensure if he could be fair and impartial or not." Further, he knew K.J.'s mother, who was "a fact witness and . . . an eyewitness . . . to the kidnapping."

3. The third juror, Ms. Holden, was stricken because she had been a classmate of two potential witnesses at defendant's trial. The State also explained that

> an additional reason for the peremptory strike against Ms. Holden was the fact when she was describing her political science background and nature as a student, she also was indicating that she was a participant, if not an organizer, for Black Lives Matter at her current college with her professor, and whether or not that would have any implied unstated issues that may arise due to either law enforcement, the State, or other concerns we may have.

Following the State's explanation of the bases for the exercise of its peremptory challenges, the trial court reiterated that it "continues to find . . . that there has not been a *prima facie* showing as to purposeful discrimination" in violation of *Batson*.

At the conclusion of the trial, the jury returned verdicts finding defendant not guilty of second-degree kidnapping, but guilty of first-degree murder. Defendant timely appealed.

II. Discussion

On appeal, defendant argues that the trial court erred in ruling that he failed to establish a *prima facie* showing that the State exercised peremptory challenges in a racially discriminatory manner, in violation of *Batson*. The State has filed a motion to dismiss defendant's appeal. After first disposing of the State's motion, we turn to the merits of defendant's appeal.

A. Motion to Dismiss

[1] The State argues that defendant's failure to include in the appellate record a transcript of the jury selection proceedings warrants dismissal of defendant's appeal. We disagree and deny the State's motion to dismiss on this ground.

The record in this case is minimally sufficient to permit appellate review. We disagree with the proposition that, in order to be entitled to review of a *Batson* claim, a defendant *must* include a verbatim transcript of jury selection in the record. We find no support in our statutes or case law which lead to such a result. We hasten to add that if a defendant anticipates making a *Batson* discrimination argument, it is extremely difficult to prevail on such grounds without a transcript of jury selection.

> A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

State v. Cummings, 346 N.C. 291, 307-308, 488 S.E.2d 550, 560 (1997) (citations omitted), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

In determining whether a defendant has established a *prima facie* case of discrimination, our Supreme Court has noted that "[s]everal factors are relevant[.]" *State v. Hoffman*, 348 N.C. 548, 550, 500 S.E.2d 718, 720 (1998).

> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against [African Americans] such that it tends to establish a pattern of strikes against [African Americans] in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike [African American] jurors in a single case, and the State's acceptance rate of potential [African American] jurors.

Id. (quoting *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995)).

A verbatim transcript need not be furnished in every case for us to review whether a defendant established a *prima facie Batson* claim before the trial court. *See State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412 (1989) (acknowledging even without a verbatim transcript of jury selection, the record contained "the barest essentials" to permit review: "the racial composition of the jury, the number of

[African American] jurors excused, and the State's proffered reasons for their exclusion. The record also contains defense counsel's response to the prosecutor's explanations and the trial judge's conclusions."). Yet a defendant must include *some evidence* in the record, in one form or another, shedding light on the aforementioned factors to enable appellate review of a *Batson* claim. A narrative summary of *voir dire* proceedings, made during the *Batson* hearing and agreed to by defense counsel, the prosecutor, and the trial court, as was done here, may suffice to permit review. Moreover, the narrative summary in this case was minimally sufficient to enable review.

While we believe that such a narrative must contain more relevant information in order to prevail, as discussed *infra* in our determination on the merits, unlike the dissent, we find remand to be unnecessary. The dissent opines that the trial court erred in failing to make specific findings of fact as to the *Quick* factors in its determination that defendant had not made a *prima facie* showing, and believes remand for entry of such findings to be appropriate. We disagree. The trial court's findings on defendant's *Batson* claim were indeed conclusory: "[A]t this point, the Court does not find that the State's exercise of peremptory challenges has even reached [the very low hurdle for making a *prima facie* claim] yet. . . . [T]he Court has found at this point there's not a *prima facie* showing, and the Court will deny the *Batson* challenge."

Nonetheless, remand is inappropriate. While the absence of a transcript of *voir dire* does not preclude our review, it does preclude remand in the instant case. "[T]he failure of a trial court to find facts is not prejudicial where there is no '*material* conflict in the evidence on *voir dire*.' " *Sanders*, 95 N.C. App. at 500-501, 383 S.E.2d at 413 (emphasis in original) (quoting *State v. Riddick*, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (1976)). In *Sanders*, where the trial court entered a similar conclusory finding,

> we [were] forced to assume that no material difference in fact existed since the defendant failed her duty to assure the availability of a jury *voir dire* transcript for our review. Thus, the trial judge's failure to make adequate factual findings d[id] not constitute reversible error. Further, the defendant's failure to secure a *voir dire* transcript ma[de] remand for further findings by the trial judge pointless. Without such transcript, we still would be unable to determine whether the trial judge's [new] findings had a basis in fact.

Id. at 501, 383 S.E.2d at 413. The Court then proceeded to review the trial court's conclusory finding based "only [on] the information

adduced at the *Batson* inquiry." *Id.* Such is the appropriate course of action in this case.

B. Reviewing the Merits of Defendant's *Batson* Claim

[2] Reviewing defendant's *Batson* claim based upon the transcript of the trial court's hearing on the matter, we find no error.

"[T]he State's privilege to strike individual jurors through peremptory challenges[ ] is subject to the commands of the Equal Protection Clause." *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 82. "When the government's choice of jurors is tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial." *Miller-El v. Dretke*, 545 U.S. 231, 238, 162 L. Ed. 2d 196, 212 (2005) (internal quotation marks, alterations, and citation omitted). When a defendant makes such an allegation, the trial court is obligated to address defendant's claim with the three-step analysis set forth in *Cummings*, 346 N.C. at 307-308, 488 S.E.2d at 560, detailed *supra* part A.

"[W]hen a trial court rules that the defendant has failed to establish a *prima facie* case of discrimination, this Court's review is limited to a determination of whether the trial court erred in this respect." *State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004) (citation omitted), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005). The trial court's orders concerning jury selection are entitled to deference on review. *See State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997) (noting that the trial court is afforded deference on jury selection rulings because the trial court has "the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial") (citation omitted). Thus, we "must uphold the trial court's findings unless they are clearly erroneous." *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998) (internal quotation marks and citation omitted).

As an initial matter, we must note that we are precluded from considering in our analysis the reasons given for the State's exercise of the peremptory challenges at issue. These reasons were offered by the prosecutor only after ordered to do so by the trial court "out of an abundance of precaution[,]" after the court expressly held that defendant had not met his burden of establishing a *prima facie* Batson claim.

When a trial court requests that the State explain its reasons for excusing an African American prospective juror after the court has expressly found that defendant failed to establish a *prima facie* claim,

step one of the *Batson* analysis does not become moot, and the trial court is not subsequently required to determine whether the State's proffered explanations are nondiscriminatory. *Hoffman*, 348 N.C. at 551-52, 500 S.E.2d at 721. However, when a prosecutor "volunteers his reasons for the peremptory challenges in question before the trial court rules [on] whether the defendant has made a *prima facie* showing, . . . the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether" the proffered explanation is nondiscriminatory. *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996) (citations omitted), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997).

In the instant case, although the appellate record contains the State's reasons for striking three prospective African American jurors, we are precluded from using this information in the first step of the *Batson* analysis. The trial court clearly ruled that defendant had not made out a *prima facie* case of a *Batson* violation prior to the State's provision of its nondiscriminatory explanations. The record shows that after the trial court initially ruled against defendant's *Batson* challenge, the trial court asked, "out of an abundance of precaution, [whether] the State wish[ed] to offer a racially-neutral basis for the exercise[.]" At that time, even if the State had *volunteered* its reasons for exercising its peremptory strikes—which it declined to do—our analysis of defendant's *Batson* claim would remain the same, because the State's reasons would have been proffered *after* the trial court's ruling on the matter. Likewise, the fact that the trial court subsequently ordered the State to articulate its nondiscriminatory reasons for the peremptory challenges is irrelevant; the first step of the *Batson* analysis will be considered moot only if "the trial court requires the prosecutor to give his reasons *without ruling on the question of a prima facie showing*." *Id.* (emphasis added).

Next, we address defendant's argument that the trial court's order on his *Batson* claim is facially deficient. Defendant asserts that in its written order, the trial court "found only that there was not a *prima facie* showing made to establish any violations by the State for its exercise of peremptory challenges." However, given that the court never reached the second step of the *Batson* analysis, this was the only finding that was required. The trial court is only tasked with making "specific findings of fact at each stage of the *Batson* inquiry that it reaches." *State v. Headen*, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010) (citation omitted). The record on appeal includes the trial court's order on defendant's *Batson* challenge, setting forth the factual basis of the challenge

and the court's decision on the matter. Thus, the trial court's order is not facially deficient, as defendant contends.

We now turn to a substantive analysis of the trial court's order finding that defendant failed to establish a *prima facie Batson* claim. From the transcript of the hearing, we are only able to ascertain defendant's race and that the State used three of its four peremptory challenges to remove prospective African American jurors and alternates. However, we do not know the victim's race, the race of key witnesses, questions and statements of the prosecutor that tend to support or refute a discriminatory intent, or the State's acceptance rate of potential African American jurors. Finally, we see nothing in the record from which we can ascertain the final racial composition of the jury.

We will not "assume error by the trial judge when none appears on the record before" us. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 645 (1983) (citation omitted). Without more information regarding the factors set forth in *Hoffman* and *Quick*, defendant has not shown us that the trial court erred in its finding that no *prima facie* showing had been made. Therefore, we uphold the trial court's ruling on the merits of defendant's *Batson* claim.

We would urge all criminal defense counsel that the better practice is to request a verbatim transcription of jury selection if they believe a *Batson* challenge might be forthcoming. However, if that is not initially done, it is incumbent that counsel place before the trial court evidence speaking to all the *Hoffman* factors for evaluation on appeal. Without such information, it is highly improbable that such a challenge will succeed. Such is the pitfall of defendant's case in this appeal.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judge ZACHARY concurs.

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

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

I agree the record before us is minimally sufficient to permit appellate review. *See State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409,

412 (1989) (acknowledging that although the "lack of a *voir dire* transcript detracts from our ability to review the substance of the proffered reasons," the record contained "the barest essentials" to permit review: "the racial composition of the jury, the number of black jurors excused, and the State's proffered reasons for their exclusion[,]" while also noting "[t]he record also contains defense counsel's response to the prosecutor's explanations and the trial judge's conclusions"). Consequently, I join in denying the State's Motion to Dismiss the Defendant's Appeal.

This case illustrates the immense difficulty in preserving a *Batson*[1] challenge for appellate review under our existing case law. I agree a verbatim transcript of jury selection is not always necessary to preserve a *Batson* challenge. Indeed, I suspect in many cases the need to make a *Batson* challenge only becomes apparent during the voir dire and after a defendant's opportunity to request complete recordation.[2] Thus, there must be another way to establish the necessary record to preserve the issue for appellate review. *See, e.g.*, *State v. Shelman*, 159 N.C. App. 300, 310, 584 S.E.2d 88, 96 (2003) (requiring "a transcript *or some other document setting out pertinent aspects of jury selection*" in order to review a defendant's *Batson* challenge (emphasis added)).

However, our existing case law significantly limits a party's ability to preserve the issue absent not only complete recordation but also specific and direct voir dire questioning of prospective jurors (or other evidence) about their race. *See State v. Mitchell*, 321 N.C. 650, 654, 365 S.E.2d 554, 556 (1988) ("Statements of counsel alone are insufficient to support a finding of discriminatory use of peremptory challenges." (citation omitted)); *see also State v. Brogden*, 329 N.C. 534, 546, 407 S.E.2d 158, 166 (1991) ("[D]efendant, in failing to elicit from the jurors by means of questioning or other proper evidence the race of each juror, has failed to carry his burden of establishing an adequate record for appellate review."); *State v. Payne*, 327 N.C. 194, 200, 394 S.E.2d 158, 161 (1990) (holding record not adequately preserved where "defendant attempted to support his motion via an affidavit purporting to provide the names of the black prospective jurors"); *Shelman*, 159 N.C. App. at 310, 584 S.E.2d

1. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

2. If there is any lesson to be drawn here from the majority result, it appears it is that the surest (if not the only) way to preserve a *Batson* challenge is to request recordation of jury voir dire in every single case for every single defendant. Of course, this recordation is expressly *not* required by statute in noncapital cases. *See* N.C. Gen. Stat. § 15A-1241(a)(1) (2017).

at 96 ("Nor is the transcript of the trial court's discussion with defense counsel regarding defendant's *Batson* challenge an adequate substitute for these factual details[.]").[3]

In light of our case law indicating a trial lawyer cannot recreate the record of an unrecorded jury voir dire to preserve a *Batson* challenge, the obligation to recreate that record, it seems, must fall on the trial judge in conjunction with the parties. *See*, *e.g.*, N.C. Gen. Stat. § 15A-1241(c) ("When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made."). Here, for example, the trial court and lawyers cooperated to partially recreate the record. Specifically, the parties each put on the record their respective positions as to each peremptory challenge, establishing that the State used three out of four challenges on African American jurors and another African American juror was excused for cause. These basic facts appear undisputed on the record before us. The one key element left out, however, was the actual make-up of the jury.[4]

I accept the premise that this Court cannot presume error where none appears on the cold record before us. I also take the point that it is an appellant's burden to demonstrate error on the record and the objecting party's burden to establish a prima facie showing under *Batson*. Nevertheless, I am persuaded, on the facts of this case and the admittedly limited record before us, that the challenge by defense counsel to the use of three out of four peremptory challenges on African American jurors places this case sufficiently in line with *State v. Barden* so as to require the trial court to conduct a *Batson* hearing and make specific findings of fact as to whether Defendant had made a prima facie *Batson* challenge. 356 N.C. 316, 344-45, 572 S.E.2d 108, 127-28 (2002) (holding the use of 71.4% of peremptory challenges on African American jurors was supportive of a prima facie *Batson* violation).

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3. I note a prior decision of this Court touching on related preservation issues is currently pending before our state Supreme Court. *See State v. Bennett*, ___ N.C. App. ___, 821 S.E.2d 476 (2018), *disc. rev. allowed*, 372 N.C. 107, 824 S.E.2d 402, 405 (2019).

4. It is significant neither the defense nor the State set out the make-up of the jury on the record. The acceptance rate of jurors would seem to be just as applicable as the rejection rate to either establishing or defending a prima facie *Batson* challenge. Further, the fact the *only* African American prospective jurors discussed were the four excused either for cause or peremptorily could imply those were the only four African American prospective jurors subjected to voir dire. Certainly, there is also no record before us of any African American juror actually being seated in this case.

Barden, on a more complete record, held a prima facie *Batson* violation had been established. Notably, there, our Supreme Court pointed out there was "no hint of racism" in the prosecutor's questions and even noted the prosecutor accepted two (of seven) African American jurors. *Id.* at 343-44, 572 S.E.2d at 127. Rather, the Supreme Court looked to both the acceptance rate and the rate upon which the State exercised its peremptory challenges against African American jurors.[5] Acknowledging a numerical analysis is not necessarily dispositive, the Court nevertheless concluded the numerical analysis was useful in determining a prima facie showing had been made. *Id.* at 344, 572 S.E.2d at 127 (citation omitted).

I would not go so far on this record as to hold Defendant met his burden to establish a prima facie case for a *Batson* violation. Rather, I would conclude defense counsel's *Batson* challenge was sufficiently valid to require the trial court to make specific findings of fact based on the trial court's own first-hand observations and credibility determinations as to the factors present relevant to a prima facie *Batson* inquiry, including the overall make-up of the jury.[6]

Indeed, the trial court's ability to make such first-hand observations of jury selection is exactly why we—as an appellate court—must show great deference to the trial court. *See generally State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722 (1998) (citation omitted); *see also State v. Nicholson*, 355 N.C. 1, 21, 558 S.E.2d 109, 125 (2002) ("The trial court's determination is given deference on review because it is based primarily on firsthand credibility evaluations." (citation omitted)). This is also why, however, it is so imperative that " '[t]o allow for appellate

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5. It appears in *Barden* the State peremptorily rejected five of seven African American jurors. At the same time, and at the same rate, the State also exercised five of seven peremptory challenges on African American jurors. *Id.* at 344, 572 S.E.2d at 127. Thus, the discussion of the acceptance rate and peremptory-challenge rate in that case mirrors each other.

6. While not determinative, it is also persuasive to me in reaching this conclusion that the trial court, having observed all of this first-hand, felt it necessary to first request and subsequently *order* the State to put its justifications for exercising these peremptory challenges on the record. The practice of ordering a party to give its reasons for exercising a peremptory challenge in the absence of a prima facie *Batson* violation is at odds with the very purpose of peremptory challenges. Indeed, it is the requirement of a prima facie showing of a *Batson* violation that protects a party's right to exercise peremptory challenges without every strike being open to examination. The fact the trial court felt compelled to order the State to put its justifications for exercising these challenges into the record strongly suggests Defendant had met his burden to establish a prima facie showing under *Batson*.

review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches.' " *State v. Headen*, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010) (quoting *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998)). Here, the trial court did not make specific findings of fact to permit appellate review regarding the relevant factors set out in *State v. Quick*[7] in determining whether there was a prima facie showing by Defendant under our *Batson* analysis. See 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995) (citation omitted).

Consequently, I would grant the limited remedy of remanding this case to the trial court for specific findings of fact in order to permit appellate review of the trial court's decision, including any further evidentiary proceedings the trial court deems necessary to accommodate its fact finding as to the factors it deems relevant. *Cf. Hoffman*, 348 N.C. at 555, 500 S.E.2d at 723. As such, I respectfully dissent from the majority result affording Defendant no relief from judgment.

7. *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995) ("Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors." (citation omitted)).

STATE OF NORTH CAROLINA
v.
TONY DESHON JONES, DEFENDANT

No. COA19-281

Filed 21 January 2020

1. Appeal and Error—petition for writ of certiorari—untimely notice of appeal—defendant not informed of right to appeal

Where defendant failed to timely file notice of appeal from revocation of his probation, the Court of Appeals used its discretion to grant defendant's petition for writ of certiorari where the accompanying affidavit from defense counsel stated he did not remember whether he informed defendant of his right to appeal, his right to assistance from counsel, or the time period for filing notice of appeal.

2. Probation and Parole—revocation—transcript of testimony from prior hearing—no violation of right to confront witnesses

At a probation revocation hearing, an officer's testimony from a prior suppression hearing was properly introduced as competent evidence that defendant was in possession of a firearm while being a felon during his probationary period and that defendant carried a concealed weapon without a permit. Section 15A-1345(e) did not require the officer's live testimony at the revocation hearing, defendant did not request the trial court to make a ruling under that section that good cause existed for not allowing confrontation of the witness, nor did the record indicate that defendant or his counsel sought to confront and cross-examine the officer at the revocation hearing. The matter was remanded for correction of clerical errors in the judgments to show the correct probation violation.

Appeal by Defendant from judgments entered 23 October 2017 by Judge James K. Roberson in Durham County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

BROOK, Judge.

Tony Deshon Jones ("Defendant") appeals from judgments entered upon the trial court's finding that he violated his probation by committing new crimes. The trial court activated two of Defendant's suspended sentences after finding the probation violation. We hold that Defendant has failed to show error and affirm.

I. Background

On 5 August 2015, Defendant pleaded guilty to one count of possession of a firearm by a felon and one count of discharging a weapon into occupied property. Judge G. Wayne Abernathy entered two judgments in Durham County Superior Court that day, determining Defendant to be a prior record level II offender and sentencing him to 14 to 26 months for possession of a firearm by a felon and 29 to 47 months for discharging a weapon into occupied property. These sentences were to run concurrently. However, Judge Abernathy suspended the sentences and placed Defendant on a 36-month term of supervised probation.

On 1 April 2016, less than a year into the term of that probation, law enforcement observed Defendant outside the Joy Mart, a store in Durham, North Carolina, while officers were investigating potential criminal activity. Defendant was observed outside the Joy Mart for approximately one hour without going inside the store from approximately 50 yards away by Officer Norwood, who was monitoring the Joy Mart in an unmarked vehicle.

When Defendant left the store "sometime prior to midnight," Officer Norwood began following him in his car. As he was following Defendant, Officer Norwood noticed Defendant driving approximately 15 miles over the speed limit, and activated his blue lights and siren, conducting a traffic stop of Defendant.

During the stop, Officer Norwood requested Defendant's drivers license and registration and when Defendant replied that he did not have "any ID," Officer Norwood asked that Defendant exit the vehicle. After quickly frisking Defendant for weapons, Officer Norwood stepped to the front passenger side of Defendant's vehicle and, shining a flashlight inside, observed "what appeared to him to be a handgun, specifically 2 to 3 inches of the grip of what appeared to be a handgun or pistol between the console and seat." Defendant had not previously alerted Officer Norwood to the presence of a gun in the vehicle or informed Officer Norwood that he had a concealed carry permit allowing him to carry a concealed gun. Officer Norwood reached into the

vehicle and retrieved what he discovered was a loaded Smith & Wesson pistol. Officer Norwood then placed Defendant under arrest.

Defendant was charged with carrying a concealed weapon and possession of a firearm by a felon. On 24 April 2017, Defendant filed a motion to suppress the pistol recovered during the search, which the trial court denied in open court on 11 July 2017. At the trial of these charges, however, the jury was unable to reach a unanimous verdict, and Defendant's motion for mistrial was granted on 14 July 2017.

Previously, on 7 June 2017, a violation report had been filed in Durham County Superior Court alleging that Defendant had violated his probation by absconding. On 10 and 18 August 2017, supplemental violation reports were filed in Durham County Superior Court alleging that Defendant had violated probation by committing new criminal offenses, despite the fact that the jury had not found him guilty of these crimes.

The violations came on for hearing on 14 September 2017 before the Honorable James K. Roberson. On 23 October 2017, after two continuances, Judge Roberson did not find an absconding violation but did find that Defendant had committed the new criminal offenses of possession of a firearm by a felon and carrying a concealed weapon and revoked probation for committing these offenses. Judge Roberson activated the suspended sentences previously imposed by Judge Abernathy. The court entered two judgments to that effect.

II. Petition for Writ of Certiorari

[1] Before reaching the merits of Defendant's sole argument on appeal, we first address his petition for certiorari, which he has filed because of his failure to timely notice appeal from the revocation of his probation. In our discretion, we grant the petition and issue the writ.

Rule 21 of the North Carolina Rules of Appellate Procedure provides that "[t]he writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments . . . of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Under N.C. Gen. Stat. § 15A-1347(a), "[w]hen a superior court judge, as a result of a finding of a violation of probation, activates a sentence . . . , the defendant may appeal under G.S. 7A-27." N.C. Gen. Stat. § 15A-1347(a) (2019). There is an appeal as of right to our Court under N.C. Gen. Stat. § 7A-27(b) from "any final judgment of a superior court," with exceptions not at issue here. *Id.* § 7A-27(b)(1).

In the present case, Defendant was found to be in violation of his probation on 23 October 2017 in superior court. However, he did not

notice appeal from that finding within 14 days, as required by Rule 4(a)(2) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 4(a)(2) ("Any party . . . may take appeal by . . . filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment"). In a supporting affidavit attached as an exhibit to Defendant's petition for certiorari, Defendant's trial counsel avers that he lacks "any specific recollection of discussing an appeal . . . with [Defendant]," nor can Defendant's trial counsel recall "advising [Defendant] that an attorney would be appointed to handle his appeal if he could not afford one," or that "there was a 14-day deadline . . . to enter notice of appeal." In a letter filed with the trial court on 24 April 2018, Defendant alerted the court that he wished to appeal the finding that he violated his probation, explaining that his trial counsel did not explain his right to appeal from the finding, and had not assisted him by exercising that right on his behalf. Defendant's right to appeal therefore "has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). Because Defendant evidently did not understand that he had a right to an appeal from the violation, and it appears that his trial counsel did not explain this right to him – a right he wished to exercise – in the exercise of our discretion we grant Defendant's petition and issue the writ.

III. Merits

[2] In his sole argument on appeal, Defendant argues that the trial court erred in revoking his probation based on the testimony of an officer who testified at a previous hearing on a motion to suppress but not at the revocation hearing. Specifically, Defendant contends that he was deprived of the right to confront and cross-examine this officer at his revocation hearing because the trial court allowed the transcript of his testimony to be introduced and did not find that good cause existed to justify the officer's absence from the revocation hearing. We disagree.

N.C. Gen. Stat. § 15A-1345(e) governs probation revocation hearings, providing in relevant part as follows:

> (e) Revocation Hearing.--Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. . . . At the hearing, evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information,

> and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services. Formal rules of evidence do not apply at the hearing, but the record or recollection of evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing.

N.C. Gen. Stat. § 15A-1345(e) (2019) (emphasis added).

"A proceeding to revoke probation is not a criminal prosecution," however. *State v. Duncan*, 270 N.C. 241, 245, 154 S.E.2d 53, 57 (1967). The statutory right conferred by N.C. Gen. Stat. § 15A-1345(e) is a codification of the probationer's right to due process under the Fourteenth Amendment and "[t]hus, Sixth Amendment rights . . . are not involved." *State v. Braswell*, 283 N.C. 332, 337, 196 S.E.2d 185, 188 (1973). Although under N.C. Gen. Stat. § 15A-1345(e), a probationer must be "effectively allowed to speak on [his or] her own behalf[,] [and] to present information relevant to the charge that [he or] she [] violated a condition of probation," *State v. Coltrane*, 307 N.C. 511, 516, 299 S.E.2d 199, 202 (1983), the failure of a probationer to request that a witness attend the violation hearing or be subpoenaed and required to testify can constitute waiver of the right to confrontation, *State v. Terry*, 149 N.C. App. 434, 438, 562 S.E.2d 537, 539-40 (2002). The due process right to confrontation prior to a probation revocation also permits "use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n. 5, 93 S. Ct. 1756, 1760 n. 5, 36 L. Ed.2d 656 (1973). And while N.C. Gen. Stat. § 15A-1345(e) confers upon a probationer a right to confrontation, it commits to the discretion of the trial court whether "good cause [exists] for not allowing confrontation." N.C. Gen. Stat. § 15A-1345(e) (2019). Finally, the State need only present "competent evidence establishing a defendant's failure to comply with the terms of probation" to establish the predicate required for the trial court to determine "that the defendant has violated a condition[.]" *Terry*, 149 N.C. App. at 437-38, 562 S.E.2d at 540. "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation." *Id.* at 438, 562 S.E.2d at 540 (citation omitted).

In the present case, Defendant did not request the trial court to make a good cause finding that confrontation should not be allowed. Nor is there anything in the record to suggest that Defendant requested testimony from the officer or subpoenaed the officer to compel his attendance at the revocation hearing. Instead, Defendant's argument in the trial court was that admission of the transcript of testimony by the officer presented at the motion to suppress should not be allowed because it was introduced to prove that he had committed additional criminal offenses during his term of probation, violating a condition of probation, when the jury did not find him guilty at the trial of these charges. We hold that the officer's testimony at the prior hearing on the motion to suppress, relating to whether Defendant was in possession of a firearm while being a felon during the term of his probation and was possessing a concealed weapon without a permit on 1 April 2016, was competent evidence. The trial court's determination that he had violated probation, though the State was unable to prove these charges to the jury, is not error. It therefore was not error for the trial court to neglect to make a ruling on whether good cause existed where such ruling was not requested by Defendant. Furthermore, live testimony from the officer, who testified at the suppression hearing but not at the revocation hearing, was not required under N.C. Gen. Stat. § 15A-1345(e). There is no indication in the record that Defendant or his counsel sought to confront and cross-examine the officer at the revocation hearing.

IV. Conclusion

Defendant has failed to show that the trial court erred by revoking his probation and activating his sentence. However, the judgments revoking Defendant's probation and activating his sentences state that they are based on the alleged probation violation of absconding rather than committing new criminal offenses, which was the basis for the trial court's activation of Defendant's previously suspended sentences. Therefore, these judgments are remanded only for correction of the clerical errors to make "the record speak the truth." *State v. May*, 207 N.C. App. 260, 263, 700 S.E.2d 42, 44 (2010) (internal marks and citation omitted).

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
FAYE LARKIN MEADER, DEFENDANT

No. COA19-554

Filed 21 January 2020

Criminal Law—defenses—intoxication—jury instructions

Defendant was not entitled to a jury instruction on voluntary intoxication or diminished capacity where, at most, she presented evidence that she was intoxicated and behaving somewhat erratically when she broke into a vehicle and stole several items of personal property, but she did not demonstrate that she was so completely intoxicated as to render her utterly incapable of forming the intent to commit the crimes charged.

Judge BROOK dissenting.

Appeal by defendant from judgments entered 19 December 2018 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 5 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew Baptiste Holloway, for the State.

The Green Firm, PLLC, by Bonnie Keith Green, for defendant-appellant.

YOUNG, Judge.

Where the evidence, taken in the light most favorable to the defendant, did not show that defendant was so intoxicated as to be incapable of forming intent, the trial court did not err in denying defendant's request to instruct the jury on voluntary intoxication or diminished capacity. We find no error.

I. Factual and Procedural Background

The relevant and undisputed facts of this case are as follows: On 22 November 2017, Faye Larkin Meader (defendant) arrived at the office of Family Solutions, appearing and behaving in an intoxicated manner. Law enforcement was contacted to remove her from the premises. While defendant was present, clients at Family Solutions discovered their car

door open. Several items of personal property were missing from the vehicle, and when police arrived to detain defendant, they discovered them on her person. On 24 September 2018, defendant was indicted for felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen goods or property.

Prior to trial, defendant filed notice of intent to offer the defense of voluntary intoxication or diminished capacity. The matter proceeded to trial. At the jury charge conference, defendant requested an instruction on voluntary intoxication or diminished capacity, on the basis that "each and every witness testified that Ms. Meader was intoxicated." The trial court denied this request.

The jury returned verdicts finding defendant guilty on all three charges. The trial court sentenced defendant to 30 days imprisonment on the charge of misdemeanor larceny, and entered a suspended sentence of 30 months, to begin upon defendant's release from prison on the charges of larceny and breaking or entering a motor vehicle. Having entered sentences on those two charges, the trial court arrested judgment on the charge of possession of stolen goods.

Defendant appeals.

II. Standard of Review

"[Arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988).

III. Request for Jury Instruction

In her sole argument on appeal, defendant contends that the trial court erred in denying her request for a jury instruction on voluntary intoxication. We disagree.

"Voluntary drunkenness is not an excuse for a criminal act, but in certain instances, it may be sufficient to negate the requisite intent element of a crime." *State v. Kyle*, 333 N.C. 687, 698, 430 S.E.2d 412, 418 (1993). "Where a specific intent element is an essential element of the offense charged, voluntary intoxication may negate the existence of that intent." *Id.* at 698-99, 430 S.E.2d at 418. "Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He

must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form [the requisite intent]." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536.

> The evidence must show that at the time of the [alleged crime] the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming [the requisite intent]. *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913). In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975). The question then, in this case, is whether there was evidence that defendant was intoxicated to such extent that he was utterly incapable of forming a specific intent to [commit the crime charged] so as to require an instruction on intoxication by the trial judge.

State v. Medley, 295 N.C. 75, 79-80, 243 S.E.2d 374, 377 (1978).

In the instant case, defendant contends that, "viewed in a light most favorable to her, there was substantial evidence that her mind and reason were so completely intoxicated and overthrown as to render her utterly incapable of forming the requisite intent for felony breaking and entering a motor vehicle and misdemeanor larceny and possession of stolen goods."

In support of this position, defendant notes that the original call to which police responded was "a dispatch of an intoxicated subject[,]" and that an officer testified that, when he first encountered defendant, "she just appeared to be either intoxicated or impaired by an illegal substance." The officer further testified that defendant, while inside of a business and in front of witnesses, pulled down her pants to display a bruise on her groin. Defendant also notes that the witness who called police said defendant "seemed intoxicated[;]" that another witness testified that defendant seemed "a little disoriented, agitated[,]" and "[h]er speech, her kind of line of thinking was going in a lot of different directions[;]" and that another witness described her peculiar, giggling behavior and unusual conversational topics. Defendant also cites additional testimony and evidence that she was incoherent, that she may have been hallucinating, and that she smelled of alcohol.

The State notes, however, that this paints an incomplete picture of the evidence at trial. While officers were initially called to deal with an intoxicated individual, and a number of witnesses described defendant

as such, defendant was not arrested for intoxication. To the contrary, one of the witnesses observed that, while defendant appeared "agitated," she was "fairly cooperative" in response to questioning, and was "just answering" the questions put to her by officers. Moreover, evidence showed that she was aware of her circumstances. Once officers had placed her in custody for the possession of stolen goods, and had placed her in the back of the police car, she asked witnesses, "don't let them . . . take me to jail."

Defendant cites *State v. Keitt* for the principle that her voluntary intoxication served as a defense to the felonious intent required in the crimes charged, and that it was error to deny her request for a jury instruction. *See State v. Keitt*, 153 N.C. App. 671, 571 S.E.2d 35 (2002), *aff'd per curiam*, 357 N.C. 155, 579 S.E.2d 250 (2003). However, the facts of that case are distinguishable. In *Keitt*, a witness testified that the defendant "was so intoxicated that he was unable to ride a bicycle or even walk home on his own[;]" another witness testified that the defendant "was barely able to stand on his own[;]" and another witness testified that the defendant "had trouble navigating and fumbled with the door and the screen door[.]" *Id.* at 677, 571 S.E.2d at 39. In the instant case, by contrast, there was no testimony that defendant stumbled or suffered from limited mobility, nor even that her speech was slurred. Rather, the evidence merely suggested that she smelled of alcohol and was behaving somewhat erratically.

We hold that the facts of this case are, instead, more closely aligned with those of *State v. Wilson-Angeles*, ___ N.C. App. ___, 795 S.E.2d 657 (2017). In that case, as in this case, the defendant argued that the evidence was sufficient to entitle her to an instruction on voluntary intoxication. In support of this argument, the defendant cited "various behaviors exhibited by Defendant on the night in question, including, *inter alia*, yelling profanities, inexplicably singing hymns, claiming to be the victim, attempting to take her shirt off to show law enforcement an injury, and passing out at the police department." *Id.* at ___, 795 S.E.2d at 666. We held, however, that while the evidence did show that the defendant "was intoxicated to some degree[,]" it was insufficient to entitle her to a voluntary intoxication instruction. *Id.* We went on to note that the evidence "did not establish how much alcohol Defendant had consumed prior to committing the crime at issue, which case law suggests is information of significant consequence to the determination of whether a defendant is entitled to a voluntary intoxication instruction." *Id.* Nor did the evidence "tend to show the length of time over which Defendant had consumed alcohol before committing the [crime] in this case, a showing

which must be made before a defendant is entitled to this instruction." *Id*. We therefore held that defendant was "not entitled to a voluntary intoxication instruction." *Id*. at ___, 795 S.E.2d at 667.

Our reasoning in *Wilson-Angeles* was not novel. In *State v. Ash*, 193 N.C. App. 569, 577, 668 S.E.2d 65, 71 (2008), this Court held that while there was some evidence that the defendant was intoxicated while committing the crime charged, "there was no evidence as to exactly how much he consumed prior to the commission of the crime at issue[,]" which, taken with other evidence in that case, supported the trial court's decision not to instruct the jury on voluntary intoxication. Similarly, in *State v. Geddie*, 345 N.C. 73, 95, 478 S.E.2d 146, 157 (1996), *cert. denied*, 522 U.S. 825, 139 L. Ed. 2d 43 (1997), our Supreme Court held that "[e]vidence tending to show only that defendant drank some unknown quantity of alcohol over an indefinite period of time before the murder does not satisfy the defendant's burden of production."

Defendant is correct that there was ample evidence of defendant's intoxication at the time of the offenses charged. However, mere intoxication is not sufficient to establish voluntary intoxication as a defense to the formation of intent. As in *Wilson-Angeles*, *Ash*, and *Geddie*, there was no evidence in the instant case of how much defendant had consumed, or over what period. There was also insufficient evidence that defendant was so severely intoxicated, beyond mere inebriation, that she was incapable of comprehending her surroundings or acting on her own, let alone forming the intent to commit a crime.

Defendant further contends that the trial court erred in permitting the State to improperly shift its burden onto defendant with its closing argument. However, defendant failed to raise timely objection to the State's closing argument, thus failing to preserve it for review. Moreover, defendant has failed to argue that this constituted plain error. *See* N.C.R. App. P. 10(a)(4). As such, we dismiss such argument.

Ultimately, the question before us is whether the evidence, taken in the light most favorable to defendant, tended to show that defendant was intoxicated to such a profound degree that it was impossible for her to form the requisite intent to perform the crimes charged. We hold that, even under this standard, defendant's evidence did not meet the necessary burden. At most, defendant presented evidence of some intoxication, but she did not demonstrate that she was "so completely intoxicated and overthrown" as to render her "utterly incapable" of forming intent. As such, we hold that the trial court did not err in denying defendant's request for an instruction on voluntary intoxication or diminished capacity.

NO ERROR.

Judge TYSON concurs.

Judge BROOK dissents with separate opinion.

BROOK, J., dissenting.

I respectfully dissent. We view the evidence in the light most favorable to the defendant in assessing whether a jury instruction on voluntary intoxication was warranted. Here, there was substantial evidence of Defendant's intoxication. And there was substantial evidence that this rendered her incapable of forming the requisite intent to commit the charged offenses. Finally, there is a reasonable possibility that the jury would have reached a different result if instructed on voluntary intoxication. I would thus hold the trial court erred in denying Defendant's request for a jury instruction on voluntary intoxication and that, as a result, she is entitled to a new trial.

I. Evidence Presented at Trial

On 22 November 2017, Lindsey Penninger and her husband Walter Penninger completed an appointment with their son at Family Solutions in Greensboro and discovered that their car had been broken into during their session. There were no signs of damage or forced entry to the car. Mrs. Penninger testified that, while she generally locks her car door, she might not have done so on this occasion. Mrs. Penninger noticed her laptop was missing,[1] and Mr. Penninger realized his firearm magazine was also missing. While they waited for law enforcement to arrive, Mr. Penninger went back inside the building where he came across Defendant, and he asked her if she had seen anything. Mr. Penninger testified that Defendant answered that "she was somewhere having sex with a bunch of people on a table, and they have a video of it. And then somebody jumped off – some guy jumped off three stories and punched her."

Officer Jordan Fulp testified that she was dispatched to Family Solutions after receiving a call of an intoxicated subject and possible breaking and entering. When she arrived, Officer Fulp went inside the building to speak with Defendant, and "she automatically started talking about getting beat up the night before by a guy named Sebastian."

1. Once Mrs. Penninger returned home, she found her laptop and realized it had never been in the car.

Defendant then "pulled her pants down in front of everybody" to display a "bruise near her groin area." Officer Fulp testified that when officers tried to escort Defendant out of the building, "she immediately became loud[] and she did not want to follow instructions." As a result, officers put Defendant in handcuffs, but as they did so, Defendant started calling for an "Omar" and asked Omar to bring her wallet. Officer Fulp testified there was no one named Omar on the scene. Defendant also told Officer Fulp that she needed to get her bra from "the bedroom" and collect her purse before she could leave with Officer Fulp. Officer Fulp testified there were no bedrooms in the Family Solutions building and that Defendant did not have any belongings with her. Officer Fulp was finally able to place Defendant in her patrol car, where Defendant proceeded to yell, "I love you" several times and later urinated on herself.

Officer Fulp testified she and other officers searched for the items that Mr. and Mrs. Penninger reported stolen but were not able to locate them. Officer Fulp then tried to take the handcuffs off Defendant and release her, but "she didn't want to get out of [the] car" and had to be "coaxed" out. After Defendant exited the vehicle, Officer Fulp saw the gun magazine in Defendant's right front pocket. Officer Fulp asked Defendant what was in her pocket, and Defendant responded, "[O]h, it's my cellphone," and pulled out the magazine to show Officer Fulp. Defendant had previously told Officer Fulp that her phone had been broken the night before. Defendant also had a pair of pink sunglasses and a koozie that read, "Logan and Macy, Stokesdale, North Carolina, 5-5-2017" sticking out of the V-neck of her shirt during the entire encounter, both of which belonged to the Penningers and were taken from their car. Mrs. Penninger testified that the koozie was a party favor from her sister's wedding. Officer Fulp then arrested Defendant and transported her to jail.

Defendant's aunt, Francis Womble, testified that she received a call from her niece while she was in jail. Ms. Womble testified that Defendant "sounded delirious" and told her "she had gone to see Keith[] [a]nd she got in his car and started blowing his horn." Ms. Womble testified Defendant thought Keith had called the police and had her arrested. Ms. Womble testified that Keith lives in High Point.

II. Governing Case Law

As discussed by the majority, "[arguments] challenging the trial court's decisions regarding jury instructions are reviewed *de novo*." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). When an instruction is requested by counsel and the trial judge considers and

refuses the request, the issue is preserved for appeal. *See Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984).

"Voluntary intoxication is not a legal excuse for a criminal act." *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981). It is a defense, however, "if the degree of intoxication is such that a defendant could not form the specific intent required for the underlying offense." *State v. Golden*, 143 N.C. App. 426, 430, 546 S.E.2d 163, 166 (2001). In order for the trial court to be required to give an instruction on voluntary intoxication, the defendant must "produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming the requisite specific intent." *State v. Ash*, 193 N.C. App. 569, 576, 668 S.E.2d 65, 70-71 (2008) (citation and marks omitted). The defendant may rely exclusively on evidence presented by the State. *State v. Herring*, 338 N.C. 271, 275, 449 S.E.2d 183, 186 (1994). Importantly, when assessing whether to give an instruction on intoxication, "courts must consider the evidence in the light most favorable to the defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citation omitted).

Our Court has found substantial evidence of intoxication based on witnesses' perceptions of the defendant. In *State v. Keitt*, 153 N.C. App. 671, 571 S.E.2d 35 (2002), *aff'd per curiam*, 357 N.C. 155, 579 S.E.2d 250 (2003), a witness testified that "at some time between 8:30 p.m. and 9:00 p.m. on the night of the break-in, the defendant was so intoxicated that he was unable to ride a bicycle or even walk home on his own." *Id.* at 677, 571 S.E.2d at 39. Another witness testified that when the defendant was brought home, he "was barely able to stand on his own." *Id.* The prosecuting witness testified that when defendant "was trying to leave her home, he had trouble navigating and fumbled with the door." *Id.* Finally, when the officer went to arrest "the defendant the next morning, he smelled alcohol on the defendant." *Id.* We held this evidence, viewed in the light most favorable to the defendant, showed that he was entitled to the voluntary intoxication instruction. *Id.*

Even if there is evidence of substantial intoxication, when a defendant takes "deliberate actions that suggest a clear purpose in carrying out" the crime, a voluntary intoxication instruction is not warranted. *See State v. Wilson-Angeles*, 251 N.C. App. 886, 897, 795 S.E.2d 657, 667 (2017). Taking steps "designed to hide [the] defendant's participation" in the crime, like disposing of evidence, demonstrates the defendant's ability to "plan and think rationally" and shows that a defendant is not so intoxicated as to be unable to form intent. *State v. Long*, 354 N.C.

534, 538-39, 557 S.E.2d 89, 92 (2001). Additionally, when a defendant takes "deliberate actions that suggest a clear purpose in carrying out the" crime, it indicates a defendant has "some level of awareness of her surroundings." *Wilson-Angeles*, 251 N.C. App. at 897-98, 795 S.E.2d at 667. Deliberate actions include leaving "the scene, gather[ing] supplies, and return[ing] to . . . carry out the crime." *Id.*

On appeal, if the reviewing court determines the trial court erred in denying the defendant's request on voluntary intoxication, the question then becomes whether the trial court's error requires a new trial. *Keitt*, 153 N.C. App. at 677, 571 S.E.2d at 39.

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

N.C. Gen. Stat. § 15A-1443(a) (2017). This requires showing that there is a "reasonable possibility that a different result would have occurred had the instruction been given." *Keitt*, 153 N.C. App. at 678, 571 S.E.2d at 40. Where "the case is relatively close on the degree of . . . culpability . . . due to both the substantial evidence of defendant's intoxication at the time he committed the crime and . . . the manner of the [offense] and defendant's actions immediately before and after it[,] . . . there is a reasonable possibility that a different result would have obtained at trial" when an intoxication instruction is erroneously omitted. *Mash*, 323 N.C. at 349-350, 372 S.E.2d at 538-39.

III. Applying Case Law to these Facts

Taken in the light most favorable to Defendant, there was substantial evidence presented at trial supporting the conclusion that Defendant was intoxicated and, as a result, incapable of forming the requisite specific intent. Further, the trial court's failure to give the requested voluntary intoxication instruction prejudiced Defendant and thus requires a new trial.

A. Intent

i. Evidence of Intoxication

There was substantial evidence here, viewed in the light most favorable to Defendant, of her intoxication. As the majority acknowledges, "the original call to which police responded was 'a dispatch of an intoxicated

subject.'" *Meader*, *supra* at ___. The intoxicated subject in question was Defendant, who witnesses described as "agitated," "irritated," and "delirious." Officer Fulp testified that "by first appearance [Defendant] . . . appeared to be either intoxicated or impaired by an illegal substance." Defendant also inexplicably told officers that a gun magazine in her pocket was a flip phone and seemed unable to answer questions directly. For instance, when Mr. Penninger asked Defendant if she had seen anything with regard to the breaking and entering, Defendant responded that "she was somewhere having sex with a bunch of people on a table, and they have a video of it. And then somebody jumped off – some guy jumped off three stories and punched her." Also, when officers arrived and began speaking with her, Defendant pulled down her pants, began calling for "Omar," and said she "needed to get her bra from the bedroom." Finally, Defendant urinated on herself while in the police car.

The majority asserts "that th[e] [evidence of intoxication] paints an incomplete picture of the evidence at trial." *Meader*, *supra* at ___. Specifically, the majority states that while the evidence showed Defendant was agitated, disoriented, and intoxicated or impaired, she was also "fairly cooperative." *Id.* However, to "view the evidence in the light most favorable to the defendant" means if there is evidence of agitation, disorientation, intoxication or impairment, then Defendant was agitated, disoriented, and intoxicated or impaired—this despite evidence that Defendant was also somewhat cooperative. *See Mash*, 323 N.C. at 348, 372 S.E.2d at 538 ("While there is some evidence to the contrary, when viewed in the light most favorable to defendant, the evidence of defendant's state of intoxication is enough to require the voluntary intoxication instruction."). Relatedly, the majority's emphasis on the absence of information about how much and when Defendant consumed intoxicating substances here is misplaced. Such information is not necessarily dispositive. *See*, *e.g.*, *Kiett*, 153 N.C. App. at 677-78, 571 S.E.2d at 39-40 (holding defendant was entitled to voluntary intoxication instruction despite lack of evidence as to how much and when defendant consumed alcohol). And fixating on it in this instance elevates form over substance; everyone—the State, Officer Fulp, the Penningers, and Ms. Womble—agrees Defendant was intoxicated.

ii. Evidence of Lack of Requisite Specific Intent

Viewed in the light most favorable to Defendant, the evidence in this case also shows a distinct lack of deliberation and purpose. Defendant here made no attempt to leave the scene of the crime. She took no steps to hide her participation in the crime. With seemingly no regard for the consequences of her actions, she showed officers the items that had

been taken from the car. Nor did Defendant take deliberate actions that indicated a level of awareness of her surroundings. Two of the three items Defendant took from the Penningers' car had little to no value, and Defendant told law enforcement that the gun magazine in her pocket was a flip phone. Furthermore, according to both Officer Fulp's and Ms. Womble's testimony, Defendant either thought she was with Keith in High Point or in an unknown house with Omar.

All of this stands in stark contrast to the case central to the majority's analysis, *State v. Wilson-Angeles*. While there was evidence in *Wilson-Angeles* that defendant "was intoxicated to some degree," 251 N.C. App. at 898, 795 S.E.2d at 667, she also "quickly handed off a container of alcohol as law enforcement approached her, [which] indicat[ed] some level of awareness of her surroundings," *id*. The defendant in *Wilson-Angeles* also took "deliberate actions that suggest[ed] a clear purpose in carrying out the attempted arson." *Id*. at 897, 795 S.E.2d at 667. Specifically, she had to "leave the scene, gather supplies, and return to [the prosecuting witness's] door to carry out the crime" of making a Molotov cocktail. *Id*. at 898, 795 S.E.2d at 667.

B. Prejudice

Defendant also has shown "a reasonable possibility that a different result would have occurred had the instruction been given." *Keitt*, 153 N.C. App. at 678, 571 S.E.2d at 39. First and foremost, and as noted above, the evidence of Defendant's profound intoxication as well as her actions around the time of the offense raised serious questions about whether Defendant could form the requisite intent. *Mash*, 323 N.C. at 349-350, 372 S.E.2d at 538-39. Even without the requested instruction, the jury sent two questions during deliberations showing they were struggling with the issue of intent. The first jury question stated that the jury was evenly split on the issue of intent. The trial judge instructed the jury that it must reach a unanimous verdict. The jury next requested a definition for "utterly incapable" in response to the State's closing argument that Defendant was not "utterly incapable" of forming the requisite intent for the crimes charged. In short, there is a reasonable possibility that there would have been a different result if the jury had been properly instructed.[2]

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2. The majority also cites *State v. Ash* in support of its assertion that an intoxication instruction was not necessary here. *Ash* is readily distinguishable as, among other things, the alleged error in that case was not preserved, meaning defendant needed to show plain error. 193 N.C. App. at 575, 668 S.E.2d at 70. Defendant here need show only a reasonable possibility that the error at issue produced a different result—a far less deferential standard.

IV. Conclusion

Viewing the evidence in the light most favorable to Defendant, there was substantial evidence of intoxication such that her "mind and reason were so completely intoxicated and overthrown as to render h[er] utterly incapable of forming [the requisite intent]." *State v. Shelton*, 164 N.C. 513, 518, 79 S.E. 883, 885 (1913), *overruled on other grounds by State v. Oakes*, 249 N.C. 282, 106 S.E.2d 206 (1958). Further, there is a reasonable possibility that a different result would have been reached at trial if the requested instruction had been given. I would, therefore, reverse and remand for a new trial.

STATE OF NORTH CAROLINA
v.
WILLIAM LEE SCOTT

No. COA19-250

Filed 21 January 2020

Homicide—second-degree—felony murder by vehicle—erroneous admission of blood test—alternative theories of malice sent to jury

The trial court erroneously denied defendant's motion to suppress blood evidence, taken from him during medical treatment after he was involved in a vehicle collision in which the other car's driver died and which revealed defendant was intoxicated, because the trial court's order compelling the hospital to turn over samples of defendant's blood was insufficient under either N.C.G.S. § 8-53 or N.C.G.S. § 90-21. However, the admission of the blood results was not prejudicial where two other theories supporting the malice element of second-degree murder sent to the jury—of speeding and reckless driving—were supported by the evidence, including testimony of an eyewitness, defendant's prior traffic offenses, and data obtained from the computer in defendant's vehicle that showed he was traveling at 78 miles per hour five seconds before the crash in a 45 mile per hour speed zone.

Judge BRYANT concurring in the result.

Judge BROOK concurring in part and dissenting in part.

Appeal by defendant from judgment entered 23 July 2018 by Judge Paul C. Ridgeway in Alamance County Superior Court. Heard in the Court of Appeals 15 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

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

TYSON, Judge.

William Lee Scott ("Defendant") appeals from a judgment entered after a jury found him guilty of second-degree murder and felony death by vehicle. The trial court arrested judgment in the felony death by vehicle and entered judgment and sentenced Defendant on the conviction for second-degree murder. We find no prejudicial error.

I. Background

During the afternoon of 21 June 2013, Jose Munoz ("Munoz") was driving on University Drive in Elon. He observed a green Jeep vehicle pass him in a no-passing zone at a high rate of speed. Munoz depressed his brake pedal to allow the green Jeep "to get in [his lane] and not hit" oncoming traffic. When Munoz arrived at the intersection of Manning Drive and University Drive, he observed the green Jeep had collided with a 2003 white Chevrolet Impala vehicle, which had attempted to make a left turn. Munoz also observed Defendant seated in the driver's seat of the green Jeep with blood on his face and Veocia Warren ("Warren") apparently deceased seated inside the white Chevrolet.

Burlington Police Officer Michael Giroux ("Lt. Giroux") was the first responder to arrive on the scene. Giroux also serves as a part-time volunteer lieutenant with the Elon Fire and Rescue Department. Lt. Giroux observed "an approximately [seventy] year old black female in the driver's seat [of the white Impala vehicle] with her face covered with blood who was unresponsive and did not appear to be breathing."

John Cuthriell ("Cuthriell") of the Alamance County Rescue Department also arrived on the accident scene. Cuthriell observed "significant amounts of trauma to [Warren]." "There was blood visible and the head was essentially cocked at an angle that [he] did not believe that the patient's condition to be sustainable of life."

Both Cuthriell and Lt. Giroux checked Warren and were unable to detect a pulse in her carotid artery by feel or by using an oximeter. They

used a heart monitor to check for electrical activity in her heart. After they were unable to find an electrical rhythm, Warren was pronounced dead at the scene.

Warren sustained multiple abrasions and lacerations to her head, her upper body and her lower extremities, a possible broken neck, and a fracture to her left arm. Her cause of death was listed as multiple blunt force trauma.

Elon Assistant Fire Chief Charles Walker ("Asst. Chief Walker") arrived on the scene and began assisting Defendant. Asst. Chief Walker observed Defendant, while he was still restrained in the driver's seat of the green Jeep. Defendant was observed to be "in and out" of consciousness. Defendant was removed from his vehicle, placed on a backboard, and transported by ambulance to Moses Cone Hospital ("Hospital") in Greensboro.

After finishing his investigation at the accident scene, Elon Police Lieutenant Jim Giannotti ("Lt. Giannotti") went to the Hospital to speak with Defendant. Upon arrival, he was informed Defendant had already been released from the Hospital. Lt. Giannotti contacted Defendant at his girlfriend's house later that day.

Defendant was described as "really, really upset" and crying when he learned of Warren's death. Defendant stated he remembered seeing the white car as she approached his vehicle, and "the next thing [he] knew she was in front of his lane. And that [he] tried to get out of the way of it." Defendant further stated he was going "the speed limit or a little over" at the time of the crash.

Lt. Giannotti observed Defendant "didn't seem impaired" but noted "he just seemed different." In his accident report, Lt. Giannotti determined that Warren's vehicle was in Defendant's right-of-way or "in his path of travel" at the time of the collision.

A. Blood Evidence

Investigators sought and obtained a court order for release of Defendant's medical records from the Hospital. Lt. Giannotti obtained the order from the Elon Police Department. Five days after the accident Lt. Giannotti returned to the Hospital to determine whether Defendant's blood had been drawn and tested. The Hospital confirmed that Defendant's blood was drawn shortly after his arrival in the emergency department.

In addition to the blood tests and results for the purposes of diagnosing Defendant's injuries incurred in the accident, the Hospital produced

three vials of blood. The Hospital did not conduct any toxicology tests on Defendant's blood. Each vial was labeled with Defendant's name (Scott, William) and Medical Record Number: (MRN: 030043599). All three vials were closed, two of them with a red snap and one vial was closed with a purple top, to signify the vial contained an anti-coagulate, but no preservatives.

Lt. Giannotti received the three vials from the Hospital and drove them to the State Bureau of Investigation ("SBI") laboratory in Raleigh. The SBI's laboratory test results showed Defendant's blood alcohol concentration was .22 grams of alcohol per 100 milliliters of blood.

B. Speed Evidence

North Carolina Highway Patrol Sergeant Stephen Myers ("Sgt. Myers") was dispatched to the scene of the crash as a member of the Accident Reconstruction Unit. The posted speed limit at the intersection of University Drive and Manning Drive was forty-five miles per hour.

Sgt. Myers utilized a data retrieval tool to download information from the computer of Defendant's vehicle. The data Sgt. Myers retrieved indicated the Jeep's speed five seconds prior to the crash was seventy-eight miles per hour with a fifty-three percent accelerator pedal and a forty-seven percent engine throttle. The data also indicated that a tenth of a second before impact, Defendant's green Jeep was traveling at seventy-three miles per hour, with zero percent accelerator pedal, and the brake pedal was depressed.

Two months after the crash, Elon Police Lieutenant Kelly Blackwelder and Detective Brian Roof conducted a follow-up interview with Defendant at his home in Burlington. Defendant stated that on the day of the crash he visited several construction sites, traveled back to his house to retrieve a tool, and to a pharmacy to buy some ear drops. Defendant further stated he was "maybe going 58, maybe 60 miles per hour" at the time of the crash and that he was "not much of a speeder in general. Not even on the Interstate."

Defendant stated he had seen Warren's Impala in the roadway on Manning Avenue but noted "it happened so quickly." Defendant thought Warren had probably run a stop sign. The last thing Defendant recalled from the incident was slamming on his brakes and trying to stop his car to avoid Warren's vehicle in his lane of travel. Defendant denied consuming alcohol or medication prior to the crash.

Defendant was indicted for second-degree murder, felony death by vehicle, and misdemeanor death by vehicle on 3 September 2013. On

13 April 2018, Defendant filed a motion to suppress and memorandum of law seeking to exclude the results of the blood samples obtained from the Hospital. The same day, Defendant also filed a motion *in limine* and memorandum of law seeking to exclude the same blood evidence. Defendant's motion to suppress was heard on 6 July 2018 and denied by order on 16 July 2018. On 16 July 2018 the State dismissed the misdemeanor death by vehicle charge. Defendant's trial began 17 July 2018.

The jury's verdict found Defendant was guilty of second-degree murder and felony death by vehicle. The trial court sentenced Defendant in the mitigated range to an active term of 120-156 months and arrested judgment on the conviction for felony death by vehicle. Defendant gave written notice of appeal.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred by denying his motion to suppress blood evidence obtained pursuant to a court order.

IV. Motion to Dismiss

A. Standard of Review

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).

B. Analysis

1. Admission of Blood Test Results

Defendant asserts the trial court's denial of his motion to suppress blood evidence was error. He argues the court order authorizing blood evidence to be collected and tested was insufficient under the statutes.

The trial court issued its order requiring the Hospital to release Defendant's medical records under N.C. Gen. Stat. § 8-53 (2017), which provides:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

In evaluating the district court's order to release Defendant's medical records under N.C. Gen. Stat. § 8-53, we are guided by our Supreme Court's precedent in the case of *In re Superior Court Order*, 315 N.C. 378, 338 S.E.2d 307 (1986). "[T]he trial judge must be presented with something more than the complainant's bare allegation that it is the best interest of justice to allow the examination." *Id.* at 381, 338 S.E.2d 310. The movant must show by an "affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime." *Id.*

The officer's Application for Order contained a "bare allegation" that a fatality had occurred during a car crash. No affidavit or any evidence of a crime being committed or any indicia to raise a reasonable suspicion was included. When the order was sought, the collision had been preliminarily declared to have been caused by Warren's vehicle being in Defendant's right of way and lane of travel at the time of the collision.

In *State v. Smith*, 248 N.C. App. 804, 805 789 S.E.2d 873,874 (2016), an officer responding at the scene of a motorcycle crash had noted "the strong odor of alcoholic beverage . . . emanating from [the defendant's] breath as he was trying to speak and breathe." Another officer investigating the crash "noticed the 'very strong' odor of alcohol on [the defendant's] breath." *Id.* at 805, 789 S.E.2d at 874. At the hospital, the same investigating officer "continued to detect a strong odor of alcohol on

[the defendant's] breath and observed that [the defendant] had bloodshot eyes and slurred speech." *Id.* The officer concluded "it was more probable rather than not that [the defendant had been] driving under the influence of alcohol." *Id.*

Here, no allegation or indication of Defendant's purported intoxication was asserted in the record or in the Application for Order. None of the officers, firefighters, or paramedics on the scene, nurses, physicians, or investigating officers in close and direct contact with Defendant at the hospital noticed any signs of impairment at the time of the collision or thereafter.

The first and only indication of Defendant's intoxication were results of tests on Defendant's blood samples taken from the Hospital and tested over a week later at the SBI laboratory. The trial court's order on Defendant's motion to suppress specifically found "the affidavit and order entered in this case on June 26, 2013 would fail" under N.C. Gen. Stat. § 8-53, but denied Defendant's motion to suppress and admitted the results of the blood tests under N.C. Gen. Stat. § 90-21.

We agree the trial court's order cannot be sustained under N.C. Gen. Stat. § 8-53, but this does not end our analysis of the order. This Court has held a "trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for it." *State v. Turner*, 239 N.C. App. 450, 455, 768 S.E.2d 356, 359 (2015). N.C. Gen. Stat. § 90-21.20B may provide a statutory method for a "judicial official" to order the disclosure of private health information in the event of a vehicle crash. *See Smith*, 248 N.C. App. at 814-15, 789 S.E.2d at 879-80.

N.C. Gen. Stat. § 90-21.20B(a1) (2017) provides:

> Notwithstanding any other provision of law, if a person is involved in a vehicle crash:
>
> > (1) Any health care provider who is providing medical treatment to the person shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.
> >
> > (2) Law enforcement officers shall be provided access to visit and interview the person upon

> request, except when the health care provider requests temporary privacy for medical reasons.
>
> (3) A health care provider shall disclose a certified copy of all identifiable health information related to that person as specified in a search warrant or an order issued by a judicial official.

The State asserts the trial court's ruling on Defendant's motion to suppress was proper under this statute. It argues Defendant's blood was drawn in the regular course of medical treatment after arrival in the Hospital's emergency department with injuries from a motor vehicle crash. The samples were not drawn at the request or suggestion of a law enforcement officer or in connection with any pending investigation. The Hospital conducted routine blood draws upon Defendant's arrival in the emergency department to diagnose his condition for medical treatment.

Application of the car crash provisions of this statute falls outside of the statutes at issue and reviewed in *Mitchell v. Wisconsin*, __ U.S. __, __ n.1, 204 L. Ed. 2d 1040, 1044 n.1 (2019). ("Wisconsin also authorized BAC testing of drivers involved in accidents that cause significant bodily harm, with or without probable cause of drunk driving. We do not address those provisions." (citation omitted)). The Supreme Court of the United States' plurality opinion in *Mitchell* does not support the State's argument.

In addition, the trial court's order does not base its reasoning upon exigent circumstances to draw blood without a warrant from an incapacitated person, who is under suspicion for drunk driving. "[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *State v. Romano*, 369 N.C. 678, 687, 800 S.E.2d 644, 656 (2017) (quoting *Missouri v. McNeely*, 569 U.S. 141, 165, 185 L. Ed. 2d 696, 715 (2013)).

The State's reliance on *State v. Smith* is also inapposite. The facts in *Smith* involved a search warrant for the defendant's test results and did not involve whether the search warrant was supported by sufficient probable cause. *Smith*, 248 N.C. App. at 815, 789 S.E.2d at 879. This Court concluded the "identifiable health information" in § 90-21.2-B(a1)(3) requires a search warrant or judicial order that "specifies the information sought." *Id.*

However, a valid order remains subject to the reasonable suspicion standard required by our Supreme Court's opinion in *In re Superior*

Court Order, 315 N.C. at 382, 338 S.E.2d at 307. A search warrant remains subject to the probable cause standard contained in N.C. Gen. Stat. § 15A-244 (2017). As noted above, the order before us is not based upon either reasonable suspicion or probable cause.

Under N.C. Gen. Stat. § 8-53, the only evidence tending to show Defendant was impaired by intoxication was the results of Defendant's blood draws, which were conducted at the SBI laboratory more than a week after the blood had been drawn at the Hospital. Defendant's motion to suppress should have been sustained and the blood test results should have been excluded. Defendant's second-degree murder conviction cannot be supported on a theory of intoxication to provide the required element of malice. Because we reach this conclusion that the admission of the test results of Defendant's blood was error, we do not need to address Defendant's remaining arguments related to the denial of the motion to suppress the results of the blood evidence.

2. Speeding and Reckless Driving as Malice

The trial court also instructed the jury on two other grounds from which it could find the requisite malice to support a conviction for second-degree murder:

> b. The laws of this State make it unlawful to drive in excess of the posted speed limit. To establish that the Defendant drove in excess of the posted speed limit, the State must prove the following two things beyond a reasonable doubt.
>
> > i. A speed limit was lawfully posted by appropriate signs erected by proper authorities giving motorists notice of the speed limit on University Drive giving motorists notice of the speed limit; and
> >
> > ii. that the defendant drove a vehicle on this portion of the highway at a speed exceeding the posted speed limit.
>
> c. The laws of this State make it unlawful to drive recklessly. To establish that the Defendant drove recklessly, the State must prove the following two things beyond a reasonable doubt.
>
> > i. That the defendant drove a vehicle upon a street or highway; and
> >
> > ii. That he drove that vehicle in disregard of posted speed limits and marked no passing lanes and that in

> doing so he acted carelessly and heedlessly in willful or wanton disregard of the rights or safety of others.

This instruction followed the pattern jury instruction. *See* N.C.P.I. -- Crim. 206.32A (2010). The jury was instructed on two additional and distinct theories of Defendant's unlawful conduct to support a finding of malice, for second-degree murder, in addition to Defendant's intoxication.

a. Eyewitness and Officers' Testimony

The State presented the testimony of Munoz, who had observed Defendant's green Jeep pass him at a high rate of speed in a no-passing zone immediately prior to the collision. Munoz testified he had to slow his vehicle down to allow Defendant's green Jeep back into the lane and avoid a collision. He continued driving to the scene and personally observed that the green Jeep had collided with the white Chevrolet.

The State also provided the testimony of Sgt. Myers, who had examined Defendant's vehicle's computer. This data tended to show Defendant's vehicle was traveling seventy-eight miles per hour five seconds prior to the crash and was traveling seventy-three miles per hour near the point of impact, while in a forty-five mile per hour speed zone.

Because the jury returned a general verdict form that did not specify the specific ground to support malice, and Defendant did not object to this testimony nor challenge any of the jury instructions to support the element of malice, evidence of these other two theories support Defendant's conviction for second-degree murder. Contrary to the assertion in our colleague's dissent, Defendant has not argued and cannot show any error on the blood test results of intoxication is prejudicial under either of these grounds to warrant a new trial.

b. Rule 404(B) Evidence

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2017) provides:

> 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

The trial court admitted, over Defendant's objection, a certified copy of Defendant's three judgments and convictions for driving while impaired, two instances of speeding, driving while license revoked, and no operator's license. The State argues the evidence of Defendant's prior

traffic offenses is properly admitted under Rule 404(b) and shows his intent, knowledge, or absence of mistake to support malice as an essential element of second-degree murder. We agree.

"[P]rior driving convictions of a defendant are admissible to show malice, and the showing of malice in a second-degree murder case is a proper purpose within the meaning of Rule 404(b)." *State v. Goodman*, 149 N.C. App. 57, 72, 560 S.E.2d 196, 206 (2002) (Greene, J., dissenting), *rev'd per curiam per the dissent*, 357 N.C. 43, 577 S.E.2d 619 (2003). Defendant's argument is without merit and is overruled.

V. Conclusion

The admission of the later SBI laboratory alcohol test results of Defendant's blood, which was drawn a week earlier at the Hospital immediately following the accident, was erroneous under either statute. The State provided substantial evidence of both Defendant's high speed and his reckless driving, together with his prior record, to show malice to support Defendant's conviction for second-degree murder.

Defendant has failed to carry his burden to show any prejudicial error in the denial of the motion to suppress. Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no prejudicial error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judge BRYANT concurs in the result.

Judge BROOK concurs in part and dissents in part with separate opinion.

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

I join the portion of the lead opinion holding that neither of the orders entered by the district court or superior court allowing the State to obtain and introduce evidence that Defendant was impaired at the time his vehicle collided with Ms. Warren's were based on evidence showing reasonable suspicion that Defendant had committed any crime. I therefore concur in the holding that Defendant's motion to suppress this evidence should have been granted. However, I respectfully dissent from the portion of the lead opinion holding that admission of this evidence in violation of Defendant's Fourth Amendment rights did not

constitute prejudicial error. This error was not harmless beyond a reasonable doubt. Defendant is therefore entitled to a new trial.

I. Fourth Amendment Violation

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. The U.S. Supreme Court has observed:

> [t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Schmerber v. Cal., 384 U.S. 757, 769-70, 86 S. Ct. 1826, 1835, 16 L. Ed.2d 908 (1966). "The Amendment thus prohibits 'unreasonable searches,' . . . [and] the taking of a blood sample . . . is a search." *Birchfield v. North Dakota*, ___ U.S. ___, ___, 136 S. Ct. 2160, 2173, 195 L. Ed.2d 560 (2016). *See also State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017) ("drawing blood . . . constitutes a search under both the Federal and North Carolina Constitutions"). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 575 U.S. 306, 310, 135 S. Ct. 1368, 1371, 191 L. Ed.2d 459 (2015) (per curiam). Blood tests, in particular, (1) "require piercing the skin and extract a part of the subject's body"; (2) are "significantly more intrusive than blowing into a tube"; and (3) "place[] in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, ___ U.S. at ___, 136 S. Ct. at 2178 (internal marks and citation omitted).

As a general matter, the Fourth Amendment requires the issuance of a warrant supported by probable cause to effectuate a search and seizure. *Terry v. Ohio*, 392 U.S. 1, 20-22, 88 S. Ct. 1868, 1879-80, 20 L. Ed.2d 889 (1968). There are exceptions to this requirement, however. For instance, law enforcement may effectuate a brief investigatory seizure of a person to search for weapons if based upon reasonable suspicion. *Id.* at 27, 88 S. Ct. at 1883. As this Court has observed,

> [r]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less

> than preponderance of the evidence. The standard is satisfied by some minimal level of objective justification. A court must consider 'the totality of the circumstances—the whole picture' in determining whether a reasonable suspicion to make an investigatory stop exists. When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, how the warrantless search was exempted from the general constitutional demand for a warrant.

State v. Smathers, 232 N.C. App. 120, 123, 753 S.E.2d 380, 382-83 (2014) (internal marks and citation omitted). "The reasonable suspicion" that serves as the basis for the investigatory search and seizure "must arise from the officer's knowledge prior to the time of the stop." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

In *In re Superior Court Order*, 315 N.C. 378, 381, 338 S.E.2d 307, 310 (1986), our Supreme Court held that the State was required to make a showing of reasonable suspicion before the production of certain bank records could be compelled. The records in question were potential evidence of a crime but at the time they were sought the matter was in an investigatory stage and no charges had been filed. *Id.* at 379-80, 338 S.E.2d at 308-09. Rejecting the argument that, in the absence of an authorizing statute, the trial court lacked the authority to order the production of the records, the Supreme Court held that trial courts are invested with inherent authority to order potential evidence to be produced during investigations, including the bank records in question. *Id.* at 380, 338 S.E.2d at 309. The Supreme Court cautioned, however, that this inherent authority is still subject to constitutional limits; that is, the State still must present "an affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime." *Id.* at 381, 338 S.E.2d at 310. "With this evidence before it," the Supreme Court explained, "the trial court can make an independent decision as to whether the interests of justice require the issuance of an order rather than relying solely upon the opinion of the prosecuting attorney." *Id.*

In the present case, the superior court's order denying Defendant's motion to suppress misstated that the motion to obtain the blood collected from Defendant during his treatment at the hospital, styled an "Application for Order for Moses Cone Hospital Medical Records," contained a bare allegation by the officer investigating the death of Ms.

Warren "that a fatality had occurred during a car crash." This allegation was made by an assistant district attorney tasked with prosecuting the case, not an officer investigating Ms. Warren's death. That is what the Supreme Court held was improper in *In re Superior Court Order*; the superior court's reliance on the prosecutor's allegation in the motion is precisely the "sole[] [reliance] upon the opinion of the prosecuting attorney" that the Supreme Court rejected in *In re Superior Court Order*. 315 N.C. at 381, 338 S.E.2d at 310. Likewise, "[r]elying solely upon the opinion of the prosecuting attorney," the district court was unable to "make an independent decision as to whether the interests of justice require[d] the issuance of [the] order[.]" *Id*. Furthermore, as the superior court noted in the order denying the motion to suppress, "the [motion] and order simply recite the bare allegations that Defendant was involved in an automobile accident; that the other driver was killed; that Defendant was treated and released at the hospital; and that 'due to the motor vehicle accident resulting in the death of another, and in order to complete the investigation and to determine if [Defendant] was impaired, the Elon Police Department is in need of all medical records from Moses Cone Hospital for [Defendant][.]'"

In short, at the time the State sought the order compelling the hospital to produce Defendant's blood, the allegation in the June 2013 motion that a fatality had occurred during a car crash was not supported by any evidence. There is no record affidavit or testimony by a witness with knowledge of the circumstances surrounding the wreck or investigation of Ms. Warren's death pre-dating the district court's June 2013 order that could have constituted reasonable suspicion to support entry of this order. Nor is there any indication that the district court considered any evidence beyond that in the record before our Court when it ordered the hospital to produce Defendant's blood in June 2013. The superior court acknowledged as much in denying the motion to suppress based on the incorrect legal standard, conceding that "[i]f measured against [the] principle [that the equivalent of reasonable suspicion is required], the . . . order entered in this case on June 26, 2013 would fail[.][1] The orders

1. The superior court concluded that the required showing under N.C. Gen. Stat. § 90-21.20B(a1), which the court believed provided the governing standard, was merely "of (a) the fact that an automobile accident occurred and (b) that specified individual health information exists that is relevant thereto," a lower standard than reasonable suspicion. However, the unsupported allegations of the prosecutor in June 2013 did not even meet this standard; these allegations did not constitute evidence "of (a) the fact that an automobile accident occurred and (b) that specified individual health information exists that is relevant thereto" because they were not verified by the prosecutor or a witness, nor was a supporting affidavit attached to the motion as an exhibit. *See, e.g.*, *State v. Simmons*, 205 N.C. App. 509, 523-25, 698 S.E.2d 95, 105-06 (2010) (evidence establishing reasonable

allowing the State to obtain and introduce evidence that Defendant was impaired at the time his vehicle collided with Ms. Warren's were therefore erroneous.

II. Remedy for Constitutional Violation

Having concluded that Defendant's Fourth Amendment rights were violated by compelling the production of his blood from the hospital without a warrant and in the absence of any evidence establishing reasonable suspicion that he committed any crime, I turn to whether this error, and the subsequent introduction at trial of evidence obtained from analysis of Defendant's blood by personnel at the State Bureau of Investigation ("SBI") laboratory, requires that the judgment entered upon the jury's verdict be vacated, necessitating a new trial. I conclude that the judgment must be vacated, and a new trial is required.

"Fourth Amendment rights are enforced primarily through the 'exclusionary rule,' which provides that evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation." *State v. McKinney*, 361 N.C. 53, 58, 637 S.E.2d 868, 872 (2006) (citation omitted). "The 'fruit of the poisonous tree doctrine,' a specific application of the exclusionary rule, provides that '[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit" of that unlawful conduct should be suppressed.'" *Id.* (quoting *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992)). Although preserved errors not of constitutional dimension are reviewed for whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial," *State v. Wiggins*, 334 N.C. 18, 27, 431 S.E.2d 755, 760 (1993) (citation omitted), "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt," *State v. Lawrence*, 365 N.C. 506, 513, 723 S.E.2d 326, 331 (2012) (internal marks and citation omitted).

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suspicion may be supported by affidavit but is not limited to affidavit and may also include testimony). There is no record testimony pre-dating the district court order compelling production of the blood supporting the allegations in the motion either. When "the government coerces, dominates, or directs the action of a private person, a resulting search and seizure may violate the guarantees of the Fourth Amendment." *State v. Hauser*, 115 N.C. App. 431, 436, 445 S.E.2d 73, 78 (1994) (citation omitted). The warrantless compelled production of records under N.C. Gen. Stat. § 90-21.20B(a1) by a private party, such as a hospital, must be supported by reasonable suspicion. *See In re Superior Court Order*, 315 N.C. at 381, 338 S.E.2d at 310.

Defendant argues he "was prejudiced by the trial court's denial of his motion to suppress the blood evidence[;]" a review of the facts reveals that admission of evidence obtained in violation of the Fourth Amendment was not harmless beyond a reasonable doubt here. The State's theory of the case was predicated upon the blood evidence of Defendant's impairment establishing the malice element required to convict Defendant of second-degree murder. Indeed, the State dismissed the misdemeanor death by vehicle charge and proceeded to trial on second-degree murder by vehicle and felony death by vehicle alone once the trial court denied Defendant's motion to suppress. In discussing the admissibility of the blood evidence, the superior court stressed its centrality to the State's case: "I'm not sure what the evidence of impairment is. You know, there will be a motion to dismiss at the end of the State's case. And as I understand the case, it rises or falls on the blood evidence." As the trial court predicted and the majority of this Court agrees, "[t]he first and only indication of Defendant's intoxication were results of tests on Defendant's blood samples taken from the Hospital and tested over a week later at the SBI laboratory." *State v. Scott*, *supra* at ___. And, most importantly, none of the witnesses testifying at trial who came into contact with Defendant after his vehicle collided with Ms. Warren's vehicle noticed the odor of alcohol on or about his person, nor did any notice Defendant slur his speech or exhibit other signs of impairment. As Officer Giannotti confirmed on cross-examination, as of 21 June 2013, the day of the wreck, he had seen no evidence that Defendant was impaired. Officer Giannotti testified further that he never requested that Defendant submit to any alcohol testing because "there was nothing that gave rise to a belief that [Defendant] was impaired[.]"

The opinion of the Court suggests that the introduction of the blood evidence and results of testing performed on the blood did not constitute prejudicial error because there was other evidence – namely, Defendant's prior convictions for impaired driving and speeding and evidence that Defendant was speeding on the day of the collision with Ms. Warren – from which the jury could have concluded that the showing of malice required for a conviction of second-degree murder by motor vehicle had been met. This suggestion seems to be based on a misapplication of the applicable legal standard, however. The standard is whether we can "declare a belief that [the federal constitutional error] was harmless beyond a reasonable doubt." *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331 (citation omitted). Although it is true that evidence was introduced at trial that Defendant was speeding on the day of the wreck and had prior speeding and impaired driving convictions, I cannot say with any

confidence that the erroneous admission of blood evidence here – evidence the superior court observed at the outset of trial the case "rises and falls on" – did not prejudice Defendant, much less can I so state beyond a reasonable doubt. *See id.*

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JANUARY 2020)

ANTON v. ANTON No. 19-549	Wake (17CVS15355)	Dismissed
BERENS v. BERENS No. 19-306	Mecklenburg (13CVD11484)	Affirmed in part; Remanded in part.
CLARK v. US AIRWAYS, INC. No. 19-707	N.C. Industrial Commission (14-044292)	Affirmed
IN RE J.I. No. 19-86	Robeson (12JT427) (12JT428) (12JT429)	Affirmed in part; Remanded in part.
IN RE RIEGER No. 19-304	Wake (17E2314) (17SP1488)	Affirmed
IN RE V.T. No. 19-297	Mecklenburg (17JA155) (17JA157) (17JA211-12)	Vacated and Remanded.
IN RE X.E.R. No. 19-233	Buncombe (13JT383) (13JT384) (13JT385)	Affirmed
IN RE Z.S.B. No. 18-1105	Alleghany (16JT15)	Vacated and Remanded
LEE v. ALLEN No. 19-265	Sampson (17CVD1401)	Reversed and Remanded
PAEZ v. PAEZ No. 18-1206	Wake (16CVD14072)	Affirmed in part; Vacated in part.
STATE v. CLYDE No. 19-82	Cleveland (15CRS2553) (15CRS55243)	NO PREJUDICIAL ERROR
STATE v. DAVIS No. 19-280	Nash (17CRS50271)	Affirmed and remanded in part and vacated and remanded in part

STATE v. HALL No. 18-1290	Cumberland (16CRS57652) (16CRS57694) (16CRS63320)	No error in part; No plain error in part.
STATE v. HORNE No. 19-249	Union (15CRS53521)	No Error
STATE v. PHIFER No. 19-541	Forsyth (01CRS59970)	Affirmed
STATE v. SHELL No. 19-146	Guilford (17CRS80457)	No Error
STATE v. THOMAS No. 19-399	Transylvania (17CRS50321) (17CRS50371-72)	No Error
STATE v. WASHINGTON No. 19-547	Wayne (17CRS50992-93)	No Error
WRUBLUSKI v. WRUBLUSKI No. 19-467	Onslow (14CVD420)	Affirmed in part; Reversed and remanded in part.

INGRAM v. N.C. STATE BD. OF PLUMBING, HEATING & FIRE SPRINKLER CONTRACTORS

[269 N.C. App. 476 (2020)]

PHILANDER INGRAM, COMMERCIAL CONTROLS, INC., PETITIONERS
v.
NORTH CAROLINA STATE BOARD OF PLUMBING, HEATING AND FIRE SPRINKLER CONTRACTORS, RESPONDENT

No. COA19-436

Filed 4 February 2020

1. Administrative Law—disciplinary proceeding—professional licensing board—incompetence—prevailing industry standards

The State Board of Plumbing, Heating and Fire Sprinkler Contractors properly suspended petitioners' HVAC contracting licenses on grounds that their installation of a new HVAC unit at a restaurant was incompetent under N.C.G.S. § 87-23(a). Because the legislature authorized the Board, with its specialized knowledge and expertise, to prescribe the standard of competence required of the professionals it regulates, the Board was not required to receive expert testimony related to the "standards prevailing in the industry" in order to conclude petitioners violated those standards. Moreover, the record showed that petitioners' faulty installation of the HVAC unit caused the restaurant to experience significant water leaks.

2. Administrative Law—disciplinary proceeding—professional licensing board—incompetence—duty to perform work in workmanlike manner

The State Board of Plumbing, Heating and Fire Sprinkler Contractors properly suspended petitioners' HVAC contracting licenses on grounds that they were incompetent under N.C.G.S. § 87-23(a) for failing to conduct an independent load calculation before installing a new HVAC unit at a restaurant. The Board received testimony indicating that the restaurant was an older building and, in order to install the HVAC unit in a competent manner, petitioners needed to verify the existing load calculations to ensure they were correct. By failing to do so, petitioners violated their duty to perform work in a workmanlike manner and to complete the installation properly, safely, and in accordance with applicable codes.

3. Administrative Law—disciplinary proceeding—professional licensing board—incompetence—HVAC installation—substantial evidence

The State Board of Plumbing, Heating and Fire Sprinkler Contractors properly suspended petitioners' HVAC contracting

licenses on grounds that their installation of a new HVAC unit at a restaurant was incompetent under N.C.G.S. § 87-23(a) where the Board's decision was supported by substantial evidence in the record, which showed that petitioners installed the unit using the building's original load calculations without verifying them (by performing new calculations) and connected the unit to a visibly cracked platform, which caused the restaurant to experience severe water leakage through the roof.

4. Administrative Law—disciplinary proceeding—professional licensing board—license peddling—substantial evidence

The State Board of Plumbing, Heating and Fire Sprinkler Contractors properly suspended petitioners' HVAC contracting licenses on grounds that they engaged in license peddling where substantial evidence showed that petitioners knowingly sent employees of a contractor licensed in South Carolina (but not North Carolina) to obtain a permit to install two HVAC systems in Shelby, North Carolina; the employees indicated that they were not on petitioners' payroll but "they get a 1099"; petitioners eventually obtained the permit in person, but never ended up doing any work on the Shelby project; and petitioners admitted that they never paid the contractor's employees for their work.

Appeal by Petitioners from Order entered 6 February 2019 by Judge Lori I. Hamilton in Union County Superior Court. Heard in the Court of Appeals 17 October 2019.

Vann Law Firm, P.A., by Christopher M. Vann, for petitioners-appellants.

Young Moore and Henderson, P.A., by Reed N. Fountain and John N. Fountain, for respondent-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Philander Ingram (Ingram) and Commercial Controls, Inc. (collectively Petitioners) appeal from the trial court's Order affirming an Order of the State Board of Plumbing, Heating and Fire Sprinkler Contractors suspending Petitioners' licenses for twenty-four months followed by twelve months of supervised probation. The Record reflects the following relevant facts:

Petitioners are engaged in the business of HVAC contracting. In 2004, Ingram received a residential license for HVAC contracting and in 2005 supplemented that license with a Heating Group 3, Class I License, which authorized additional residential and light commercial HVAC work. Ingram holds those licensees in the name of Commercial Controls, Inc. From 1 January 2013 to 31 December 2015, Petitioners were on probation due to a prior decision from the State Board of Plumbing, Heating and Fire Sprinkler Contractors. Two separate incidents gave rise to the appeal before us.

Beginning in December 2014, Petitioners entered into two contracts with a general contractor as part of a restaurant renovation of "The Cooking Pot" in Charlotte, North Carolina. Petitioners were subcontracted to install an exhaust hood system for the commercial kitchen and separately to install a complete duct system for the preexisting HVAC system, to service the dining area, and to install a new, four-ton HVAC system to service the restaurant's kitchen. The total contracted amount between Petitioners and the general contractor was $49,995.

Petitioners, utilizing the building's original load calculations, installed a new HVAC unit onto a preexisting platform on the roof of the restaurant and connected it to the existing duct system. Petitioners hung the new hood in the kitchen but did not complete final installation. Petitioners received $24,500 from the general contractor for this work, but Ingram stated he "chose to not continue any more work until [he] was paid in full as the contract dictated." After Petitioners walked away from The Cooking Pot project, the restaurant owner (Ms. Ikuru) hired additional contractors to finish the installations required to open her business. Ms. Ikuru averred that she began experiencing significant leakage from the roof after the installation of the new HVAC unit. Upon inspection, Ms. Ikuru was informed the leaks were the result of improper installation of the new HVAC unit. Subsequently, Ms. Ikuru filed a complaint with the North Carolina Licensing Board for General Contractors, who forwarded the complaint to the North Carolina State Board of Plumbing, Heating and Fire Sprinkler Contractors (the Board) around March 2016.

On 20 June 2017, another complaint was filed against Petitioners. Kathy Melton, the City of Shelby Building Inspection Department's Administrative Assistant, averred that on 13 June 2017, two men employed by Carolina Air attempted to get a permit on behalf of Petitioners for a project at 401 N. Morgan Street, Shelby, North Carolina, a property

managed by White Oaks Manor. The men informed her that they were not on the payroll but "they get a 1099." Melton did not issue a permit at that time. Later that day, Ingram obtained the requested permit in person; however, no installation or work occurred at 401 N. Morgan Street.

On 11 January 2018, the Board issued a Notice of Hearing to Petitioners related to the two complaints. Specifically, the Notice of Hearing alleged: Petitioners' work at The Cooking Pot was incompetent in that they used the original load calculations for the building rather than completing new ones, installed the new HVAC unit on an existing platform and "did not repair gaps in the flashing claiming that was not part of the installation[,]" failed to install equipment rails, pieced together curb caps that were not watertight, capped new gas and electric penetrations with a bucket, and did not complete the final hookup of the hood system. The Notice of Hearing alleged Petitioners' "arrangement with White Oaks Manor constitutes license peddling or aiding and abetting contracting without license, both of which are violations of the statutes and rules enforced by [the] Board, and violate [Petitioners'] probation . . . ."

The case was heard before the Board on 24 July 2018. At Petitioners' hearing, the Board received testimony from, among others: Ingram; Ms. Ikuru; Mr. Mumtaz, the general contractor from The Cooking Pot; Howard Longacre, an employee of Baker Roofing Company who was hired by the property management company of The Cooking Pot to inspect the roof; Jonathan Yerkes, a Field Investigator for the Board who investigated the complaint filed against Petitioners related to The Cooking Pot; and Kathy Melton, Administrative Assistant at the City of Shelby Building Inspections Department.

On 8 August 2018, the Board entered an Order (Board's Order) suspending Petitioners' licenses for twenty-four months to be followed by a twelve-month period of supervised probation. On 7 September 2018, Petitioners filed a Petition for Judicial Review in Union County Superior Court. On 6 February 2019, the trial court entered an Order affirming the Board's Order. On 7 March 2019, Petitioners timely filed Notice of Appeal from the trial court's Order.

Issues

Petitioners contend (I) the trial court incorrectly determined that the Board did not err when it affirmed the Board's determination that Petitioners' installation at The Cooking Pot was incompetent and (II) the trial court incorrectly determined the Board's decision was supported by substantial evidence.

Standard of Review

> Appellate review of a judgment of the superior court entered upon review of an administrative agency decision requires that the appellate court determine whether the trial court utilized the appropriate scope of review and, if so, whether the trial court did so correctly. The nature of the error asserted by the party seeking review dictates the appropriate manner of review: if the appellant contends the agency's decision was affected by a legal error, *de novo* review is required[.]

Dillingham v. N. C. Dep't of Human Res., 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999) (citation and quotation marks omitted). "When the issue for review is whether an agency's decision was supported by substantial evidence in view of the entire record, a reviewing court must apply the whole record test." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004) (citations and quotation marks omitted). "A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Id.* (citation omitted). Accordingly, we review the trial court's Order first to determine if the trial court applied the correct standard of review to Petitioners' claims. We then review the trial court's Order for questions of law de novo and apply the whole-record test to determine if the trial court's decision affirming the Board is supported by substantial evidence.

Analysis

I. Petitioners' Alleged Incompetence

Petitioners contend the Board erred as a matter of law when it concluded Petitioners' work at The Cooking Pot was incompetent under N.C. Gen. Stat. § 87-23(a). Specifically, Petitioners contend the applicable regulation of the building code constitutes the minimum standard of competence and therefore Petitioners complied with the minimum standards of competence when the work passed inspection and, second, that Petitioners were not required by regulation to conduct an independent load calculation when installing the new HVAC unit. Petitioners' contentions are questions of law, which the trial court properly reviewed de novo. We also review Petitioners' contentions de novo. *See Dillingham*, 132 N.C. App. at 708, 513 S.E.2d at 826.

A. Inspection

[1] Petitioners first contend the trial court erred in affirming the Board's conclusion Petitioners' work at The Cooking Pot was incompetent because "the provisions of the building code are the minimum standard of competence" and the "Board's investigator testified that the rooftop HVAC unit passed inspection." Petitioners further contend that for the Board to conclude Petitioners violated "standards prevailing in the industry[,]" expert testimony on the issue of "installing a four-ton rooftop heating and air conditioning unit" was necessary. The trial court concluded the Board was not required to receive expert testimony related to the "standards prevailing in the industry." We agree.

Our Supreme Court has considered similar issues regarding the necessity of expert testimony in hearings before professional licensing boards. In *Leahy v. N. C. Bd. of Nursing*, our Supreme Court reversed an unanimous Court of Appeals decision and held "[t]he knowledge of the [Nursing] Board includes knowledge of the standard of care for nurses. . . . There is no reason it should not be allowed to apply this standard if no evidence of it is introduced." 346 N.C. 775, 781, 488 S.E.2d 245, 248 (1997).

In its reasoning, the Court emphasized the language found in North Carolina's Administrative Procedure Act (APA), which states "[a]n agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it[,]" N.C. Gen. Stat. § 150B-41(d), and "the composition and statutorily prescribed functions of the Nursing Board[.]" *Watkins*, 358 N.C. at 195, 593 S.E.2d at 767 (citing *Leahy*, 346 N.C. at 781, 488 S.E.2d at 248). In analyzing "the composition and statutorily prescribed functions" of the Nursing Board, the Court highlighted the Nursing Board:

> [C]urrently consists of nine registered nurses, four licensed practical nurses, one retired doctor, and one lay person. The Board is authorized to develop rules and regulations to govern medical acts by registered nurses. It is empowered to administer, interpret, and enforce the Nursing Practice Act. The Board is required to adopt standards regarding qualifications of applicants for licensure and to establish criteria which must be met by an applicant in order to receive a license.

Leahy, 346 N.C. at 781, 488 S.E.2d at 248 (citations omitted).

In *Watkins* our Supreme Court extended its *Leahy* analysis to the Dental Board and "declin[ed] to impose a *per se* rule that expert testimony is required to establish the standard of care in disciplinary hearings conducted by professional licensing boards." *Watkins*, 358 N.C. at 196, 593 S.E.2d at 767. The petitioner argued that the Dental Board was not qualified to opine on the standard of care applicable to orthodontists, who are licensed under the Dental Board. *Id.* at 194, 593 S.E.2d at 767. The Court, following *Leahy*, looked to the North Carolina APA and the "composition and statutorily prescribed functions" of the Dental Board. *Id.* at 195, 593 S.E.2d at 767. The *Watkins* Court determined "the Board is composed of six licensed dentists, one dental hygienist, and one layperson" and that the "Dental Practice Act vests the [Dental] Board with broad authority to regulate the practice of dentistry, including the powers to grant or revoke a license and to enact rules and regulations governing the profession." *Id.* at 196-97, 593 S.E.2d at 768 (citations omitted).

The *Watkins* Court reasoned that although the standard of care for health providers in negligence cases is generally established by expert testimony that "rationale is not necessarily controlling within the context of disciplinary proceedings conducted by professional licensing boards where, as here, the factfinding body is composed entirely or predominantly of experts charged with the regulation of the profession." *Id.* at 196, 593 S.E.2d at 767. The Court concluded, "[u]nder *Leahy*, where knowledge of the requisite standard of care must be within the board's specialized knowledge and expertise, the board may apply the appropriate standard even if no evidence of [the standard of care] is introduced." *Id.* at 198, 593 S.E.2d at 769 (citation and quotation marks omitted). Accordingly, the Court held "the [Dental] Board acted within its authority in determining that petitioner had breached the applicable standard of care[.]" *Id.* at 209, 593 S.E.2d at 775.

Here, Petitioners contend expert testimony on the "manufacturers specifications and installation instructions and standards prevailing in the industry" was required for the Board to determine Petitioners violated those standards. We disagree. As with both boards in *Watkins* and *Leahy*, the Board's procedures for administrative hearings is governed by North Carolina's APA. *See* N.C. Gen. Stat. § 87-23(a) (2019) ("All of the charges [brought to the Board] shall be in writing and investigated by the Board. Any proceedings on the charges shall be carried out by the Board in accordance with the provisions of Chapter 150B of the General Statutes."). As our Supreme Court noted in *Watkins*, Section 150B-41

of our APA expressly provides "[a]n agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it." *Id.* § 150B-41(d) (2019); *Watkins*, 358 N.C. at 195, 593 S.E.2d at 767.

Accordingly, we look to the "composition and statutorily prescribed function" of the Board in the case *sub judice*. First, the Board consists of seven appointed members:

> [O]ne member from a school of engineering of the Greater University of North Carolina, one member who is a plumbing or mechanical inspector from a city in North Carolina, one licensed air conditioning contractor, one licensed plumbing contractor, one licensed heating contractor, one licensed fire sprinkler contractor, and one person who has no tie with the construction industry to represent the interests of the public at large.

N.C. Gen. Stat. § 87-16 (2019). The Legislature, in mandating the Board be comprised of licensed contractors from each industry the Board regulates as well as a licensing inspector and a member of a school of engineering, has demonstrated that it intended the Board have specialized knowledge and expertise. On 24 June 2018, the date of Petitioners' hearing, the Board was comprised of John Royal, a professional engineer and the Board's School of Engineering member, Robert Owens, owner and operator of a consulting firm that specializes in construction and engineering, William Sullivan, a licensed HVAC contractor, and Stuart Schwartz, a licensed HVAC contractor and owner and operator of a HVAC contracting business.

In addition, the Board is "authorized by statute to develop rules and regulations to govern [Plumbing, Heating, and Fire Sprinkler Contractors.]" *See Watkins*, 358 N.C. at 195, 593 S.E.2d at 767. In 1931, the General Assembly created the Board "to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings[ ]" upon the same principles "that the Legislature has required a license of physicians, surgeons, osteopaths, chiropractors, chiropodists, dentists, opticians, barbers, and others[.]" *Roach v. Durham*, 204 N.C. 587, 591, 169 S.E. 149, 151 (1933) (citations and quotation marks omitted). The General Assembly has directed, "to protect the public health, comfort and safety, the Board shall establish two classes of licenses[ ]" and further granted "[t]he Board shall prescribe the standard of competence, experience and efficiency to be required

of an applicant for license of each class, and shall give an examination designed to ascertain the technical and practical knowledge of the applicant . . . ." N.C. Gen. Stat. § 87-21(b)(1),(3) (2019).

The General Assembly has "empowered [the Board] to administer, interpret, and enforce" its rules. *Watkins*, 358 N.C. at 195, 593 S.E.2d at 767. The Board is expressly authorized

> to revoke or suspend the license of or order the reprimand or probation of any plumbing, heating, or fire sprinkler contractor . . . who is guilty of any fraud or deceit in obtaining or renewing a license, or who fails to comply with any provision or requirement of this Article, or the rules adopted by the Board, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of a plumbing, heating, or fire sprinkler contractor, or any combination thereof, as defined in this Article.

N.C. Gen. Stat. § 87-23(a); *see* 21 N.C. Admin. Code 50.0412(d) (2018) ("The Board may suspend or revoke a license where it is found that the licensee has failed to comply with the minimum standards of competence as set forth in 21 NCAC 50.0505(b).") The Board's rules provide "licensees shall design and install systems which meet or exceed our minimum standards of the North Carolina State Building Code, manufacturer's specifications and installation instructions *and standards prevailing in the industry*." 21 N.C. Admin. Code 50.0505(b) (2018) (emphasis added).

As the *Leahy* Court held the Nursing Board was "required to adopt standards regarding qualifications of applicants for licensure and to establish criteria which must be met by an applicant in order to receive a license[,]" *Leahy*, 346 N.C. at 781, 488 S.E.2d at 248, the Legislature has expressly delegated the authority to the Board here to "prescribe the standard of competence . . . required of an applicant for license of each class[.]" N.C. Gen. Stat. § 87-21(3). Accordingly, we are persuaded, under *Leahy* and *Watkins*, that the Board was not required to consider expert testimony related to the "manufacturers specifications and installation instructions and standards prevailing in the industry" as Petitioners contend.

In light of this holding, we now review the Record de novo to determine if the trial court erred as a matter of law in affirming the Board's conclusion Petitioners' installation was incompetent and in violation

of the Board's regulations. At Petitioners' hearing, Jonathan Yerkes, Administrative Officer and Field Investigator for the Board, Mr. Mumtaz, the original general contractor on The Cooking Pot project, Ms. Ikuru, owner of The Cooking Pot, Michael Pickard, the contractor hired to finalize installation of the kitchen hood, Ingram, and Howard Longacre, a roofer hired by Ms. Ikuru's property management company, all testified before the Board.

The Record before the trial court established: Petitioners "completed the installation of the roof top unit, connect[ed] [it] to the existing duct work and installed some new duct work for the hood system in the kitchen." Ingram averred "[a]s far as the rain water leak coming from the area of the unit I installed, I state when installing I set the unit on top of the pre-existing platform." Ingram conceded he walked off the job prior to its completion. Ms. Ikuru informed the Board she has "continuously experienced water leaking in the area under where Petitioners installed the four ton unit." Yerkes testified to the contents of photographs provided by Ms. Ikuru. The photographs showed the new, four-ton HVAC unit placed on the existing pad and curb. Yerkes observed "no new pad and no new curb had been installed by Petitioners prior to the placement of the new HVAC system[,]" and the "existing pad and curbing were visibly cracked and not properly sealed so as to allow water to come in through the roof." The general contractor, Mumtaz, testified that "the [HVAC] unit and curb don't match" and that "there was no flashing to alleviate leaking[.]" Additionally, Longacre examined and photographed the roof, reporting that the "HVAC unit had been placed on top of the curb which was allowing water to . . . enter the building . . . ." Longacre also performed a water test that indicated "[t]he cause of the leak is actually the new [HVAC] and curb."

From this evidence the Board determined Petitioners' work was incompetent in violation of N.C. Gen. Stat. § 87-23. The trial court reviewed and summarized this evidence in its Order and concluded this evidence supported the Board's determination. We agree. The Record reflects that Petitioners' installation of the HVAC unit caused The Cooking Pot to experience significant leaks. The Board, with its specialized knowledge and expertise, determined based on this evidence that Petitioners' conduct was incompetent and did not "meet or exceed the minimum standards of the North Carolina State Building Code, manufacturer's specifications and installation instructions and standards prevailing in the industry." 21 N.C. Admin. Code 50.0505(b). Although Petitioners contend passing inspection establishes competence, we emphasize, as the Board argues, Petitioners are required to also *meet*

or exceed "manufacturer's specifications and installation instructions and standards prevailing in the industry." *Id*. We further agree with the trial court that the Board may use its expertise to evaluate the evidence before it, and accordingly, we affirm the trial court's Order and conclude the Board did not err as a matter of law when it determined Petitioners were required to comply with "manufacturer's specifications and installation instructions and standards prevailing in the industry."

B. Load Calculation

[2] Petitioners next contend the trial court erred in affirming the Board's conclusion that Petitioners were incompetent for failing to conduct an independent load calculation prior to installing the new HVAC unit. Petitioners cite the Board's regulation at 21 N.C. Admin. Code 50.0505(f), which states "[w]hen either a furnace, condenser, package unit or air handler in an existing residential heating or air conditioning system is replaced, the licensed HVAC contractor or licensed technician is required to perform a minimum of a whole house block load calculation." 21 N.C. Admin. Code 50.0505(f). Petitioners emphasize that this regulation applies only to *residential* HVAC units. The Board agrees with Petitioners that the regulation only applies to residential units; however, the Board contends that Petitioners' duty to conduct an independent load calculation comes from Petitioners' duty to "ensure that the contract is performed in a workmanlike manner and with the requisite skill and that the installation is made properly, safely and in accordance with applicable codes and rules." 21 N.C. Admin. Code 50.0505(a).

It is undisputed Petitioners relied on the building's original load calculations that were previously supplied to them. Our review of the Record indicates before the renovation the building had a ten or twelve-ton HVAC unit on the roof. Because the space was being upfitted to include a kitchen, the new, four-ton HVAC unit was installed to service the kitchen. The Board received testimony from Yerkes stating "[one] can use [a] . . . certified engineered load calculation, but he would have to verify as a licensee that that load calculation is correct for what he's putting in, which would require him doing a load to ensure that that load is correct." Ingram conceded he did not verify the load calculation on which Petitioners relied.

The Board received testimony indicating that in order to perform the installation in a competent manner, a licensee would have to verify the load calculation to ensure it is correct. Additionally, the Board received evidence indicating that the building was old and had been previously occupied by an unrelated business. Accordingly, we conclude

the trial court correctly determined Petitioners violated the duty to "perform work in a workmanlike manner and with the requisite skill and that the installation is made properly, safely and in accordance with applicable codes and rules." 21 N.C. Admin. Code 50.0505(a).

II. Substantial Evidence

Petitioners next contend the trial court's Order affirming the Board's Order for HVAC installation and for license peddling is not supported by competent evidence. In reviewing Petitioners' claim, the trial court appropriately applied the whole-record test to determine if the Board's decision was supported by substantial evidence. *See Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. "A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Id.* (citation and quotation marks omitted). "Substantial evidence is defined as relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and quotation marks omitted).

A. HVAC Installation

[3] Petitioners contend the Board's conclusion that Petitioners' HVAC installation was incompetent is not supported by substantial evidence in the Record. Our review of the Record, as outlined *supra*, reflects the whole record supports the Board's determination that Petitioners' installation did not comply with the Board's regulations—specifically "manufacturer's specifications and installation instructions and standards prevailing in the industry"—and further that the Board was correct to use their professional expertise when assessing the evidence before it. Accordingly, the trial court properly concluded the Board's decision is supported by substantial evidence.

B. White Oaks Manor Permit

[4] Petitioners next contend the Board's conclusion that Petitioners were engaged in license peddling is not supported by substantial evidence. Petitioners challenge the Board's Finding of Fact 15, which provides:

> 15. With respect to the job at White Oaks Manor located at 401 N. Morgan St. Shelby N.C., the testimony supports the inference that [Petitioners] knowingly sent employees of a contractor licensed in South Carolina but not North Carolina to obtain the permit to install two mini-split HVAC systems. The testimony by [Ingram] that

> he had planned to carry out the work himself a week after sending employees of another firm to get the permit is not credible. Simple projects like installation of ductless heat pumps (mini splits) would ordinarily receive permit and installation the same day. There was no evidence that [Petitioners] completed the installation or obtained a final inspection. The Board did not place weight on the statement of the South Carolina personnel that [Petitioners] utilized individuals for licensed work who were not bona-fide employees of Commercial Controls and paid workers in cash or 1099's. Respondent's actions constituted license peddling.

Our review of the Record as it pertains to Petitioners' license peddling indicates there is substantial evidence to support the Board's Finding. Melton, Administrative Assistant for the City of Shelby Building Inspection Department, averred that two men, employed by Carolina Air, entered the Department on 13 June 2017 and attempted to obtain a permit for Petitioners. The men informed Melton they received 1099s from Petitioners. Melton denied the men a permit and attempted to reach their supervisor, Bill Bolin. When Melton contacted Bolin, she reported that he was "vague" and informed her that he received a 1099 from Petitioners. At Petitioners' hearing, the Board heard testimony from David Boulay, an Administrative Officer and Field Investigator for the Board. Boulay began investigating Petitioners in 2017 after he received a complaint from Melton. Boulay testified that Bolin was evasive when he attempted to meet with him and that "[Bolin] actually said to me on the phone that he was paid [by Petitioners] with cash and 1099, and then [Bolin] later changed his statement, when he actually gave me a consent agreement, which he swore to, that he wasn't paid with cash or 1099."

Ingram averred that he had an agreement with Bolin "where they purchase the equipment and [he] install[s] it." He further stated "[Bolin] and his employees are not on my pay roll" and that he does not pay them for their time or labor. Ingram conceded he obtained the requested permits in person, but that he never completed any work pursuant to the permit and that no final inspection on the permits occurred. Ingram indicated he understood work could have been completed under the permit by another. Accordingly, we are satisfied by the whole record that there is substantial evidence in support of the Board's determination that Petitioners were engaged in license peddling in violation of 21 N.C. Admin. Code 50.0403. Thus, the trial court did not err in affirming the Board's decision.

Conclusion

Accordingly, in light of the foregoing, the trial court's Order affirming the Board's Order suspending Petitioners' licenses for twenty-four months and ordering twelve months of supervised probation is affirmed.

AFFIRMED.

Judge ARROWOOD and Judge COLLINS concur.

KIMBERLY MIMS, PLAINTIFF
v.
DARRELL D. PARKER, SR., LORI WALKER PARKER, DEFENDANTS

No. COA19-317

Filed 4 February 2020

1. Animals—dog attack—strict liability—dangerous animal

In an action for compensatory damages arising from plaintiff's injuries after defendants' bulldog, having broken free from his collar and leash, attacked plaintiff on the street, the trial court properly granted summary judgment in favor of defendants on plaintiff's strict liability claim because the bulldog had neither killed nor inflicted serious injury on anyone before attacking plaintiff, and therefore was not a "dangerous dog" within the meaning of the applicable statute.

2. Animals—dog attack—negligence—owner liability—reasonable restraint of dog

In an action for compensatory damages arising from plaintiff's injuries after defendants' bulldog, having broken free from his collar and leash, attacked plaintiff on the street, the trial court properly granted summary judgment in favor of defendants on plaintiff's negligence claim where plaintiff's expert testified that a collar and leash were reasonable restraints for that breed of bulldog, both parties acknowledged that the bulldog was restrained by a collar and leash on the day of the attack and had never exhibited aggressive behavior before that day, and where there was no evidence of prior incidents that would have put defendants on notice that their dog required stronger restraints.

Appeal by Plaintiff from Order entered 8 August 2018 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 17 October 2019.

Couch & Associates, PC, by Finesse G. Couch, for plaintiff-appellant.

Brown, Crump, Vanore & Tierney, L.L.P., by Andrew A. Vanore, III, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

Kimberly Mims (Plaintiff) appeals from an Order entered 8 August 2018 granting summary judgment for Darrell D. Parker, Sr. and Lori Walker Parker (collectively, Defendants). The Record reflects the following undisputed, material facts:

On the morning of 10 November 2009, Defendants' daughter and son, ages sixteen and thirteen, respectively, were walking their dog Blue before school on Summer Storm Drive in Durham, North Carolina. Defendants purchased Blue, an American Bulldog, in 2001 and had moved to Durham in September 2009. Blue was wearing a collar and was restrained on a leash while Defendants' children walked him. Plaintiff was walking along the opposite side of the street that morning after walking her daughter to the bus stop. Blue began barking at Plaintiff and pulling on his leash. Blue broke his collar and ran toward Plaintiff. Defendants' children called after Blue; however, he continued to run to Plaintiff. Blue bit Plaintiff several times on different areas of her body. Plaintiff was transported by ambulance to Durham Regional Medical Center for treatment. There, Plaintiff received a tetanus shot and stitches for her injuries. Plaintiff returned eight days later to have the stitches removed; Plaintiff sought no further medical treatment. After the incident, Blue was quarantined by Durham County Animal Control. Animal Control noted that prior to the 10 November 2009 incident they received no reports concerning Blue's behavior.

On 10 October 2017, Plaintiff initiated this action against Defendants seeking compensatory damages under theories of negligence, strict liability, and infliction of emotional distress. On 18 June 2018, Defendants moved for summary judgment. Defendants alleged that they had never received any complaints about Blue's behavior or noticed him acting aggressively toward any person or animal prior to the 2009 incident.

On 26 June 2018, Plaintiff objected to Defendants' Motion for Summary Judgment and moved the court to enter summary judgment in favor of Plaintiff. Plaintiff's Motion included an affidavit from her expert, Dr. David A. Wilson, Doctor of Veterinary Medicine (Dr. Wilson), averring that "[t]he American Bull Dog is a dangerous breed of dog[.]" Defendants deposed Dr. Wilson, and during his deposition he testified to his opinion of the American Bulldog breed,[1] stating that it "w[as] developed specifically to be aggressive[.]" Dr. Wilson stated it was his opinion that all "pit bulls" are not "dangerous dogs." Dr. Wilson identified that responsible restraint for an American Bulldog would be with a collar and leash. Dr. Wilson indicated his opinions were not specifically about Blue but about "the breed." Plaintiff conceded, in an earlier deposition, she was not aware of any incidents or complaints related to Defendants' dog before or after her incident on 10 November 2009.

On 3 July 2018, Defendants filed an Amended Motion for Summary Judgment, and on 12 July 2018, Plaintiff filed an "Amended Notice of Motion for Summary Judgment" again requesting summary judgment in her favor. On 19 July 2018, Defendants supplemented their response to Plaintiff's interrogatories identifying Dr. Jillian M. Orlando, Doctor of Veterinary Medicine (Dr. Orlando), as their expert witness. Dr. Orlando disagreed with Dr. Wilson's opinion that Blue was a dangerous dog because of his "physical appearance" or "apparent or verified breed." Dr. Orlando averred "that the temperament of a dog is determined by multiple factors, including, but not limited to, that specific dog's early experience, and socialization." The trial court heard arguments on the parties' respective Motions for summary judgment, and, on 8 August 2018, the trial court entered an Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. Plaintiff timely filed Notice of Appeal.

Issue

The sole issue before this Court is whether the trial court's grant of summary judgment in favor of Defendants on Plaintiff's strict-liability and negligence claims was proper.

Analysis

I. Summary Judgment

We review a trial court's summary judgment order de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary

1. Dr. Wilson stated that the American Bulldog breed is "another variation of . . . AmStaff, Pit Bull, Bulldog, American Pit Bulldog." Thus, throughout his deposition testimony he uses these different breed names interchangeably.

judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019) (emphasis added).

A. Strict Liability

[1] Plaintiff first contends the trial court erred by granting summary judgment in favor of Defendants on Plaintiff's strict-liability claim. This issue hinges on whether Defendants' dog was a "dangerous dog" under N.C. Gen. Stat. § 67-4.1(a)(1) at the time of the incident. The General Assembly directs that "[t]he owner of a dangerous dog shall be strictly liable in civil damages for any injuries or property damage the dog inflicts upon a person, his property, or another animal." N.C. Gen. Stat. § 67-4.4 (2019). A "dangerous dog" is defined as

> [a] dog that:
>
> 1. Without provocation has killed or inflicted severe injury on a person; or
>
> 2. Is determined by the person or Board designated by the county or municipal authority responsible for animal control to be potentially dangerous because the dog has engaged in one or more of the behaviors listed in subdivision (2) of this subsection."

Id. § 67-4.1(a)(1)(a). " 'Severe injury' means any physical injury that results in broken bones or disfiguring lacerations or required cosmetic surgery or hospitalization." *Id.* § 67-4.1(a)(5).

Plaintiff argues "the statute's plain language does not require prior dangerous acts" and asks us to interpret N.C. Gen. Stat. § 67-4.1(a)(1)(a) so that "[i]n those instances where an animal has committed the most damaging of attacks . . . a dog [is] automatically a dangerous dog." As such, Plaintiff contends Blue should have been classified as a "dangerous dog" under N.C. Gen. Stat. § 67-4.1(a)(1)(a)(1) before the incident with Plaintiff. We disagree.

"If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citation and quotation marks omitted). Section 67-4.1(a)(1)(a)(1) states that a dangerous dog is one that "[w]ithout provocation *has* killed or inflicted severe injury on a person[.]"

N.C. Gen. Stat. § 67-4.1(a)(1)(a)(1) (emphasis added). It is undisputed that prior to the morning of 10 November 2009, Blue had not "killed or inflicted severe injury on a person[.]" *Id.* Accordingly, Blue was not "a dangerous dog" within the meaning of Section 67-4.1(a)(1)(a)(1) on 10 November 2009. The General Assembly hinging strict liability on the dog having been classified a dangerous dog prior to the incident in question is also consistent with our caselaw holding an essential element in dog-bite cases is prior knowledge of the animal's vicious propensity. *See Lee v. Rice*, 154 N.C. App. 471, 474, 572 S.E.2d 219, 222 (2002) ("[T]he gravamen of the cause of action is not negligence, but rather the wrongful keeping of the animal with *knowledge* of its viciousness." (emphasis added) (alterations, citations, and quotation marks omitted)); *see also Swain v. Tillet*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967) ("To recover for injuries inflicted by a domestic animal . . . plaintiff must allege and prove: (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper *knew or should have known* of the animal's vicious propensity[.]" (emphasis added) (citation, emphasis, and quotation marks omitted)). Because Blue was not a "dangerous dog" at the time of the 10 November 2009 incident under Section 67-4.1(a)(1), Defendants were not "owners of a dangerous dog" subject to strict liability under Section 67-4.4.[2] Thus, the trial court properly granted summary judgment in favor of Defendants on the strict-liability claim.

B. Negligence

[2] Plaintiff next contends the trial court erred in granting summary judgment for Defendants on Plaintiff's negligence claim arising from the dog bite.

> The test to determine defendant's liability in this case has been stated: The test of the liability of the owner of the dog is . . . whether the owner should know from the dog's past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result. *That is, the liability of the owner depends upon his negligence in failing to confine or restrain the dog.* The size, nature and habits of the dog, known to the owner, are all circumstances

2. Plaintiff makes no argument that any other provision of Section 67-4.1(a)(1) defining a "dangerous dog" applies here.

> to be taken into account in determining whether the owner was negligent.

Hunnicutt v. Lundberg, 94 N.C. App. 210, 211-12, 379 S.E.2d 710, 711-12 (1989) (emphasis added) (quotation marks omitted) (citing *Sink v. Moore*, 267 N.C. 344, 350, 148 S.E.2d 265, 270 (1966)). Specifically, Plaintiff contends summary judgment was improper because a genuine issue of material fact exists as to whether Defendants knew Blue was "dangerous" because of his breed. We disagree.

It is undisputed that, on the morning of 10 November 2009, Defendants' children were walking Blue, who was restrained with a collar and leash. The facts, taken in the light most favorable to Plaintiff, indicate that there were no prior incidents that would have put Defendants on notice that Blue required restraints in excess of a collar and leash. Plaintiff's own expert's testimony reflected:

> [Dr. Wilson]. I believe that certain breeds and types and crosses of those breeds are inherently more likely to be dangerous than other breeds of dogs and should be consequently trained and retrained and restrained in a responsible manner at all times.
>
> [Defendants' Counsel]. How do you restrain them in a responsible manner? A leash and a –
>
> [Dr. Wilson]. Collar and a leash.

Accordingly, Plaintiff's own expert testified *even if* Blue was of a breed "inherently more likely to be dangerous than other breeds[,]" a "collar and leash" is a responsible manner by which to restrain Blue.[3] What

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3. Plaintiff argues this Court's decision in *Hill v. Williams* supports her negligence claim; however, *Hill* is distinguishable from the case at hand. 144 N.C. App. 45, 547 S.E.2d 472 (2001). In *Hill*, the facts established the defendants' Rottweiler was left unrestrained *and* unsupervised on the defendants' property where it attacked the plaintiff as he was working on defendants' property as a contractor. *Id.* at 47, 547 S.E.2d at 474. The same Dr. Wilson as in the case *sub judice* testified to the dangerous propensity of the Rottweiler breed. *Id.* at 48, 547 S.E.2d at 474-75. The trial court denied the defendants' motion for a directed verdict on the plaintiff's negligence claim, and the jury returned a verdict that the plaintiff was injured by the negligence of the defendants. *Id.* at 49, 547 S.E.2d at 475. On appeal, this Court held "the question of defendants' negligence in failing to restrain [their Rottweiler] in light of their knowledge of the Rottweiler animal's general propensities was an issue for the jury and the trial court did not err in denying defendants' trial motions in that regard." *Id.* at 55, 547 S.E.2d at 478. Here, Dr. Wilson testified a collar and leash was a responsible restraint for Blue as an American Bulldog, and it is undisputed Blue was restrained. Accordingly, *Hill* does not support Plaintiff's argument that summary judgment for Defendants on Plaintiff's negligence claim was improper.

Plaintiff contends is a material, disputed fact—whether Defendants knew Blue was "dangerous" because of his breed—is not material because the undisputed evidence in this case shows Defendants nevertheless restrained Blue in a responsible manner.

"[S]ummary judgment is proper where the evidence fails to establish negligence on the part of defendant[.]" *Gardner v. Gardner*, 334 N.C. 662, 665, 435 S.E.2d 324, 327 (1993) (alterations, citations, and quotation marks omitted). Under the well-established test for liability in this instance—"[t]hat is, the liability of the owner depends upon his negligence in failing to confine or restrain the dog[ ]"—we conclude the trial court correctly granted summary judgment in favor of Defendants. *Hunnicutt*, 94 N.C. App. at 211, 379 S.E.2d at 712 (citation and quotation marks omitted). Here, "the pleadings, depositions, answers to interrogatories, and admissions on file" indicate that Defendants were not negligent in their confinement or restraint of Blue. *See* N.C. Gen. Stat. 1A-1, Rule 56(c). Neither party presented evidence that Blue had previously exhibited aggressive behavior, and Durham County Animal Control noted no prior complaints. Plaintiff's expert testified reasonable restraints for a dog like Blue are a "collar and leash," and both parties acknowledge that on 10 November 2009 Blue was restrained on a collar and leash. No evidence was presented to indicate Blue had previously broken his collar or leash or otherwise establish that such a restraint was no longer reasonable. Thus, the trial court correctly granted summary judgment in favor of Defendants on Plaintiff's negligence claim.

Conclusion

For the foregoing reasons, the trial court's grant of summary judgment for Defendants is affirmed.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

MORRIS v. POWELL

[269 N.C. App. 496 (2020)]

SHANNON MORRIS (POWELL), PLAINTIFF
v.
DEAN POWELL, DEFENDANT

No. COA19-524

Filed 4 February 2020

1. Child Custody and Support—emancipation—moving out of home—judicial decree

The trial court erred by failing to order a father to pay past-due child support that accrued after his seventeen-year-old son moved out of his mother's home to live with another family. Pursuant to statute, a child must be judicially emancipated to terminate a parent's child support obligations.

2. Child Custody and Support—failure to pay child support—contempt of court—willfulness—child not living with custodial parent

The trial court did not err by declining to hold a father in contempt of court for failure to comply with his child support obligations where the court found that the father did not intend to willfully violate the order because he was under the mistaken apprehension that he could stop paying child support when his seventeen-year-old son moved out of his mother's home to live with another family.

Judge HAMPSON concurring in separate opinion.

Judge BERGER concurring in part and dissenting in part.

Appeal by Plaintiff from order entered 4 February 2019 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 29 October 2019.

Lewis, Deese, Nance & Briggs, LLP, by Renny W. Deese, for Plaintiff.

Schiller & Schiller, PLLC, by David G. Schiller, for Defendant.

INMAN, Judge.

This appeal presents a question of first impression in North Carolina: when the child of divorced parents leaves the custodial parent's home to live on his own, but is not decreed by a court to be legally emancipated,

does the non-custodial parent's obligation to pay child support automatically terminate? Based on the express language and common sense application of governing statutes, the answer is no.

Shannon Morris ("Mother") appeals from an order entered following the filing of a contempt motion against Dean Powell ("Father") for failing to make court-ordered payments after their child moved out of Mother's home. Mother argues that the trial court erred in (1) failing to enforce Father's child support obligation for January through April 2018—the months immediately following their son's leaving home and before the court hearing—and (2) failing to hold Father in contempt of court. We hold that the trial court erred in failing to enforce the child support obligation and remand for further proceedings in that regard. We affirm the trial court's conclusion that Father had not committed willful contempt.

I. FACTUAL AND PROCEDURAL HISTORY

The record below shows the following:

Mother and Father married on 1 January 1994, and as a result of that marriage two minor children were born. Mother and Father divorced and in June 2013 were granted joint custody of Richard,[1] the only remaining minor child of the marriage. Mother received primary physical custody, and Father was ordered to pay Mother one thousand dollars per month as child support.

In August 2016 Richard began living with Father, who then filed a motion seeking to modify custody and child support. The trial court granted Father's motion, awarding him primary physical custody and suspending his child support obligation. The court later ordered Mother to pay child support of $284 per month.

In March of 2017 Richard moved back in with Mother. The trial court entered a consent order granting Mother primary custody and reinstating Father's one thousand dollar per month child support obligation, effective 1 May 2017.

Richard continued to live with Mother until December 2017, when at age seventeen he moved in with his girlfriend and another family. From that time, neither parent provided him with financial support, and he did not return to live with either parent at any time relevant to this appeal.

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1. A pseudonym is used to protect the identity of the juvenile.

Because Richard was no longer living with Mother, Father stopped making child support payments in January 2018. In April 2018 Mother filed a contempt motion with the trial court for nonpayment, asserting that Father was in arrears in the amount of four thousand dollars for the period of January through April 2018. In response, Father filed a motion to terminate his child support obligation, retroactive to January 2018.

Following a hearing, the trial court granted Father's motion to terminate his child support obligation effective 1 May 2018. The trial court found that Richard "was living on his own and had essentially emancipated himself without the benefit of a court order." The court also found that Father had not willfully violated the child support order but made no finding as to the arrears owed by Father. It also dismissed Mother's motion for contempt. Mother appeals.

II. ANALYSIS

A. Father's Support Obligation

[1] Mother argues that the child support payments from January to April 2018 vested when they became due, and that the trial court erred when it failed to order Father to pay the arrearage. We agree.

Under our General Statutes, each court-ordered child support payment is vested when it accrues, and past due payments may not be vacated or modified "in any way for any reason" except as otherwise provided by law. N.C. Gen. Stat. § 50-13.10(a) (2019). Father argues that his obligation was terminated when Richard emancipated himself. Considering our statutes *in para materia* leads us to disagree.

Our General Statutes provide that child support payments "shall terminate" when a child reaches the age of 18 or is "otherwise emancipated."[2] N.C. Gen. Stat. § 50-13.4(c) (2019). The supporting parent may unilaterally terminate payments when the conditions of Section 50-13.4(c) are met. *Leak v. Leak*, 129 N.C. App. 142, 144, 497 S.E.2d 702, 703 (1998). The question in this case is whether Richard, when he moved out of Mother's home in December 2017, emancipated himself in a manner that satisfies Section 50-13.4(c)(1). This is an issue of first impression in North Carolina.

Our legislature has provided, in Article 35 of the Juvenile Code, a specific process by which a juvenile may petition a court for a judicial decree of emancipation. N.C. Gen. Stat. § 7B-3500 (2019). The statute

2. Child support payments may still be required after the child turns 18 if the child is still attending school. N.C. Gen. Stat. §§ 50-13.4(c)(2)-(3) (2019).

specifically provides that once the decree is entered, a parent "is relieved of all legal duties and obligations owed" to the emancipated child. *Id.* § 7B-3507. Richard did not pursue judicial emancipation.

Father contends that a decree was not necessary to terminate his child support obligation because Richard emancipated himself. Section 50-13(c)(1) does not explicitly refer to a decree of emancipation. In this respect, the statute is ambiguous.

When a statute is ambiguous, we determine the intent of the legislature and carry out that intention "to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). In this case, we must determine whether Section 50-13.4(c)(1) terminates a parent's child support obligation only upon entry of a judicial decree of emancipation or, in the alternative, if the legislature intended a broader understanding of the term "emancipation" to apply. The answer to this question is found in another section of the Juvenile Code, which provides that Article 35 supersedes common law provisions for emancipation. Based on this unambiguous expression of the legislature's intent, we hold that a minor must be judicially emancipated to terminate a parent's child support obligation.

Prior to the enactment of Article 35, emancipation was a common law doctrine in North Carolina. A child could be automatically emancipated by marriage or turning twenty-one. *Gillikin v. Burbage*, 263 N.C. 317, 322, 139 S.E.2d 753, 758 (1965). Partial or complete emancipation could also occur in several different ways, such as abandonment by the parent, subject to a fact-based analysis. *Id.* Other states recognize common law doctrines of *de facto* or self-emancipation, under which the specific facts are weighed to determine if a minor has "moved beyond the care, custody, and control of a parent." *See, e.g.*, *In re Marriage of Baumgartner*, 237 Ill. 2d 468, 480, 930 N.E.2d 1024, 1031 (2010). Father asks us to adopt this understanding of the term emancipation in applying Section 50-13.4(c)(1).

Father's argument is negated by the final provision of Article 35: "A married juvenile is emancipated by this Article. All other common-law provisions for emancipation are superseded by this Article." N.C. Gen. Stat. § 7B-3509 (2019). Because we must read statutes concerning the same subject "*in pari materia*, as together constituting one law, and harmonized to give effect to each," *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980) (internal citations omitted), Article 35 precludes us from accepting common law methods of emancipation for the purposes of Section 50-13.4(c)(1). Although the trial court found as a

fact that Richard "had essentially emancipated himself without the benefit of a court order," the legislature has made clear that emancipation is defined by statute, occurring only as provided by Article 35. Accordingly, Father's child support obligations could not have automatically terminated absent a decree of emancipation.

Mother's brief also challenges several of the trial court's findings of fact regarding Richard's independence from her financial support and, in conclusion, requests that this Court remand this case with instructions that Father be ordered to pay $10,000 in child support. Mother offers no explanation of how she calculated that amount, though it appears to be the sum of payments that would have vested after April 2018 had the trial court not terminated Father's child support obligation.[3] But Mother does not challenge the trial court's conclusion of law terminating Father's prospective child support obligations, nor does she argue that the challenged findings of fact are material to this or any other of the trial court's conclusions of law. "Issues in support of which no reason or argument is stated will be taken as abandoned." N.C. R. App. P. 28(b)(6) (2019). None of the challenged findings is material to Mother's argument or our conclusion that, as a matter of law, vested child support obligations cannot be retroactively terminated. So we need not address those challenges and do not address Mother's unexplained claim for an award of $10,000.

Our dissenting colleague offers an equitable analysis and concludes that the trial court did not err in terminating Father's child support obligation going forward from the date of the hearing. This analysis was not argued by Father, perhaps because the issue was not raised in Mother's appeal.

We acknowledge our colleague's equitable concerns. But the issue of whether the trial court erred in terminating Father's prospective child support obligations has been abandoned by Mother. Also, the authority to remedy perceived inequities in our statutes lies with the legislature and not the courts. *See Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968) ("Therefore, so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decision.")

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3. While the language of the trial court's order is slightly unclear in that it purports to "suspend," rather than terminate, Father's child support obligation, it explicitly grants Father's motion in which Father requests his child support obligation be terminated. Therefore we do not find any ambiguity in the court's order and read it as terminating Father's child support obligation.

B. Contempt

[2] Mother also argues that the trial court erred in failing to hold Father in contempt of court. When reviewing contempt proceedings, we are limited to determining whether there is competent evidence to support the findings of fact and whether those findings support the conclusions of law. *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007). We will not disturb on appeal findings of fact that are supported by any competent evidence. *Id.* Findings of fact that are not challenged on appeal are conclusive and binding on this Court. N.C. R. App. P. 10(a) (2019); *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991).

To hold a party in civil contempt for failure to comply with a court order, the trial court must find, among other facts, that the party's noncompliance was willful. *Shippen v. Shippen*, 204 N.C. App. 188, 190, 693 S.E.2d 240, 243 (2010) (citing N.C. Gen. Stat. § 5A-21 (2019)). The trial court here found that Father "did not inten[d] to willfully violate this Court's order" because "he was under the mistaken apprehension that he could simply stop paying" after his son Richard ceased living with Mother. Mother does not challenge this finding on appeal. As we are bound by this finding of fact, and contempt requires willful noncompliance, we affirm the trial court's decision not to hold Father in contempt.

III. CONCLUSION

For the above reasons, we vacate the trial court's order excusing Father from paying past due child support and remand to the trial court to calculate the amount Father owes for the period of January through April 2018, and for additional findings as necessary to that order. We affirm the trial court's dismissal of Mother's motion for contempt.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judge HAMPSON concurs by separate opinion.

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

BERGER, Judge, concurring in part, dissenting in part in separate opinion.

Child support payments are not intended to be a wealth transfer from non-custodial parent to non-custodial parent. Rather, child

support payments are intended to provide for "the reasonable needs of the child[.]" N.C. Gen. Stat. § 50-13.4 (c) (2017). Accordingly, the trial court did not err when it suspended Defendant's child support obligation, and I respectfully dissent. I concur with the remainder of the majority opinion.

As a preliminary matter, the majority fails to address the standard of review for child support orders. On appeal,

> child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion. 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. The trial court must, however, 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.

Ferguson v. Ferguson, 238 N.C. App. 257, 260, 768 S.E.2d 30, 33 (2014) (*purgandum*). As set forth below, the trial court did not abuse its discretion, and the majority has not demonstrated that the trial court's decision was "manifestly unsupported by reason." *Head v. Mosier*, 197 N.C. App. 328, 332, 677 S.E.2d 191, 195 (2009) (citation and quotation marks omitted).

The trial court determined that neither parent had custody of the minor child since December 2017, and the minor child was self-sufficient by June 2017. This was a changed circumstance from the prior child support order in which the mother had actual physical custody of the minor child. The trial court further determined that the amount of support necessary to meet the child's reasonable needs at the time of the hearing was $0.00, in part because "he got a job, leased an apartment and obtained a car . . . [and] was living entirely on his own." In addition, the child support payments that were made by Defendant to Plaintiff were not being used for the benefit of the minor child. Based upon these findings, the trial court suspended Defendant's child support obligation.

The purpose of child support is to provide financial "support of a minor child . . . to meet the reasonable needs of the child for health, education, . . . maintenance, . . . [and] accustomed standard of living of the child." N.C. Gen. Stat. § 50-13.4(c). In addition, child support orders "may be modified or vacated at any time, upon motion in the cause and a

showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2017). Defendant alleged in his motion that "there have been changed circumstances sufficient to modify the prior order in that the minor child has ceased residing with Plaintiff[.]"

The threshold question, which the majority does not address, is whether Defendant made a showing of changed circumstances. The unchallenged findings of fact by the trial court include:

> 11. The minor child informed Plaintiff/Mother that he had a plan to live with another family; Plaintiff/Mother disagreed with his plan but still reinforced their rules and stated that he was free to leave if he didn't follow their rules.
>
> 12. In mid-December 2017, the minor child left Plaintiff/Mother's home and moved in with the other family and his girlfriend at the time.
>
> 14. The minor child had a part time job and began to support himself with the help of this other family; he did however continue to attend school for a short period of time and was becoming self-sufficient.
>
> 17. Defendant/Father felt that the child support should not be paid to Plaintiff/Mother if the child was no longer living with Plaintiff as in his word's child support is to provide support for his son and not to support the mother.
>
> 28. The child was living on his own and had essentially emancipated himself without the benefit of a court order.

These unchallenged facts are binding on appeal. *Carpenter v. Carpenter*, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citation omitted).

In addition, the trial court made the following findings of fact, which were supported by competent evidence:

> 18. The minor child went to school for a month or so and then dropped out and moved to Hickory with his older sister sometime in April 2017.
>
> 19. At that time, he obtained some type of employment and promised to attend school; but he didn't

complete school and he stayed there until June 2017 when he moved to Hildebran, North Carolina.

20. When he moved to Hildebran, NC, somehow but unclear to the court; even though he was only 17 years of age he got a job, leased an apartment and obtained a car; at this time, he was living entirely on his own.

21. The evidence is clear that neither parent was providing support to the minor child and he was not in either parent's custody but was on his own.

22. The court finds that Plaintiff/Mother abrogated her responsibility as a parent by allowing the child to de facto emancipate himself.

24. The amount of support necessary to meet the child's needs from either of the parents to meet the child's needs at this time was zero.

31. The evidence clearly demonstrates that Plaintiff/Mother did not extend the amount of the court ordered child support to the child.

36. By June 2017 the child was essentially self-sufficient.

"The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Cushman v. Cushman*, 244 N.C. App. 555, 558, 781 S.E.2d 499, 501 (2016) (citation and quotation marks omitted).

The child was no longer residing with either parent. This fact, in and of itself, is a changed circumstance. The trial court essentially found that there were two non-custodial parents, and one non-custodial parent obligated to provide child support to another non-custodial parent. The "child support" payments made by Defendant were not being used for the benefit of the child, and the amount of support necessary to meet the child's needs from the non-custodial parents was zero. Based upon these facts, Defendant established changed circumstances sufficient to *modify or vacate* Defendant's child support obligation. N.C. Gen. Stat. § 50-13.7(a).

"The amount of a parent's child support obligation is determined by application of The North Carolina Child Support Guidelines (Guidelines)." *Barham v. Barham*, 127 N.C. App. 20, 24, 487 S.E.2d 774, 777 (1997) (citation omitted). One consideration in the application of the

Guidelines is the number of overnights the minor child spends with his or her parents. However, the Guidelines would not be applicable here because neither parent has custody of the minor child for more than 243 days (Worksheet A); the parties do not share custody for at least 123 days (Worksheet B); and split custody is not an issue (Worksheet C). An order for child support in this factual scenario requires consideration of "facts relating to the reasonable needs of the child for support . . . [and] the basis for the amount ordered." N.C. Gen. Stat. § 50-13.4(c).

The trial court found Defendant's child support payments exceeded the reasonable needs of the child as the child's reasonable needs were $0.00. Moreover, the trial court determined that Plaintiff "clearly demonstrate[d] that [she] did not extend the amount of the court ordered child support to the child." Because continued payment for child support in this circumstance would be unjust, *see* N.C. Gen. Stat. § 50-13.4(c), the trial court did not abuse its discretion in suspending Defendant's child support obligation pursuant to N.C. Gen. Stat. § 50-13.7(a).

Because there was a showing of changed circumstance, the trial court did not abuse its discretion when it suspended Defendant's child support obligation. It runs counter to common sense that a non-custodial parent would be required to continue paying child support to another non-custodial parent in this factual scenario.

HAMPSON, Judge, concurring.

I fully concur in both the reasoning and result reached in Judge Inman's majority opinion. I write separately only to add a few observations.

I.

First, as the discussion in the majority and dissenting opinions illustrate, the basis for the trial court's Order "suspending" Father's child support obligation as of 1 May 2018 in this case is unclear. On one hand, as the dissent perceives, the trial court appears to address the issue within the context of a modification of child support[1] and a deviation from the Child Support Guidelines[2] to set Defendant-Father's child

1. Although one likely could be inferred, the trial court did not make an express determination that a substantial change of circumstances existed justifying modification of child support. *See Beamer v. Beame*r, 169 N.C. App. 594, 595, 610 S.E.2d 220, 222 (2005).

2. Treating this as a deviation from the Guidelines in this case seems misplaced. I see nothing in the Record before us showing Defendant-Father's child support was *ever*

support obligation at zero. This approach seems supported by the trial court's oral rendition of its ruling where it stated:

> The Court therefore determines that a modification should be granted to show the sum of child support as zero. And child support should be suspended, effective May 1, 2018.
>
> There is just cause to allow the modification and to deviate to zero as the amount of child support.
>
> The Court further finds the Defendant father is not in [willful] contempt, this Court has jurisdiction over the parties and the subject matter, and the child support should be suspended and/or terminated effective May 1, of 2018.

On the other hand, however, other than a passing mention of modification, the trial court's written and entered Order suspending Defendant-Father's child support obligation is couched in terms of stopping child support on the basis of the child's self-emancipation. The practical reality is the trial court effectively terminated Defendant-Father's child support obligation. The evidence showed the parties' son turned 18 on the very day the trial court heard evidence in this case. It seems plain, on the facts of this case, this was not some temporary suspension of child support as it would be, at best, highly unlikely Plaintiff-Mother could obtain a future court order reinstating support now that the child is eighteen (even if her son was not yet twenty and progressing in his studies).[3] *See* N.C. Gen. Stat. § 50-13.4(c) (2019).

II.

Second, although the approach employed by the trial court and dissent in this case has, at least at first glance, some common-sense appeal, the broader impact of embracing a rule that permits a trial court to terminate child support for a nonjudicially emancipated minor creates other practical problems. Here, based on its finding the parties' son had "de facto emancipated himself," the trial court only purported to suspend Defendant-Father's child support obligation. However, under

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calculated based on the Guidelines. Moreover, there is nothing on this Record to establish what Defendant-Father's support obligation under the Guidelines would have been in this case as of the date of the 2018 hearing from which to deviate.

3. To be fair, both parties presented testimony their son had been progressing or otherwise intended to keep progressing toward a high school diploma or its equivalent.

North Carolina law, *both* parents generally share primary responsibility for the support of their child. *See* N.C. Gen. Stat. § 50-13.4(b). This is illustrated by our Child Support Guidelines, which calculate the total child support obligation of the parents based on combined adjusted monthly gross income. *N.C. Child Support Guidelines*, N.C. Annotated Rules 60, 63 (2020).

Thus, there are two potential longer-term practical impacts of accepting the "de facto emancipation" concept in child support cases. Viewed in its most literal sense, a determination a minor has self-emancipated would mean both parents' child support obligation would terminate because the child would have no need of any parental support. This interpretation turns the minor into an equitable orphan with no party having any legal obligation to provide support for the child.

The other reading of this concept is that only the support obligation of the payor-parent is terminated by a child's self-emancipation. This approach leaves the remaining parent as the party solely responsible for the support of the minor child. In many cases, as in this case, this will be the primary custodial parent. The custodial parent remains responsible for maintaining the custodial home (for if, and when, the self-emancipated child returns) and remains legally obligated for the support of the minor child.

Indeed, scratching the surface of the evidence presented even in this case illustrates this point and demonstrates the parties' son was not wholly independent of his parents' support. For example, Defendant-Father conceded Plaintiff-Mother continues to pay their son's cellphone bill. He also testified, although their son makes payments to Plaintiff-Mother, it is Plaintiff-Mother who is the responsible party on the son's car insurance.[4] Indeed, when the son was in a car accident, Defendant-Father testified the son returned to Plaintiff-Mother's home for several days because "he had no choice" as "he had no ride." Plaintiff-Mother offered evidence their son returned home intermittently and that throughout the year he was living away from home she would provide him groceries along with some financial help towards bills.

The son's employment situation during his year of self-emancipation was fluid. He began working at a restaurant; then, after he moved in with

4. There was apparently no consideration of which party is responsible for any health insurance or possible medical expenses. The history of the case reflects Defendant-Father had previously been responsible for carrying insurance on the son but that the parties were required to split uninsured costs 50/50. The trial court's Order does not expressly address this issue.

his sister near Hickory, he began working at a carwash—a job Plaintiff-Mother testified was procured by her current husband. Defendant-Father testified the son had now obtained employment laying cable—a job he had started only three days prior to the evidentiary hearing.

The son's living arrangements during that year were even less sure. Upon moving out of his mother's home, he lived with another family that helped provide support. He then moved in with his older sister, where Plaintiff-Mother testified she would regularly deposit funds into his sister's account to help cover expenses. Defendant-Father could not explain how his minor son was able to enter into a lease with his current landlord except to explain the son and the landlord had reached some understanding and his son was currently living in a trailer with a "fellow named Lanny."

Thus, even on the facts of this case, the evidence reflects the parties' then-minor son remained at some level dependent on his parents and, in particular, Plaintiff-Mother for support. It is true these needs may not have risen to the level of Defendant-Father's then-existing child support obligation. Upon proper evidence and findings of fact as to the child's actual reasonable needs, the parents' respective abilities to pay, and other relevant factors, a downward modification of some amount may well have been in order. Likewise, the facts of this case may well have justified termination of child support as soon as the child reached the age of eighteen. *See* N.C. Gen. Stat. § 50-13.4(c). However, in the absence of judicial emancipation, the trial court's ruling that "suspended and/or terminated" Defendant-Father's child support obligation for the then-minor son was error.

STATE OF NORTH CAROLINA
v.
MOLLY MARTENS CORBETT AND THOMAS MICHAEL MARTENS

No. COA18-714

Filed 4 February 2020

1. Jury—misconduct—murder trial—motion for appropriate relief—speculative allegations

The trial court did not abuse its discretion by denying defendants' motion for appropriate relief without holding an evidentiary hearing, where defendants' allegations of juror misconduct in their murder trial—based on post-trial media interviews given by several jurors—were speculative and conclusory. Even if the trial court had held an evidentiary hearing, which it was not required to do, the no-impeachment rule regarding jury verdicts (Evidence Rule 606(b)) would have barred defendants from presenting any admissible evidence in support of their allegations, which hinged on internal, not external, influences. Moreover, defendants failed to demonstrate any alleged misconduct was prejudicial.

2. Homicide—second-degree—voluntary manslaughter—sufficiency of evidence

In a prosecution for second-degree murder and voluntary manslaughter arising from an altercation in which the victim received at least twelve blows to the head, the State presented substantial evidence from which a rational juror could conclude that defendants did not act in self-defense or in defense of each other, despite the exculpatory handwritten statement by one defendant claiming self-defense.

3. Evidence—hearsay—child witnesses—medical treatment exception—declarant's intent—relevance to medical diagnosis

In a murder prosecution arising from a fatal domestic altercation, statements made by the victim's two children during medical evaluations conducted a few days after the incident satisfied the two-step inquiry for the medical treatment exception to the hearsay rule pursuant to *State v. Hinnant*, 351 N.C. 277 (2000), and should not have been excluded. The statements were intended for medical purposes given the medical setting in which they were made (at a non-profit children's advocacy center) and the understanding the children had of the overall medical purpose of the interviews, and the statements were reasonably pertinent to medical treatment or

diagnosis where the children had been exposed to domestic violence and trauma.

4. Evidence—hearsay—unavailable child witnesses—residual exception—circumstantial guarantees of trustworthiness

In a murder prosecution arising from a fatal domestic altercation, the trial court committed prejudicial error by excluding statements of the victim's two children—made within days of the incident during interviews with social services and medical personnel—after concluding the statements lacked circumstantial guarantees of trustworthiness so as to qualify for admission under the residual exception to the hearsay rule. The trial court erroneously limited its findings of fact to the events surrounding the victim's death and failed to take into consideration the children's personal knowledge of the incidents they described, their understanding of the seriousness of the inquiries and the importance of truthfulness, and the fact that their statements were highly probative to defendants' claims of self-defense and defense of another.

5. Appeal and Error—preservation of issues—expert testimony—reliability—multiple objections

In a murder prosecution, defendants preserved for appellate review the issue of whether conclusions by a bloodstain pattern analysis expert were sufficiently reliable by lodging several objections—not only during voir dire of the expert but also after the State proffered the expert's supplemental report containing conclusions about stained articles of clothing, which were the subject of defendants' objections during voir dire.

6. Evidence—expert testimony—bloodstain analysis—untested—reliability—Rule 702(a)

In a murder prosecution, testimony by an expert in bloodstain analysis regarding stains on two articles of clothing that had not been tested for the presence of blood was improperly admitted where it failed the reliability test pursuant to Rule 702(a). The admission was prejudicial where the untested stains provided the sole basis for the expert's conclusion that the victim's head was close to the floor when being struck, which undermined defendants' self-defense claims.

7. Witnesses—testimony—murder trial—co-defendant's testimony—exclusion improper

In a prosecution of a father and a daughter for the murder of the daughter's husband, the trial court committed prejudicial error by

excluding the father's testimony that, during the altercation giving rise to the murder charges, he heard his daughter say to the victim, "Don't hurt my dad." The statement did not constitute hearsay because it was offered to illustrate the father's state of mind, not to prove the truth of the matter asserted, and where defendants asserted claims of self-defense and defense of another, the reasonableness of any fear indicated by the statement should have been left for the jury to resolve.

8. Homicide—jury instructions—aggressor doctrine—evidentiary support

In a prosecution of a father and a daughter for the murder of the daughter's husband, the trial court erred by instructing the jury on the aggressor doctrine as to the father, who claimed he acted in self-defense and in defense of another. All of the evidence showed that the victim was the initial aggressor by choking the daughter and stating his intention to kill her—despite the father bringing a bat to the altercation and the fact that the victim displayed much more extensive injuries than the defendants, the father did not willingly enter into the altercation without provocation. Further, erroneously excluded testimony about the daughter's exclamation during the incident negated the State's argument that there was a pause in the assault and that the father re-entered the fight.

9. Homicide—multiple errors—prejudice—new trial

In a prosecution of a father and a daughter for the murder of the daughter's husband, defendants demonstrated prejudice and were entitled to a new trial. Where the trial court committed multiple evidentiary and instructional errors which prevented defendants from presenting a meaningful defense, and post-trial interviews given by jurors indicated they had unanswered questions that excluded evidence would have addressed, a reasonable possibility existed that absent the errors, a different result would have been reached at trial.

Judge COLLINS concurring in part and dissenting in part.

Appeal by defendants from judgments entered 9 August 2017 and order entered 4 December 2017 by Judge W. David Lee in Davidson County Superior Court. Heard in the Court of Appeals 31 January 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorneys General Jonathan P. Babb and L. Michael Dodd, for the State.

Tharrington Smith, LLP, by Douglas E. Kingsbery and Melissa H. Hill, for defendant-appellant Molly Martens Corbett.

Crumpler Freedman Parker & Witt, by David B. Freedman, Jones P. Byrd, Jr., and Dudley A. Witt, for defendant-appellant Thomas Michael Martens.

ZACHARY, Judge.

Defendants Molly Martens Corbett ("Molly") and Thomas Michael Martens ("Tom"), daughter and father, appeal from judgments entered upon a jury's verdicts finding them guilty of second-degree murder in the death of Jason Corbett ("Jason"), Molly's husband. Defendants also appeal the trial court's order denying their Motion for Appropriate Relief alleging juror misconduct. After careful review, we affirm the order denying Defendants' Motion for Appropriate Relief. However, due to a number of prejudicial errors apparent within the record, we reverse the judgments entered upon Defendants' convictions for second-degree murder and remand for a new trial.

Although Defendants raise 13 issues on appeal—many of which are interconnected and complex—this case is deceptively simple, boiling down to whether Defendants lawfully used deadly force to defend themselves and each other during the tragic altercation with Jason. Having thoroughly reviewed the record and transcript, it is evident that this is the rare case in which certain evidentiary errors, alone and in the aggregate, were so prejudicial as to inhibit Defendants' ability to present a full and meaningful defense. Moreover, the trial court erred in instructing the jury on the aggressor doctrine as to Tom, given the absence of evidence to support such an instruction.

Because these errors are dispositive and warrant a new trial, we need not address the additional issues raised by Defendants.

I. Background

Jason originally lived in Ireland with his first wife, Margaret, and their two children, Jack and Sarah. After Margaret died unexpectedly in 2004, Jason hired Molly to work as an *au pair*. Jason and Molly later began a romantic relationship, and in 2011, they moved with the children to Davidson County, North Carolina. Jason and Molly married later that year.

A. The Altercation

On 1 August 2015, Molly's parents, Tom and Sharon Martens, traveled from their home in Knoxville, Tennessee, to visit the Corbetts in Davidson County. Tom, an attorney and retired FBI agent, packed an aluminum Little League baseball bat and a tennis racket as gifts for Jack. When Tom and Sharon arrived at the Corbetts' home at around 8:30 p.m., Jason was in the driveway, drinking a beer with a neighbor, and he walked over to greet Tom and Sharon. That evening, Tom, Sharon, Jason, Molly, and Sarah had dinner together while Jack attended a party. Jack came home at around 11:00 p.m. Because of the late hour, Tom decided not to give Jack the bat and tennis racket that night.

Tom and Sharon slept in the guest room, which was located just below the bathroom that adjoined Jason and Molly's bedroom. Late in the night, Tom was awakened by noises, including "a scream and loud voices," above their bedroom. Wearing only a golf shirt and boxer shorts, Tom jumped out of bed, grabbed the Little League bat that remained with his luggage by the bed, and rushed upstairs.

Once he arrived upstairs, Tom determined that the noises were coming from Jason and Molly's bedroom. When Tom opened the bedroom door, Molly and Jason were facing each other, and Jason had his hands around Molly's neck. As Tom entered and closed the door behind him, Jason quickly removed his hands from Molly's neck, and shifted her into a tight chokehold with her neck in the crook of his right arm, and her body positioned between himself and Tom.

Tom repeatedly told Jason, "Let her go"; Jason repeatedly responded, "I'm going to kill her." Jason began to move down the hall toward the bathroom, dragging Molly with him. Tom feared that if Jason took Molly into the bathroom and closed the door, Tom would be unable save her, and "that would be the end of that." To impede Jason's progress down the hall, Tom swung the baseball bat at "the back of the two of them glued together"—hitting Jason in the back of the head, while carefully avoiding Molly. Jason did not "go down" or even waver, and it seemed to Tom that the blow only "further enraged" Jason. Nevertheless, Tom continued to hit Jason "as many times as [he] could to distract him because he now had Molly in a very tight chokehold," and "she was no longer wiggling."

Despite Tom's efforts, Jason successfully pulled Molly into the bathroom. Tom was close behind them, however, and Jason was unable to close the door. Tom had more room to maneuver inside of the bathroom than in the hallway, and he was able to hit Jason in the head with the bat again. Yet these efforts "didn't seem to have any effect."

Jason forced his way out of the bathroom, into the hallway, and back into the bedroom, pushing Molly and Tom along as he went. The affray resumed in the bedroom. Tom swung the bat at Jason, who caught the bat in his left hand, enabling Molly to break free from Jason's chokehold. While Tom and Jason were struggling for possession of the bat, Jason "punche[d]" his hand out and shoved Tom across the width of the bed, and Tom fell face first onto the floor. As he lay facedown on the floor, Tom heard Molly scream, "Don't hurt my dad."

When Tom got up, he saw Jason holding the bat, standing in "a good athletic position . . . looking between [Tom] and Molly." Seeing that Molly was "trapped" between the wall and the bed, Tom "rush[ed]" Jason to "try to get ahold of the bat." Tom and Jason renewed their struggle for control of the bat, and at some point, Molly picked up a brick paver that was sitting on her nightstand and used it to strike Jason.

Tom managed to regain control of the bat. By this point, he was "shaking" and physically weak from the altercation. However, because Tom remained afraid that Jason might regain control of the bat and again attempt to kill him or Molly, Tom continued hitting Jason until he was down, and Tom felt certain that Jason "could not kill" them.

Shortly thereafter, Tom called 911 and told the operator, "My, my, uh, daughter's husband, uh, my son-in-law, uh, got in a fight with my daughter, I intervened, and I, I think, um, and, he's in bad shape. We need help. . . . He, he's bleeding all over, and I, I may have killed him." With the 911 operator's guidance, Molly and Tom took turns administering CPR to Jason until the emergency medical crew arrived.

B. The Investigation

Davidson County EMS paramedics arrived at the scene within ten minutes of receiving the 911 call. One paramedic quickly determined that Jason had suffered "severe heavy trauma to the back of the head." While attempting to lift Jason's chin in order to prepare him for intubation, all of the paramedic's left "fingers went inside the skull."

Inside of the house, first responders observed a significant amount of blood on the floor and walls of the bedroom, dry blood on portions of Jason's body, and a brick paver on the bedroom floor. Deputies from the Davidson County Sheriff's Office retrieved the children from their bedrooms, where they found Sarah and Jack asleep and undisturbed.

Meanwhile, Deputy David Dillard escorted Molly to his patrol car, where she remained for approximately one hour. In his written report of the incident, Deputy Dillard noted that Molly was "very obviously in

shock." He recalled that Molly "was making crying noises but [he] didn't see any visible tears. She was also rubbing her neck. . . . It wasn't a constant. She would do it and stop and do it and then stop while continuing to make the crying noises."

Molly was "in the fetal position" on the ground beside Deputy Dillard's car when two paramedics approached to examine her. Both paramedics observed redness on Molly's throat, and when one of them asked Molly whether her neck hurt, she said yes, and stated that she had been choked. Aside from Molly's symptoms of shock and the redness and soreness to her throat, none of the first responders observed any apparent injuries to either Molly or Tom.

Lieutenant Frank Young, III, arrived on the scene later, and took photographs of Jason's body. One of the photographs depicted Jason's right hand with a long blonde hair in his palm.

Later that day, Molly submitted the following written statement to the Davidson County Sheriff's Office:

> My husband, Jason Corbett, was upset that he awoke and an argument ensued with him telling me to "shut up," (etc.) and he applied pressure to my throat/neck and started choking me. At some point, I screamed as loud as possible. He covered my mouth and then started choking me again with his arm. My father, Tom Martens, came in the room and I cannot remember if he said something or just hit Jason to get him off me. Jason grabbed the bat from him and I tried to hit him with a brick (garden decor) I had on my nightstand. I do not remember clearly after that.

On 3 August 2015, a medical examiner at the North Carolina Office of the Chief Medical Examiner performed an autopsy and determined Jason's cause of death to be blunt force head trauma, including "extensive skull fractures" and "two large, branched, full-thickness lacerations of bilateral parietal scalp," arising from multiple blows to the head. The medical examiner found that one laceration on Jason's head "ha[d] an appearance of a postmortem injury." He also noted that Jason had a blood alcohol level of 0.02% and tested positive for low levels of an antidepressant medication known to have sedative effects.

That day, Sarah and Jack were staying with Molly's brother in Union County when they were visited by a social worker from the Union County Department of Social Services ("DSS"). Pursuant to a request from the Davidson County Sheriff's Office, the social worker conducted separate

interviews of the children, inquiring about issues including domestic violence and familial relationships. During his interview, Jack reported that "his dad gets mad at his mom [Molly] for no good reason." He also shared that once, he was accidentally pushed down the stairs while attempting to intervene in a fight between Jason and Molly. Sarah similarly stated during her interview that "her dad is angry on a regular basis," and she described an incident when Jason pulled Molly's hair and "smacked her in the face."

Upon the referral of Davidson County DSS, on 6 August 2015, four days after Jason's death, Jack and Sarah received child medical evaluations at the Dragonfly House Children's Advocacy Center in Mocksville, North Carolina. Davidson County Sheriff's Detectives Mark Hanna and Nathan Riggs observed the forensic medical interview portions of the children's separate, two-part child medical evaluations. Prior to the interviews, Detectives Hanna and Riggs met with the other members of the children's multi-disciplinary team and submitted the following list of questions related to the investigation of Jason's death, which they wanted the interviewer to ask the children:

> QUESTIONS FOR KIDS –
>
> 1. FIND OUT ABOUT DV IN HOME.
>
>   IS JACK AFRAID OF DAD. DO KIDS LIKE/HATE MOLLY.
> 2. FIND OUT ABOUT PAVER IN BEDROOM
> 3. ASK ABOUT NIGHTMARE THAT WOKE HER UP.
> 4. ASK ABOUT HOW THE "EMERGENCY #"
>
>   –WHY WAS IS [sic] SETUP – WHO SETUP – WHEN – WHO WROTE#.
> 5. ASK WHERE G-MOM + G-DAD USUALLY SLEEP WHEN THEY STAY
> 6. ASK IF DAD EVER MENTIONED A TRIP TO IRELAND THIS MONTH
> 7. ASK ABOUT RELATIONSHIP W/ MOLLY
> 8. ASK ABOUT SARAH'S SLEEPING IN BED W/MOLLY [illegible] DAD.

During his interview, Jack described how Jason often got angry with Molly over "simple things" such as "bills" and "leaving lights on." Jack stated that Jason "physically and verbally hurt" Molly, and that he had personally witnessed occasions when Jason punched, hit, and pushed her. According to Jack, Jason's anger problems had "gotten worse over the past few months."

In addition, Jack explained that the brick paver was present in the master bedroom because Molly and the children "were going to paint it, because [they] just . . . got flowers that [they] were going to plant in [their] front yard or back yard[.]" Jack further explained, however, that it had been raining, and they did not want the brick paver "getting all wet. So [they] brought it inside, and [Molly] put it at her desk."

Like Jack, Sarah similarly stated during her interview that Jason would get angry for "ridiculous reasons," such as when he was inadvertently awakened from sleep at night. Sarah explained that she sometimes had nightmares and would come to Molly for comfort, but that Jason would get "very angry" if she accidentally woke him up. Sarah described one such incident that occurred in the middle of the night that Jason died. That night, Sarah had a nightmare involving the fairies on her bedsheets, and she went to Jason and Molly's bedroom and asked Molly to change her sheets. When Molly got out of bed to go to Sarah's bedroom, Jason became angry, and the ensuing argument between Molly and Jason eventually led to the deadly affray in this matter.

C. Defendants' Trial

On 18 December 2015, a grand jury indicted Molly and Tom for second-degree murder and voluntary manslaughter. Defendants pleaded not guilty, and a joint trial was set for 17 July 2017 in Davidson County Superior Court, the Honorable W. David Lee, judge presiding.

By the time of trial, Jack and Sarah were in the custody of Jason's family in Ireland, and thus, beyond the subpoena power of the trial court. Accordingly, prior to trial, Defendants moved to admit the children's hearsay statements from their interviews conducted (1) by the Union County DSS social worker on 3 August 2015, and (2) at the Dragonfly House on 6 August 2015, pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4), the medical diagnosis or treatment exception, or in the alternative, Rules 803(24) and 804(b)(5), the residual exceptions. Following a hearing on 8 and 9 June 2017, the trial court decided to defer its ruling on Defendants' motion until trial. Ultimately, although the trial court found that both children were unavailable to testify, it nonetheless denied Defendants' motion to admit the children's hearsay statements following Tom's testimony during Defendants' case-in-chief.

At trial, the State relied heavily upon forensic evidence, including photographs of Jason's body and the undeniably violent fight scene, as well as the testimony of first responders and law enforcement officers who were present that night. The State also presented significant medical evidence, including testimony from the medical examiner and

Jason's medical records from Kernersville Primary Care, which established that two weeks before his death, during a 16 July 2015 appointment, Jason reported that he had been feeling dizzy and "more stressed and angry lately for no reason."

When the State proffered an expert witness in bloodstain pattern analysis, Defendants requested voir dire, challenging the reliability of the witness's conclusions regarding certain evidence that the State had not submitted to the North Carolina State Crime Laboratory for blood or DNA testing. Following voir dire, the trial court ruled that the testimony was sufficiently reliable under N.C. Gen. Stat. § 8C-1, Rule 702(a), and admitted the witness's testimony over Defendants' objections at trial.

At the charge conference, Defendants requested that the trial court remove all aggressor language from the proposed pattern jury instructions, arguing that there was no evidence "that anyone was the aggressor but Jason." The State had "no objection" to the trial court's "declining to instruct on the aggressor issue as to" Molly, but argued that there was "conflicting evidence" in Tom's case, which could reasonably be interpreted to support that he was the aggressor. Following detailed arguments from the parties, the trial court ruled, as a matter of law, that Molly was not an aggressor, and properly omitted all aggressor language from the proposed pattern instructions in her case. As to Tom, however, the trial court ruled in the State's favor, and accordingly, instructed the jury on the aggressor doctrine in his case.

The State also requested that the trial court instruct the jury that it could find Molly guilty under an acting-in-concert theory, if it found that she was present during the incident and acted with Tom in pursuit of a common plan or purpose. The trial court delivered the State's requested instruction, over Defendants' objections.

On 9 August 2017, the jury returned verdicts finding Defendants guilty of second-degree murder. That day, the trial court entered separate judgments sentencing Defendants to 240-300 months each in the custody of the North Carolina Division of Adult Correction. Defendants gave oral notice of appeal in open court.

On 16 August 2017, Defendants filed a joint Motion for Appropriate Relief asserting that they were entitled to an evidentiary hearing and ultimately, a new trial, due to alleged juror misconduct. On 4 December 2017, the trial court entered an order denying Defendants' Motion for Appropriate Relief, which Defendants timely appealed to this Court.

II. Motion for Appropriate Relief

[1] We first address Defendants' challenge to the trial court's order denying their Motion for Appropriate Relief. Defendants contend that the trial court erred by failing to grant, or conduct an evidentiary hearing on, Defendants' requests to set aside the jury verdicts and judgments and grant them a new trial, "because competent evidence demonstrates frequent juror misconduct prejudicial to the defense and harmful to the judicial system." We disagree.

A. Standard of Review

On appeal, we review a trial court's order denying a motion for appropriate relief "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) (quotation marks and citation omitted). "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." *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748, *cert. denied*, 549 U.S. 1000, 166 L. Ed. 2d 378 (2006). "However, the trial court's conclusions are fully reviewable on appeal." *Wilkins*, 131 N.C. App. at 223, 506 S.E.2d at 276.

B. N.C. Gen. Stat. § 15A-1414

"After the verdict but not more than 10 days after entry of judgment," a criminal defendant may "by motion . . . seek appropriate relief for any error committed during or prior to the trial." N.C. Gen. Stat. § 15A-1414(a) (2019). *See generally id.* §§ 15A-1414, -1415 (setting forth the errors that may be asserted, as well as the time limitations upon, a criminal defendant's motion for appropriate relief made in the trial division). However, once the 10-day, post-judgment period expires, the only errors from which a defendant may seek appropriate relief in the trial court are those specifically enumerated in N.C. Gen. Stat. § 15A-1415. *Id.* § 15A-1414(b); *see also id.* § 15A-1415.

Whether the trial court must conduct an evidentiary hearing before ruling on a motion for appropriate relief depends upon a number of factors, including when the motion was filed; the complexity of the issues

presented, as well as the trial court's familiarity with the underlying record; and whether the allegations involve questions of law or fact. *See id.* § 15A-1420(c)(1)-(4). No evidentiary hearing is required "when the motion is made in the trial court pursuant to [N.C. Gen. Stat. §] 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact." *Id.* § 15A-1420(c)(2).

Accordingly, where the defendant moves the trial court for appropriate relief within 10 days following entry of judgment, the decision of whether to hold "an evidentiary hearing is . . . within the sound discretion of the trial court." *Elliott*, 360 N.C. at 419, 628 S.E.2d at 748. "[I]f the trial court can determine from the motion and any supporting or opposing information presented that the motion is without merit, it may deny the motion without any hearing either on questions of fact or questions of law, including constitutional questions." *Id.* (original emphasis and citations omitted). We review the trial court's decision to deny "an evidentiary hearing for abuse of discretion." *Id.* (citation omitted).

C. Defendants' Motion for Appropriate Relief

In the instant case, after the jury returned verdicts on 9 August 2017 finding Defendants guilty of second-degree murder, the trial court proceeded to enter separate judgments and sentences upon Defendants' convictions. Defendants entered oral notice of appeal in open court.

Seven days later, on 16 August 2017, Defendants filed a Motion for Appropriate Relief alleging juror misconduct and violations of their constitutional rights, and requesting that the trial court "set an evidentiary hearing, set aside the jury's verdict[s] and grant [Defendants] a new trial." In support of their motion, Defendants submitted affidavits and exhibits, including (1) printouts from Facebook on 10 August 2017 showing various individuals discussing the details of Defendants' trial, and a few former jurors sharing their personal experiences and opinions about the case; and (2) an 11 August 2017 report featuring coverage of Defendants' case and trial in that evening's upcoming episode of ABC News "20/20."

In the State's Response to Defendants' Motion for Appropriate Relief, filed 21 August 2017, the State asserted that Defendants' allegations of juror misconduct were "speculative" and could not be proved by admissible evidence; accordingly, the State requested that the trial court deny Defendants' motion without conducting an evidentiary hearing. On 25 August 2017, Defendants filed a Supplemental Motion for Appropriate Relief and Reply to State's Response, and submitted additional supporting affidavits and exhibits including, *inter alia*, affidavits

from two individuals who attested to having witnessed pre-deliberation conversations between jurors. The State filed a response to Defendants' Supplemental Motion for Appropriate Relief on 8 September 2017.

Without conducting an evidentiary hearing, on 4 December 2017, the trial court entered an order denying Defendants' Motion for Appropriate Relief, determining that

> there is neither evidence nor forecast with reasonable certainty of evidence that rises above the level of mere speculation or conjecture of either (1) any extraneous prejudicial information brought to a juror's attention or (2) any outside influence that has violated either defendants' [sic] constitutional right of confrontation brought to bear on any juror.

In their filings before the trial court, Defendants advanced numerous arguments in support of their contention that "frequent juror misconduct prejudicial to the defense and harmful to the judicial system" occurred in this case. However, we need only address the three arguments raised in Defendants' briefs with respect to this issue.

On appeal, Defendants contend that the trial court abused its discretion by denying their Motion for Appropriate Relief, as well as their request for an evidentiary hearing, because (1) competent evidence demonstrated that certain jurors "committed gross and pervasive misconduct in their private discussions of the case"; (2) jurors engaged in "private discussions" amongst themselves prior to deliberations, thereby violating Defendants' constitutional right to trial by a jury of twelve qualified jurors; and (3) several jurors' statements during post-trial media interviews evinced that they improperly considered and formed opinions about Molly's mental health, although that issue was not in evidence.

After careful review, we agree with the State that the trial court did not abuse its discretion by denying Defendants' Motion for Appropriate Relief without conducting an evidentiary hearing. Defendants' allegations of juror misconduct are, at best, general, speculative, and conclusory. Furthermore, we conclude that even if the trial court were to hold an evidentiary hearing on Defendants' § 15A-1414 motion—which it is not required to do, *see* N.C. Gen. Stat. § 15A-1420(c)(2)—precedent prohibiting verdict impeachment would bar Defendants from presenting any admissible evidence to prove the truth of their allegations.

The proscription against impeachment of a jury verdict "is well settled in North Carolina." *State v. Cherry*, 298 N.C. 86, 100, 257 S.E.2d 551,

560 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). "[A]fter a verdict has been rendered and received by the court, and jurors have been discharged, jurors will not be allowed to attack or overthrow their verdict, nor will evidence from them be received for such purpose." *Id.*

The purpose of the "no-impeachment rule" is "to promote freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." *Cummings v. Ortega*, 365 N.C. 262, 267, 716 S.E.2d 235, 239 (2011), *cert. denied*, 566 U.S. 993, 182 L. Ed. 2d 1029 (2012). This rule has been codified under N.C. Gen. Stat. § 8C-1, Rule 606(b), and N.C. Gen. Stat. § 15A-1240(a). As our Supreme Court has observed, "Rule 606(b) reflects the common law rule that affidavits of jurors are inadmissible for the purposes of impeaching the verdict except as they pertain to *extraneous influences* that may have affected the jury's decision." *Cummings*, 365 N.C. at 267, 716 S.E.2d at 239 (internal quotation marks omitted). *See also State v. Lyles*, 94 N.C. App. 240, 246, 380 S.E.2d 390, 394 (1989) ("[T]he exceptions to the anti-impeachment rule listed in Section 15A-1240 are designed to protect the same interests as, and are entirely consistent with, the exceptions in Rule 606(b).").

Whether evidence may be utilized to impeach a verdict depends upon whether jurors were subjected to "external" or "internal" influences. External influences, "which generally are admissible to prove the invalidity of a verdict," may "include information dealing with the defendant or the case which is being tried, which reaches a juror without being introduced in evidence." *Cummings*, 365 N.C. at 269, 716 S.E.2d at 240 (internal quotation marks, ellipsis, and citation omitted). By contrast, "internal influences" include "information coming from the jurors themselves—the effect of anything upon a juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." *Id.* "Internal influences may include: a juror not assenting to the verdict, a juror misunderstanding the instructions of the court, a juror being unduly influenced by the statements of his fellow-jurors, or a juror being mistaken in his calculations or judgments." *Id.* (internal quotation marks and citations omitted).

In the case at bar, it is evident that any notions developed by the jurors regarding Molly's mental health relate to "internal influences" of the jury. Therefore, Rule 606(b) precludes Defendants from presenting juror testimony—or affidavits regarding the internal influences of the jury—as a means to impeach the verdicts. *See Elliott*, 360 N.C. at 420, 628 S.E.2d at 748 (concluding that the trial court did not abuse its discretion

in denying a hearing where the "defendant would have been unable to present any evidence which would have strengthened the claims made in the motion for appropriate relief").

Nor do Defendants offer any facts to support that their allegations regarding the jurors' statements concerning Molly's mental health are based upon anything beyond mere speculation or opinion. The interviews appearing on ABC News "20/20," in which three jurors made statements that Defendants allege pertained to Molly's mental health, were conducted after the verdicts had been rendered. Notably, Defendants fail to identify, or even suggest, any source from which the jurors might have improperly gleaned this information prior to rendering a decision at trial. *Cf. State v. Rollins*, 224 N.C. App. 194, 201-02, 734 S.E.2d 634, 636-37 (2012) (holding that the trial court did not abuse its discretion by failing to hold an evidentiary hearing on the defendant's motion that "failed to specify: which news broadcast the juror in question had seen besides a possible broadcast summary from the News 14 Carolina website; the degree of attention the juror . . . had paid to the broadcast; the extent to which the juror . . . received or remembered the broadcast; whether the juror . . . had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct" (footnote omitted)), *aff'd per curiam*, 367 N.C. 114, 748 S.E.2d 146 (2013).

The no-impeachment rule similarly defeats Defendants' arguments regarding any "private discussions" that allegedly took place between jurors. Again, "Rule 606(b) of the North Carolina Rules of Evidence bars jurors from testifying during consideration of post-verdict motions seeking relief from an order or judgment about alleged predeliberation misconduct by their colleagues." *Cummings*, 365 N.C. at 270, 716 S.E.2d at 240-41. The *Cummings* Court concluded that affidavits tending to show that a juror made statements regarding his opinion about the case were inadmissible under Rule 606(b) because such statements were internal influences: "Even if [a juror] had made up his mind before [the] plaintiff introduced any evidence, this state of mind is precisely the type of information that Rule 606(b) excludes. Consequently, the affidavits of [two of the jurors] were inadmissible pursuant to Rule 606(b)." *Id.* at 271, 716 S.E.2d at 241.

Here, the no-impeachment rule bars the admission of Defendants' proffered affidavits. Moreover, any evidence regarding pre-deliberation conversations would also be inadmissible under Rule 606(b). *See* N.C. Gen. Stat. § 8C-1, Rule 606(b) ("Nor may [a juror's] affidavit or evidence

of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.").

Moreover, the affidavit from the non-juror who attested to having witnessed two jurors conversing in a car prior to the jury's deliberations contains nothing more than speculative allegations. *See Elliott*, 360 N.C. at 420, 628 S.E.2d at 748 (holding that the trial court did not abuse its discretion in denying a request for an evidentiary hearing where the "defendant failed to make an adequate threshold showing of juror misconduct"). Indeed, as Defendants acknowledge in their brief, "the content of this conversation is unknown." By Defendants' own admission, the only parties who could offer evidence regarding the subject and scope of this conversation are the two jurors who took part. But as previously explained, their statements would not be admissible for that purpose. *See* N.C. Gen. Stat. § 8C-1, Rule 606(b); N.C. Gen. Stat. § 15A-1240(a); *cf. Rollins*, 224 N.C. App. at 201, 734 S.E.2d at 636 ("Based on the record, [the] defendant's evidence was insufficient to show the existence of the asserted ground for relief. There is insufficient evidence to determine whether juror misconduct occurred as [the] defendant's motion and [a fellow juror's] affidavit merely contained general allegations and speculation." (citations and internal quotation marks omitted)).

For the same reasons, Defendants' argument that the alleged private discussion between jurors violated their constitutional right to trial by 12 qualified jurors must also fail. *See Elliott*, 360 N.C. at 418, 628 S.E.2d at 747 ("[T]he documentary evidence [the] defendant submitted to support his motion for appropriate relief was insufficient to show, by any standard, that juror misconduct occurred in the form of private deliberations outside the presence of the other jurors. While [the] defendant's brief characterizes the prayer between the two jurors as 'deliberations' and 'discussions about the case outside the presence of their ten fellow jurors,' there is nothing in the record that indicates a discussion or deliberation of any kind occurred.").

Even assuming, *arguendo*, that the affidavits were admissible to prove misconduct, Defendants nevertheless fail to indicate the effect—prejudicial or otherwise—of the alleged misconduct upon the jury's verdicts. *See* N.C. Gen. Stat. § 15A-1420(c)(6) ("Relief must be denied unless prejudice appears, in accordance with [N.C. Gen. Stat. §] 15A-1443."); *see also Cummings*, 365 N.C. at 271-73, 716 S.E.2d at 241-42 (reversing this Court's decision upholding the trial court's grant of a new trial due to jury misconduct, despite allegations from multiple jurors that predeliberation statements by one juror "inhibited jurors from engaging in full deliberations" and "interfered with [another juror's] thought

process"); *Elliott*, 360 N.C. at 419, 628 S.E.2d at 748 (affirming the trial court's denial of the defendant's "inadequately supported motion for appropriate relief" because the defendant "failed to shed light on any prejudice to [the] defendant which arose from [the alleged juror] discussions").

Absent the required showing of prejudice, we conclude that the trial court did not err in denying Defendants' Motion for Appropriate Relief without conducting an evidentiary hearing.

III. Motion to Dismiss

[2] Defendants next argue that the trial court erred by denying their motions to dismiss for insufficient evidence the charges of second-degree murder and voluntary manslaughter. Defendants contend that this case is analogous to *State v. Carter*, 254 N.C. 475, 119 S.E.2d 461 (1961), in which our Supreme Court held, *inter alia*, that "[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." 254 N.C. at 479, 119 S.E.2d at 464. Accordingly, Defendants assert that the State failed to present substantial evidence to rebut or contradict Molly's exculpatory handwritten statement establishing that Molly and Tom acted in lawful self-defense and defense of others, which was introduced by the State and by which the State was bound. We disagree.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* The trial court "must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* at 492, 809 S.E.2d at 549-50 (citation omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016).

"Second-degree murder is defined as (1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Arrington*, 371 N.C. 518, 523, 819 S.E.2d 329, 332 (2018) (quotation marks and citation omitted). By contrast, voluntary manslaughter is defined as "the unlawful killing of a human

being without malice, express or implied, and without premeditation and deliberation." *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981). Malice sufficient to support a conviction of second-degree murder is either actual, express malice, or acting in a manner "which is inherently dangerous to human life . . . [in that it is] so reckless[ ] and wanton[ ] as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982). "[T]he burden of showing an unlawful killing . . . rest[s] with the State." *Carter*, 254 N.C. at 479, 119 S.E.2d at 464 (citation omitted).

When a defendant raises a self-defense claim on a motion to dismiss, the State must "present sufficient substantial evidence which, when taken in the light most favorable to the State, is sufficient to convince a rational trier of fact that [the] defendant did not act in self-defense." *State v. Kirby*, 206 N.C. App. 446, 453, 697 S.E.2d 496, 501 (2010) (citation and quotation marks omitted). The four elements of self-defense are:

> (1) it appeared to [the] defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) [the] defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) [the] defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) [the] defendant did not use excessive force, i.e.[,] did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Presson, 229 N.C. App. 325, 328, 747 S.E.2d 651, 654-55 (citations omitted), *disc. review denied*, 367 N.C. 274, 752 S.E.2d 150 (2013).

Defendants rely heavily on *State v. Carter* to support their contention that the trial court erred by denying their motion to dismiss the second-degree murder charges. The salient facts in *Carter* came entirely from a county sheriff's testimony. At 9:00 p.m. on 7 July 1960, the defendant came to the home of the sheriff and said, "I think I have killed my daddy." *Carter*, 254 N.C. at 476, 119 S.E.2d at 462. Earlier that night, when the defendant's father came home from work, he noticed that a screen

door was damaged. He became angry and "jumped on [the defendant's] 9 and 1/2-year-old brother . . . about it." *Id.* The defendant's mother and father began to argue, which led to the defendant's father beating her mother with a wine bottle. *Id.* at 477, 119 S.E.2d at 462. When the defendant tried to intervene, the defendant's father "grabbed [the defendant's] arm and started twisting it." *Id.* After the defendant's father released her, he began beating her mother again. *Id.* at 477, 119 S.E.2d at 463. The defendant retrieved a bumper jack and hit her father on the head with it numerous times until he went down, at which time the defendant left her father on the ground and took her mother to the hospital. *Id.* The defendant's father died two days later. *Id.* at 478, 119 S.E.2d at 463.

In *Carter*, "the State introduced statements of the accused to the effect that the defendant was trying to stop the deceased from assaulting her mother with a broken bottle." *Id.* at 479, 119 S.E.2d at 464. The State limited its evidence in this regard to the accused's statements, and there was "no evidence from which a jury could reasonably find that either the defendant or her mother was at fault in starting the altercation described in the record." *Id.* Our Supreme Court explained that "[w]hile the State by offering this evidence was not precluded from showing that the facts were different, no such evidence was offered, and the State's case was made to rest entirely on the statements of the defendant, which the State presented as worthy of belief." *Id.* Thus, the Court concluded that "[t]his evidence plainly negatives the existence of an unlawful killing," and reversed the trial court's denial of the defendant's motion for judgment of nonsuit. *Id.* at 479-80, 119 S.E.2d at 464.

We conclude that *Carter* is not analogous to the case before us. This Court has repeatedly distinguished self-defense cases from *Carter* where there is circumstantial or physical evidence contradicting exculpatory evidence. *See, e.g.*, *State v. Stafford*, 66 N.C. App. 440, 443, 311 S.E.2d 64, 66 ("While there was evidence tending to show that [the] defendant acted in self-defense, there was also substantial circumstantial evidence tending to show an intentional shooting done without legal excuse. The credibility and sufficiency of [the] defendant's evidence to establish his plea of self-defense were for the jury to evaluate in the light of the court's instructions." (citation and internal quotation marks omitted)), *disc. review denied*, 311 N.C. 406, 319 S.E.2d 279 (1984); *State v. Lane*, 3 N.C. App. 353, 355, 164 S.E.2d 618, 619 (1968) ("The evidence did not completely exculpate the defendant because accidental death was not conclusively shown. There was some intimation of ill will or a quarrel between the defendant and the deceased, and the defendant was holding the knife in such a manner as to indicate an intentional use thereof.").

Likewise, the instant case was not entirely predicated on Molly's statement that she and Tom acted in self-defense and defense of each other. Here, the State presented substantial circumstantial evidence from which a rational juror could reach a contrary conclusion, including that: (1) Jason suffered at least twelve blows to the head; (2) Tom had no visible injuries and Molly had only a "light redness" on her neck; (3) Jason was unarmed when the altercation occurred; (4) the children remained asleep throughout the entire altercation; (5) EMS, paramedics, and law enforcement responders observed that some of the blood on Jason's body had dried, and that Jason's body felt cool; (6) Tom told a coworker that he hated Jason; and (7) Jason had a life insurance policy, of which Molly was the named beneficiary.

Viewed in the light most favorable to the State, there was sufficient evidence from which a rational juror could conclude that Defendants did not act in self-defense, or defense of each other. Accordingly, the trial court did not err by denying Defendants' motions to dismiss the charges of second-degree murder and voluntary manslaughter.

IV. Evidentiary Errors

A. Sarah and Jack's Interview Statements

We next consider Defendants' arguments that the trial court erred by excluding hearsay statements made by Sarah and Jack (1) during their child medical evaluations at the Dragonfly House on 6 August 2015, and (2) during their 3 August 2015 interviews with a social worker employed by the Union County DSS.

On 3 August 2015, the day after Jason's death, both children were interviewed by a Union County DSS social worker, after an urgent request from the Davidson County Sheriff's Office. Later that week, on 6 August 2015, Jack and Sarah visited the Dragonfly House, a nationally accredited children's advocacy center in Mocksville, North Carolina. The children were referred to the Dragonfly House by the Davidson County Sheriff's Office, due to concerns of abuse in the home.

Prior to trial, Defendants moved to admit hearsay statements made by the children during their interviews (1) by Union County DSS on 3 August 2015; and (2) at the Dragonfly House on 6 August 2015, pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4), or in the alternative, Rules 803(24) and 804(b)(5).[1] Defendants further moved the trial court "to

1. Defendants also moved to admit statements made by the children on 13 August 2015 during interviews conducted by Union County DSS personnel, at the request of

declare the minor witnesses, Jack Corbett and Sarah Corbett, unavailable for purposes of testifying at" trial, noting the defense's inability "to procure the presence of" Jack and Sarah, who "are citizens and residents of the country of Ireland which is outside the jurisdiction of the subpoena power of the state of North Carolina." The State sought to exclude all of the proffered statements. Following an extensive hearing with numerous witnesses on 8 and 9 June 2017, the trial court decided to "defer an absolute ruling" on Defendants' hearsay motion until trial.

The trial court delivered its ruling on Friday, 4 August 2017, shortly after Tom testified during Defendants' case-in-chief. The court properly found "that both Jack Corbett and Sarah Corbett are unavailable for purposes of this proffer of evidence. . . . [T]hey are beyond the jurisdiction and process of th[e] Court[,]" in that they "have been and remain in Ireland." The trial court concluded, however, that none of the proffered statements were admissible under either (1) the medical diagnosis or treatment exception, Rule 803(4), or (2) the residual exception, pursuant to Rule 803(24). The trial court subsequently entered a written order memorializing its ruling.

1. Medical Diagnosis or Treatment Exception

[3] Defendants first contend that the trial court erroneously concluded that the children's statements were not admissible under Rule 803(4). We agree.

Rule 803 provides, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) Statements for Purposes of Medical Diagnosis or Treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C. Gen. Stat. § 8C-1, Rule 803(4).

Davidson County DSS. However, on appeal, Defendants do not argue that the exclusion of these statements was erroneous. Accordingly, we do not consider the 13 August 2015 statements in our analysis. *See* N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

The medical diagnosis or treatment exception to the hearsay rule is based upon the common-law rationale "that a patient has a strong motivation to be truthful in order to obtain appropriate medical treatment." *State v. Hinnant*, 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000). For this reason, statements admitted under Rule 803(4) are considered "inherently trustworthy and reliable[.]" *Id.* at 284, 523 S.E.2d at 668.

In *Hinnant*, our Supreme Court established a two-part test for admissibility under Rule 803(4):

> First, the trial court must determine that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment. The trial court may consider all objective circumstances of record in determining whether the declarant possessed the requisite intent. Second, the trial court must determine that the declarant's statements were reasonably pertinent to medical diagnosis or treatment.

Id. at 289, 523 S.E.2d at 670-71. A trial court's determination of the admissibility of hearsay statements pursuant to Rule 803(4) is reviewed de novo on appeal. *State v. Norman*, 196 N.C. App. 779, 783, 675 S.E.2d 395, 399, *disc. review denied*, 363 N.C. 587, 683 S.E.2d 382 (2009).

In order to satisfy the first prong of the *Hinnant* test—the intent inquiry—the proponent of Rule 803(4) evidence must "demonstrat[e] that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669. As our courts have repeatedly recognized, however, it is not always easy to ascertain "whether a declarant understood the purpose of his or her statements[,]" *id.*, particularly in cases involving child-declarants. *See, e.g.*, *id.*; *State v. Blankenship*, __ N.C. App. __, __, 814 S.E.2d 901, 915-16 (2018), *disc. review denied*, 372 N.C. 295, 827 S.E.2d 98 (2019); *State v. Isenberg*, 148 N.C. App. 29, 36-37, 557 S.E.2d 568, 573 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 288, 561 S.E.2d 268 (2002).

The trial court may consider a number of factors in determining whether a child's statements were motivated by the necessary intent, including "whether an adult explained to the child the need for treatment and the importan[ce] of truthfulness; with whom and under what circumstances the declarant was speaking; the setting of the interview; and the nature of the questions." *Blankenship*, __ N.C. App. at __, 814 S.E.2d at 916 (citation omitted). But again, "the trial court should consider *all* objective circumstances of record surrounding [the] declarant's

statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670 (emphasis added).

"The second inquiry under Rule 803(4) is whether the statements of the declarant are reasonably pertinent to diagnosis or treatment." *Id.* (citations omitted). Here, it is important to note that a "statement need not have been made to a physician" in order to satisfy Rule 803(4)'s requirements for admission. N.C. Gen. Stat. § 8C-1, Rule 803(4) cmt. Indeed, our Supreme Court has recognized that the exception could "include 'statements to hospital attendants, ambulance drivers, or even members of the family.' " *Hinnant*, 351 N.C. at 288, 523 S.E.2d at 670 (quoting *State v. Smith*, 315 N.C. 76, 84, 337 S.E.2d 833, 839 (1985) (quoting N.C. Gen. Stat. § 8C-1, Rule 803(4) cmt.)).

The common-law rationale underlying the medical diagnosis or treatment exception is "equally relevant during the second inquiry under Rule 803(4). If the declarant's statements are not pertinent to medical diagnosis, the declarant has no treatment-based motivation to be truthful." *Id.* at 289, 523 S.E.2d at 670. The Court in *Hinnant* thus determined that although statements to nonphysicians made *before* the declarant obtains treatment might be covered by the exception, "Rule 803(4) does not include statements to nonphysicians made after the declarant has already received initial medical treatment and diagnosis." *Id.* Nor does the Rule apply where the declarant "was interviewed *solely* for purposes of trial preparation." *Id.* (emphasis added) (citations omitted). *But cf. Isenberg*, 148 N.C. App. at 38-39, 557 S.E.2d at 574 (concluding that statements were properly admitted under Rule 803(4) where the trial court found from the evidence that "the purpose of the examination was 'dual, in that it was both for the purpose of medical intervention and for the purpose of future prosecution,' which meets the first prong of the [*Hinnant*] test").

In the instant case, the trial court concluded that the children's interview statements were inadmissible under Rule 803(4) because:

> 3. None of the proffered statements of Jack Corbett and Sarah Corbett satisfy the first prong of the Hinnant analysis as they were not intended to obtain a medical diagnosis or treatment.
>
> 4. Likewise, none of the proffered statements of Jack Corbett and Sarah Corbett satisfy the second prong of the Hinnant analysis as they were not pertinent to any medical diagnosis or treatment.

Following similar reasoning, our dissenting colleague concludes that the children's statements fail the first prong of the *Hinnant* test because (1) the forensic medical interviews were conducted in a child-friendly environment, separate and distinct from the physical examinations that the children received at the Dragonfly House; and (2) the objective circumstances of record do not indicate that the children understood that the purpose of the interviews was to obtain medical diagnosis or treatment. We disagree.

Here, the child-friendly setting in which the interviews were conducted favors admission, rather than exclusion, of Jack's and Sarah's statements. Brandi Reagan, Executive Director of the Dragonfly House, testified at the pretrial hearing on Defendants' motion to admit the children's statements. Reagan explained that the Dragonfly House is an independent, nationally accredited, non-profit children's advocacy center "that provides all-inclusive services to children who have either disclosed abuse or are suspected of experiencing abuse, which is physical abuse, sexual abuse, neglect or witnessed violence." The Dragonfly House provides myriad services, including a "child medical evaluation," which Reagan explained is "a type of exam that is very detailed and thorough that is set forth from the [State] Department of Social Services . . . us[ing] a program . . . that was established by UNC Chapel Hill." The purpose of a child medical evaluation is to determine the child's needs, and to diagnose and treat the child accordingly.

A child medical evaluation at the Dragonfly House begins with a meeting of the child, his or her caregivers, and Heydy Day, child advocate for the Dragonfly House. Day conducts intake paperwork, answers questions, and informs the parties what to expect during all stages of the appointment. Reagan testified that "[a]fter [Day] explains that to the caregiver, she does explain that to the child at their level so if it's a younger child, she will explain it in a different way than she would a teenager. She makes sure that they understand and they know what to expect."

Day described how she typically explains the child medical evaluation process to the parties during intake:

> I start off talking to the child and the caregiver saying, "you will be talking with one of my friends today," whether that's our interviewer Kim or interviewer Brandi, you will be talking to that lady.
>
> Her job is just to talk with you. That's all she will do. But while she is talking with you there are cameras set

up in the room. I typically point out the camera to them in the lobby. We have security cameras just for security purposes in the lobby. Outside I will say, "Can you find the camera in this room?" They will point to it. I say, "Miss Kim and Miss Brandi have cameras just like that in that room. The cameras in that room are to record what you and her talk about because this is really important. This way I don't have to talk to all of these different people that you don't know." I usually ask them, "Do you have any questions? Are you okay with that?" And I will answer their questions. After that I say, "While you are talking with Miss Brandi or Miss Kim your caregiver will be talking with our doctor. Our doctor will be asking questions about your health throughout your whole life."

I typically give kids examples of those questions such as, have you ever been in the hospital, have you ever had surgeries, broken bones, allergies, take medicine regularly, just to give the child an idea what the doctor is going to be talking to their caregiver about. I say, "Once you finish talking with Miss Kim or Miss Brandi and the doctor finishes talking with the caregiver, then the doctor will call you back to do a head to toe check-up of you." I say, "there is a nurse, . . . she's going to help you pick out a T-shirt and a blanket for the medical exam."

. . . .

"Once you come out of the bathroom, the nurse and doctor will ask you how much you weigh, how tall you are." I usually say, "The thing that gives you a hug for your blood pressure, your vision, your hearing, your height, your head check, back, bottom, private area, legs and feet." I do a head to toe of myself to give them an overview of what is to be expecting [sic]. I say, "Is that okay with you?" I get a variety of responses on that from different children. I say, "Do you have any questions for me about that?" I answer the questions if they have any. Then I say, "Okay I will go ahead and let everybody know I have spoken with you and then Miss Kim or Miss Brandi will come and get you." Then I will defer them.

The Dragonfly House is "set into an old home." Forensic medical interviews[2] and physical examinations are conducted in separate bedrooms across the hall from one another. The interview room is "intentionally designed and laid out to be . . . 'child friendly' ": there is an easel "in case the child needs to draw," along with anatomically correct dolls, Play-Doh, and tissues, among other items.

Nonetheless, the room's child-friendly design does not negate its clinical purpose. Reagan testified that the room's two "chairs are positioned so that they can be seen from two cameras on the wall; one is – you can see everything in the room from both cameras; one is primarily focused on one chair. The other is focused on the other chair." Members of the child's "multi-disciplinary team"[3] may view the forensic medical interview in an adjacent "observation room," via a one-way, live audio-visual feed.

In the instant case, the child-friendly atmosphere and the separation of the examination rooms do not indicate that the children's statements during the interviews were not intended for medical purposes. The children were informed *before* their interviews that they would be receiving medical interviews together with physical examinations as part of their full evaluations at the Dragonfly House. *See Hinnant*, 351 N.C. at 289, 523 S.E.2d at 670 ("Rule 803(4) does not include statements to nonphysicians made after the declarant has already received initial medical treatment and diagnosis.").

Day testified that during intake, she informed Jack and Sarah that they "[we]re going to be interviewed and . . . have a medical exam." Day did not recall either child asking any questions during intake; in her view, the children "seem[ed] to understand" both components of the child medical evaluation. *Contra State v. Bates*, 140 N.C. App. 743, 746-47, 538 S.E.2d 597, 600 (2000) (concluding that the record failed to demonstrate that the child possessed the requisite intent under Rule 803(4) where the child "did not know why she was there" and the psychologist "never made it clear that the child needed treatment"; neither the psychologist nor the " 'child-friendly' room" in which the interview

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2. According to Reagan, a "forensic interview" is "an interview done by someone who is trained to talk to children in a non-leading manner in a format that is approved on a national level while being recorded."

3. Davidson County Sheriff's Detective Mark Hanna explained, "We have what's called an MDT, multi-disciplinary team, which involves law enforcement, DSS and the Dragonfly House. Each of those entities work together to figure out what's going on in the child's life, how to properly treat the child, and get services for the child."

was conducted "emphasize[d] the need for honesty"; and "the child's statements lack[ed] inherent reliability because of the nature of [the psychologist's] leading questions"), *disc. review denied*, 353 N.C. 383, 547 S.E.2d 20 (2001).

Moreover, Reagan testified that the Dragonfly House is child-friendly *by design*: the intention is to ease any anxiety that the child may be experiencing upon arrival, and to encourage open and frank discussions. Day testified that in her experience, "the lobby is the most comfortable place" for families to conduct intake procedures, likely due to the child-friendly décor and the presence of many toys, children's books, and puzzles. Children come to the Dragonfly House because they are either confirmed or suspected victims of some type of abuse or other trauma; they are more likely to be truthful with an unknown interviewer if they are at ease and feel safe and comfortable with their surroundings. *Cf. State v. McLaughlin*, 246 N.C. App. 306, 321, 786 S.E.2d 269, 281 (rejecting the defendant's contention that some of the nurse's interview questions, "such as the importance of telling the truth, were not pertinent to medical diagnosis or treatment[,]" because "these questions were crucial to establishing a rapport with the victim and impressing upon him the need to be open and honest about very personal and likely embarrassing details pertinent to his well-being"), *appeal dismissed and disc. review denied*, 368 N.C. 919, 787 S.E.2d 29 (2016).

Both the dissent and the trial court focus heavily on the children's responses to one of Reagan's initial inquiries: "Tell me why you're here." Sarah replied, "Because my dad died." Jack responded, "[M]y dad died, and people are trying—my aunt and uncle from my dad's side are trying to take away—take me away from my mom." The trial court gleaned from these responses that "[t]he children understood the impetus of these interviews was to affect future legal custody determinations and not to obtain medical evaluation or treatment." The dissent concludes that Defendants fail "to affirmatively establish that Sarah or Jack had the requisite intent to make statements" for medical diagnosis or treatment purposes during their forensic interviews. *Dissent* at 21. Both analyses under Rule 803(4) miss the point.

Under the first prong of the *Hinnant* test, the focus is not whether the children independently sought out medical treatment, nor even whether their statements evince that they might do so if they were able. Instead, the focus must be on whether all of the objective circumstances of record demonstrate that the children understood the overall medical purpose and significance of their interviews at the Dragonfly House, and were accordingly motivated to be truthful. *See State v. Lewis*, 172 N.C.

App. 97, 104, 616 S.E.2d 1, 5 (2005) (concluding that the first part of the *Hinnant* inquiry was satisfied where "the children were old enough to understand the interviews had a medical purpose, and they indicated as such[,]" and "the circumstances surrounding the interviews created an atmosphere of medical significance"—even though "the interviews took place in a 'child-friendly' room, not a medical examination room"—because they were conducted "at a medical center, with a registered nurse, immediately prior to a physical examination").

Here, the objective circumstances of record support the conclusion that the children had the requisite intent under Rule 803(4). Reagan asked non-leading, open-ended questions, and she instructed the children that they should not "guess at anything." Both Day and Reagan emphasized the overall significance of the child medical evaluations that Jack and Sarah would be receiving at the Dragonfly House. Day testified that during intake, she points to the security cameras in the lobby and tells children that there will be similar cameras in the interview room "to record what you and [Miss Kim or Miss Brandi] talk about because *this is really important*." (Emphasis added).

Reagan testified that before she begins interviewing a child, she explains her "rules" for the interview. Reagan first establishes that the child knows the difference between the truth and a lie. Reagan also instructs the child to correct her if she makes a mistake, and explains that if she asks a question that the child cannot answer, "it's okay to say you don't know."

Jack and Sarah were of sufficient age and maturity to understand the medical significance of the overall evaluations. *See id.* ("[T]he children were old enough to understand the interviews had a medical purpose, and they indicated as such."). Furthermore, it is evident from the children's conduct and responses—both during Reagan's statement of the "rules" and throughout their interviews—that they understood the importance of honesty. Sarah self-corrected when she misspoke; when her answer was unclear, Reagan gently redirected Sarah to the previous topic until she provided a clear answer. Moreover, not only did Reagan convey the importance of honesty, when asked whether anyone had told them what to say during their interviews prior to their arrival at the Dragonfly House, both children affirmatively stated that they had only been instructed to "tell the truth."

Jack was initially reluctant to speak about his father's death during his interview with Reagan. Who could blame him? It would be a rare ten-year-old boy indeed who relished the opportunity to speak openly with

a complete stranger about what must be deeply painful, complicated feelings regarding the violent, tragic death of his father—and in Jack's case, his last remaining biological parent—mere hours after attending his funeral. But this is precisely why Jack required the Dragonfly House's services, and why he and Sarah were referred for examinations: they were present during an extremely traumatic event involving the death of their father, and they may have been witnesses to, or victims of, domestic abuse. *See McLaughlin*, 246 N.C. App. at 321, 786 S.E.2d at 281 ("[H]aving the victim relate the details from beginning to end helped the medical practitioners to evaluate the extent of the mental and physical trauma to which the victim was exposed, inquire as to whether the victim was out of danger, and discover whether other abusers or victims may have been involved.").

There is no requirement under the Rule or the *Hinnant* test that children independently seek medical treatment, nor even request it. Children do not have the ability to seek medical assistance without the resources, financial or otherwise, of their parents or caregivers. *See Smith*, 315 N.C. at 84, 337 S.E.2d at 840 ("[Y]oung children cannot independently seek out medical attention, but must rely on their caretakers to do so."). Nor do they have the emotional acumen or the language necessary to effectively seek help when the medical need involves mental health. Indeed, this is an area with which many *adults* struggle. In asking children who lack sufficient knowledge even to verbalize the trauma that they have experienced to independently seek medical assistance, the trial court demands too much.

Our courts have a strong precedent of allowing this type of evidence in cases involving children. Most often it is the State seeking its admission. *See*, *e.g.*, *McLaughlin*, 246 N.C. App. at 321, 786 S.E.2d at 281; *State v. Burgess*, 181 N.C. App. 27, 34-35, 639 S.E.2d 68, 74 (2007), *cert. denied*, 365 N.C. 337, 717 S.E.2d 384 (2011); *Lewis*, 172 N.C. App. at 105, 616 S.E.2d at 6; *State v. Thornton*, 158 N.C. App. 645, 649-51, 582 S.E.2d 308, 310 (2003); *Isenberg*, 148 N.C. App. at 36, 557 S.E.2d at 573.

The Dragonfly House is just one of many similar team-oriented children's advocacy centers statewide. Excluding the evidence in this case runs counter to existing precedent and muddies the law moving forward. *Cf. McLaughlin*, 246 N.C. App. at 322 n.5, 786 S.E.2d at 282 n.5 ("We do not posit that the [children's advocacy center] interview is a substitute for in-court testimony, but, where, as here, the declarant is unavailable, his video recorded medical interview is sufficiently reliable to be admissible. Therefore, the jury is able to assess the testimony, to observe the demeanor of the declarant, to determine the credibility and

trustworthiness of his statements, and thereby perform their function as a jury.").

Having determined that the children possessed the requisite intent under Rule 803(4), we proceed to the second inquiry of the *Hinnant* test. We conclude that the children's statements were reasonably pertinent to medical treatment or diagnosis, and therefore, should have been admitted pursuant to Rule 803(4).

Following their forensic medical interviews, Sarah and Jack received physical examinations by Dr. Amy Suttle, the pediatrician for the Dragonfly House. Based upon the results of the examinations, Dr. Suttle diagnosed both children as "victim[s] of child abuse based on exposure to domestic violence" and recommended that they "receive mental health services" as treatment. The children attended one therapy session in North Carolina on 10 August 2015, following a referral by the Dragonfly House personnel, and they began attending counseling for grief and trauma in early September 2015, after they were taken to Ireland.

As Defendants argued at the pretrial hearing on the admissibility of these statements, Jack and Sarah were referred to the professionals at Dragonfly House in order to obtain examinations "primarily for their health, safety, and welfare." The medical interviews and the physical examinations were conducted for the same purpose and as part of the same overall child medical evaluation. Both parts were used to inform the ultimate conclusion in each child's medical evaluation, and conducting one part without the other would render the evaluation incomplete.

The children's statements evince the requisite intent under Rule 803(4), and the statements clearly pertain to medical treatment or diagnosis. Thus, the trial court erred in excluding these statements.

2. Residual Exception

[4] Even if the children's Dragonfly House forensic medical interview statements were inadmissible under the medical diagnosis or treatment exception to the rule against hearsay, these statements are admissible under the residual exception.

The residual exception to the rule against the admission of hearsay is codified by N.C. Gen. Stat. § 8C-1, Rules 803(24) and 804(b)(5). Rules 803(24) and 804(b)(5) are "substantively nearly identical": "Rule 804(b)(5) is a verbatim copy of Rule 803(24), except that Rule 804(b)(5) also requires that the declarant be unavailable before the hearsay may

be admitted and Rule 803(24) does not." *State v. Triplett*, 316 N.C. 1, 7, 340 S.E.2d 736, 740 (1986). For purposes of Rule 804, a declarant is "unavailab[le] as a witness" if, *inter alia*, he "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means." N.C. Gen. Stat. § 8C-1, Rule 804(a)(5).

As set forth under either Rule, the residual exception permits admission of

> [a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. 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, Rules 803(24), 804(b)(5).

In order for hearsay statements to be admissible under Rule 803(24) or Rule 804(b)(5), the trial court must determine:

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003).

We review a trial court's ruling on the admissibility of hearsay statements under the residual exception for abuse of discretion. *State v. Sargeant*, 365 N.C. 58, 62-63, 707 S.E.2d 192, 195 (2011); *Smith*, 315

N.C. at 97, 337 S.E.2d at 847. The trial court must "make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its discretion in making its ruling." *Sargeant*, 365 N.C. at 65, 707 S.E.2d at 196 (citing *Smith*, 315 N.C. at 97, 337 S.E.2d at 847). "If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether th[e] record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." *Id.* "If we conclude that the trial court erred in excluding [Jack's and Sarah's] hearsay statement[s], we consider whether [D]efendant[s] w[ere] prejudiced." *Id.* at 65, 707 S.E.2d at 197.

Defendants contend that the trial court committed prejudicial error by concluding that the following evidence was inadmissible under the residual exception: (1) the children's statements during their interviews with the Union County DSS social worker on 3 August 2015; and (2) Jack's and Sarah's statements during their child medical evaluations at the Dragonfly House on 6 August 2015.[4] We agree.

In its written order, the trial court determined, in relevant part:

> 1. The declarant minor children, Jack Corbett and Sarah Corbett, are unavailable for purposes of N.C.G.S. 8C-1, Rule 803.
>
> . . . .
>
> 6. Admissibility of hearsay statements offered pursuant to the residual exception, N.C.G.S. 8C-1, Rule 803(24) is governed by the six-prong test set out by our Supreme Court in State v. Smith, 315 N.C. 76 (1990).
>
> 7. This court must first consider whether proper notice has been given. The defendant provided written notice to the State more than 60 days in advance of trial. This notice was proper and timely.

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4. Contrary to their arguments at trial, Defendants do not contend on appeal that the 3 August 2015 Union County DSS interview statements were admissible under the medical diagnosis or treatment exception; consequently, we limit our consideration of the admissibility of those statements to the residual exception, in accordance with N.C.R. App. P. 28(b)(6). Furthermore, as explained in Section IV(A)(1) above, the children's Dragonfly House statements should have been admitted under the medical diagnosis or treatment exception. But even assuming, *arguendo*, that Sarah's and Jack's statements from the child medical evaluations conducted at the Dragonfly House on 6 August 2015 were inadmissible under Rule 803(4), for the reasons set forth herein, the trial court nevertheless erred by excluding the statements under the residual exception.

> 8. This court next considers whether each proffered statement is specifically covered under one of the other hearsay exceptions. The defendants' only contention of another applicable exception is the medical treatment or diagnosis exception, Rule 803(4). The court has determined the statements are not admissible pursuant to that exception. The court has reviewed all other exceptions set out in the Rule and finds that none are applicable.
>
> 9. This court must next consider whether the proffered statements are trustworthy. "[A] hearsay statement . . . may be admissible under the residual exception if it possesses 'circumstantial guarantees of trustworthiness' equivalent to those required for admission under the enumerated exceptions." Smith, at 93.
>
> . . . .
>
> 14. The proffered statements do not have circumstantial guarantees of trustworthiness. Further, this court having concluded the statements are not trustworthy, the court need not continue to the additional prongs of the Smith analysis.

(Alteration in original).

The third inquiry of the trial court's analysis, which asks whether the proffered statement possesses "circumstantial guarantees of trustworthiness" akin to those required for admission under other exceptions, "has been called 'the most significant requirement' of admissibility" under the residual exception to the rule against the admission of hearsay. *Smith*, 315 N.C. at 93, 337 S.E.2d at 844-45. In evaluating the "circumstantial guarantees of trustworthiness" of a statement pursuant to Rules 803(24) and 804(b)(5), the trial court must consider "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742. "Also pertinent to this inquiry are factors such as the nature and character of the statement and the relationship of the parties." *Id.* at 11, 340 S.E.2d at 742.

Here, the trial court concluded that the proffered statements lack circumstantial guarantees of trustworthiness because:

> 11. The court is not assured of the personal knowledge of the declarants as to the underlying events described in that both children identified the source of their knowledge being nothing more than statements of a defendant and that defendant's mother. The declarations contain no reference to seeing, hearing or perceiving anything about the events described except these statements of others.
>
> 12. The court is not assured of the children's motivation to speak the truth, but instead finds the children were motivated, in the near immediate aftermath of the death of their father, to preserve a custody environment with the only mother-figure they could remember having known during their lives. The children appear to have known that if they were not in the custody of defendant Molly Corbett they would be taken to live in the Republic of Ireland with relatives of their father.
>
> 13. The proffered statements were specifically recanted and disavowed.

Defendants challenge the following findings of fact underlying the above conclusions: (1) findings #15 and #20, which pertain to the children's personal knowledge; (2) finding #21, that the statements "were not made at a time when the children were motivated to speak the truth but were rather motivated to affect future custody arrangements"; and (3) finding #22, that the statements regarding Molly and Jason's relationship "have been specifically recanted" by the children in diary entries and a Skype interview between Jack and a member of the district attorney's office. We consider each of Defendants' arguments in turn.

Findings of fact #15 and #20 provide:

> 15. The children's statements did not describe actual knowledge of the events surrounding the homicide of Jason Corbett. Jack identified the source of the information in his statements by saying "my mom told me" and "she (defendant Molly Corbett) told us." Sarah similarly described the source of her knowledge, saying the [sic] her grandmother "told [me] first and then her mother [told me]." When speaking of her "grandmother," Sarah was referring to the mother of defendant Molly Corbett and the wife of defendant Thomas Martens.
>
> . . . .

> 20. The statements of the children which the defense proffers were not made out of the personal knowledge of the declarant children but are instead double hearsay declarations of the defendant Molly Corbett and her mother.

(Alterations in original).

Insofar as the trial court limited its consideration of the children's statements during their interviews with Union County DSS and Dragonfly House personnel on 3 and 6 August 2015, respectively, to "the events surrounding the homicide of Jason Corbett" alone, findings of fact #15 and #20 are erroneous. *See Sargeant*, 365 N.C. at 65, 707 S.E.2d at 196 ("If the trial court either fails to make findings *or makes erroneous findings*, we review the record in its entirety to determine whether th[e] record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." (emphasis added)).

As explained in Section IV(A)(1) above, the Davidson County Sheriff's Office referred the children to the Dragonfly House, due to concerns that they may have witnessed or experienced domestic abuse. Similarly, Union County DSS personnel interviewed the children at the request of Davidson County DSS, to which this matter had been referred by the Davidson County Sheriff's Office, following allegations of domestic violence and substance abuse in the home. On 3 August 2015, Davidson County DSS faxed a letter to Union County DSS, stating, *inter alia*:

> To Whom This May Concern:
>
> Our agency received and accepted a [Child Protective Services] referral in reference to [Jack and Sarah Corbett] on 08/02/2015 with a 72 hours [sic] response time, however due to the nature of this report and the concerns that Molly Corbett, step-mother, may leave to Tennessee with the children we asked that you assist us in initiating this case TODAY (08/03/2015). *Please interview each children* [sic] *privately* to address the [Child Protective Services] concerns as well as questions surround [sic] SEEMAPS. *Please interview the mother and her parents, Mr. and Mrs. Martens, regarding the incident that was alleged in the* [*Child Protective Services*] *referral.*
>
> Due to the death of the children's father, our Sheriff's Office has scheduled a [child medical evaluation] for both children. This [child medical evaluation] have [sic] been schedule [sic] for Thursday (08/06/2015) at 1:00 pm. Please

> provide the family with the attached brochure regarding our [child advocacy center]. *I've informed Mrs. Corbett that she cannot be present during the children's* [*child medical evaluation*] *due to the nature of the allegations*. Mrs. Corbett reported that her mother can transport the children to and from their appointment. Please address this in the safety plan with Mrs. Corbett and her mother.

(Emphases added).

This letter plainly states that the primary purpose of the Union County DSS interviews—like the Dragonfly House interviews—was to ensure the immediate safety and well-being of the children. Indeed, as the trial court observed in finding of fact #16, the Union County DSS interviews were conducted "in regard to alleged alcohol and/or substance abuse by the defendant Molly Corbett and concern about physical abuse of Jack Corbett." Moreover, it is also clear from this letter that the utmost care was taken to protect the objectivity, integrity, and confidentiality of the children's interviews, both those conducted by DSS personnel as well as those conducted at the Dragonfly House. Davidson County DSS requested that Union County DSS interview each child privately, and specifically noted that Molly had already been instructed that her presence was not permitted during the children's Dragonfly House interviews.

The trial court's findings of fact #21 and #22 are similarly flawed in their reasoning:

> 21. These same statements were not made at a time when the children were motivated to speak the truth but were rather motivated to affect future custody arrangements – specifically the children feared that they were going to be "taken away from their mother" and removed to another country by their father's relatives.
>
> 22. The statements of the children that are offered by the defense as pertinent to the relationship between Molly Corbett and Jason Corbett have been specifically recanted. Sarah Corbett, the younger of the two children, recanted her statements in diary entries made after her return to Ireland. Jack Corbett recanted his statements in diary entries and during a recorded interview with members of the District Attorney's Office.

Finding of fact #21 is erroneous in that it overlooks the overwhelming evidence that both children understood the seriousness of the

proceedings and the importance of truthfulness, as well as the temporal proximity of the children's statements to Jason's death. Although both children indicated that they loved Molly and desired to remain in her custody, this, alone, is not indicative of a dishonest motive, particularly where there is substantial evidence to the contrary.

Moreover, this finding discounts statements by Jack and Sarah that tend to *refute* that "the children feared that they were going to be 'taken away from their mother' and removed to another country by their father's relatives." Jack told Reagan that he was "[a]ngry and upset" about what had happened, and he wondered, "How can people be so mean?" When Reagan asked him what he meant, Jack clarified, "How my dad could get so angry. How my grandpa could hit him with a bat and my mom hit him with a brick." Sarah explained to Reagan that she held Molly's hand at Jason's funeral earlier that day on 6 August 2015, "[b]ecause my aunt, she's – she's real nice, but she gets emotional, and she doesn't want me and Jack to have a bad life. She wants us to have the best life that she can make for us. But my mom wants the same."

As for the children's alleged recantations, it is unclear from finding of fact #22 why the trial court deemed the "diary entries" or the circumstances of Jack's Skype interview with a member of the district attorney's office to be more trustworthy than either of the objective and impartial interviews at issue here. The diary entries were never authenticated before the trial court. Moreover, while Molly was explicitly prohibited from attending the children's interviews with Union County DSS and Dragonfly House personnel, Jack's Skype interview with the district attorney's office was conducted from his home in Ireland, with his aunt—Jason's sister—and uncle upstairs and within earshot. *Cf. Sargeant*, 365 N.C. at 66, 707 S.E.2d at 197 ("We emphasize again that the issue is not whether [the declarant's] statement is objectively accurate; the determinative question is whether [the declarant] was motivated to speak truthfully when he made it. The agreement between [the defendant's co-conspirator] and the State, reached when [the co-conspirator] provided his statement, appears designed to ensure his truthfulness.").

Both the Union County DSS and the Dragonfly House interviews covered much more information than just the specific "events surrounding the homicide of Jason Corbett," to wit: Jason's worsening anger management issues; Molly and Jason's ongoing relationship troubles, including alleged verbal, emotional, and physical abuse; and, perhaps most importantly, the children's awareness and perception of these issues. Furthermore, the most probative of the children's statements are all clearly based upon their own personal knowledge. For example,

during her 3 August 2015 Union County DSS interview, Sarah told the social worker that "what she likes most about home" is "being with her mom when her dad is not there . . . because her dad fights her mom and sometimes he brings it out on her. She stated sometimes she will get in trouble for saying stop." Sarah told the social worker that "her father screams and yells" and "is angry on a regular basis"; when her parents' fighting "is really bad, . . . she has to stay in her room for a long time." Sarah "has seen her dad hit her mom and pull her hair." Sarah shared that, on one occasion, she "saw her dad smack her mom. [Sarah] stated that her mom fell, got up and then went to the car."

Similarly, Jack told the social worker "that what he does not like [about] being at home is his parents fighting. Jack stated physically and verbally." Jack said "that his dad gets mad at his mom for no good reason; . . . she can do nothing right." According to Jack, Jason "curses his mom; [Jack] stated that he has seen his dad a few times hit his mom with his fist anywhere on her body that he can."

The children's Dragonfly House interviews are lengthy and broadly substantive. But perhaps the most material of evidence that may be gleaned from the Dragonfly House interviews are statements that the children made based upon their personal knowledge and never recanted, and which unquestionably pertained to "the events surrounding the homicide of Jason Corbett."

Sarah told Reagan that she often experienced difficulty sleeping through the night, and in such instances, she would approach Molly for comfort. Jason, however, disliked it when Sarah got out of bed and Molly attended to her in the middle of the night, and he would get angry with them both. The evidence shows that Sarah's nightmare and her consequent appearance in Jason and Molly's bedroom on 2 August 2015 was the precipitating event that caused Jason to grow angry with Molly, thereby starting the fight that led to the fatal altercation:

> Ms. Reagan: Okay. And had there ever been any times that you did wake up during the night in the past?
>
> Sarah Corbett: Yeah.
>
> Ms. Reagan: Okay. What would happen when you do wake up during the night?
>
> Sarah Corbett: I would go downstairs because I usually had a nightmare. But I think what caused my dad being really mad that night was because, um, my mom kept on

coming upstairs because I – like I have fairies on my bed, and I really get scared of those things, because they like look like there are spiders and lizards on my bed. So that's why my mom had to keep on coming up. I couldn't fall asleep until my mom put another sheet on my bed, and then my dad got mad.

Ms. Reagan: Okay. So you told me that you had fallen asleep downstairs and someone carried you upstairs. Did you wake up at any point after that?

Sarah Corbett: Nope.

Ms. Reagan: Okay. So you said your mom had to put another sheet on. How did you know that?

Sarah Corbett: Because before I went to sleep, she – because I woke up, like, in the middle – like not in the middle, but like – I'm sorry I said that I didn't wake up.

Ms. Reagan: It's okay.

Sarah Corbett: I woke up just a little bit. Um, because it's like I just woke up before my mom put me in my bed, and I put – and I put the – I put the covers on me, and I tried to go to bed, but I couldn't.

Ms. Reagan: Okay.

Sarah Corbett: And at first I thought I had a big lizard in my room. And it freaked me out.

Ms. Reagan: And you said she kept coming and checking on you?

Sarah Corbett: Uh-huh.

Ms. Reagan: And why do you think that's what they were arguing about?

Sarah Corbett: Because my dad, like, doesn't like my mom sleeping, like, with me. He wants her to be upstairs with him.

Ms. Reagan: Have you ever heard them argue about that before?

Sarah Corbett: Yes.

Bedsheets matching those described by Sarah are visible on the floor in State's Ex. 62, a photograph of Sarah's bedroom.

Jack's Dragonfly House interview also contains statements, based upon his personal knowledge, that are both material and highly probative to Defendants' claims of self-defense and defense of a family member. The State established that there were two possible murder weapons: the baseball bat, which Tom brought with him from the basement upon hearing the commotion upstairs, and the brick paver, which was already sitting on Molly's dresser in the bedroom when the affray began. The brick paver's presence in the master bedroom was never explained to the jury. The admission of Jack's Dragonfly House statements would therefore have provided a reasonable answer to a significant and unanswered question:

> Ms. Reagan: Okay. And then tell me about this cinder block that you were talking about. Like a brick that your mom used?
>
> Jack Corbett: Um, we were going to paint it, because we just – we just got flowers that we were going to plant in our front yard or back yard, and we were going to paint it so it would look pretty, and that – *it was in my mom's room*, *because it was raining earlier*, *and we already – we were going to paint it. We didn't want it getting all wet*. So we brought it inside, and my mom put it at her desk. And then that's where it was.

(Emphasis added).

Like Sarah's statements about Jason's anger following her nightmare and appearance in Jason and Molly's bedroom, Jack's statement about the brick paver tends to corroborate Molly's written statement from 2 August 2015. Moreover, no other evidence admitted at trial is as material or as probative of Defendants' version of events, and thus their defense, as either of these statements.

After finding that the children were unavailable to testify for purposes of N.C. Gen. Stat. § 8C-1, Rule 803, the trial court failed to consider the practical effect of that finding in conducting the rest of its analysis under the residual exception. *See Triplett*, 316 N.C. at 9, 340 S.E.2d at 741 (observing that "the necessity for use of the hearsay testimony often will be greater" and "the inquiry . . . may be less strenuous" under Rule 804(b)(5) than Rule 803(24), "since the declarant will be unavailable"). The trial court's determination that there were insufficient "circumstantial

guarantees of trustworthiness" to support admission of the children's statements was "made on the basis of inaccurate and incomplete findings of fact used to reach unsupported conclusions of law." *Sargeant*, 365 N.C. at 67, 707 S.E.2d at 198.

Accordingly, the trial court erred by excluding the children's statements during their interviews by Union County DSS personnel on 3 August 2015, and at the Dragonfly House on 6 August 2015. Moreover, for the reasons more fully explained in Section VI below, the trial court's exclusion of this evidence prejudiced Defendants' ability to present a complete and meaningful defense. *See id.* at 68, 707 S.E.2d at 198 ("As a matter of fundamental fairness, the exclusion of [the co-conspirator's] statement deprived the jury of evidence that was relevant and material to its role as finder of fact.").

B. Bloodstain Pattern Analysis

We next address Defendants' challenge to the testimony of Stuart James, the State's expert witness in bloodstain pattern analysis. Defendants contend that James's testimony regarding the untested blood spatter on the underside hem of Tom's boxer shorts and the bottom of Molly's pajama pants was not sufficiently reliable for admission under N.C. Gen. Stat. § 8C-1, Rule 702(a). We agree.

1. Issue Preservation

[5] During voir dire, Defendants raised a targeted challenge to the reliability of James's proposed testimony concerning his analysis of certain bloodstains on the underside of Tom's boxer shorts and the bottom of Molly's pajama pants. Wendell Ivory, a forensic scientist with the North Carolina State Crime Laboratory, had testified the previous day that, unlike stains appearing elsewhere on these and other articles of clothing worn by Defendants during the altercation with Jason, the stains at issue never received even basic, or "presumptive," testing to confirm the presence of blood.

Defendants questioned James about several of the conclusions in his "Supplementary Report of Bloodstain Pattern Analysis," which James drafted on 16 February 2016 after traveling to North Carolina to examine certain bloodstained evidence, including Tom's boxer shorts and Molly's pajamas. Defendants challenged the following conclusions from James's three-page Supplementary Report:

- The impact spatters on the front underside hem of the left leg of the shorts are consistent with the wearer of the shorts close to and above the source of spattered

> blood. The source of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.
>
> . . . .
>
> • The impact spatters on the front lower legs and cuff of . . . the pajama bottoms are consistent with the wearer in proximity to Jason Corbett when he was close to the floor when blows were struck to his head.

James acknowledged that because none of the stains underlying these conclusions were ever submitted for testing—a fact that he did not learn until the day before he testified in court—James could not state "with a scientific certainty" that the stains on either garment were, in fact, blood. James also conceded that he had never seen—neither in person nor via photograph—Tom wearing the boxer shorts, and consequently, he did not know how the boxer shorts "laid on [Tom's] body" or whether "the cuff was flipped up or down or anything along those lines[.]" Nevertheless, James was permitted to testify that the State's failure to test the evidence in question did not "really . . . change much of [his] opinion. It is still impact spatter with the wearer of the shorts in proximity with the source of the blood." When the trial court asked whether James "consider[ed] the opinions that [he's] offered and as outlined in both of these reports to be the product of reliable principles and methods in bloodstain pattern analysis[,]" James responded, "Yes, I do."

Noting that James's own peer-reviewed treatise, *The Analysis of Blood and Forensic Serology*, mandates that "an identification of blood be established to a scientific certainty before it can be presented in court[,]" Defendants asserted that the proposed expert testimony was not "properly before this Court, pursuant to 702-(a)." More specifically, Defendants contended that (1) the challenged testimony was not "based on sufficient facts or data," in that James had not been provided with the necessary information "to render that particular opinion within the broader scope of his other opinions"; and (2) as a result, James was not provided "the opportunity to apply the principles and methods reliabl[y] to the facts in this case."

At the conclusion of voir dire, the trial court ruled that, notwithstanding the failure to identify the stains as blood to "a scientific certainty," James would be permitted to testify to his expert opinion before the jury.

Our dissenting colleague concludes that Defendants waived appellate review of this issue because, despite their careful and extensive

objections during voir dire, Defendants failed to object in the presence of the jury when the evidence was actually introduced at trial. *Dissent* at 43. However, the transcript reveals that Defendants did, in fact, timely object, and did so on multiple occasions before the jury throughout James's testimony. This issue was properly preserved for appellate review.

Tom's counsel first objected when the State tendered James as an expert in the field of bloodstain pattern analysis. Defendants did not object throughout James's testimony providing a general overview of the field of bloodstain pattern analysis, nor did they raise any substantive objections while James began to testify to his conclusions regarding the blood spatter at the scene in the instant case.

However, Defendants immediately objected when the State proffered James's "Supplementary Report of Bloodstain Pattern Analysis" containing his comments and conclusions concerning, *inter alia*, Tom's boxer shorts and Molly's pajamas, which were the subject of Defendants' objections during voir dire. The trial court admitted James's Supplementary Report as State's Ex. 200 over Defendants' explicit objections to James's conclusions and supporting testimony. Additionally, Defendants later objected when the State submitted photographs of Tom's boxer shorts and Molly's pajamas, which James enhanced under his digital microscope; the trial court overruled Defendants' objections and admitted the photos as State's Ex. 201-215 and 216-237, respectively. Moreover, when the State's direct examination of James continued to a second day, Defendants renewed their previous objections for the record in the presence of the jury before his testimony resumed.

It is, therefore, clear that Defendants properly objected and preserved this issue for appeal, and we proceed to the merits of their argument.

2. Rule 702(a)

[6] Defendants contend that the trial court erred by admitting James's expert testimony regarding the untested stains on the underside of Tom's boxer shorts and the bottom of Molly's pajama pants, because the testimony did not satisfy Rule 702(a)'s reliability test or the expert's own admitted standards for reliability. We agree.

"Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to" N.C. Gen. Stat. § 8C-1, Rule 104(a). *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016) (citations omitted).

> In answering this preliminary question, the trial judge is not bound by the rules of evidence except those with

> respect to privileges. To the extent that factual findings are necessary to answer this question, the trial judge acts as the trier of fact. The court must find these facts by the greater weight of the evidence. As with other findings of fact, these findings will be binding on appeal unless there is no evidence to support them.

Id. at 892-93, 787 S.E.2d at 10-11 (internal quotation marks and citations omitted).

The trial court must then determine, from its findings of fact, "whether the proffered expert testimony meets Rule 702(a)'s requirements of qualification, relevance, and reliability." *Id.* at 893, 787 S.E.2d at 11. On appeal, we review the trial court's ruling for abuse of discretion. *Id.* "[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." *Id.* (citation omitted).

Rule 702(a) provides:

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

N.C. Gen. Stat. § 8C-1, Rule 702(a).

As noted above, "Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible." *McGrady*, 368 N.C. at 889, 787 S.E.2d at 8. First, the witness must be "qualified as an expert," such that the witness is "in a better position than the trier of fact to have an opinion on the subject[.]" *Id.* at 889, 787 S.E.2d at 9.

Second, the expert testimony must be relevant, and must "assist the trier of fact to understand the evidence[.]" *Id.* at 889, 787 S.E.2d at 8. "But relevance means something more for expert testimony. 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." *Id.* (internal citation omitted).

Third, and most pertinent to our analysis here, the expert testimony must be reliable. When evaluating the reliability of expert testimony, "[t]he primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate[.]" *Id.* at 890, 787 S.E.2d at 9 (internal quotation marks and citations omitted). "However, conclusions and methodology are not entirely distinct from one another, and . . . the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Id.* (internal quotation marks and citations omitted).

"The precise nature of the reliability inquiry will vary from case to case[,]" and "determining how to address the three prongs of the reliability test" is within the trial court's discretion. *Id.* In the context of scientific testimony, *McGrady* delineates the following additional factors "from a nonexhaustive list" that may bear upon 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.

Id. at 890-91, 787 S.E.2d at 9 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-94, 125 L. Ed. 2d 469, 482-83 (1993)) (internal quotation marks omitted).

Again, these "factors are part of a flexible inquiry, so they do not form a definitive checklist or test[.]" *Id.* at 891, 787 S.E.2d at 9-10 (citations and internal quotation marks omitted). "Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3)." *Id.* at 892, 787 S.E.2d at 10.

3. Analysis

Defendants do not challenge James's qualifications to testify as an expert in the field of bloodstain pattern analysis. Indeed, the record shows that James is unquestionably qualified to provide expert testimony on the subject. Rather, Defendants contend that James's conclusions regarding the untested stains on the underside of Tom's boxer shorts and the bottom of Molly's pajama pants are not the product of

reliable principles and methods applied reliably to the facts of this case. We agree.

James coauthored a peer-reviewed treatise on the subject of bloodstain pattern analysis, which sets forth the methodology and standards governing the field. As established at trial, James's treatise provides, *inter alia*: "Although it might seem that visual identification of a stain is blood, it would be sufficient to warrant further analysis of the material, proper scientific approach and legal requirements dictate that such an identification be established to a scientific certainty before it can be presented in court[.]" And when asked about the routine protocol and procedures used in conducting bloodstain pattern analysis, James testified, consistent with his treatise, that the stains should be subject to presumptive, confirmatory, and DNA testing—in that order—*before* an analysis of the spatter is conducted.

Yet, James's analysis of the challenged evidence clearly contravened the reliability protocol established in his own treatise. James testified that he was able to reach his ultimate conclusions concerning the stains on the underside of Tom's boxer shorts and the bottom of Molly's pajama pants, despite the State's failure to submit those stains for even the most basic testing for the presence of blood (presumptive testing). James testified that he reached his conclusions based on the "physical characteristics" of the stains; he determined that their "location, size, shape, and distribution" were "very characteristic of blood spatter[.]" But again, James acknowledged that he could not testify to a scientific certainty that these stains were, indeed, blood.

James also testified that in conducting an analysis of bloodstained clothing, it is the "best practice" for an analyst to view a photograph of the person wearing the blood-spattered clothes. However, during cross-examination, James conceded that contrary to the best practice set forth in his treatise, he never viewed a photograph of Tom "wearing just the boxer shorts." In fact, "the only photographs that [he] received of [Tom] with his clothing was a different pair of shorts that he was wearing. Apparently the boxer shorts were beneath that. These shorts were given to him to wear." As for Molly, James testified that the State provided him with just one photograph of her wearing the pajama pants. James agreed, however, that it was not readily apparent from that photograph how the pants actually fit Molly on the night of the incident. In the photograph, the pajama pants seem "longer than how pants would typically fit a person[,]" and "[t]he rear portion . . . appears to be dragging on the ground or between her leg and flip flop[.]"

Notwithstanding James's expertise in bloodstain pattern analysis, noncompliance with the reliability standards and protocol prescribed in one's own treatise is inherently suspect, particularly when the treatise propounds that "proper scientific approach and legal requirements dictate that such an identification be established to a scientific certainty before it can be presented in court." *Cf. McGrady*, 368 N.C. at 891, 787 S.E.2d at 10 (noting that "[t]he federal courts have articulated additional reliability factors that may be helpful in certain cases, including . . . [w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion").

The State argues, and James similarly testified during voir dire, that testing the stains on the underside of Tom's boxer shorts was unnecessary to James's conclusions because the appropriate testing was performed on certain *other stains* appearing on the front side of the boxer shorts. However, these assertions are inconsistent with James's other testimony during voir dire that the spatters on the underside of Tom's boxer shorts "have to be" the result of a separate blow "because on the inside of the hem – it's not a soak-through from the outside so they would have to be coming up from down below."

Moreover, Defendants have never challenged the trial court's admission of James's testimony regarding those stains that received full presumptive, confirmatory, and DNA testing before James rendered his analysis. Without such testing, it seems nearly impossible to escape questions of how the testimony could be "based upon sufficient facts or data," N.C. Gen. Stat. § 8C-1, Rule 702(a)(1), and whether "[t]he witness has applied the principles and methods reliably to the facts of the case," *id.* § 8C-1, Rule 702(a)(3). *See State v. Babich*, 252 N.C. App. 165, 168, 797 S.E.2d 359, 362 (2017) ("[E]ven if expert scientific testimony might be reliable in the abstract . . . the trial court must assess whether that reasoning or methodology properly can be applied to the facts in issue." (citation and internal quotation marks omitted)).

In the present case, the State failed to enable James to testify in any reliable manner concerning his analysis of the blood spatter. James readily admitted that the underside of Tom's boxer shorts had not received presumptive testing for the presence of blood, proper protocol per James's treatise. He also conceded that the State never informed him that these stains had not been tested; indeed, he did not learn this information until the day before he testified.

Nevertheless, James testified that he concluded:

> With respect to the small spatters on the front underside of the left leg of the shorts, *these were consistent with the wearer of the shorts close to and above the source of the spattered blood.* To what extent, I can't really say. In order for the stains to get to that location on the inside of the leg, they would have to be traveling, you know, at least somewhat upward in order to do that. *My conclusion there was the source of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.*

(Emphases added).

This unsupported conclusion is more emphatic than even that which James provided regarding the *tested bloodstains* on the front of Tom's boxer shorts:

> [M]y conclusions are that the spatters on the front of these boxer shorts were confirmed as impact spatters. . . . [T]he stains were embedded within the weave of the fabric, which is pretty much the definition of impact spatter on clothing. And this had me – my conclusions then are these impact spatters are consistent with the wearer of these boxer shorts in proximity to the victim Jason Corbett when blows were struck to his head. The head being the source of the blood in this particular case.

Although James referenced other stains on Defendants' clothing and concluded that they were consistent with the wearer being in Jason's general proximity at the time of impact, the untested stains on the underside of Tom's boxer shorts and Molly's pajama pants were the *only stains* that allowed James to specifically conclude that Jason's head was near or on the floor at the time of impact. Given how critical these particular stains were to supporting James's ultimate conclusions, it is reasonable to expect the State to ensure that this evidence received all of the necessary and recommended testing before expert testimony regarding the source and content of the stains could be admitted at trial.

To be sure, it would certainly be excessive and unreasonable to require that the State test every trace of forensic evidence discovered at a crime scene in order for expert testimony to pass muster under Rule 702. As James explained during voir dire, "DNA laboratories often . . . only allow maybe five or six samples to be submitted" because of the

burden that testing additional samples would have on laboratories. In this case, however, the central value of James's testimony—that which is most probative of the State's theory of the case, and consequently, the most prejudicial to Defendants' cases—specifically relates to the untested stains on the underside of Tom's boxer shorts and the bottom of Molly's pajama pants, which James opined tend to show impacts to Jason's head while it was near the floor. Moreover, the State had ample opportunity to ensure that these stains were among those submitted for testing for the presence and source of the purported blood, but failed to do so.

At trial, Ivory testified that he was responsible for testing certain evidence at the request of the Davidson County Sheriff's Office. Ivory explained that he routinely tests materials in accordance with a "submission form," in which the submitting agency "detail[s] specifics of the case as well as any items to be submitted for testing and the type of testing that is requested[.]" According to Ivory, "In this particular case certain areas were asked to be tested." When asked whether anyone requested that he test the stains underneath the hem of Tom's boxer shorts or the bottom of Molly's pajama pants, Ivory responded that no one requested that those areas be tested. James, however, testified that he had previously suggested that the State test "at least some of the stains that [he] had marked. . . . They did some but not all."

By failing to ensure that suspected blood stains are appropriately tested for the presence of human blood, the State knowingly risked depriving its expert witness of the ability to conduct a blood spatter analysis in accordance with established and reliable principles and methods. This risk is exacerbated in cases where, as here, the expert testimony regarding those specific stains is both a crucial element of the State's case, and highly prejudicial to Defendants.

Here, James simply was not provided with all the necessary information to provide reliable expert testimony that satisfied the requirements of Rule 702(a). As Defendants asserted during voir dire, James's inability to "state to a scientific certainty that [it] is blood" was "not his fault[,]" but the State's:

> [I]f we don't even have presumptive testing on a different set of stains, on a completely different side of this pair of underwear that's coming from a different event, that reaches a different conclusion, then if we don't even have presumptive testing on that, let alone confirmatory. I think, according to [James's] book, that's not something

> that's properly before this Court, pursuant to 702-(a). I just don't think that it is. Again, that's not Mr. James'[s] fault. He was not provided that piece of information. I'm assuming that could have been tested at some point over the last couple of years. Again, it wasn't – that's not his fault. His own words, he cannot state to a scientific certainty that is blood. If you can't, that's not proper evidence before this Court and before this jury.

For the foregoing reasons, James's testimony regarding the untested stains on Tom's boxer shorts and Molly's pajama pants was based upon insufficient facts and data, and accordingly, could not have been the product of reliable principles and methods applied reliably to the facts of this case. *Id.* § 8C-1, Rule 702(a)(3). Therefore, the trial court abused its discretion by admitting this testimony.

4. Prejudice

"An error is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *State v. Mason*, 144 N.C. App. 20, 27, 550 S.E.2d 10, 16 (2001) (citation and internal quotation marks omitted). "[T]he erroneous admission of evidence is reversible if it appears reasonably possible that the jury would have reached a different verdict without the challenged evidence." *Id.* at 28, 550 S.E.2d at 16.

Ultimately, the only part of James's testimony that could have possibly assisted the jury in reaching its verdict is James's erroneously admitted conclusion that the untested stains on Tom's boxer shorts and Molly's pajama pants were consistent with a strike to Jason's head "while it was close to the floor in the bedroom." However, it is difficult to view this testimony as anything "more than mere conjecture[,]" given that James's analysis was grounded neither in actual data nor the principles and methods outlined in his treatise and testimony to establish reliability. *See Babich*, 252 N.C. App. at 172, 797 S.E.2d at 364 ("[W]here, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* 'fit' test because the expert's otherwise reliable analysis is not properly tied to the facts of the case.").

If this is the bedrock of James's scientific inquiry concerning the challenged evidence, then it is unclear why he was in a better position to make this ultimate determination than the lay members of the jury. Without viewing a photograph of Tom wearing the boxer shorts, as James testified was the appropriate practice in his field, James was

unable to discern the position of Tom's body relative to Jason at the time of impact. And given the State's failure to ensure that the stains were appropriately tested and verified as Jason's blood, James was no better positioned than the jury to decide with any scientific certainty whether the relevant stains were, in fact, blood—or its source. Mere observations of the "physical characteristics" of the stains and their locations are not determinations that the jury is incapable of making on its own. *Cf. McGrady*, 368 N.C. at 895, 787 S.E.2d at 12 ("Though [the] defendant served in the military, he did not testify that he relied on any specialized training in threat assessment when he evaluated the threat that [the victim] posed to his life and the life of his son. Nor was there any evidence that he relied on anything other than common experience and instinct when he did so. *Jurors possess this experience and instinct as well, which is exactly why they are tasked with deciding whether a defendant has acted in self-defense.*" (emphasis added)).

Lastly, it is important to note that North Carolina's 2011 amendment to Rule 702 substantially "chang[ed] the level of rigor that our courts must use to scrutinize expert testimony before admitting it." *Id.* at 892, 787 S.E.2d at 10; *see also id.* (observing that our previous *Howerton* standard "was decidedly less rigorous than the *Daubert* approach" incorporated with the 2011 adoption of the language from the federal rule (internal quotation marks and citation omitted)). Rule 702 as amended "necessarily strikes a balance between competing concerns since the testimony can be both powerful and quite misleading to a jury because of the difficulty in evaluating it." *Id.* (citation and internal quotation marks omitted).

In this case, James's testimony had the powerful effect of bolstering the State's claim that Jason was struck after and while he was down and defenseless. However, given that James's testimony failed to assist the jury in determining whether this was, in fact, the case, the testimony could only serve to unduly influence the jury to reach a conclusion that it was fully capable of reaching on its own. Given this undue influence, as explained in Section VI below, "it appears reasonably possible that the jury would have reached a different verdict without the challenged evidence." *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16.

C. Tom's Stricken Testimony

[7] Defendants next argue that the trial court erred in striking Tom's testimony that he "hear[d] Molly scream[,] 'Don't hurt my dad.' " The challenged exchange occurred on direct examination, during Tom's account of the fatal altercation with Jason:

> [DEFENSE COUNSEL:] And what happened after that?
>
> [TOM:] And that's – you know, if I can get any more afraid, that was it. I can't see him. It's dark in the bedroom. I'm thinking the next thing is going to be a bat in the back of the head. I'm on the ground. I hear Molly scream "Don't hurt my dad."
>
> [THE STATE:] Objection, move to strike.
>
> THE COURT: That's sustained. Don't consider that, ladies and gentlemen.

As an initial matter, we note that although the State did not "stat[e] the specific grounds" for its objection to Tom's testimony, the parties nevertheless seem to agree that the basis for the State's objection—hearsay—was "apparent from the context." 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 if the specific grounds were not apparent from the context.").

The trial court erroneously sustained the State's objection to Tom's testimony because Molly's out-of-court statement was either non-hearsay, or alternatively, admissible hearsay. The prohibition against the admission of hearsay "does not preclude a witness from testifying as to a statement made by another person when the purpose of the evidence is not to show the truth of such statement but merely to show that the statement was, in fact, made." *State v. Holder*, 331 N.C. 462, 484, 418 S.E.2d 197, 209 (1992) (citation omitted). Thus, when an out-of-court "statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay" at all. *Id.*

"The probative value of a nonhearsay statement does not depend, in whole or in part, upon the competency and credibility of any person other than the witness." *Valentine*, 357 N.C. at 524, 591 S.E.2d at 856 (citations and internal quotation marks omitted). "Further, a nonhearsay statement does not put the truth or falsity of the statement at issue." *Id.*; *see also id.* at 521, 524, 591 S.E.2d at 854, 856 (explaining that the statement "You know where we are from and if somebody pulls a knife or a gun out on you, you are supposed to get smoked" was offered not for its truth—"that this was in fact the custom in the area where [the] defendant and [his brother] were raised"—but instead "to show that [the] defendant intended to shoot the victim").

Here, Tom's testimony was not offered to prove the truth of Molly's statement—i.e., that Jason was, in fact, attempting to "hurt [her] dad." Nor did the relevance of this statement depend upon its truth. *See State v. Alston*, 131 N.C. App. 514, 517, 508 S.E.2d 315, 317 (1998) (rejecting the defendant's hearsay challenge to the admission of his child's statement "Daddy's got a gun," where the evidence was admitted solely for its effect on the officer's state of mind and to "explain his subsequent conduct"), *superseded by statute in part on other grounds*, *as stated in State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003), *disc. review denied*, 358 N.C. 157, 593 S.E.2d 83 (2004).

Molly's statement was offered and admissible for the non-hearsay purpose of illustrating Tom's then-existing state of mind—a particularly relevant issue, given Defendants' claims of self-defense and defense of another. *See State v. Faucette*, 326 N.C. 676, 683, 392 S.E.2d 71, 74 (1990) (concluding that the victim's statements regarding the defendant's threats were admissible under Rule 803(3) because they revealed the victim's "then-existing fear of [the] defendant" and explained "why she did not want [him] visiting her home," which was relevant to show that the defendant "knew he was entering the . . . home without consent," and "to rebut [the] defendant's self-defense inferences that he did not start shooting until he saw her reach for her gun" (quotation marks omitted)); *see also* N.C. Gen. Stat. § 8C-1, Rule 803(3) (excepting from the rule against hearsay a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition").

The State, however, contends that "[t]he alleged statement, while self-serving, was not relevant. . . . Immediately prior to his stricken testimony of what [Molly] allegedly said, [Tom] testified that Jason had just shoved him across the bed. The alleged statement of [Molly] added nothing to [Tom]'s state of mind." Our dissenting colleague echoes this sentiment, concluding that "[e]ven assuming, *arguendo*, that the trial court erred by sustaining the State's objection," Defendants are unable to show prejudice, because "Tom had already testified about circumstances illustrating the reasonableness of his fear and apprehension, and Molly's statement – made after the altercation had been well underway – was of mild, if any, additional value." *Dissent* at 49. These assertions miss the point.

Despite the number and complexity of the issues presented, the outcome of this case ultimately turns on whether Defendants' use of deadly force was lawful under the circumstances. Pursuant to N.C. Gen. Stat. § 14-51.3, our statute governing self-defense and defense of others:

> (a) A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, *a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if* . . . the following applies:
>
> (1) *He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.*
>
> . . . .
>
> (b) *A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force* . . . .

N.C. Gen. Stat. § 14-51.3 (emphases added).

Each of the central issues of this appeal ultimately concerns whether the trial court properly admitted or "excluded evidence that was relevant to [Defendants'] belief that [their] li[ves] w[ere] threatened in relation to [their] plea[s] of self-defense" and defense of others. *State v. Webster*, 324 N.C. 385, 389, 378 S.E.2d 748, 751 (1989). "In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to [the] defendant." *Id.* at 391, 378 S.E.2d at 752.

It is the jury, not the trial court, which must determine the reasonableness of the defendant's belief under the circumstances, "unless there is no evidence from which a jury could conclude [the] defendant's belief is reasonable." *Id.* at 393, 378 S.E.2d at 753; *cf. State v. Harvey*, 372 N.C. 304, 309, 828 S.E.2d 481, 484 (2019) ("Despite his extensive testimony recounting the entire transaction of events from his own perspective, [the] defendant never represented that [the victim's] actions in the moments preceding the killing had placed [the] defendant in fear of death or great bodily harm such that [the] defendant reasonably believed that it was necessary to fatally stab [the victim] in order to protect himself."). "A jury should, as far as possible, be placed in [the] defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if [the] defendant acted under reasonable apprehension of danger to his person or his life." *Webster*, 324 N.C. at 392, 378 S.E.2d at 753.

Here, when viewed in the light most favorable to Defendants, "[t]he excluded testimony went to the heart of [Tom's] self-defense claim[,]" as well as his claim of defense of Molly. *Id.* at 393, 378 S.E.2d at 753. In order to fully appreciate the extent to which "sustaining the objection . . . prevented [Tom] from completing his side of the story[,]" *id.*, it is necessary to review the challenged testimony in full context:

> [DEFENSE COUNSEL:] What happened after you came down the hallway?
>
> [TOM:] Okay. Then we come back down the hallway and we emerged from the hallway. We are back in the bedroom and so I get what I think is a chance to hit him, as I have before, in the back of the head, only this time he's ready for me. And he puts up his left hand and catches the bat perfectly right in his palm as I swing the bat at the back of his head. But in the process, Molly goes free. She escapes to his right or he let's [sic] her go. Anyway, the two of them separate. But now he's got the bat. And I'm still holding the bat. But he cocks his arm like this (demonstrated). Jason is right-handed, that's my experience. This is with his left hand. He cocks his hand and he punches out (demonstrating) and shoves me across the entire bed, the width of the bed, and I'm on the floor with my back to him and face down on the carpet. And –
>
> Q. And what happened after that?
>
> A. And that's – you know, if I can get any more afraid, that was it. I can't see him. It's dark in the bedroom. I'm thinking the next thing is going to be a bat in the back of the head. I'm on the ground. I hear Molly scream "Don't hurt my dad."
>
> [THE STATE:] Objection, move to strike.
>
> THE COURT: That's sustained. Don't consider that, ladies and gentlemen.
>
> [DEFENSE COUNSEL:] All right.
>
> [TOM:] And I'm scrambling. I remember thinking irrationally now that I lost my glasses in this exchange and that I need to find my glasses. You know, I'm shook up, and then I realize how stupid that is. I'm better off without my glasses. Because if you are in a fight, you don't want your

> glasses jammed into your eyes. But I don't know how long it took me. It was a shock to get thrown across the bedroom. But I get up. And I turn over and I get up and now I see Jason essentially where he was, which is essentially where we started, inside the door to the bedroom, just a step or two toward that door from the hallway to the right of the bed as you enter the bedroom, and he's got the bat, and Molly is by the nightstand in the, you know – it's between the wall on that side and the bed, so she's over there. She's trapped. She can't get past him.
>
> [THE STATE:] Objection to what Molly may or may not be able to do.
>
> [DEFENSE COUNSEL:] His observations.
>
> THE COURT: That's overruled. He may continue.
>
> [TOM:] And I'm on the other side of the room at the end of the bed. And things look pretty bleak. He's got the bat. He's in a good – looks like he's in a good athletic position. He has his weight down on the balls of his feet. He's kind of looking between me and Molly. And so I decided there's – well, I decided to rush him and try to get ahold of the bat.

Viewed in full context, the significance of Tom's testimony regarding Molly's statement "Don't hurt my dad" is manifest. Not only was this statement directly "relevant to [Tom]'s belief that his life was threatened in relation to his plea of self-defense[,]" *Webster*, 324 N.C. at 389, 378 S.E.2d at 751, but for reasons more fully explained below, the exclusion of this testimony also bore upon the question of Tom's ultimate role in the affray—i.e., whether the evidence supported a jury instruction on the aggressor doctrine, *see State v. Holloman*, 369 N.C. 615, 628, 799 S.E.2d 824, 833 (2017) (holding that the provisions of N.C. Gen. Stat. § 14-51.4(2)(a) "allowing an aggressor to regain the right to use defensive force under certain circumstances do not apply in situations in which the aggressor initially uses deadly force against the person provoked").

"In light of the circumstances of this case and the trial court's instructions on self-defense," *Webster*, 324 N.C. at 393, 378 S.E.2d at 753, as explained in Section VI, we conclude that the trial court committed prejudicial error in striking Tom's testimony that he "hear[d] Molly scream[,] 'Don't hurt my dad.' " *Cf. id.* at 392-94, 378 S.E.2d at 753-54 (awarding the defendant a new trial where the trial court "erroneously sustained the State's objection to the question about whether [the] defendant felt

that his life was threatened because that evidence was highly relevant to the crucial question of [the] defendant's statement of mind at the time of the shooting, his knowledge and belief of danger, and his knowledge and belief of the necessity for action in relation to his plea of self-defense").

V. Instructional Error

[8] We next address the trial court's decision to instruct the jury on the aggressor doctrine with respect to Tom's claim that he was, at all times, acting in self-defense and in defense of his daughter, Molly. Tom argues that the trial court committed reversible error by instructing the jury that he would not be entitled to the full benefit of self-defense or defense of a family member if the jury found that he were the initial aggressor in the altercation with Jason. We agree.

A. Standard of Review

"The jury charge is one of the most critical parts of a criminal trial." *State v. Lee*, 370 N.C. 671, 674, 811 S.E.2d 563, 565 (2018) (citation omitted). The trial court's duty is momentous: to deliver a clear instruction on the law arising from all of the evidence presented, and to do so "in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *Holloman*, 369 N.C. at 625, 799 S.E.2d at 831 (citation omitted). We review de novo parties' challenges to the trial court's decisions regarding jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"The jury must not only consider the case in accordance with the State's theory but also in accordance with [the] defendant's explanation." *State v. Guss*, 254 N.C. 349, 351, 118 S.E.2d 906, 907 (1961) (per curiam). Consequently, "[w]here there is evidence that [the] defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); *see also Lee*, 370 N.C. at 677, 811 S.E.2d at 568 (Martin, C.J., concurring) (asserting that the principle articulated in *Dooley* "should apply equally to defense of another" where the evidence supports such an instruction).

In considering whether to deliver a jury instruction on self-defense, the trial court generally must view the evidence in the light most favorable to the defendant. *State v. Mumma*, 372 N.C. 226, 239 n.2, 827 S.E.2d 288, 297 n.2 (2019) (citing *Holloman*, 369 N.C. at 625, 799 S.E.2d at 831). However,

> this principle does not apply to the determination of whether the trial court erred by addressing the "aggressor" doctrine in the course of instructing the jury concerning the law of self-defense. In determining whether a self-defense instruction should discuss the "aggressor" doctrine, the relevant issue is simply whether the record contains evidence from which the jury could infer that the defendant was acting as an "aggressor" at the time that he or she allegedly acted in self-defense.

Id. (citing *State v. Cannon*, 341 N.C. 79, 82-83, 459 S.E.2d 238, 241 (1995)).

"When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct the jury on the aggressor doctrine of self-defense." *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016). Where the trial court delivers an aggressor instruction "without supporting evidence, a new trial is required." *State v. Vaughn*, 227 N.C. App. 198, 202, 742 S.E.2d 276, 278 (citation and quotation marks omitted), *disc. review denied*, 367 N.C. 221, 747 S.E.2d 526 (2013).

B. Aggressor Doctrine

Simply stated, the aggressor doctrine denies a defendant "the benefit of self-defense if he was the aggressor in the situation." *Juarez*, 369 N.C. at 358, 794 S.E.2d at 300. An individual who "aggressively and willingly enter[s] into the fight without legal excuse or provocation" is properly deemed "the aggressor in bringing on the difficulty[.]" *State v. Mize*, 316 N.C. 48, 51-52, 340 S.E.2d 439, 441 (1986).

Courts consider a variety of factors in determining which party was the aggressor, including the circumstances that precipitated the altercation; the presence or use of weapons; the degree and proportionality of the parties' use of defensive force; the nature and severity of the parties' injuries; or whether there is evidence that one party attempted to abandon the fight. *See, e.g.*, *State v. Spaulding*, 298 N.C. 149, 155, 257 S.E.2d 391, 395 (1979) (determining that the victim was the aggressor in a fatal prison-yard knife fight where the victim continued to advance upon the defendant "with his hand jammed into his pocket," while the defendant, who anticipated the attack and "arm[ed] himself as a precaution," used no "language tending to incite an affray" and "made no show of force"); *State v. Washington*, 234 N.C. 531, 534, 67 S.E.2d 498, 500 (1951) ("All the evidence offered at the trial below shows that the deceased, and not the defendant, was the aggressor. The defendant's evidence indicates that she was entirely free from fault and never fought willingly and

unlawfully. Her evidence further shows that the deceased made a violent attack upon her. . . . She begged the deceased to stop beating her, and it was only after he announced his intention to take her elsewhere and kill her that she stabbed him in a vital spot.").

The State's arguments, and the dissent's conclusion with respect to this issue, heavily rely upon the disparity of injuries suffered by the parties. The State disputes Tom's contention that the State failed to introduce any evidence to contradict Defendants' version of events, and counters that "the lack of any injuries to [Tom], compared with the devastating injuries to Jason, is sufficient evidence to support the aggressor instruction." According to the State, this Court "held exactly that" in *State v. Presson*, 229 N.C. App. 325, 747 S.E.2d 651 (2013). For support, the State cites the following portion of our Court's opinion in *Presson*: "Further, the lack of injuries to [the] defendant, compared to the nature and severity of the wounds on [the victim] at his death, is sufficient evidence from which a jury could find that [the] defendant was the aggressor or that [the] defendant used excessive force." 229 N.C. App. at 330, 747 S.E.2d at 656.

This portion of *Presson*, however, addresses the sufficiency of the State's evidence to withstand the defendant's motion to dismiss the charges, based on his claim of perfect self-defense. *See id.* Although the defendant in *Presson* also contended that the trial court erred by instructing the jury that he "would lose the right to self-defense if he was the aggressor," *id.*, review of this issue was limited to plain error, due to the defendant's failure to object to the jury instructions at trial, *id.* at 331, 747 S.E.2d at 656. *See id.* ("[The d]efendant bases this claim on similar grounds as those stated in his first argument, arguing that there is insufficient evidence to support the finding that [he] was in any way the aggressor in the fatal confrontation. But, as we have set forth above, the State did put forth sufficient evidence from which a reasonable jury could find that [the] defendant was the aggressor or used excessive force. Accordingly, we find no error with the jury instruction explaining that [the] defendant was not entitled to perfect self-defense if he was found to be the aggressor.").

The distinction between the standard of review of a motion to dismiss and that of plain error is significant. *Compare id.* at 329, 747 S.E.2d at 655 (noting that a motion to dismiss based on perfect self-defense requires the trial court to consider "whether the State has presented substantial evidence which, when taken in the light most favorable to the State, would be sufficient to convince a rational trier of fact that the defendant did not act in [perfect] self-defense"), *and State v. Smith*, 300

N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."), *with Mumma*, 372 N.C. at 241, 827 S.E.2d at 298 ("As a result of [the] defendant's failure to object to the delivery of an 'aggressor' instruction to the jury before the trial court, [the] defendant is only entitled to argue that the delivery of the 'aggressor' instruction constituted plain error, under which [the] defendant is not entitled to an award of appellate relief on the basis of the alleged error unless he can demonstrate that a fundamental error occurred at trial that had a probable impact on the jury's finding that the defendant was guilty[.]" (citations, quotation marks, and footnote omitted)), *and Juarez*, 369 N.C. at 358-59, 794 S.E.2d at 300 (concluding that it was "not necessary . . . to decide whether an instruction on the aggressor doctrine was improper," because the defendant failed to meet his burden, under plain error review, of showing that "absent the erroneous instruction, it is probable that the jury would have found that he acted in perfect self-defense" and "would not have rejected his claim of self-defense for other reasons").

The cases that the dissent and the State cite for the proposition that a disparity in injuries is, standing alone, sufficient evidence to support an instruction on the aggressor doctrine were reviewed for plain error. *See Mumma*, 372 N.C. at 241-42, 827 S.E.2d at 298; *Juarez*, 369 N.C. at 357-58, 794 S.E.2d at 299-300; *Presson*, 229 N.C. App. at 330-31, 747 S.E.2d at 656. However, the State cites no case, and we are unaware of any, to so hold upon review for preserved error. Tom's challenge to the inclusion of the aggressor instructions was properly preserved at trial; therefore, *Mumma*, *Juarez*, *Presson*, and other plain error cases with a heightened review for prejudice are inapposite here.

At the charge conference in the instant case, defense counsel requested that the trial court remove all aggressor language from the proposed pattern instructions, asserting that there was no evidence to support "that anyone was the aggressor but Jason." The State conceded that it had "no objection to the Court declining to instruct on the aggressor issue as to Defendant Molly Corbett." As to Tom, however, the State contended that there was "conflicting evidence as to which party was the aggressor," because "there was comment about when the bat entered the equation[.]" The State noted that Tom "brought the one physical deadly weapon" into the fight, in that "the bat entered the equation when [Tom] was standing outside the room, heard an argument, and decided to barge in[.]"

To the extent that the trial court based its ruling on Tom's decision to arm himself with the baseball bat before joining the affray, this ruling

was in error. The mere fact that a defendant was armed is not evidence that he was the aggressor if he made no unlawful use of his weapon. *See Spaulding*, 298 N.C. at 155, 257 S.E.2d at 395 ("In going out into the yard, [the] defendant was going to a place where he had a right to be. In arming himself as a precaution, in the context of this case, [the] defendant was not at fault vis-à-vis the law of homicide so long as he did not use the knife or threaten [the] decedent with it until it became necessary or apparently necessary to do so in self-defense." (internal citation omitted)); *State v. Alston*, 228 N.C. 555, 557-58, 46 S.E.2d 567, 568-69 (1948) (awarding a new trial due to the trial court's erroneous denial of the defendant's request for an instruction "that the fact that the defendant had a pistol in his pocket, but had made no unlawful use of it prior to the attack upon him by the deceased, would not deprive the defendant of his legal right of self-defense"); *Vaughn*, 227 N.C. App. at 203, 742 S.E.2d at 279-80 (concluding that the "[d]efendant's decision to arm herself and leave the vehicle, while perhaps unwise, was not, in and of itself, evidence that she brought on the difficulty, 'aggressively and willingly' entered the fight, or intended to continue the altercation"); *State v. Tann*, 57 N.C. App. 527, 531, 291 S.E.2d 824, 827 (1982) (rejecting the State's argument that the "defendant, who anticipated the confrontation, armed himself with a .38 caliber pistol, and failed to avoid the fight, was somehow responsible for causing the altercation. These observations do not in any way suggest that [the] defendant was the provocator . . . ." (citation omitted)).

The State also argued at the charge conference that Tom "assumed some degree of aggression after there was a pause when he was no longer under a continuous assault," but nonetheless opted to rejoin the affray. In support of this argument, the State cited the portion of Tom's testimony from which the State successfully moved to strike Molly's statement, "Don't hurt my dad":

> [THE STATE:] . . . The testimony from [Tom] from his direct and cross-examination was that after there had been strikes against [Jason] in the bedroom, in the hallway to the bath, in the bathroom, and then back into the bedroom, that [Jason] had caught the bat in his left hand, had then moved [Tom] claims, to have been flung all the way across the room even to the ground. He went as far as to say he was expecting to get hit in the head with the bat, which was his perception that [Jason] had time to advance upon him and hit him with the bat. Instead he had enough time to realize he had lost his glasses and

> finds his glasses, then stands up and turns around and in this confined space sees [Jason]. Yes, holding the bat, but not advanced on him having not attacked him, having not advanced on [Molly], who [Tom] said escaped [Jason's] grasp moments earlier and had moved over to the side away from him.
>
> [Tom] describes very deliberating [sic] everything, evaluated the situation and made the choice, in his words, to rush [Jason]. He then arrested, in his testimony, the bat from [Jason] and proceeded to hit him in the head repeatedly. That would be some indication certainly at least as to [Tom] that at that point in time he assumed some degree of aggression after there was a pause when he was no longer under a continuous assault. Since we believe that's a reasonable interpretation of the evidence, we ask that that instruction be kept.

Insofar as the trial court based its ruling upon the above argument, that decision was erroneous for two reasons. First, as discussed in Section IV(C) above, Tom's testimony that he heard Molly scream, "Don't hurt my dad," was admissible and should not have been excluded. Proper admission of this testimony would have foreclosed the State's argument during the charge conference that "there was a pause when [Tom] was no longer under a continuous assault." Second, Jason was the initial aggressor, and the first person to use deadly force; therefore, Jason could not regain the right to use defensive force unless he first withdrew from the affray.

"Historically, . . . North Carolina law did not allow an aggressor using deadly force to regain the right to exercise the right of self-defense in the event that the person to whom his or her aggression was directed responded by using deadly force to defend himself or herself." *Holloman*, 369 N.C. at 626, 799 S.E.2d at 831; *see also id.* at 626, 799 S.E.2d at 831-32 (explaining the limits of the common-law rule—that "if one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy into which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder" (citations and quotation marks omitted)).

In 2011, however, "the General Assembly amended the law of self-defense in North Carolina to clarify that one who is not the initial aggressor may stand his ground, regardless of whether he is in or outside the home." *Lee*, 370 N.C. at 675 n.2, 811 S.E.2d at 566 n.2 (internal citation

omitted). Our amended defensive force "statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability." *Id.* at 674, 811 S.E.2d at 566. Pursuant to N.C. Gen. Stat. § 14-51.3(a),

> a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to [N.C. Gen. Stat. §] 14-51.2.

N.C. Gen. Stat. § 14-51.3(a)(1)-(2).[5]

"Both sections provide that individuals using force as described are immune from civil or criminal liability and that such individuals have no duty to retreat before using defensive force." *State v. Bass*, 371 N.C. 535, 541, 819 S.E.2d 322, 325-26 (2018) (citations and internal footnote omitted). Accordingly, "wherever an individual is lawfully located . . . the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." *Id.* at 541, 819 S.E.2d at 326.

As under the common law, the right to use defensive force is not unlimited under N.C. Gen. Stat. §§ 14-51.2 and 14-51.3. Indeed, the statutory justification is not available to an individual who uses defensive force, and:

> (2) Initially provokes the use of force against himself or herself. However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force

5. N.C. Gen. Stat. § 14-51.2, "Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm," provides a rebuttable presumption in favor of the "lawful occupant of a home, motor vehicle, or workplace" who uses deadly defensive force under the circumstances set forth by subsection (b). "This presumption does not arise" under N.C. Gen. Stat. § 14-51.3(a)(1). *Lee*, 370 N.C. at 675, 811 S.E.2d at 566.

> reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

N.C. Gen. Stat. § 14-51.4(2).

In *Holloman*, our Supreme Court, construing N.C. Gen. Stat. § 14-51.4(2)(a) for the first time, considered "the extent, if any, to which North Carolina law allows an aggressor to regain the right to utilize defensive force based upon the nature and extent of the reaction that he or she provokes in the other party." 369 N.C. at 626, 799 S.E.2d at 831. Our Supreme Court first observed that, unlike the common-law rule, the plain language of subsection (2)(a) "does not, when read literally, appear to distinguish between situations in which the aggressor did or did not utilize deadly force." *Id.* at 627, 799 S.E.2d at 832.

Nevertheless, the Supreme Court declined to adopt the defendant's proposed construction—"which would allow an aggressor to utilize defensive force in the event that his conduct caused the person provoked to lawfully utilize deadly force in his own defense"—concluding that such an interpretation "cannot be squared with the likely legislative intent motivating the enactment of" N.C. Gen. Stat. § 14-51.4(2)(a):

> Simply put, the adoption of [the] defendant's construction of [N.C. Gen. Stat.] § 14-51.4(2)(a) would create a situation in which the aggressor utilized deadly force in attacking the other party, the other party exercised his or her right to utilize deadly force in his or her own defense, and the initial aggressor then utilized deadly force in defense of himself or herself, thereby starting the self-defense merry-go-round all over again. We are unable to believe that the General Assembly intended to foster such a result, under which gun battles would effectively become legal, and hold that the provisions of [N.C. Gen. Stat.] § 14-51.4(2)(a)

> allowing an aggressor to regain the right to use defensive force under certain circumstances do not apply in situations in which the aggressor initially uses deadly force against the person provoked.

Id. at 628, 799 S.E.2d at 833.

In the instant case, the undisputed evidence—viewed in the light most favorable to the State—simply does not support that anyone but Jason was the aggressor in the altercation on 2 August 2015. That night, Tom and Sharon were staying in the guest bedroom in the basement, below the master bedroom occupied by Jason and Molly. Tom "had been asleep for a while" when he "was awakened from a sound sleep" by noises upstairs. Tom testified that he "heard thumping, like loud foot falls on the floor above [him] and . . . a scream and loud voices."

Tom surmised from these noises that "[t]here was an obvious disturbance going on above [him] somewhere in the house." According to Tom, "it sounded bad . . . like a matter of urgency." Tom testified that he instinctively "got out of bed, grabbed that baseball bat" off the floor beside his luggage, where he had left it earlier that evening, and—without getting dressed or putting on shoes—headed upstairs. Tom explained that although he "did not know at that time what . . . was" causing the commotion upstairs, "[i]t seemed like a good idea" to bring the bat with him, because he "was going up to something that sounded confrontational and [he]'d rather have the baseball bat in [his] hand than not."

Once he arrived upstairs, Tom determined that the noises were coming from inside of Jason and Molly's bedroom. At trial, Tom described the scene he witnessed when he opened the door:

> [TOM:] In front of me, I would say seven or eight feet in front of me, in front of the door as I opened the door, Jason had his hands around Molly's neck. They were facing each other. She was a little to the right. He was a little to the left (indicating).
>
> [DEFENSE COUNSEL:] Where were they in the bedroom?
>
> A. They were, as I'm entering the door, they were to the right of the bed and maybe a step out from the bed closer to the bedroom, the exit from the bedroom.
>
> Q. What happened next?
>
> A. Um – I closed the door.

Q. Why?

A. I don't know. I don't. I did. I know that I did. And I said, "Let her go." And he said, "I'm going to kill her." And I said, "Let her go." And he said, "I'm going to kill her." And I said, "Let her go." (Witness starting to cry.) And he said, "I'm going to kill her." And I don't know how many times that happened. But it happened several times. But I left something out. When I entered, he had his hands up around her neck, and as soon as I entered, he reversed himself so that he had her neck in the crook of his right arm (demonstrating). And she was in front of him between me and him.

Q. What happened then?

A. And he was really angry.

[THE STATE:] Objection.

THE COURT: Overruled.

[TOM:] And I was really scared. And he took a step back toward the hallway that goes to the bathroom. And I was afraid that he would get to the bathroom and close the door and that would be the end of that. (Witness crying.) Because I would not be able to save her behind the bathroom door. So I took a step to my right and I hit him in the head, the back of the head with the baseball bat. That seemed like the most effective place to hit him. I didn't want to hit Molly. So I tried to hit the back of the two of them glued together. His head was taller than hers and I know that I hit him that time. But it didn't have any effect except seemingly further enraged him. He didn't waiver [sic]. He didn't go down.

[DEFENSE COUNSEL:] How tall are you?

A. About 5,11 [sic].

Q. How much do you weigh?

A. I weigh about 160 pounds.

Q. So after – what happened after you hit him the first time?

A. Then he did, as I feared, he continued to edge down toward into the hallway leading to the bathroom. And I

didn't have as much room in that hallway to maneuver as I did in the bedroom. But I tried. And I tried to hit him as many times as I could to distract him because he now had Molly in a very tight chokehold with his forearm on this side (indicating) and his bicep on this side (demonstrating). She was no longer – she was no longer wiggling. She was just weight, being dragged back into the hallway. So I tried to hit him. I don't know how effective those hits were because I didn't have room to maneuver and to – but I tried. And I was determined that he was not going to close that bedroom door between me and her. And he did get to the bathroom but I was too close for him to close the door.

And we got into the bathroom and now I had room to maneuver again and I did what I did before in the bedroom, I took a step to the right, and was able to get the little angle on him behind him and I hit him. So I know of two times that I hit him in the back of the head and whatever happened in the hallway. (Long pause.) And again, it didn't seem to have any effect. And so he changed tactics at that point. I mean, he had gone into the bathroom. I had followed him into the bathroom and so now he started to push back down the hallway and I was able to get into the hallway before him, but he's pushing me down the hallway – I mean, he's not literally touching me. He's pushing Molly down in front of him and he's getting away. I really don't think I hit him in that trip, in the return trip in the hallway, because he was initiating the action toward me and I was scared and – anyway, that's what I remember.

In this contest, the parties were not equally positioned. Jason was 39 years old, 6'0" tall, and weighed 262 lbs. Tom was 65 years old, 5'11" tall, and weighed 160 lbs. Molly was 31 years old, 5'6" tall, and weighed 110 lbs.

The State offered no evidence to refute Tom and Molly's account of the events, nor does the disparity in the parties' injuries, alone, tend to do so. Furthermore, in focusing solely on the absence of obvious injuries to Defendants, the dissent and the State fail to acknowledge other evidence that tends to corroborate their version of events, including the long blonde hair that is visible in the palm of Jason's right hand in State's Ex. 172, a photograph taken at the scene of the incident and admitted at trial; and evidence that Molly was suffering from shock when first responders arrived to the scene. Deputy David Dillard testified that Molly was "visibly upset" and "very obviously in shock" when he

interviewed her that night. Sergeant Barry Alphin testified that when he left the ambulance to check on Molly, he found her lying on the ground in the fetal position, covered with a blanket. At some point, he noticed that her throat was red.

Moreover, as to the aggressor determination, it is significant that Jason was the first to employ deadly force. Tom testified that from the moment he opened the bedroom door, "Jason had his hands around Molly's neck," and he was stating his intention to kill her. As Tom entered the room, Jason "reversed himself so that he had her neck in the crook of his right arm[,]" and he kept Molly in a "very tight chokehold" in front of him while the fight moved from room to room. At some point, Tom noticed that Molly "was no longer wiggling. She was just weight, being dragged back into the hallway."

As a retired FBI agent, Tom knew the potential dangers of Jason's "very tight chokehold." Tom testified on cross-examination that he was "pretty familiar with this chokehold[,]" which works to "subdue someone by restricting their blood flow," due to its previous popularity with the Los Angeles Police Department. And Tom testified that Molly was subdued quickly: "Initially she was wiggling. When he put her into the chokehold, but as we got down and into the hallway she was pretty limp."

All of the evidence supports that Jason was the initial aggressor in the affray, and the first person who used deadly force. In that Tom "did not aggressively and willingly enter into the fight without legal excuse or provocation[,]" *Mize*, 316 N.C. at 51, 340 S.E.2d at 441, the trial court erred by instructing the jury on the aggressor doctrine with respect to Tom's claims of self-defense and defense of another.

VI. Prejudice

[9] Finally, we consider the extent to which Defendants were prejudiced by the errors analyzed above. Again, "[a]n error is not prejudicial unless there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *Mason*, 144 N.C. App. at 27, 550 S.E.2d at 16; *see also* N.C. Gen. Stat. § 15A-1443(a). As explained below, we agree with Defendants that "there is a reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at" trial. N.C. Gen. Stat. § 15A-1443(a).

First, as explained in Section IV(A)(1), the children's interview statements contained significant material evidence that went to the heart of Defendants' claims of self-defense and defense of another. Sarah was

a fact witness, as her nightmare was the event that precipitated Jason and Molly's fight, which led to the fatal altercation. During the multidisciplinary team meeting preceding the children's medical evaluations at the Dragonfly House, Detectives Hanna and Riggs specifically requested that Reagan inquire about Sarah's nightmare during the children's forensic interviews.

Moreover, Jack's Dragonfly House interview is *the only evidence* that could have explained the presence of the brick paver in the bedroom. This evidence was extremely important to the Defendants' cases as well as the State's case: for Defendants, Jack's statement would have provided a reasonable explanation for the existence of an otherwise out-of-place brick paver in Molly and Jason's bedroom. The State, on the other hand, *benefited* from the unexplained presence of one of two potential murder weapons in the master bedroom, and in fact, raised this very question during its opening statement, noting: "There is a brick paver in the master bedroom and there is nothing else having to do with landscaping or gardening or building walls inside that bedroom."

Defendants requested that the trial court consider the State's reference to the brick paver during its opening argument when the court eventually ruled upon Defendants' motion to admit the children's hearsay statements:

> [DEFENSE COUNSEL:] A brief matter, nothing to rule on at this time. During [the State's] opening statement he made reference to the paving stone and indicated there were no gardening implements in the room. We made a pretrial motion to be able to get in the statements from Jack Corbett he made at the Dragonfly House. One of the things he talked about in that statement is how the paving stone got into the bedroom in the first place. I believe that would be relevant on that issue. And would ask at the time the Court consider that as well not for diagnosis or treatment in terms of the State is raising an issue and their investigation at least, you know, showed that Jack Corbett said how the paving stone got there. They left a question for the jury. I want the Court to take that into consideration when the time comes if we offer evidence and before that to the Court.

Following the trial court's exclusion of the children's hearsay statements, Defendants made a motion in limine to preclude the State from "arguing to the jury how did that paving stone get in there when they

have evidence from an individual who is taken to the Dragonfly House and made that statement . . . to ask that evidence be suppressed, then argue to the contrary, I would say would be inappropriate[.]" The State assured the trial court and Defendants that it would avoid the issue during closing arguments. Nevertheless, the damage was already done.

Included in the evidence Defendants submitted in support of their Motion for Appropriate Relief are numerous screenshots of Facebook comments showing individuals—including multiple members of the jury—discussing the case.[6] According to jury foreman Tom Aamland, the jurors "had many unanswered questions while deliberating[,]" but " 'how and why' the paver made it into the home" was the "*#1 question that was talked about when deliberations started*[.]" (Emphasis added). Jack's statement from his Dragonfly House interview would have answered this question, and its exclusion clearly prejudiced Defendants' ability to present a meaningful defense. *Cf. Lee*, 370 N.C. at 676, 811 S.E.2d at 567 ("[T]he record reflects a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial. During closing argument the State contended that [the] defendant's failure to retreat was culpable. As such, the omission of the stand-your-ground instruction permitted the jury to consider [the] defendant's failure to retreat as evidence that his use of force was unnecessary, excessive, or unreasonable." (internal citation omitted)).

Similarly, the children's statements regarding Jason's worsening issues with anger management, along with their statements concerning the relationship between Jason and Molly, would have corroborated and provided significant context for the written statement that Molly provided at the Davidson County Sheriff's Office on 2 August 2015. Moreover, the children's statements would also have corroborated testimony from Katie Wingate, nurse practitioner at Kernersville Primary Care, where both Molly and Jason were patients. Wingate testified that

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6. As discussed in Section II, the no-impeachment rule bars the admission of "evidence of any statement by [a juror] concerning a matter about which he would be precluded from testifying . . . for the[ ] purpose[ ]" of impeaching the jury's verdict. N.C. Gen. Stat. § 8C-1, Rule 606(b); *see also id.* § 15A-1240(a). For this reason, the evidence Defendants submitted in support of their Motion for Appropriate Relief is inadmissible to impeach the verdicts rendered by the jury in this matter. However, there is no prohibition on this Court's consideration of this evidence for the purposes of assessing whether Defendants suffered actual prejudice by the errors discussed herein, and determining the likelihood that, absent these errors, "a different result would have been reached at" trial. *Id.* § 15A-1443(a).

when Jason visited Kernersville Primary Care on 16 July 2015, approximately two weeks prior to his death,

> [h]e reported he had been feeling faint and dizzy, this started six months ago, was now occurring more frequently. Now occurring at least once a week and at random times. No relation to exercise or walking. *He said he had been more stressed and angry lately for no reason.* He had also not been taking his thyroid medication for six or seven weeks, had not had follow-up with his cardiologist in at least a year.

(Emphasis added).

The State had just successfully moved to admit into evidence Jason's medical records from his 16 July 2015 visit to Kernersville Primary Care when Wingate provided the testimony above. However, neither the State nor Defendants were aware that these records even existed until the morning before Wingate testified. Where the State opens the door by proffering medical records and a testifying witness to explain their contents, fundamental fairness demands that Defendants be permitted to offer evidence to corroborate that Jason had been "more stressed and angry lately for no reason." The children's interview statements would have served this purpose.

Defendants argue that, in addition to corroborating Jason's medical records, the children's statements also describe specific "instances of [Jason's] irrational anger toward [Molly] and themselves[,]" which "would have been admissible when offered to demonstrate [Jason's] angry and violent nature," and to establish Jason's "role in the altercation as the aggressor." However, this argument is foreclosed by our Supreme Court's decision in *State v. Bass*, 371 N.C. 535, 819 S.E.2d 322 (2018), which was released during the parties' briefing period to our Court. *See Bass*, 371 N.C. at 544, 819 S.E.2d at 327 ("To say that a person is the aggressor on a specific occasion is not to say that he has a violent character: a generally peaceful person may experience a moment of violence, and a normally aggressive or violent person might refrain from violence on a specific occasion. . . . Accordingly, *with regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts*." (emphasis added)).

Nonetheless, *Bass* does not foreclose the admission of *all* evidence regarding a victim's character for violence. Even where specific violent acts would be inadmissible, the victim's character for violence may

still be proved through evidence of his reputation in the community, or statements offered in the form of an opinion. *See State v. Watson*, 338 N.C. 168, 188, 449 S.E.2d 694, 706 (1994) (holding that, "[b]ecause the jury was instructed on self-defense and was required to determine who was the aggressor in the affray," the trial court erred by excluding a defense witness who would have provided opinion testimony regarding the victim's violent character), *disavowed in part on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724, *cert. denied*, 514 U.S. 1071, 131 L. Ed. 2d 569 (1995); *see also Bass*, 371 N.C. at 544, 819 S.E.2d at 328 (distinguishing *Watson* on the basis that "*Watson* dealt only with opinion evidence—not evidence of specific acts" and thus "it sheds little light on the issue presented" in *Bass*).

Assuming, *arguendo*, that the children's statements regarding Molly and Jason's relationship, as well as Jason's "angry and violent nature," might be admissible as *opinion* evidence, and not as evidence of specific violent acts committed by Jason against Molly, the record supports that there is a reasonable possibility that the exclusion of this evidence affected the jury's verdicts. In support of their Motion for Appropriate Relief, Defendants included a news report that was released prior to televised coverage of the case on ABC News "20/20," in which jurors challenged Molly's claim, during her pretrial interview with 20/20, that she was a victim of abuse. As one juror explained, "The defense did not once suggest any of that[.] *So we as jurors, or me as a juror, cannot take that into consideration because it was never presented as a possibility*." (Emphasis added). Aamland echoed this sentiment: "We had to go by what we heard[.]"

Furthermore, for the reasons explained in Section IV(B), James's expert testimony on bloodstain pattern analysis failed to satisfy the reliability requirements set forth under N.C. Gen. Stat. § 8C-1, Rule 702(a)(1)-(3), as interpreted by our Supreme Court in the seminal case of *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016).

We emphasize that we do not hastily arrive at our conclusion on this issue: that, not only did the trial court err by admitting James's testimony regarding the untested stains on Tom's boxer shorts and Molly's pajama pants, but also, that it "appears reasonably possible that the jury would have reached a different verdict without the challenged evidence." *Mason*, 144 N.C. App. at 28, 550 S.E.2d at 16.

Abuse of discretion is certainly a high bar to overcome, with the burden of demonstrating prejudice even more cumbersome. Here, however, James's testimony and conclusions regarding the untested stains

on Tom's boxer shorts and Molly's pajama pants were not based upon sufficient facts and data to reliably pass muster under N.C. Gen. Stat. § 8C-1, Rule 702(a)(1). Moreover, notwithstanding James's unchallenged qualifications in the field of bloodstain pattern analysis, a careful review of his testimony raises serious questions concerning the extent to which he "applied his own methodology reliably in this case." *McGrady*, 368 N.C. at 899, 787 S.E.2d at 14.

Here, the erroneous admission of James's testimony was significantly prejudicial to Defendants. This was the *only* evidence offered as direct proof that Defendants hit Jason in the head from above. James's testimony thus bolstered the State's case to show that Defendants administered blows while Jason was down on the ground and defenseless. And yet, because James's conclusions about the untested stains were supported by neither sufficient data nor reliable methodology, his testimony about the "physical characteristics" of the stains—including their "location, size, shape, and distribution"—could not have assisted the jury in rendering its verdicts, "because these matters were within the jurors' common knowledge." *Id.* at 895, 787 S.E.2d at 12; *see also id.* ("The factors that [the defendant's proposed expert witness] cited and relied on to conclude that [the] defendant reasonably responded to an imminent, deadly threat are the same kinds of things that lay jurors would be aware of, and would naturally consider, as they drew their own conclusions.").

Additionally, as explained in Section IV(C), Tom's testimony regarding Molly's statement "Don't hurt my dad" was admissible and should not have been excluded. The trial court's error in sustaining the State's objection to this testimony was prejudicial. Tom's testimony was directly relevant to the reasonableness of his belief that the use of deadly force was necessary to prevent imminent death or great bodily harm to himself or Molly—that is, whether his use of deadly force was lawful under the circumstances, the central issue of the case. Moreover, the trial court's erroneous exclusion of this testimony made way for the State's argument for jury instructions on the aggressor doctrine, contending that "at that point in time [Tom] assumed some degree of aggression after there was a pause when he was no longer under a continuous assault."

The trial court committed reversible error in Tom's case by delivering unsupported jury instructions on the aggressor doctrine. *Juarez*, 369 N.C. at 358, 794 S.E.2d at 300. This error alone entitles Tom to a new trial. However, the record evinces that the trial court's error very likely prejudiced Molly, as well.

The trial court ruled, as a matter of law, that Molly was not the aggressor, but instructed the jury that it could find her guilty under an acting-in-concert theory of culpability. "We have long held that a jury is presumed to follow the instructions given to it by the trial court." *State v. Wiley*, 355 N.C. 592, 637, 565 S.E.2d 22, 52 (2002) (citation omitted), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). Here, however, the record clearly demonstrates that the jury *did not* follow the trial court's instructions. In the Facebook comments proffered by Defendants in support of their Motion for Appropriate Relief, Aamland stated, "[W]e decided on 2nd degree for both, *but feel Molly was the aggressor*, and her dad wanted to take the heat for her actions… he admitted participating, so 'in concert' means equal responsibility to both." (Emphasis added). Accordingly, while the trial court reversibly erred by delivering unsupported jury instructions on the aggressor doctrine in Tom's case, whether due to confusion or some other reason, the record also clearly establishes that the jury did not follow the trial court's instructions with regard to Molly.

For these reasons, we conclude and hold that Defendants satisfied their burden of demonstrating prejudice—that "there is a reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at" trial. N.C. Gen. Stat. § 15A-1443(a).

Specifically, Defendants have established a reasonable possibility that the jury might have reached a different result, but for (1) the erroneous exclusion of the children's hearsay statements during their interviews conducted by Union County DSS personnel on 3 August 2015, and at the Dragonfly House Children's Advocacy Center on 6 August 2015; (2) the improper admission of expert testimony regarding the untested stains on Tom's boxer shorts and Molly's pajama pants, which failed to satisfy N.C.R. Evid. 702(a)'s reliability requirements; and (3) the trial court's error in sustaining the State's motion to strike Tom's testimony that he heard Molly scream, "Don't hurt my dad." In addition, the trial court committed reversible error in Tom's case by delivering unsupported jury instructions on the aggressor doctrine. Although Tom, alone, is entitled to a new trial on this basis, for the reasons explained above, the record indicates that this instructional error very likely confused the issues for the jury in Molly's case as well.

Accordingly, we hold that both Defendants are entitled to a new trial in this matter. Moreover, because the issues discussed herein are dispositive of Defendants' appeals, we need not and do not address the additional arguments raised in their briefs.

VII. Conclusion

"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). The tragic and unusual circumstances of this case are a humble reminder of the importance of the jury's vital role in our delicate system of justice. Due to the compounding evidentiary and instructional errors that occurred both before and throughout the three-week trial in this matter, Defendants were prevented from presenting a meaningful defense, or from receiving the full benefit of their claims of self-defense and defense of a family member. As a result, the jury was denied critical evidence and rendered incapable of performing its constitutional function. Defendants are therefore entitled to a new trial.

For the reasons stated herein, we affirm the trial court's order denying Defendants' Motion for Appropriate Relief. However, due to the numerous preserved, prejudicial errors apparent within the record, we reverse the judgments entered upon Defendants' convictions for second-degree murder and remand for a new trial.

NEW TRIAL.

Judge TYSON concurs.

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

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

I concur in the majority opinion that the trial court did not err by (1) denying Defendants' request for an evidentiary hearing on their Motion for Appropriate Relief ("MAR"), (2) denying Defendants' MAR, or (3) denying Defendants' motions to dismiss for insufficient evidence. I respectfully dissent from the remainder of the majority opinion that leads to its conclusion that Defendants are entitled to a new trial.

I. Factual Background

Although the majority opinion includes a recitation of the facts, I include a recitation of the facts as well.

Jason was a native of the Republic of Ireland, where he originally lived with his first wife, Margaret, and their children, Sarah and Jack. Margaret died of an asthma attack in 2003. After Margaret's death, Jason employed Molly as an *au pair*. After several weeks, Jason and Molly

established a romantic relationship. In 2011, Jason, Molly, Sarah, and Jack (collectively, the "Corbetts") moved to Davidson County, North Carolina. Jason and Molly got married that same year.

Tom Martens' testimony

On 1 August 2015, Tom and his wife Sharon, Molly's mother, decided to visit the Corbetts. Tom, an attorney and retired FBI agent, packed a Little League baseball bat and a cut-down tennis racket for Jack. Tom and Sharon left their home in Knoxville, Tennessee and arrived at the Corbetts' home at 8:30 pm. When they arrived, Jason was sitting in a lawn chair in the driveway having a beer with his neighbor. Jason got up and greeted Tom and Sharon.

Tom unpacked the car while Molly ordered pizza. Tom, Sharon, Jason, Molly, and Sarah had pizza while Jack was at a party. Jack arrived home around 11:00 pm. Tom did not give Jack the bat at that point because it was late and time for everyone to go to bed. Tom and Sharon retreated to the guest room in the basement, which is just below the bathroom that joins Jason and Molly's master bedroom.

Tom testified, "I was awakened from a sound sleep, and I don't know what time it was, but I had been asleep for a while. And I heard thumping, like loud foot falls on the floor above me and I heard a scream and loud voices. There was an obvious disturbance going on above me somewhere in the house." Tom got out of bed, grabbed the baseball bat that was with his luggage on the floor beside his bed, and went upstairs. He opened the door to Jason and Molly's bedroom and saw that "Jason had his hands around Molly's neck." Tom went inside the bedroom and closed the door.

Tom repeatedly told Jason, "Let her go." Jason repeatedly replied, "I'm going to kill her." Tom testified, "I was really scared" and described how Jason, with Molly's neck in the crook of his arm, took a step toward the hall that led to the bathroom. Fearing Jason would get to the bathroom and close the door, Tom testified, "I took a step to my right and I hit him in the head, the back of the head with the baseball bat." But Jason "didn't waiver. He didn't go down." Tom further described the altercation, admitting, "I tried to hit him as many times as I could to distract him because he now had Molly in a very tight chokehold with his forearm . . . ."

Once they were in the bathroom, Tom angled himself behind Jason and hit Jason two more times in the head. Tom again stated this "didn't seem to have any effect." Jason then began pushing into the hallway while holding Molly in front of him. When they were back in the bedroom,

Tom swung the bat again, but Jason caught the bat with his left hand and Molly was able to go free. At this point, both Tom and Jason had the bat. Jason "cock[ed] his hand," "punche[d] out," and shoved Tom across the bed. Tom ended up "on the floor with [his] back to him and face down on the carpet."

When Tom got up, he saw Jason with the bat and Molly by the nightstand. Tom decided to "rush" Jason and "try to get ahold of the bat." When he did so, both he and Jason ended up with both hands on the bat. Tom testified that he tried to hit Jason with the end of the bat. In doing so, Jason "los[t] his grip," and Tom gained control of the bat.

Tom did not know how many times he hit Jason. Tom testified, "I hit him until he goes down. And then I step away. . . . I hit him until I thought that he could not kill me." After he gathered his thoughts, he called 911. Tom told the 911 operator, "My, my, uh, daughter's husband, uh, my son-in-law, uh, got in a fight with my daughter, I intervened, and I, I think, um, and, he's in bad shape. We need help. . . . He, he's bleeding all over, and I, I may have killed him." While on the 911 call, Molly and Tom both tried to administer CPR, as guided by the operator. When law enforcement arrived, Molly and Tom were told to wait outside on the front porch.

On direct examination, Tom testified, "[Jason] wasn't my favorite person. I didn't like him. I'm sure I said disparaging things about him." On cross-examination, Tom acknowledged that prior to marrying Molly, Jason had transferred a "sizeable amount" of money to America to purchase the Davidson County residence, such that there was no mortgage on the property. Additionally Jason had transferred $49,073.39 to Tom "for the marriage[.]" Tom was aware that Jason had a life insurance policy and that Molly was the beneficiary.

Barry Alphin's testimony

Sergeant Barry Alphin, a paramedic with Davidson County Emergency Medical Services ("EMS"), received a call at 3:03 am on 2 August 2015 that someone was in cardiac arrest. Ten minutes later he arrived at the scene in an ambulance with his co-worker, David Bent. They had arrived at the scene before they received an update that the call had been changed from cardiac arrest to assault. Alphin went into the room and "saw blood all over the floor and walls." He saw a lamp laying on the floor, and "there was a brick right there in front of it. I noticed there was a small ball bat leaning up against a dresser. . . . As we walked in, I saw [Jason] supine or feet laying out on his back with his head around the corner." Molly and Tom were in the room, and Molly was doing chest compressions on Jason. Paramedics took over the chest

compressions; Molly and Tom stepped outside the door. At some point, Alphin noticed some redness on Molly's throat or neck.

Alphin went to the ambulance and retrieved a back board. With the assistance of other rescue workers, he put Jason on the board and took him to the ambulance. He attempted to intubate Jason. Alphin testified, "I went to lift the chin. As I did, my left hand, all of my fingers went inside the skull. My right hand was just mushy. At that point I realized there was severe heavy trauma to the back of the head." Alphin noted Jason's "eye[] sockets had a lot of gel blood. His ear had a lot of gel." He tried to clean Jason up to find the source of bleeding. He also noted dried blood on Jason's cheek. At 3:24 am, Alphin concluded that life sustaining efforts were futile and stopped advanced life support.

David Bent's testimony

David Bent, also a paramedic with Davidson County EMS, arrived at the scene with Alphin and attempted to get into the master bedroom. They were not able to open the door completely because Jason was lying naked on the floor, partially blocking the door. Bent "observed dry blood on" Jason's body. At some point, he came into contact with Molly and observed a light redness on the left side of her neck. She told him she had been choked. She also told him she felt okay and did not want to go to the hospital.

Clayton Daggenhart and Rusty Ramsey's testimony

Corporal Clayton Daggenhart with the Davidson County Sheriff's Office received a call from the 911 center a little after 3:00 am on 2 August 2015. The call originally came in as a cardiac incident, but two minutes later was changed to an assault call. He arrived at the scene at 3:16 am; an ambulance was in the driveway. Daggenhart went directly inside the house and into the master bedroom. As he closed the door, he noted blood on the backside of it. A naked white male, who he later determined was Jason, was lying on his back next to what appeared to be puddles of congealing blood. Jason appeared to have a pool of blood around his left eye socket as well as blood on his chest. Daggenhart took some photographs of the scene, and then EMS personnel loaded Jason onto a portable back board and placed him on a stretcher to remove him from the residence.

After Jason's body was removed, Daggenhart began looking around the room. Daggenhart testified,

> I noted that there was blood that appeared to be dried or drying on the wall. There were several pools of blood next

> to where the body had been. There was blood on the wall past where the body had been. I noted more blood that was going into what seemed to be and was the master bathroom.

He also observed a "brick stone or paving stone and a baseball bat . . . [r]ight next to a dresser that's just to the side of the master bedroom area that leads out to the foyer." There were areas near the base of the door that were saturated with blood.

When Daggenhart exited the bedroom, Defendants were standing just outside the door. Daggenhart did not notice anything remarkable about either one, except that Molly had blood on the top of her head. Daggenhart asked them to exit the house. Daggenhart and Corporal Rusty Ramsey were directed to go retrieve the children from their bedrooms. Daggenhart testified that Sarah was "asleep in bed undisturbed, wasn't affected in any way." Ramsey testified that when he knocked on Jack's bedroom door, Jack was asleep. The officers woke the children up, carried them down the stairs, and left them with Sharon, who had come up from the basement.

Amanda Hackworth's testimony

Amanda Hackworth, also a paramedic with Davidson County EMS, was working with another paramedic, Carley Lane, when they received a cardiac arrest call a little after 3:00 am on 2 August 2015. When they arrived at the scene to assist, Jason was already being brought out of the house on the stretcher. Hackworth got into the back of the ambulance to assist. She was putting a lead on Jason to get a better cardiac read when she reached across his body and felt his torso was cool. She turned to Alphin and asked, "How long did you say they waited before they called 911[?]" She said Alphin replied, " 'They said they called as soon as he went down.' "

David Dillard's testimony

Patrol Deputy David Dillard was called to the scene a little after 3:00 am. After taping the perimeter of the scene, he escorted Molly to his patrol car. She remained there for about an hour while he remained beside the car. He testified, "She was making crying noises but I didn't see any visible tears. She was also rubbing her neck (demonstrating). I would say in a scrubbing motion-type thing. It wasn't a constant. She would do it and stop and do it and then stop while continuing to make the crying noises. That was about everything she had done."

Frank Young's testimony

Lieutenant Frank Young, a Crime Scene Investigations Supervisor, arrived at the scene at about 4:00 am. He went to the patrol car in which Molly was sitting "to photograph her for any possible injuries she had received." Young testified, "as I was preparing [to take] the photographs, [Molly] continually tugged and pulled on her neck with her hand. I asked her to please stop doing that." After several requests, she stopped. Young did not note any injuries on Molly's person.

Young also took photographs inside the master bedroom. One photograph depicted a brick with hair on it. Young later photographed both Molly and Tom at the Sheriff's Department. He did not note any injuries on either individual.

Molly's written statement

Molly gave a written statement to law enforcement officers on 2 August 2015 in which she stated the following:

> My husband, Jason Corbett, was upset that he awoke and an argument ensued with him telling me to "shut up," (etc.) and he applied pressure to my throat/neck and started choking me. At some point, I screamed as loud as possible. He covered my mouth and then started choking me again with his arm. My father, Tom Martens, came in the room and I cannot remember if he said something or just hit Jason to get him off me. Jason grabbed the bat from him and I tried to hit him with a brick (garden decor) I had on my nightstand. I do not remember clearly after that.

Dr. Craig Nelson's testimony

Dr. Craig Nelson, Associate Chief Medical Examiner at the North Carolina Office of the Chief Medical Examiner, performed an autopsy on Jason's body on 3 August 2015. "The autopsy documented multiple blunt force injuries. These included ten different areas of impact on the head, at least two of which had features suggesting repeated blows indicating a minimum of 12 different blows to the head. Additionally, he had a few other injuries elsewhere on his body, the torso and extremities." The bones in Jason's nose were broken and there were "two large complex lacerations towards the back of the head" indicating repeated blows to those areas. Portions of Jason's skull on both the left and right sides had fractures all the way around them, such that when the scalp was pulled back in the autopsy, those portions fell out of place. One laceration on the back of Jason's head "ha[d] an appearance of a postmortem injury

in that there[] [was] very little bleeding of that injury, suggesting it happened after the heart had stopped." Nelson testified, "The degree of skull fractures in this case are the types of injuries that we may see in falls from great heights or in car crashes under other circumstances."

Nelson further testified that an abrasion on the right side of Jason's forehead had a sharp linear component, consistent with an object that had an edge, that he would not expect to see from a baseball bat. Jason had a contusion on the back of his left hand and some blunt force injuries on his right thigh. Jason's blood alcohol level was .02% and he tested positive for a low level of Trazadone, an antidepressant medication that can have some sedative effects. Nelson determined the cause of death to be "blunt force head trauma."

Melanie Carson's testimony

Melanie Carson, a forensic scientist with the North Carolina State Crime Laboratory in the Trace Evidence Unit, testified that one of two hairs recovered from the end of the baseball bat, as well as twelve of twenty-five hairs recovered from the brick, were microscopically consistent with a hair sample taken from Jason.

Wendell Ivory's testimony

Wendell Ivory, a forensic scientist with the North Carolina State Crime Lab, testified that the baseball bat, brick, Molly's pajama top and bottom, Tom's shirt, and Tom's boxer shorts tested positive for the presence of human blood. Furthermore, DNA profiles taken from the tissue recovered from the brick, as well as tissue recovered from Molly's pajama top and bottom matched the DNA profile obtained from Jason.

Stuart James' testimony

Stuart James was accepted by the trial court as an expert in the field of bloodstain pattern analysis. James reviewed the photographs and videos taken at the scene, as well as the physical evidence collected by law enforcement, and prepared a written report on his findings and conclusions. Stuart testified regarding the blood stains on Tom's boxer shorts as follows:

> And my conclusions are that the spatters on the front of these boxer shorts were confirmed as impact spatters. . . . And this had me -- my conclusions then are these impact spatters are consistent with the wearer of these boxer shorts in proximity to the victim Jason Corbett when blows were struck to his head. The head being the source of the blood in this particular case.

. . . .

> With respect to the small spatters on the front underside of the left leg of the shorts, these were consistent with the wearer of the shorts close to and above the source of the spattered blood. To what extent, I can't really say. In order for the stains to get to that location on the inside of the leg, they would have to be traveling, you know, at least somewhat upward in order to do that. My conclusion there was the source of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.

In his report, he concluded, *inter alia*:

- . . . Multiple impacts to the source of blood occurred as the source of blood was descending to the floor. This resulted in the large accumulation of bloodshed in this area where the body of Jason Paul Corbett was discovered on the floor. . . .

  . . . .

- The Louisville Slugger baseball bat with blood transfer and hair fragments is consistent with having impacting [sic] the head of Jason Paul Corbett.

- The paving brick with blood transfer and hair fragments is consistent with having impacting [sic] the head of Jason Paul Corbett. The presence of transfer stains on all surfaces of the brick is not consistent with a single impact to his head.

Joann Lowry's testimony

Joann Lowry, one of Tom's co-workers, testified that during a conversation she had with Tom in 2015, Tom said, referring to Jason, "that son-in-law, I hate him."

II. Issues

After considering the parties' arguments and my partial concurrence in the majority opinion, I consolidate and structure my discussion of the issues as follows: whether the trial court erred by (1) excluding from evidence certain interview statements made by Sarah and Jack; (2) instructing the jury on the aggressor doctrine as to Tom's claims of self-defense and defense-of-others; (3) allowing into evidence certain

testimony by the State's blood spatter expert; (4) excluding from evidence Tom's testimony about a statement made by Michael Fitzpatrick; (5) striking Tom's testimony about a statement made by Molly during the altercation; (6) instructing the jury on the criminal liability theory of concerted action as to Molly; and (7) denying Tom a fair trial based on cumulative error.

The majority opinion addresses issues 1, 2, 3, 5, and 7, but does not address issues 4 and 6.

III. Discussion

1. Exclusion of the Children's Statements

Defendants contend that the trial court erred by excluding from evidence certain statements made by Sarah and Jack as inadmissible hearsay.

Before trial, Defendants moved to admit statements made by the children during 3 August 2015 interviews with a Union County Department of Social Services ("DSS") social worker[1] ("DSS Interviews") and 6 August 2015 interviews with a child forensic interviewer at the Dragonfly House ("Dragonfly House Interviews"), a child advocacy center, under several hearsay exceptions. The statements concerned the events surrounding Jason's killing as well as prior instances of Jason's violent conduct. Defendants also moved to determine the unavailability of Sarah and Jack. The State moved to exclude the statements.

The trial court conducted an evidentiary hearing on the motion during a special session of superior court on 8 and 9 June 2017, and continued to consider the admissibility of the proffered statements during the presentation of the evidence at trial. The trial court excluded the children's statements from evidence and entered a written order memorializing its ruling. The trial court found Sarah and Jack unavailable in that they were "beyond the jurisdiction and process" of the court. The trial court concluded the children's statements were inadmissible under Rule 803(4)'s medical diagnosis or treatment exception because "they were not intended to obtain a medical diagnosis or treatment" and "they were not pertinent to any medical diagnosis or treatment." The trial court further concluded the children's statements were inadmissible under Rule 803(24)'s residual exception because they "do not have circumstantial guarantees of trustworthiness."

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1. Defendants also moved to admit statements made by the children during 13 August 2015 interviews with a Davidson County DSS social worker. Defendants have made no argument on appeal that those statements were erroneously excluded and thus the issue is deemed abandoned. N.C. R. App. P. 28(a).

A. Rule 803(4)'s Medical Treatment or Diagnosis Exception

Defendants first contend that statements made by Sarah and Jack during their Dragonfly House Interviews were admissible under Rule 803(4)'s medical treatment or diagnosis hearsay exception.[2]

We review de novo a trial court's determination of the admissibility of an out-of-court statement pursuant to Rule 803(4). *State v. Norman*, 196 N.C. App. 779, 783, 675 S.E.2d 395, 399 (2009).

Rule 803(4) excepts from the general rule against hearsay[3]

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Id. § 8C-1, Rule 803(4) (2017). "This exception to the hearsay doctrine was created because of a 'patient's strong motivation to be truthful' when making statements for the purposes of medical diagnosis or treatment." *State v. Lewis*, 172 N.C. App. 97, 103, 616 S.E.2d 1, 4-5 (2005) (citing N.C. Gen. Stat. § 8C-1, Rule 803(4) official commentary (2003)).

In *State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663 (2000), our North Carolina Supreme Court created the following two-part inquiry to determine if statements are admissible under Rule 803(4): "(1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Id.* at 284, 523 S.E.2d at 667. "The first part of the inquiry seeks to determine the child's purpose in making the statement, not the interviewer's purpose in conducting the interview." *Lewis*, 172 N.C. App. at 103, 616 S.E.2d at 5 (*citing Hinnant*, 351 N.C. at 289, 523 S.E.2d at 671).

"[T]he proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the

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2. Defendants make no argument on appeal that the trial court erred in excluding under this exception statements made by the children at the DSS interviews; such argument is thus deemed abandoned. N.C. R. App. P. 28(a).

3. "'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) (2017). "Hearsay is not admissible except as provided by statute or by" the Rules of Evidence." *Id.* § 8C-1, Rule 802 (2017). There is no dispute that the statements at issue are hearsay.

declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 287, 523 S.E.2d at 669. In determining whether a child's statements are admissible under this exception, "the trial court should consider all objective circumstances of record surrounding declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 288, 523 S.E.2d at 670.

In *Hinnant*, statements made by a five-year-old alleged victim of sexual abuse were not admissible under Rule 803(4) where "there [was] no affirmative record evidence indicating that [the child's] statements were medically motivated and, therefore, inherently reliable." *Id.* at 290, 523 S.E.2d at 671. The child was interviewed by a clinical psychologist two weeks after an initial medical examination, but just prior to a follow-up examination by a medical doctor. The record did not "disclose that [the psychologist] or anyone else explained to [the child] the medical purpose of the interview." *Id.* at 289-90, 523 S.E.2d at 671. "In addition, the interview was not conducted in a medical environment. Instead, it was held in what [the psychologist] described at trial as a 'child-friendly' room, one in which all of the furniture was child-sized." *Id.* at 290, 523 S.E.2d at 671. "In [the Court's] view, such a setting did not reinforce to [the child] her need to provide truthful information." *Id.* Thus, the Supreme Court could not conclude that the child understood that the psychologist "was conducting the interview in order to provide medical diagnosis or treatment." *Id.* at 289, 523 S.E.2d at 671. Because the record failed to demonstrate that the child possessed the requisite intent when speaking with the psychologist, the child's statements "were not made for purposes of medical diagnosis or treatment." *Id.* at 290, 523 S.E.2d at 671. The trial court thus erred in admitting the statements under Rule 803(4). *Id.* at 290-91, 523 S.E.2d at 671.

In this case, Brandi Reagan, Executive Director of the Dragonfly House Children's Advocacy Center and certified child forensic interviewer, conducted interviews with Sarah and Jack. At trial, Reagan explained that when a child arrives at the Dragonfly House for an appointment, the child is met by a child advocate who "talks with th[e] nonoffending caregiver and the child about . . . people they are going to meet, every service they are going to receive[,] and what would happen at the end of the appointment." The child advocate tells the caregiver and the child "that they are there to receive a forensic interview and a medical exam. . . . [Y]ou are going to receive an interview and you will do these things in the interview; you will receive a medical exam and do these things in the medical exam."

Heydy Day, the child advocate in this case, testified, "I start off talking to the child and the caregiver saying, 'you will be talking with one of my friends today,' whether that's our interviewer Kim or interviewer Brandi, you will be talking to that lady." Day testified that she would tell the children that cameras would "record what you and her talk about because this is really important. This way I don't have to talk to all of these different people that you don't know." She further testified that she would tell the children that while they were talking with her friend, their caregiver would be talking to the doctor. Finally, she testified that she would tell the children, "Once you finish talking with Miss Kim or Miss Brandi and the doctor finishes talking with the caregiver, then the doctor will call you back to do a head to toe check-up of you."

Reagan testified that the Dragonfly House is housed in an old home and the forensic interviews took place in one of the bedrooms that was designed and decorated to be a "child-friendly" interview room. The interview room was separate from the medical examination room, but in the same facility. Sarah and Jack were not introduced to the physician or taken to a medical examination room until after they had completed their forensic interviews with Reagan.

At the beginning of the interview, Reagan introduced herself to Sarah in the following manner, "My name is Brandi, and it is my job to talk to you today, okay?" In response to Reagan's specific inquiry, "Tell me why you're here today[,]" Sarah responded, "Because my dad died."

Similarly, Reagan introduced herself to Jack in the following manner, "And Jack, my name is Brandi. And it's my job to talk to you today." In response to Reagan's specific inquiry, "Tell me why you're here[,]" Jack responded, "Um, my dad died, and people are trying – my aunt and uncle from my dad's side are trying to take away – take me away from my mom. And – that's why I'm here. My mom's trying to get custody over us." Toward the end of the interview, Reagan asked Jack, "And since you found out you were coming here, um, what has been in your mind?" Jack responded, "I was nervous at first, but then – and then my grandma and mom said everything's going to be fine. You're just going to ask me some questions, and they wanted me to tell the truth." Reagan then asked, "What do you want to happen now?" Jack responded, "Um, to be with my mom."

The objective circumstances of record surrounding each child's interview do not indicate that Sarah or Jack understood that the purpose of the interview was to gain information from them for their medical diagnosis or treatment. First, Sarah, almost 8, and Jack, almost 11, were both old enough to understand the purpose of the interview, and

they specifically indicated that they understood the purpose of the interview was to talk about their dad dying and, in Jack's case, to help his Mom get custody of Sarah and him. *Cf. Lewis*, 172 N.C. App. at 104, 616 S.E.2d at 5 (children aged 8 and 9 "were old enough to understand the interviews had a medical purpose, and they indicated as such" by "sign[ing] forms stating they understood that the registered nurse would share their statements with a medical doctor"). Recognizing the difficulty of determining whether a declarant understood the purpose of his or her statements, courts have attempted to infer a declarant's understanding from the surrounding circumstances. Here, however, no such inference is necessary as Sarah and Jack specifically articulated their understanding of the purpose of the interviews, which was something other than medical diagnosis and treatment. This record evidence alone leads to a conclusion that the children's statements were not medically motivated and, therefore, not inherently reliable.

The lack of inherent reliability in Sarah and Jack's statements is further demonstrated by additional surrounding circumstances. As in *Hinnant*, the interviews took place in a "child-friendly" room, not a medical examination room. Moreover, neither Reagan, a certified child forensic interviewer, nor Day, a child advocate, was a medical professional, and neither explained to Sarah or Jack a medical purpose for the interview or explained that their discussion would be shared with a doctor. To the contrary, Day explained that their *caregiver* would talk to the doctor while they were being interviewed and that *after* their interview they would receive a medical examination by a doctor; Reagan explained to each child that during their interview it was simply her job to talk to them. *Compare Hinnant*, 351 N.C. at 289-90, 523 S.E.2d at 671 (the Court could not conclude that the child understood the interviews were conducted in order to provide medical diagnosis or treatment where the record did not "disclose that [the psychologist] or anyone else explained to [the child] the medical purpose of the interview") *with Lewis*, 172 N.C. App. at 103-04, 616 S.E.2d at 5 (The record indicated that both children had the requisite intent to make their statements for a medical purpose where they "were both interviewed by a registered nurse, at least one of whom was wearing a nurse's uniform. . . . Both children signed forms stating they understood that the registered nurse would share their statements with a medical doctor. Both nurses testified that they also explained to the children their discussions would be shared with a doctor, who would then perform a medical examination.").

Accordingly, Defendants failed to affirmatively establish that Sarah or Jack had the requisite intent to make statements during the forensic

interview for purposes of obtaining medical diagnoses or treatment. Thus, the trial court properly concluded Sarah and Jack's statements made during the Dragonfly House Interviews were inadmissible under Rule 803(4)'s medical treatment or diagnosis exception. In light of this conclusion, I need not analyze whether either of the children's statements "were reasonably pertinent to diagnosis or treatment." *Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667.

B. Rule 803(24)'s Residual Exception

Defendants next contend that the trial court abused its discretion by excluding the children's statements made during their DSS Interviews and Dragonfly House Interviews because the trial court improperly concluded those statements lacked sufficient guarantees of trustworthiness to be admissible under Rule 803(24)'s residual exception.

"[A]dmissibility of hearsay statements pursuant to the 803(24) residual exception is within the sound discretion of the trial court." *State v. Smith*, 315 N.C. 76, 97, 337 S.E.2d 833, 847 (1985). Thus, a trial court's decision to admit or deny the admission of evidence under Rule 803(24) may be disturbed on appeal only where an abuse of such discretion is shown. *See id.* An abuse of discretion warranting reversal results only where the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Rollins*, 224 N.C. App. 197, 199, 734 S.E.2d 634, 635 (2012) (quotation marks and citation omitted).

North Carolina Rule of Evidence 803(24) provides that the following is not excluded by the rule against hearsay:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C. Gen. Stat. § 8C-1, Rule 803(24) (2017). "Because of the residual nature of the Rule 803(24) hearsay exception and the Commentary's warning that '[t]his exception does not contemplate an unfettered exercise of judicial discretion,' evidence proffered for admission pursuant to . . . Rule 803(24) . . . must be carefully scrutinized by the trial judge

within the framework of the rule's requirements." *Smith*, 315 N.C. at 91-92, 337 S.E.2d at 844. Thus, prior to admitting or denying hearsay evidence proffered under of the residual hearsay exception, the trial court must determine the following:

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003) (citing Smith, 315 N.C. at 91-98, 337 S.E.2d at 844-48).

Under the third part of this six-part test, the trial court must determine "whether the statement is trustworthy." *Id.*; *see* N.C. Gen. Stat. § 8C-1, Rule 803(24) (proffered hearsay statement must contain "circumstantial guarantees of trustworthiness" equivalent to those underpinning the remaining exceptions enumerated in Rule 803). "This threshold determination has been called 'the most significant requirement' of admissibility under Rule 803(24)." *Smith*, 315 N.C. at 93, 337 S.E.2d at 845.

In weighing the "circumstantial guarantees of trustworthiness" of a hearsay statement for purposes of Rule 803(24), the trial court must consider "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *State v. Triplett*, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986) (citing *Smith*, 315 N.C. 76, 337 S.E.2d 833). "Also pertinent to this inquiry are factors such as the nature and character of the statement and the relationship of the parties." *Triplett*, 316 N.C. at 11, 340 S.E.2d at 742 (citation omitted).

> None of these factors, alone or in combination, may conclusively establish or discount the statement's "circumstantial guarantees of trustworthiness." The trial judge should focus upon the factors that bear on the declarant at the time of making the out-of-court statement and should keep in mind that the peculiar factual context within which the statement was made will determine its trustworthiness.

Smith, 315 N.C. at 94, 337 S.E.2d at 845. "[I]f the trial judge examines the circumstances and determines that the proffered testimony does not meet the trustworthiness requirement, his inquiry must cease upon his entry into the record of his findings and conclusions, and the testimony may not be admitted pursuant to Rule 803(24)." *Id.*

"When ruling on an issue involving the trustworthiness of a hearsay statement, a trial court must make findings of fact and conclusions of law on the record." *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011) (citation omitted). "We are bound by findings of fact supported by competent evidence." *State v. Brown*, 339 N.C. 426, 438, 451 S.E.2d 181, 189 (1994) (citations omitted). "This holds true even if evidence exists 'from which a different conclusion could have been reached.' " *Brown*, 339 N.C. at 438, 451 S.E.2d at 189 (quoting *State v. Johnson*, 322 N.C. 288, 293, 367 S.E.2d 660, 663 (1988)).

On appeal, Defendants challenge the evidentiary sufficiency underlying the trial court's factual findings supporting its conclusion that "[t]he proffered statements do not have circumstantial guarantees of trustworthiness." I address each challenged finding in turn.

a. Factual Findings nos. 15 & 20

Factual findings 15 and 20, which address the trial court's consideration of "assurances of the [children's] personal knowledge of the underlying events," *Triplett*, 316 N.C. at 10, 340 S.E.2d at 742, state as follows:

> 15. The children's statements did not describe actual knowledge of the events surrounding the homicide of Jason Corbett. Jack identified the source of the information in his statements by saying "my mom told me" and "she (defendant Molly Corbett) told us." Sarah similarly described the source of her knowledge, saying the her grandmother "told [me] first and then her mother [told me]." When speaking of her "grandmother," Sarah was referring to the mother of defendant Molly Corbett and the wife of defendant Thomas Martens.
>
> . . . .
>
> 20. The statements of the children which the defense proffers were not made out of the personal knowledge of the declarant children but are instead double hearsay declarations of the defendant Molly Corbett and her mother.

These findings of fact are supported by the narrative of the DSS Interviews and the transcript of the Dragonfly House Interviews. The

DSS Interview narrative notes, "Sarah states her father screams and yells and states when her mom and dad goes into the room her dad hurts her mom. She stated her mom told her." The narrative also notes, "Sarah stated her mom told her when she was about six or seven that her dad hurt her mom."

In Reagan's Dragonfly House Interview with Sarah, Reagan told Sarah, "I want you to think about that day and tell me as much as you can possibly remember about that day when your dad died." Sarah responded,

> And then so in the nighttime at night, I was sleeping normally, and then this guy came upstairs I didn't know who it was. It was actually an officer. And me, my grandma and my brother were shut downstairs.

Later on, Sarah explained that on the night of the altercation, she fell asleep on the couch. Then, "my mom brought me up [to bed] – either my mom or my dad, I don't know." The following exchange then took place:

> [Reagan]: All right. So then the next thing you told me was that you were sleeping, and the next thing you know, a guy came into the room, and he was an officer, and it was about 4 a.m.
>
> [Sarah]: Um-hmm. Yeah, and all I knew - at first I thought he was my grandpa, and then I thought it was my bald - but I didn't have a bald grandpa, but I thought my grandpa got bald for some reason. And then I knew it was an officer.

Reagan questioned Sarah about any violence she had witnessed between Molly and Jason prior to the evening of Jason's death. Sarah stated that Jason would hurt Molly. When asked if Sarah saw Jason hurt Molly, Sarah said, "No, not really ever, but one time I saw him step on her foot." Reagan followed up by asking, "So when you said that he would fight with her and he would hurt her, you said you didn't really see it, how would you know about it?" Sarah responded, "Because, um, my mom told me."

When Sarah was explaining how she knew what transpired during the fatal altercation, she said, "my grandma told me at first, because she said – she said, like – she said that, like, um, they were having a fight, and then grandpa went upstairs." Reagan then asked, "At any time during the night, did you wake up or hear anything that was going on that night?" Sarah responded, "No. I don't know what happened because I had – I was just being a hard sleeper that night."

Later in the interview, the following exchange took place:

> [Reagan]: Okay. What would happen when you do wake up during the night?
>
> [Sarah]: I would go downstairs because I usually had a nightmare. But I think what caused my dad being really mad that night was because, um, my mom kept on coming upstairs because I - like I have fairies on my bed, and I really get scared of those things, because they like look like spiders and lizards on my bed. So that's why my mom had to keep on coming up. I couldn't fall asleep until my mom put another sheet on my bed, and then my dad got mad.
>
> [Reagan]: Okay. So you told me that you had fallen asleep downstairs and someone carried you upstairs. Did you wake up at any point after that?
>
> [Sarah]: Nope.
>
> [Reagan]: Okay. So you said your mom had to put another sheet on. How did you know that?
>
> [Sarah]: Because before I went to sleep, she - because I woke up, like, in the middle – like not in the middle, but like – I'm sorry I said that I didn't wake up.

In Reagan's interview with Jack, Reagan asked him, "How did your dad die?" Jack responded:

> Okay. Well, my sister had a nightmare about insect crawling – she had fairy blankets and insects all over her bed. That was a nightmare, though. And my dad got very mad, and he was screaming at our mom, and my mom screamed, and my grandpa came up and started to hit him with a bat. And then my dad grabbed hold of the bat – grabbed – held the bat and hit my grandpa with the bat, until my mom put a – put – we were going to paint a brick that was in there, like a cinder block, and it hit his temple, right here, and he died.

When Reagan followed up by asking, "Um, now you said your sister had a nightmare. How did you know that?" Jack responded, "My parents – my mom told me." When asked on several occasions to recount details about Jason's alleged prior behavior, Jack could not remember details,

admitted he "[didn't] actually remember[,]" or stated that he knew about an event because his mom or grandma told him. At the end of the interview, Reagan asked, "And just to make sure I understand, how did you find out that your mom hit [your dad] with a brick and your grandpa hit him with a bat?" Jack responded, "She told me."

These exchanges provide competent evidence to support the factual findings that the children's "statements did not describe actual knowledge of the events surrounding the homicide of Jason" and "were not made out of the personal knowledge of the declarant children but are instead double hearsay declarations of the defendant Molly Corbett and her mother."

b. Factual Finding no. 21

Factual finding 21, which addresses the trial court's consideration of "the [children's] motivation to speak the truth or otherwise," *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742, states as follows:

> 21. These same statements were not made at a time when the children were motivated to speak the truth but were rather motivated to affect future custody arrangements - specifically the children feared that they were going to be "taken away from their mother" and removed to another country by their father's relatives.

The Dragonfly House Interviews were set up on 3 August—the same day the DSS Interviews took place—by the Davidson County DSS and Child Protective Services. Molly was not permitted to be present at the Dragonfly House Interviews, but she signed a consent form allowing the interviews to be conducted. Between 3 and 6 August, Sarah and Jack stayed in Molly's brother's home in Union County with their grandmother, Sharon—Molly's mother and Tom's wife. During that time, Molly spent time with the children while actively pursuing custody of them—filing petitions for guardianship and stepparent adoption on 4 August, and obtaining an ex parte temporary custody order on 5 August based on her allegation that Jason's sister was coming to the United States to take the children back to Ireland with her.

On the morning of 6 August, a funeral service was held for Jason. The children attended the service with Molly and Sharon. Immediately following the service, Sharon drove Sarah and Jack to the interview at the Dragonfly House. Reagan was apparently unaware that Jason's funeral service had been held that morning until Jack told her as much near the end of his interview.

Sarah indicated to Reagan that she had "heard people talk about my aunt trying to come get us, trying to come get me and my brother. . . . And that's why at the funeral, I had to (indiscernible) my mother – my mom's hand the whole time." Reagan clarified, "You had to hold your mom's hand the whole time?" Sarah responded, "Yes."

Reagan asked Jack, "And you said that your aunt and uncle want custody of you. How did you learn that?" Jack replied, "My mom and my grandma told me." Reagan asked, "What did they say?" Jack responded, "They said, Jack, at the service they're going to try to take you away. They're trying to get you and Sarah and trying to get all of your dad's stuff and bring him back to Ireland for a funeral."

The unique circumstances under which these interviews took place fully support the trial court's finding that Sarah and Jack's statements "were not made at a time when [they] were motivated to speak the truth but were rather motivated to affect future custody arrangements" in that "the children feared that they were going to be 'taken away from their mother' and removed to another country by their father's relatives."

c. Factual Finding no. 22

Factual finding 22, which addresses the trial court's consideration of whether the children ever recanted the statements, *Triplett*, 316 N.C. at 11, 340 S.E.2d at 742, states as follows:

> 22. The statements of the children that are offered by the defense as pertinent to the relationship between Molly Corbett and Jason Corbett have been specifically recanted. Sarah Corbett . . . recanted her statements in diary entries made after her return to Ireland. Jack Corbett recanted his statements in diary entries and during a recorded interview with members of the District Attorney's Office.

To undermine the trustworthiness of the statements made by Sarah and Jack, the State proffered a 27 May 2016 videotaped Skype interview of Jack that occurred in the home of Tracy and David Lynch[4] in Ireland and was conducted by a Davidson County District Attorney, as well as copies of journal entries allegedly written by Sarah and Jack dating from January to March 2017.

During Jack's videotaped Skype interview, he stated that Molly told Sarah and him what to say during their forensic interviews while Molly

4. Tracy Lynch, Jason's sister, and her husband David are Sarah and Jack's aunt and uncle, and were awarded custody of the children after Jason's death.

and their grandmother were driving the children to the Dragonfly House on 6 August 2015. Jack stated that Molly told them what happened during the fatal altercation, about Jason choking her and Tom coming upstairs to defend her with a bat, and "to tell the DA." Jack also stated that Molly was "making up . . . stories about [Jason], saying that he was abusive, and she started saying if you don't lie [she would] never see [us] again." Jack further explained that Molly "was telling [Sarah and him] to say that [Jason] was abusive and saying that he was very mean to Molly." Jack stated, "I didn't tell the truth at Dragonfly. I didn't tell the truth [during the DSS Interview]."

Sarah's diary entries include statements indicating that Molly had told Jack and her to say that Jason hit and yelled at Molly; that Molly would punch herself; that Molly told her that Jason had killed Sarah's mom by putting a pillow over her mouth; and that Molly punched Jack. To the extent that Sarah had personal knowledge of violent episodes between Jason and Molly, the entry that Molly had told Jack and her to say that Jason hit and yelled at Molly tends to recant Sarah's prior assertion.

Thus, this evidence supports the trial court's finding of fact that the children's statements at the DSS and Dragonfly House Interviews "that are offered by the defense as pertinent to the relationship between Molly Corbett and Jason Corbett have been specifically recanted."

As the findings of fact are supported by competent evidence, they are thus conclusive and binding on appeal. *Brown*, 339 N.C. at 438, 451 S.E.2d at 189 (quotation marks and citation omitted). "This holds true even if evidence exists from which a different conclusion could have been reached." *Id.* (quotation marks and citation omitted).

Based on these findings, the trial court made the following conclusions:

> 11. The court is not assured of the personal knowledge of the declarants as to the underlying events described in that both children identified the source of their knowledge being nothing more than statements of a defendant and that defendant's mother. The declarations contain no reference to seeing, hearing or perceiving anything about the events described except these statements of others.
>
> 12. The court is not assured of the children's motivation to speak the truth, but instead finds the children were motivated, in the near immediate aftermath of the death of their father, to preserve a custody environment with the only mother-figure they could remember having known

> during their lives. The children appear to have known that if they were not in the custody of defendant Molly Corbett they would be taken to live in the Republic of Ireland with relatives of their father.
>
> 13. The proffered statements were specifically recanted and disavowed.
>
> 14. The proffered statements do not have circumstantial guarantees of trustworthiness. Further, this court having concluded the statements are not trustworthy, the court need not continue to the additional prongs of the Smith analysis.

The findings support the trial court's conclusions of law, including the conclusion that "[t]he proffered statements do not have circumstantial guarantees of trustworthiness." Based on the record before this Court, the trial court's determination that the children's statements were not admissible under Rule 803(24) was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Rollins*, 224 N.C. App. at 199, 734 S.E.2d at 635 (quotation marks and citation omitted). Accordingly, the trial court did not abuse its discretion in determining that the children's statements were not admissible under Rule 803(24) and excluding the statements as inadmissible hearsay.

C. Instances of Jason's Anger and Violent Character

Although I conclude the trial court did not err in excluding the children's statements, I nonetheless address Tom's argument that "the trial court erred in excluding the statements . . . because they offered instances of Jason's anger and violent character."

Evidence of an individual's character is generally inadmissible to prove he "acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2017). A criminal defendant may, however, introduce evidence of a victim's pertinent character traits. N.C. Gen. Stat. § 8C-1, Rule 404(a)(2). Nonetheless, "[w]hether character evidence is admissible under Rule 404(a)(2) is merely a threshold inquiry, separate from the determination of the method by which character may be proved, which is governed by Rule 405." *State v. Bass*, 371 N.C. 535, 543, 819 S.E.2d 322, 327 (2018). "Under Rule 405, character may be demonstrated by evidence of specific instances of conduct only in cases 'in which character or a trait of character of a person is an essential element of a charge, claim, or defense.' " *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 405(b)). "Otherwise, character may be proved only 'by testimony

as to reputation or by testimony in the form of an opinion.' " *Id.* (quoting N.C. Gen. Stat. § 8C-1, Rule 405(a)).

"Although under Rule 404(a)(2), evidence of a violent character is admissible to prove circumstantially that the victim was the aggressor, Rule 405(b) limits the method by which that fact may be proved." *Bass*, 371 N.C. at 544, 819 S.E.2d at 327. "[W]ith regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts." *Id.*[5]

At trial, Tom argued that the excluded statements "were primarily being offered on the issue of who was the aggressor . . . ." Tom further offered, "in particular, Jack's statements about what he saw and what he witnessed and what he heard, as well as Sarah's, . . . that that would be relevant to the issue of aggressor." However, with regard to Tom's claim of self-defense and defense of others, evidence of Jason's specific acts may not be used to prove circumstantially that Jason was the aggressor. *Id.* at 544, 819 S.E.2d at 327. Accordingly, the trial court's exclusion of the children's statements regarding Jason's prior violent behavior was not erroneous.

3. Aggressor Doctrine

Tom next argues that the trial court erred by instructing the jury on the aggressor doctrine as to his claims of self-defense and defense of others because there was no evidence that Tom was the aggressor.

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

A trial court's jury instructions should be "a correct statement of the law and . . . supported by the evidence." *State v. Conner*, 345 N.C. 319, 328, 480 S.E.2d 626, 629 (1997). The aggressor doctrine provides that a defendant may not receive the benefit of self-defense if he was

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5. *Bass* was decided by our Supreme Court during the pendency of this appeal and overruled this Court's decision in *State v. Bass*, 253 N.C. App. 754, 802 S.E.2d 477 (2017), wherein we stated that "[e]vidence of specific instances of a victim's character, known or unknown to the defendant at the time of the crime, may be relevant in establishing that the victim was the aggressor when defendant claims self-defense[,]" *id.* at 768, 802 S.E.2d at 485-86 (emphasis, quotation marks, and citation omitted), and held that defendant was entitled to present evidence of specific instances of conduct which demonstrated the victim's violent behavior under Rule 405(b). *Id.* at 768, 802 S.E.2d at 486.

the aggressor. *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016). Likewise, a defendant may not receive the benefit of defense of others if he was the aggressor. *See State v. Phifer*, 165 N.C. App. 123, 129, 598 S.E.2d 172, 176 (2004) ("The elements of self-defense are applicable to the defense of others."). Furthermore, "[a] person is entitled under the law of self-defense to harm another only if he is without fault in provoking, engaging in, or continuing a difficulty with another." *State v. Effler*, 207 N.C. App. 91, 98, 698 S.E.2d 547, 552 (2010) (internal quotation marks and citations omitted). An individual is the aggressor if he or she "aggressively and willingly enters into a fight without legal excuse or provocation." *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971). Moreover, "even if his opponent starts a fight, a defendant who provokes, engages in, or continues an argument which leads to serious injury or death may be found to be the aggressor." *State v. Lee*, 258 N.C. App. 122, 126, 811 S.E.2d 233, 237 (2018) (citations omitted).

"[W]hen reviewing a trial court's denial of a defendant's request to exclude the aggressor instruction from the jury instruction on self-defense, the appellate court does not consider the evidence in a light favorable to the defendant, as it is the province of the jury to resolve any conflict in the evidence in that regard." *Id.* at 127, 811 S.E.2d at 237 (citations omitted). Thus, where conflicting evidence was presented as to which party was the initial aggressor when a person claims self-defense, instructing the jury on the aggressor doctrine is proper. *See, e.g.*, *State v. Cannon*, 341 N.C. 79, 83, 459 S.E.2d 238, 241 (1995) ("On the evidence before it, the trial court properly allowed the triers of fact to determine that defendant was the aggressor."); *State v. Terry*, 329 N.C. 191, 199, 404 S.E.2d 658, 662-63 (1991) ("Although defendant's evidence does not support the aggressor instruction, the State's evidence supports it. By instructing jurors on the aggressor qualification, the trial court allowed the triers of fact to determine which testimony to believe.").

Tom argues that "the only accounts given of the incident leading to [Jason's] death were [Tom's] testimony, and [Molly's] written statement. No contradictory evidence was introduced by the State." In his brief, Tom recites as follows:

> [Tom] describes being awakened in the middle of the night by a commotion upstairs. He proceeded upstairs in his underwear and shirt, carrying a bat for protection in anticipation of a potential confrontation. Once he ascertained that the commotion originated from his daughter's bedroom, he entered to find [Jason] strangling [Molly]. [Tom] testified about what he saw when he entered the

> bedroom, his initial fear that [Jason] would kill [Molly] and his stated intention to do just that. He testified about his fear that [Jason] would kill him after he wrestled the bat from [Jason's] grasp. Finally, he testified about his fear after regaining control of the bat that [Jason] would continue to try to kill both [Molly] and him if he did not take action.

The State argues, however, that the circumstantial and physical evidence contradicts Molly and Tom's testimonial evidence, thus allowing the jury to conclude that Molly and Tom's version of events was not true. The State specifically argues that "the comparison o[f] the injuries to Jason (extreme) and the injuries to the two Defendants (none apparent or shown)" was sufficient evidence to support the aggressor instruction.

Jason suffered multiple blunt force injuries, including "ten different areas of impact on the head, at least two of which had features suggesting repeated blows indicating a minimum of [twelve] different blows to the head. Additionally, he had a few other injuries elsewhere on his body, the torso and extremities." On the other hand, while Alphin and Bent observed redness on the left side of Molly's neck, Dillard observed Molly "rubbing her neck . . . in a scrubbing motion-type thing" and Young testified that he saw Molly "continually tug[] and pull[] on her neck with her hand." This evidence could allow a jury to conclude that the redness on Molly's neck was self-inflicted and not a result of Jason's strangulation. Tom had no visible injuries.

While the disparity of the injuries in this case does not provide direct evidence that Tom was the initial aggressor, it provides evidence from which the jury could determine that Molly and Tom's version of events was not true. *See State v. Mumma*, 372 N.C. 226, 242, 827 S.E.2d 288, 298 (2019) (concluding that defendant could not show that, absent instructions on the aggressor doctrine, the jury would not have rejected his claim of self-defense where "the record contains no physical evidence tending to validate defendant's otherwise unsupported claim to have acted in self-defense and does contain substantial physical evidence tending to undercut his self-defense claim including, but not limited to, the evidence that [the victim] sustained defensive wounds to her hand, that she had sustained stab wounds that had been inflicted from the rear, and that the wounds that defendant sustained were much less severe than the wounds that had been inflicted upon [the victim]"); *State v. Presson*, 229 N.C. App. 325, 330, 747 S.E.2d 651, 656 (2013) ("Further, the lack of injuries to defendant, compared to the nature and severity of the wounds on [the victim] at his death, is sufficient evidence from which a jury could find that defendant was the aggressor . . . .").

Moreover, the State presented the following evidence: (1) one of Jason's head wounds was inflicted after he was dead; (2) the blood spatter indicated that Jason's head was struck as it was descending and/or was near the ground; (3) the toxicology report from Jason's body showed the presence of the drug Trazodone, which induces sleep; (4) Jason was naked and unarmed when the altercation occurred in his bedroom at 3:00 am; (5) the children, who were sleeping in their bedrooms up the stairs from Jason and Molly's bedroom, were undisturbed; (6) EMS and law enforcement responders noticed upon their arrival that some of the blood on Jason's body had dried; (7) one paramedic testified that Jason's body felt cool, and asked another paramedic, "How long did you say they waited before they called 911[?]"; (8) Tom told a co-worker he hated Jason.

Although the evidence could allow a jury to determine that Tom armed himself with a baseball bat when he heard a commotion on the floor above, and came to Molly's defense when he saw Jason choking her,[6] the evidence could also allow a jury to determine that Tom armed himself with a baseball bat and aggressively and willingly entered into the fight with Jason without legal excuse or provocation. As conflicting evidence was presented as to whether Tom was the initial aggressor, the trial court did not err in instructing the jury on the aggressor doctrine as to Tom.

4. Blood Spatter Expert Testimony

Defendants next argue that the trial court erred by admitting into evidence certain testimony by the State's blood spatter expert, Stuart James. Specifically, Defendants argue that the testimony regarding stains on the underside of the hem of Tom's boxer shorts should have been excluded as unreliable under North Carolina Evidence Rule 702(a) because it was not "the product of reliable principles and methods reliably applied to the facts of the case[.]"

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quotation marks and citations omitted). "An objection made only during a hearing out of the jury's presence prior to the actual introduction of the testimony

6. Tom correctly notes, "In this case, all the evidence and testimony entitled [Tom] to a jury instruction on self-defense." Such instruction is not at issue here.

is insufficient." *State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737-38 (2016) (internal quotation marks and citation omitted). Moreover, "[t]he admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Walters*, 357 N.C. 68, 104, 588 S.E.2d 344, 365 (2003) (internal quotation marks and citations omitted).

During James' voir dire examination, Defendants objected to James' conclusions that the stains on Tom's boxer shorts were impact blood spatter arising from blunt force strikes to Jason's head while he was on the ground as unreliable because (1) those particular stains never underwent blood testing, presumptive or confirmatory, so James could not state with scientific certainty that they were blood; (2) James never viewed a photograph of Tom wearing the boxer shorts, so he could not state with certainty the position of Tom's body when those stains occurred; and (3) James based his conclusions that the stains were "very characteristic of blood spatter" and "likely created during the same event" as the confirmed blood stains on the shorts based solely on his visual observation of "their location, size, shape[,] and distribution." The trial court overruled Defendants' objections, concluding that James' testimony was based on sufficient facts and data, was the product of reliable principles and methods with which he is familiar and with which others in his field are familiar, and that James had applied those principles to the facts.

At trial, James testified without objection as follows:

> With respect to the small spatters on the front underside of the left leg of the shorts, these were consistent with the wearer of the shorts close to and above the source of the spattered blood. To what extent, I can't really say. In order for the stains to get to that location on the inside of the leg, they would have to be traveling, you know, at least somewhat upward in order to do that. My conclusion there was the source of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.

Although Defendants objected on reliability grounds during voir dire to the introduction of James' challenged testimony, Defendants failed to object to the testimony when it was elicited by the State at trial. As Defendants did not object when the State elicited the testimony before the jury, Defendants failed to preserve the alleged error for appellate review. *Snead*, 368 N.C. at 816, 783 S.E.2d at 738. Moreover,

the unchallenged admission of James' testimony "waive[d] prior or subsequent objection to the admission of evidence of a similar character." *Walters*, 357 N.C. at 104, 588 S.E.2d at 365.

Furthermore, because Defendants failed to specifically and distinctly allege plain error in their briefs, they have waived their right to have this issue reviewed on appeal under the plain error standard. *See* N.C. R. App. P. 10(a)(4); *State v. Joyner*, 243 N.C. App. 644, 648, 777 S.E.2d 332, 335 (2015). Accordingly, Defendants' argument should be dismissed.

5. Fitzpatrick Statement

Defendants next argue that the trial court erred by excluding a statement allegedly made to Tom by the late Michael Fitzpatrick, the father of Jason's deceased first wife, Margaret. Specifically, Defendants argue that the trial court erroneously determined the statement was inadmissible hearsay and erroneously concluded the statement should be excluded under Rule 403.

Tom sought to introduce a statement allegedly made to him by Fitzpatrick to help illustrate Tom's state of mind during the altercation. Tom offered in voir dire that in an interview he gave his employer on 20 August 2015, he related that he had asked Fitzpatrick at some point in time what he thought of Jason. Tom stated that his "memory was [Fitzpatrick] said, 'I think he killed my daughter.' " Tom further explained in the interview, "I don't know if that was a bitter man, he needed someone to blame for his daughter's death or he had any basis for this."

In response in voir dire, the State proffered the coroner's report "finding that Mr. Fitzpatrick's daughter had died of an asthma attack"; testimony from Jason's family of the good relations with Fitzpatrick; and a statement Fitzpatrick gave, before he passed away, to the Solicitor's Office in Ireland, averring, "I can also state categorically that we never discussed my daughter Margaret or the circumstances of her death nor did I inform [Tom] that Jason had killed my daughter Margaret. Such statements by [Tom] are totally and utterly untrue and mischievous." The State further argued that, despite the fact that Tom, a lawyer with 30 years' FBI experience, was interviewed by law enforcement about the incident on 2 August 2015 – the day the incident occurred and 18 days prior to the interview he gave his employer – and offered, " 'perhaps it would be helpful if I just kind of launched into a story . . . because it will contribute to my state of mind[,]' " Tom did not mention Fitzpatrick's statement at that interview.

Tom's attorney responded in voir dire, "Just so we think it is relevant for state of mind, we do think we are not saying indeed that's what was heard. We are saying it was his state of mind . . . ."

In ruling on the admissibility of Fitzpatrick's statement, the court announced:

> All right. I have carefully considered the alleged statement of Mr. Fitzpatrick with respect to the cause of Margaret Corbett's death. I have considered the totality of the circumstances relating to this hearsay statement. The self-serving nature of it, and in my discretion I have determined under Rule 403 that the probative value of this evidence substantially is outweighed by the danger of unfair prejudice, confusion of the issues[,] and misleading to the jury, so I will not permit the statement of Mr. Fitzpatrick through [Tom].

A. Hearsay Determination

Tom first argues that the trial court erred as a matter of law in concluding that Mr. Fitzpatrick's statement was hearsay as the statement was not being offered to prove the truth of the matter asserted but was instead being offered to show Tom's state of mind. Tom misinterprets the court's ruling.

Although in announcing its ruling the trial court referred to "this hearsay statement[,]" the plain language of the court's ruling indicates that the trial court did not exclude Fitzpatrick's statement under Rule 802 because it was hearsay,[7] but instead excluded the statement, in its discretion, after conducting a balancing test under Rule 403. Had the court concluded the statement was hearsay, and excluded it as such, it would not have engaged in a 403 balancing test. *See State v. Brown*, 335 N.C. 477, 486-87, 439 S.E.2d 589, 595 (1994) ("Assuming, *arguendo*, that the statements were not hearsay and that they had relevance when presented in this manner, we note that they are still subject to exclusion if their 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' " (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (1992)).

B. 403 Balancing

Tom further argues that the trial court erroneously excluded the statement under Rule 403 because the court "fundamentally misunderstood

7. "Hearsay is not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802.

the highly probative purpose for which it was offered." (Original in all capital letters). "Despite [Tom's] several clarifications that the [] [s]tatement was offered for state of mind and not to prove its truth," the argument continues, "the trial court incorrectly concluded that the statement was hearsay." "The trial court then excluded the testimony under Rule 403, concluding that potential for prejudice, confusion of the issues, and misleading the jury outweighed the probative value of the testimony." Tom thus concludes, "Such a conclusion indicates that the trial court did not understand the testimony would be offered for non-hearsay purposes."

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2017). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403 (2017). The trial court's decision to exclude evidence under Rule 403 is reviewed on appeal for abuse of discretion. *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008). An abuse of discretion results only when "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." *Id.* (quotation marks and citations omitted).

The substance of Tom's argument concerning the trial court's Rule 403 analysis repeats and amplifies his argument that the trial court erred in concluding the statement was hearsay. However, as indicated above, the trial court did not exclude Fitzpatrick's statement under Rule 802 because it was hearsay, but instead excluded the statement, in its discretion, after conducting a balancing test under Rule 403.

The trial court could reasonably have concluded that the statement was only weakly, or not at all, probative of Tom's fear and apprehension of Jason. According to Tom's own explanation, Fitzpatrick's statement had little, if any, effect on Tom's fear and apprehension of Jason where Tom himself questioned the veracity and basis of the statement. Additionally, in the 2 August 2015 interview, when Tom was forthcoming with a detailed explanation of the events leading up to and including the altercation " 'because it will contribute to my state of mind[,]' " Tom's omission of Fitzpatrick's statement further indicates the statement had little, if any, effect on Tom's state of mind as to his fear and apprehension of Jason. On the other hand, given the nature of the accusation that Jason killed his first wife, the trial court could have concluded there was a strong danger of unfair prejudice and confusion of the issues.

The record shows that the trial court conducted a lengthy voir dire hearing on the admissibility of the evidence, weighed the probative value of the evidence against the possibility of unfair prejudice, and specifically found that "the probative value of this evidence substantially is outweighed by the danger of unfair prejudice, confusion of the issues[,] and misleading to the jury[.]" The trial court's ruling was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision[,]" *id.*, and thus, the trial court properly exercised its discretion in excluding Fitzpatrick's statement. *See State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995).

6. Molly's Statement

Defendants next argue that the trial court erred by striking Tom's testimony that he heard Molly scream, "Don't hurt my dad[,]" during the altercation. Citing *State v. Everett*, 178 N.C. App. 44, 630 S.E.2d 703 (2006), Defendants argue that Molly's statement was offered to illustrate the reasonableness of Tom's fear and apprehension of Jason—a necessary element of self-defense and defense of others—and was not inadmissible hearsay.

Even assuming, *arguendo*, that the trial court erred by sustaining the State's objection, Tom cannot show that he was prejudiced by the error.

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

N.C. Gen. Stat. § 15A-1443(a) (2017).

Tom testified in detail about the altercation prior to when he heard Molly scream. During this testimony, he indicated three separate times that he was scared. Immediately prior to the stricken testimony, Tom testified that Jason had just shoved him across the bed. Tom then testified, "And that's -- you know, if I can get any more afraid, that was it."

Tom had already testified about circumstances illustrating the reasonableness of his fear and apprehension, and Molly's statement—made after the altercation had been well underway—was of mild, if any, additional value. Defendants' bare assertion on appeal that the "error significantly prejudiced" them does not meet their burden of showing "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *Id.*

7. Acting in Concert

Molly argues that the trial court erred by instructing the jury on the criminal liability theory of acting in concert. Molly further argues that the trial court's acting in concert instruction was incomplete and misleading, and thus prejudicially erroneous, because the trial court failed to provide the parenthetical explanation on the "mere presence" component of acting in concert.

A. Acting in Concert Charge

Molly argues the trial court erred by instructing the jury on acting in concert because there was no evidence that she shared a common plan or purpose with Tom to kill Jason.

As a threshold matter, I first address the State's argument that this issue has not been properly preserved for appellate review because, although Molly objected at the charge conference to the acting in concert instruction, Molly "failed to renew the objection" "after the jury charge was completed[.]"

However, "[o]ur Supreme Court has held, and we reiterate, that when a party has objected to proposed jury instructions during a charge conference, and the trial court has considered and denied the request, that the party need not repeat its objections after the jury charge is given." *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 633, 627 S.E.2d 249, 254 (2006) (citing *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984)). Therefore, by objecting to the proposed acting in concert instruction at the charge conference and receiving a ruling on her objection, Molly has properly preserved this issue for appeal. We review a properly preserved challenge to the trial court's decision regarding jury instruction de novo. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"The trial court must instruct the jury on the law arising on the evidence." *State v. Simpson*, 230 N.C. App. 119, 123, 748 S.E.2d 756, 760 (2013) (quotation marks and citation omitted). In order to support a jury instruction on acting in concert, the State must present sufficient evidence that the defendant was "present at the scene of the crime" and acted "together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395 (1979). Thus, "[o]ne of the essential elements of acting in concert is that there is evidence of a common plan or purpose." *State v. Williams*, 299 N.C. 652, 657, 263 S.E.2d 774, 778 (1980).

While "[i]t is not . . . necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principal[,]" *Joyner*, 297 N.C. at 357, 255 S.E.2d at 395, "[e]vidence that a defendant did some act forming a part of the crime charged, when considered together with evidence that others also did acts leading to the crime's commission, strongly indicates that the defendant was acting in concert with others to commit the crime charged." *State v. Diaz*, 317 N.C. 545, 547, 346 S.E.2d 488, 490 (1986). Moreover, evidence that a defendant was engaged with another pursuant to a common plan or purpose may be found from the circumstances in which the incident occurred. *State v. Kaley*, 343 N.C. 107, 110, 468 S.E.2d 44, 46 (1996).

The altercation took place in Molly's bedroom at approximately 3:00 am when Jason was naked and unarmed. It is undisputed that Molly was present at the scene while Tom repeatedly hit Jason in the head with a baseball bat. During this time, by her own admission, Molly tried to hit Jason in the head with a brick, and the evidence supports a finding that Molly did in fact hit Jason in the head with a brick. This is evidence from which the jury could conclude that Molly and Tom were engaged in a common plan or purpose. Accordingly, the trial court did not err by instructing the jury on acting in concert.

B. Delivery of Acting in Concert Charge

Molly further contends that the trial court's acting in concert instruction was prejudicially erroneous because the trial court failed to instruct that "[a] defendant is not guilty of a crime merely because the defendant is present at the scene[.]"

The pattern jury instruction for acting in concert reads as follows:

> For a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit (*name crime*), each of them, if actually or constructively present, is guilty of the crime (and also guilty of any other crime committed by the other in pursuance of the common purpose to commit (*name crime*), or as a natural or probable consequence thereof.)
>
> (A defendant is not guilty of a crime merely because the defendant is present at the scene, even though the defendant may silently approve of the crime or secretly intend to assist in its commission. To be guilty the defendant must aid or actively encourage the person committing

> the crime, or in some way communicate to another person the defendant's intention to assist in its commission.)

N.C.P.I.—Crim. 202.10 (2017) (footnotes omitted). "While not mandatory, these instructions serve as a guide for judges on how a jury should be instructed concerning a particular crime." *State v. Lineberger*, 115 N.C. App. 687, 691, 446 S.E.2d 375, 378 (1994). Moreover, "[o]ptional language is contained in parentheses. The optional parenthetical phrases should be given only when warranted by the evidence." N.C.P.I. Introduction, III. User's Guide, *Use of Brackets*, *Parentheses*, *and Type Styles* (June 2016).

Again, the evidence shows that Tom hit Jason in the head with a baseball bat. Molly admitted that she tried to hit Jason in the head with a brick, and the evidence supports a finding that Molly did in fact hit Jason in the head with a brick. Thus, the evidence did not show that Molly was "merely" present at the scene but instead showed that Molly actually aided Tom at the scene. As the optional parenthetical instruction on "mere presence" was not warranted by the evidence, it was not erroneously omitted. Moreover, given the evidence that Molly was not "merely" present at the scene, even if the trial court had erroneously omitted the "mere presence" instruction, Molly cannot show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a); *see State v. Malachi*, 371 N.C. 719, 738, 821 S.E.2d 407, 421 (2018) (applying the harmless error standard to an alleged error in a jury instruction).

8. Cumulative Error

Tom next argues that, should this Court conclude that no single error was prejudicial, the cumulative effect of the errors nevertheless was sufficiently prejudicial to require a new trial. "Cumulative errors lead to reversal when 'taken as a whole' they 'deprived [the] defendant of his due process right to a fair trial free from prejudicial error.' " *State v. Wilkerson*, 363 N.C. 382, 426, 683 S.E.2d 174, 201 (2009) (quoting *State v. Canady*, 355 N.C. 242, 254, 559 S.E.2d 762, 768 (2002)). Although Tom has contended to this Court that numerous errors were made during trial, I have found only one instance of potential error, which was nonprejudicial. This nonprejudicial error did not deprive Tom of his due process right to a fair trial.

IV. Conclusion

I conclude that Defendants received a fair trial, free from prejudicial error.

STATE v. DRAVIS

[269 N.C. App. 617 (2020)]

STATE OF NORTH CAROLINA
v.
FRED GEORGE DRAVIS, DEFENDANT

No. COA18-76-2

Filed 4 February 2020

Satellite-Based Monitoring—lifetime monitoring—warrantless search—furtherance of State's legitimate interests

Reconsidering its prior opinion in light of *State v. Grady*, 372 N.C. 509 (2019), the Court of Appeals reached the same decision: imposition of lifetime satellite-based monitoring upon defendant did not constitute a reasonable warrantless search.

Appeal by Defendant from order entered 7 July 2017 by Judge Reuben F. Young in Wake County Superior Court. Originally heard in the Court of Appeals 8 August 2018. By opinion filed 4 September 2018, this Court reversed the trial court's order.

By order entered 6 September 2019, our Supreme Court remanded for reconsideration in light of its opinion in *State v. Grady*, ___ N.C. ___, 831 S.E.2d 542 (2019).

Attorney General Joshua H. Stein, by Special Deputy Attorney General L. Michael Dodd, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for the Defendant.

DILLON, Judge.

We reconsider our prior opinion in light of *State v. Grady*, ___ N.C. ___, 831 S.E.2d 542 (2019). Our prior opinion can be found at *State v. Dravis*, ___ N.C. App. ___, 817 S.E.2d 796 (Table) (2018).

After careful consideration of *Grady*, we conclude that the findings of the trial court are not sufficient to support a conclusion that the imposition of lifetime satellite-based monitoring (SBM) constitutes a reasonable warrantless search under the Fourth Amendment, as we concluded in our prior opinion. The State did not provide sufficient evidence to show how the efficacy of SBM furthered a legitimate interest of the State; e.g. to help solve sex offense crimes. Therefore, our decision

remains unchanged. The order of the trial court imposing lifetime SBM on Defendant is reversed.

REVERSED.

Judges INMAN and MURPHY concur.

STATE OF NORTH CAROLINA,
v.
BRANDON SCOTT GOINS, DEFENDANT

No. COA19-288

Filed 4 February 2020

1. Criminal Law—prosecutor's closing argument—criticizing plea of not guilty—right to fair trial—violated

Defendant was entitled to a new trial on attempted murder and related charges where, at closing arguments, the prosecutor violated defendant's constitutional right to a fair jury trial by criticizing his choice to plead not guilty to attempted murder, stating that defendant was refusing to take responsibility for his actions and that he only pleaded guilty to the worst charge against him because he knew the other charges carried less jail time.

2. Criminal Law—prosecutor's closing argument—reference to prior appellate decision—improper

At a trial for attempted murder, the prosecutor acted improperly at closing arguments by describing the facts of a prior appellate decision in a similar case (upholding the trial court's finding that a defendant acted with premeditation and deliberation), asserting the facts were weaker than the facts against defendant in the current case, and implying that the jury should convict defendant on that basis.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 21 September 2018 by Judge Christopher W. Bragg in Cabarrus County Superior Court. Heard in the Court of Appeals 5 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Catherine F. Jordan, for the State.

Joseph P. Lattimore for defendant-appellant.

MURPHY, Judge.

Criminal defendants have an absolute constitutional right to plead not guilty and be tried by a jury of their peers. U.S. Const. amend. VI; N.C. Const. art. I, § 24. Our caselaw is unequivocal that the right to enter a plea of not guilty encompasses the right to be free from condemnation in front of a jury for making that choice. A defendant's right to a fair trial is abridged by a prosecutor's complaints before a jury during closing argument about the defendant's decision to plead not guilty, and that is exactly what happened here. During her closing argument the prosecutor condemned Defendant, Brandon Scott Goins, for pleading not guilty and in doing so violated Defendant's right to receive a fair trial. We order a new trial.

BACKGROUND

This appeal concerns a violation of Defendant's constitutional right to receive a fair trial. More specifically, our resolution of the appeal is exclusively focused on the prosecutor's closing argument, wherein the alleged violation occurred. Defendant was convicted by a jury of two counts of assault with a deadly weapon on a law enforcement officer, one count of possession of a firearm by a felon, and one count of attempted first-degree murder, and sentenced to consecutive presumptive prison terms of 33 to 52 months, 17 to 30 months, 207 to 261 months, and 33 to 52 months. As our analysis is solely focused on the content of the prosecutor's closing argument, we include the relevant facts in our analysis.

ANALYSIS

A. Closing Argument

"The standard of review when a defendant fails to object at trial [to an allegedly improper closing argument] is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*." *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998). "To merit a new trial, 'the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair.' " *State v. Phillips*, 365 N.C. 103, 136, 711 S.E.2d 122, 146 (2011) (quoting *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 (2002)).

1. Defendant's Decision to Plead Not Guilty

[1] "[A] criminal defendant possesses an *absolute* constitutional right to plead not guilty and be tried before a jury, and should not and [can] not be punished for exercising that right." *State v. Thompson*, 118 N.C. App. 33, 41, 454 S.E.2d 271, 276 (1995) (emphasis in original) (internal quotation marks omitted). "[T]here are no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *State v. Ladd*, 308 N.C. 272, 284, 302 S.E.2d 164, 172 (1983) (internal quotation marks omitted). Accordingly, "[r]eference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923 (1997). Here, we are presented with a closing argument that rendered the proceedings fundamentally unfair and requires a new trial.

During closing argument, the State repeatedly brought up Defendant's failure to plead guilty: "Might ask why would [Defendant] plead not guilty? I contend to you that the defendant is just continuing to do what he's done all along, refuse to take responsibility for any of his actions. That's what he does. He believes the rules do not apply to him." Later, the State returned to Defendant's plea, stating, "[Defendant's] not taking responsibility today. There's nothing magical about a not guilty plea to attempted murder. He's got to admit to all the other charges. You see them all on video. The only thing that's not on video is what's in his head. He also knows that those other charges carry less time. There's the magic."

"No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "[P]rosecutorial argument complaining a criminal defendant has failed to plead guilty and thereby put the State to its burden of proof is no less impermissible than an argument commenting upon a defendant's failure to testify." *Thompson*, 118 N.C. App. at 41, 454 S.E.2d at 276. Here, the prosecutor's closing argument complaining about Defendant's decision to plead not guilty violates Defendant's right to receive a fair trial and necessitates a new trial.

2. Argument Regarding a Previous Appellate Decision

[2] In addition to the argument regarding Defendant's decision to plead not guilty, the prosecutor's closing argument was impermissible for a second reason. "It is not permissible argument for counsel to read, or

otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his [side] in the case on trial." *State v. Simmons*, 205 N.C. App. 509, 514, 698 S.E.2d 95, 100 (2010). Such impropriety is only grounds for a new trial where the prosecutor's use of the other case is prejudicial, i.e. where "the prosecutor's improper argument led the jury to believe that it *was compelled* to return a verdict of guilty in [the immediate] case . . . ." *Id.* at 517, 698 S.E.2d at 102.

Here, the prosecutor acted impermissibly when she stated: "I told you I was going to mention a North Carolina Court of Appeals case, it's State versus Haynesworth . . . ." After describing the facts of *Haynesworth* and the trial court's finding that, there, the defendant acted with premeditation and deliberation, the prosecutor offered, "I raise that [case] because I contend [it] is much weaker than ours." We need not decide whether this part of the prosecutor's closing argument was prejudicial such that it requires a new trial—our Constitution requires a new trial solely based on the prosecutor's argument regarding Defendant's not guilty plea—but we take this opportunity to unequivocally restate that such an argument has no place in a closing argument. The prosecutor's decision to flaunt this well-settled rule was improper.

B. Defendant's Other Arguments

In addition to his argument regarding the State's closing argument, Defendant asserts two arguments we need not address on appeal. First, he argues the trial court committed plain error by failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter, and, second, he argues the trial court committed plain error by permitting Lieutenant Smith to comment on Defendant's guilt or innocence and interpret video footage to corroborate witness testimony. Because our analysis of Defendant's other argument requires a new trial, we need not reach these arguments. *See*, *e.g.*, *State v. Long*, 196 N.C. App. 22, 41, 674 S.E.2d 696, 707 (2009) ("As we are granting defendant's request for a new trial, and the other issues he has raised may not be repeated in a new trial, we will not address his other [arguments on appeal].").

CONCLUSION

The prosecutor in this case violated Defendant's constitutional right to receive a fair trial when she improperly commented on his decision to plead not guilty.

NEW TRIAL.

Judge YOUNG concurs; Judge TYSON dissents.

TYSON, Judge, dissenting.

The majority's opinion grants Defendant a new trial based upon unobjected to statements in the prosecutor's closing argument. Without objection, Defendant could not have presented any constitutional argument to the trial court that his right to a fair trial was violated. Defendant's failure to assert this argument waives that argument on appeal. N.C. R. App. P. 10(b)(1).

Any review of the prosecutor's closing argument is limited to N.C. Gen. Stat. § 15A-1230 (2019). Defendant has not shown prejudicial error in the jury's verdict or the judgment entered thereon to be awarded a new trial. I respectfully dissent.

I. Background

Brandon Scott Goins ("Defendant") was placed on probation for felonious trafficking in opium or heroin and absconded supervision. Law enforcement officers learned Defendant was staying at a Kannapolis hotel. Kannapolis Police Detective Trey Hinton and other officers travelled to the hotel to arrest Defendant. Defendant was armed and engaged in a shoot-out with Detective Hinton, who fired his service weapon between twelve to fourteen times. Thirteen shell casings were recovered from the hotel's hallway.

The State's evidence tended to show Defendant fired his gun four times during the encounter. Defendant was injured during the shoot-out and subsequently apprehended. At trial during Detective Hinton's testimony, the State played a video of the incident recorded by the hotel's security system for the jury. The State also offered the testimony of Lieutenant Justin Smith who narrated the hotel video before the jury.

The State presented other evidence tending to show that shortly before the day of the shooting, Defendant had shown his grandmother and uncle a gun, had purchased ammunition for the gun and told them that the bullets would penetrate a bullet proof vest. The State also introduced testimony that Defendant told his uncle that the gun had "cop-killer" bullets.

Defendant was convicted by a jury of two counts of assault with a deadly weapon on a law enforcement officer, one count of possession

of a firearm by a felon, and one count of attempted first-degree murder. Defendant appealed.

II. Jurisdiction

This Court possess jurisdiction over Defendant's appeal as a matter of right pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court committed plain error by (1) permitting Lieutenant Smith to comment on Defendant's purported guilt or innocence and to interpret video footage to corroborate witness testimony and (2) failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter. Defendant also argues the prosecutor's closing argument to the jury was improper.

IV. Standard of Review

The Supreme Court of North Carolina has prohibited appellate review of and dismissed unpreserved or waived issues, but allowed limited "review [of] unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996); N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

If the defendant has failed to object to the challenged evidence or instructions, any appellate review is limited to plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). A defendant must specifically and distinctly argue for plain error review. *Id.*

V. Analysis

A. Narration

Defendant argues Lieutenant Smith did not observe any of the incidents in the hotel's hallway and the trial court committed reversible error by allowing him to "narrate" the tapes and state what the tapes showed. In *State v. Buie*, this Court held it was error for the trial court to allow the police detective's testimony about the depiction of two poor quality surveillance videos. *State v. Buie*, 194 N.C. App. 725, 732, 671

S.E.2d 351, 355 (2009). "Rather than identifying a type of wound in a still photograph, Detective Welborn offered his opinion, at length, about the events depicted in the surveillance tapes, concluding that the video corroborated the female's testimony. . . . The testimony offered by Detective Welborn was not a shorthand statement of facts, but rather an inadmissible lay opinion testimony that invaded the province of the jury." *Id.*

However, in *Buie*, the Court also held the error was not prejudicial to warrant a new trial, given the amount of other overwhelming evidence of that defendant's guilt offered to the jury. *Id.*

Here, Defendant failed to object to Lieutenant Smith's testimony. Under limited plain error review and considering the overwhelming evidence of Defendant's guilt, Defendant cannot show prejudice to be awarded a new trial on this issue. *See id.*

B. Lesser-Included Offenses

Defendant argues the trial court committed plain error by failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter. Defendant did not request an instruction on any lesser-included offense and Defendant did not object to the proposed instructions at the charge conference. Defendant "failed to object to the challenged instruction at trial, and thus, any error must be reviewed under the plain error rule." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

To support an instruction on attempted voluntary manslaughter, there must be some evidence to support that Defendant acted in the heat of passion and without malice. Defendant cites *State v. McConnaughy*, 66 N.C. App. 92, 95, 311 S.E.2d 26, 29 (1984), for the proposition that "[a]n actual threatened assault on the defendant constitutes sufficient provocation to induce the heated state necessary" to reduce the offense. Defendant argues the video shows so much smoke that it is possible Detective Hinton fired first at Defendant.

"[A] defendant is not entitled to an instruction on a lesser included merely because the jury could possible believe some of the State's evidence, but not all of it." *State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). Defendant was not entitled to an instruction on the lesser-included offense of attempted voluntary manslaughter.

The State presented more than sufficient evidence that Defendant shot first at Officer Hinton and had claimed his gun was loaded with "cop killer" bullets to penetrate a bullet-proof vest. No evidence was presented of any heat of passion to negate malice, premeditation and deliberation. Further, Defendant has not and cannot show that any purported

error was prejudicial under plain error review to warrant a new trial. Defendant's arguments are waived and properly dismissed.

C. Closing Arguments

1. Waiver of Constitutional Challenge

Rule of Appellate Procedure 10(b)(1) and long-standing and controlling precedents foreclose Defendant from raising constitutional challenges for the first time on appeal. *See, e.g.*, *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985); *State v. Wilson*, 363 N.C. 478, 484, 681 S.E.2d 325, 330 (2009); *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011).

The majority's opinion misstates the conclusion and precedent in *State v. Phillips*. In *Phillips*, as in the present case, the defendant did not preserve a constitutional argument. *Phillips*, 365 N.C. at 135, 711 S.E.2d at 145. Our Supreme Court analyzed the case in regard to a violation of N.C. Gen. Stat. § 15A-1230. *Id.*

The Supreme Court first recognized that since the defendant had not objected to any of the prosecutor's arguments below, then "no constitutional argument could have been presented to the trial court." *Id.* The Court next recognized a defendant's "failure to raise a constitutional issue at trial generally waives that issue for appeal." *Id.* The Court only proceeded to review the purported errors for a violation of N.C. Gen. Stat. § 15A-1230, and not for any purported and unasserted constitutional claim of error. *Id.*

2. Limitations on Argument to the Jury

N.C. Gen. Stat. § 15A-1230(a) provides that in closing arguments:

> an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

This statute binds all trial counsel in criminal trials and compels compliance therewith as officers of the court.

"Generally, 'prosecutors are given wide latitude in the scope of their argument' and may 'argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " *Goss*, 361 N.C. at 626, 651 S.E.2d at 877 (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687,

709-10 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996)), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008).

Our Supreme Court has stated, "a criminal defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates his constitutional right to a jury trial." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 923, (internal citations omitted), *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997).

However, contrary to the conclusion of the majority's opinion, presuming this assertion has merit does not either *ipse dixit* or *ipso facto* end the inquiry and analysis, it is merely the beginning. Defendant's failure to object imposes an even greater burden on him to show prejudice to be awarded a new trial in the face of overwhelming evidence of his guilt.

"[W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, our standard of appellate review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Only where this Court "finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." *Id.* (emphasis supplied).

The Supreme Court of the United States held: "it is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986) (citation and internal quotation marks omitted). The "relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (citation and internal quotation marks omitted).

The prosecutor's complaints about Defendant's demand for a trial are improper and satisfy the first prong of *Huey*, 370 N.C. at 179, 804 S.E.2d at 469. Counsel is admonished for referring to or questioning Defendant's exercise of his right to a trial by jury.

Moving to the second prong, the inquiry is whether the prosecutor's improper statement "impede[s] the defendant's right to a fair trial." *Id.* Only where the defendant demonstrates "prejudice will this Court conclude that the error merits relief." *Id.* Where overwhelming evidence of the defendant's guilt exists, our appellate courts "have not found statements that are improper [in and of themselves] to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470.

During her closing argument, the prosecutor recited the evidence presented including Defendant avoiding his probation officer, possessing a gun as a convicted felon, and pulling and firing a gun on Officer Hinton in the hallway of the hotel full of people. She relayed the evidence offered that Defendant set up his shot and fired at Officer Hinton.

The jury had heard testimony that Defendant had acquired "cop-killer" bullets, and viewed a videotape showing him shoot at Officer Hinton. The State presented overwhelming evidence of Defendant's guilt. Defendant cannot show the prosecutor's improper statements overcome this evidence to "amount to prejudice and reversible error." *Id.*

3. N.C. Gen. Stat. § 7A-97

Defendant also argues the prosecutor's closing argument violated N.C. Gen. Stat. § 7A-97 (2019). In her closing argument, the prosecutor stated:

> I told you I was going to mention a North Carolina Court of Appeals case, it's State v. Haynesworth, and in that case an officer responded to just a disturbance call. And the suspect was unhappy that he was there, and so he decides he's gonna fight the officer, and then he decides he's gonna go for the officer's gun. So while they're struggling with each other, the defendant puts his hands on the officer's gun and shoots and it hits part of the officer's hand. In that case, the court found that, when the suspect grabbed the officer's gun, he discharged it and struck the hand with the bullet, that was premeditation and deliberation. I raise that because I contend that case is much weaker than ours.

N.C. Gen. Stat.§ 7A-97 provides "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." This rule

> grants counsel the right to argue the law to the jury which includes the authority to read and comment on reported cases. There are, however, limitations on what portions of these cases counsel may relate. For instance, counsel may . . . not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client.

State v. Gardner, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986) (citations omitted).

Here, the prosecutor's attempt to analogize the facts along with the holding in *State v. Haynesworth*, 146 N.C. App. 523, 553 S.E.2d 103, (2001), was improper. *See State v. Anthony*, 354 N.C. 372, 430, 555 S.E.2d 557, 594 (2001) (holding the "defendant's attempt to read the facts from *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338, along with the holding in that case for the purpose of urging the jury to not find the especially heinous, atrocious, or cruel aggravating circumstance was improper").

However, and as in *State v. Gardner*, presuming the trial court's failure to intervene without any objection from Defendant was error, Defendant "must nevertheless show that this error was prejudicial." *Gardner*, 316 N.C. at 613, 342 S.E.2d at 877.

The statutory test for prejudicial error in matters not affecting asserted and preserved constitutional rights is whether "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (2019).

For reasons discussed in the unpreserved issues raised above and given the overwhelming evidence of Defendant's guilt and the prosecutor's other proper arguments, Defendant has failed to show he was so prejudiced to warrant a new trial. *See State v. Degraffenried*, __ N.C. App. __, __, 821 S.E.2d 887, 890 (2018) (holding where the evidence against the defendant was overwhelming, the defendant "failed to show the prosecutor's comments were so prejudicial to render [his] trial fundamentally unfair"), *review dismissed*, __ N.C. __, 830 S.E.2d 835 (2019).

V. Conclusion

If a defendant or his counsel believes the State's argument is improper, they are obliged to speak and object to preserve the error for appellate review. "When [a] defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

The State's evidence of Defendant's guilt was overwhelming and unrefuted. Defendant has failed to object and has not shown plain error in the trial court's permitting a witness to narrate the video footage to corroborate another witness' testimony and failing to instruct the jury on the lesser-included offense of attempted voluntary manslaughter.

While the prosecutor's comments to the jury were arguably improper under the statute, Defendant has failed to show the prosecutor's comments were so prejudicial to render Defendant's trial fundamentally unfair to warrant a new trial, or in the alternative, to now assert reversible error in any purported failure of the trial court to intervene on its own in the absence of any objection. *Id.*

Defendant received a fair trial, free from preserved or prejudicial errors. I find no prejudicial error in the jury's verdicts or in the judgment entered thereon to award a new trial. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
BRANDON ALAN PARKER

No. COA19-521

Filed 4 February 2020

1. Firearms and Other Weapons—possession of a firearm by a felon—sufficiency of evidence—circumstantial

The State presented sufficient evidence to convict defendant of possession of a firearm by a felon where defendant admitted to being present at the scene of the crime the morning that the victim was shot (which was confirmed by defendant's cell phone records), a witness identified defendant from a photo array as the armed suspect he saw when the shooting occurred, and witnesses' descriptions of the suspect were consistent with defendant's appearance.

2. Appeal and Error—preservation of issues—constitutional argument—made for first time on appeal

Where defendant failed to raise a constitutional objection to the prosecutor's misstatements about evidence during his trial for possession of a firearm by a felon—that prosecutorial misconduct denied him the right to a fair trial—he waived the issue for appeal.

3. Criminal Law—prosecutor's closing arguments—factual misstatements—no objection

Where defendant failed to object to factual misstatements by the prosecutor during closing arguments—that the suspect had a chest tattoo, when the trial testimony only showed that defendant had a chest tattoo—defendant failed to demonstrate that the trial court

abused its discretion by failing to intervene ex mero motu. While the prosecutor's misstatements may have given the jury greater confidence that defendant was the suspect, it was not enough to cause the jury to reach a different result.

Appeal by defendant from judgment entered 12 June 2018 by Judge Ebern T. Watson, III in Sampson County Superior Court. Heard in the Court of Appeals 8 January 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

Michael E. Casterline for defendant-appellant.

TYSON, Judge.

Brandon Alan Parker ("Defendant") appeals from a jury's verdict convicting him of possession of a firearm by a felon. We find no error.

I. Background

Four men from Jacksonville, North Carolina drove to Garland, North Carolina on the morning of 5 March 2015 intending to purchase marijuana. Michael Harbin drove his mother's black Toyota Camry vehicle, with Carlos James and Derrick Copeland as passengers. A fourth man followed Harbin, driving a Ford Explorer vehicle. Copeland had set up the drug purchase from Jafa McKoy in Garland.

The men arrived in Garland between 10:00 and 10:30 a.m. The driver of the Explorer parked at a nearby apartment complex and stayed with that vehicle. Harbin, James, and Copeland drove down a side road to a house located at 90 Sugar Hill Lane, in an area of Garland with a reputation for drug trafficking. They observed two men. Copeland recognized McKoy standing in front of the porch, while another man was observed sitting on the porch. McKoy introduced the other man as "P." Neither Copeland nor Harbin knew or had met "P."

McKoy told the three men the marijuana was not present, so they went to buy cigarettes at a nearby gas station. They left the gas station at 11:13 a.m. and returned to Sugar Hill Lane, after a quick stop at the Explorer. They again saw McKoy and "P," but also saw a compact car and a third man, not previously present.

McKoy told Copeland the marijuana was inside the compact car. Copeland gestured to Harbin to accompany him and both men started

walking towards the compact car. As they walked, Harbin turned and saw the unknown third man behind him.

James was left inside Harbin's mother's Camry with its keys. "P" jumped off the porch holding a revolver and moved towards the Camry. McKoy held a gun, turned towards Copeland and Harbin, and shot at them. Copeland and Harbin escaped by running into the woods, without knowing what had happened to James.

Copeland and Harbin returned to the Explorer, still parked with its driver at the nearby apartment complex, and the three men rode back to Sugar Hill Lane looking for James. They could not find him and returned to the gas station at 11:49 a.m. After trying to contact James by phone and failing to reach him, Harbin called the police at 12:24 p.m.

Freddie Stokes, a resident of the house at 90 Sugar Hill Lane, returned home around 12:30 p.m. He saw a body in his driveway and a parked black vehicle beside the body. Stokes called the police around 12:33 p.m. The police found James laying on his back. He had been shot once in the back of the head and was dead. The police found no money in James' pockets or in his wallet.

Police showed Harbin two photographic line-ups of eight photos at the police station that afternoon. Harbin identified McKoy in the first set of photos. Harbin was unable to identify a suspect from the second set of photos.

Copeland's probation officer showed him a photographic line-up of eight photos four days after James' murder on 9 March 2015. He identified Defendant's photograph as a suspect for the man introduced by McKoy as "P" with 85 to 90 percent confidence. He also identified another man's photograph as a suspect with 60 percent confidence.

North Carolina State Bureau of Investigation Agent William Brady ("Agent Brady") interviewed Defendant nearly two weeks after James' death on 18 March 2015 at the request of the Sampson County Sheriff's Office. Defendant was provided his *Miranda* rights and initially told Agent Brady he was not present at Sugar Hill Lane in Garland on 5 March 2015. Approximately seventeen minutes into the interview, Defendant admitted he was present at that address on that morning. Defendant told Agent Brady he had arrived at 90 Sugar Hill Lane, which he called "the dope hole," early in the morning, but asserted he had left by 8:30 or 9:00 a.m. that morning.

Defendant denied seeing a black car while there but did see a gray car among several cars with people coming to and going from the area.

He denied any knowledge of the men from Jacksonville or of the drug deal Copeland had arranged with McKoy.

Defendant also repeatedly denied killing anyone or being present when someone was killed. At some point during the interview, Defendant admitted to Agent Brady: "Maybe they saw me on the porch." Defendant told Agent Brady he drove north to his cousin's house in Newton Grove after he had left Sugar Hill Lane.

Defendant was indicted for first-degree murder, possession of a firearm by a felon, two counts of assault with a deadly weapon with intent to kill, robbery with a deadly weapon, two counts of attempted robbery with a deadly weapon, and attaining habitual felon status.

At trial, the State presented testimony from Jane Peterson, who had been dating Defendant at or about the time of James' death. Peterson described Defendant's appearance at the time: he "had a beard, cut close" and had a tattoo on his arm and one on his face.

During Peterson's *voir dire* testimony, while the jury was not present, the trial court heard arguments about a photograph of Defendant which the State sought to have admitted for illustrative purposes. The State argued for its admission into evidence:

> Your Honor, I have just asked Ms. Peterson how Mr. Parker appeared back in March of 2015 as opposed to how he appears today or any other time, and she's described him as having a beard, tattoos. Your Honor, other witnesses have described the man on the porch having a beard. A witness testified that he -- the man on the porch had a tattoo on his chest. Your Honor, and, as I have said, it would illustrate her testimony.

The State could not specify who took the photograph or when it was taken but gave the court assurances that Peterson had verified it was a fair and accurate representation of how Defendant had appeared in March 2015. Defendant objected on several grounds, including the lack of a proper foundation and that the photograph was more prejudicial than probative under N.C. R. Evid. 403.

The trial court conducted a *voir dire* of Peterson's testimony and ruled the photograph would be admissible for illustrative purposes only. The State moved to admit the evidence upon the jury's return. Defendant objected and the trial court overruled Defendant's standing objection and admitted the photograph for illustrative purposes only. The State

asked Peterson to show the photograph to the jury and confirm it was consistent with Defendant's appearance in March 2015.

The State obtained a probable cause search warrant for Defendant's cell phone records on 18 March 2015. The State tendered and the trial court accepted a Federal Bureau of Investigation special agent, Michael Sutton ("FBI Agent Sutton"), as an expert witness on historical cell site analysis and cellular technology. FBI Agent Sutton testified Defendant's phone was being used in an area of Garland which includes Sugar Hill Lane from approximately 8:09 to 9:57 a.m. on 5 March 2015. From 9:57 to approximately 11:38 a.m., Defendant's phone was not in use and no location could be identified.

Defendant's phone was once again located by the same cell tower in Garland at 11:38 a.m., but was then north/northwest of its previous location, towards Clinton. By 11:49 a.m., Defendant's phone was located in Clinton, not Newton Grove. FBI Agent Sutton testified he did not analyze Defendant's cell site records past 11:49 a.m.

Defendant moved to dismiss all charges for insufficiency of the evidence at the close of the State's presentation of its case. The trial court found the State had presented insufficient evidence tending to show Defendant possessed the specific intent to kill under a theory of acting in concert and dismissed the counts of assault with a deadly weapon with intent to kill. The trial court denied Defendant's motion to dismiss the remaining charges. Defendant did not testify or present any evidence at trial.

The jury found Defendant guilty of possession of a firearm by a felon. The jury found Defendant not guilty of the remaining charges. Defendant stipulated and pled guilty to attaining habitual felon status. The trial court determined Defendant was a Prior Record Level V offender and sentenced Defendant as a habitual felon to an active term of 105 to 138 months in prison. Defendant gave notice of appeal in open court.

II. Jurisdiction

This Court possesses jurisdiction over Defendant's appeal from judgment as a matter of right pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issues

Defendant argues the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon for insufficient

evidence. Defendant also argues the State misrepresented evidence before the trial court and made false and misleading statements to the jury during closing arguments, which deprived him of a fair trial.

IV. Motion to Dismiss

A. Standard of Review

> The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence.

State v. Weakley, 176 N.C. App. 642, 651, 627 S.E.2d 315, 321 (2006) (citation omitted).

B. Analysis

[1] Defendant argues the trial court erred in denying his motion to dismiss all charges for insufficient evidence. The State's eyewitnesses did not provide a positive identification of Defendant at trial. Defendant asserts the other evidence connecting him to James' death was circumstantial and insufficient. Viewing the evidence in the light most favorable to the State, we disagree.

Defendant argues the State offered insufficient direct evidence, and the State's circumstantial evidence raised only conjecture that Defendant was the same man McKoy had identified as "P." This argument discounts the materiality of circumstantial evidence on a trial court's ruling on a motion to dismiss and our standard of review on appeal.

> The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial, or both. *Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.* If a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in

> combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

State v. McDaniel, 372 N.C. 594, 603-04, 831 S.E.2d 283, 290 (2019) (emphasis supplied) (citations, alterations, and internal quotation marks omitted).

Presuming, *arguendo*, but without deciding the State offered no direct evidence that Defendant was the man identified by McKoy as "P," the State's case survives a motion to dismiss with sufficient circumstantial evidence to support a reasonable inference of Defendant's guilt. *See id.*

To support the trial court's denial of Defendant's motion to dismiss the remaining charges, Defendant voluntarily admitted he was present at 90 Sugar Hill Lane on the morning of James' death, and that he might have been seen by Copeland, Harbin, and James on the porch with McKoy. Defendant's cell phone was located in Garland near the scene close to the approximate time of the incident.

Copeland identified Defendant from a photo array as the armed suspect on the porch and present at the scene with "85 to 90 percent" confidence. Copeland testified "P" had a "beard, brown skin, [and a] tattoo on the upper cheek," and estimated he was about 6'2" tall and weighed about 240 pounds. Harbin testified "P" was wearing a hat, had a beard, and "was like a burley dude, like a kind of bigger dude."

The State also presented testimony from Jane Peterson, Defendant's girlfriend at the time of the incident. She described Defendant's appearance at the time: he "had a beard, cut close" and had one tattoo "on his arms and one on his face."

Although this evidence may not rule out every hypothesis of Defendant's innocence, that is not the State's burden on Defendant's motion to dismiss. *Id.* at 604, 831 S.E.2d at 290. The evidence is sufficient to support a reasonable inference of Defendant's guilt, when viewed in the light most favorable to the State. *See id.* The trial court correctly ruled the State presented sufficient evidence to submit the remaining charges to the jury. Defendant's argument is overruled.

V. Prosecutorial Misconduct

Defendant argues he is entitled to a new trial because prosecutorial misconduct denied him a fair trial. Defendant argues the State made false statements about testimonial evidence on four occasions during the trial: once while arguing for the admission of the

photograph of Defendant for illustrative purposes, and three times during closing argument.

Arguing for the admission of the photograph, the prosecution stated, "a witness testified that he -- the man on the porch had a tattoo on his chest." Although Defendant's girlfriend, Peterson, had just testified to this fact about Defendant, no witness had testified to this description of "P." The prosecution mentioned witness' testimony that "P" had a chest tattoo three more times during closing arguments. The prosecution twice attributed this alleged testimony to Copeland, who never testified that "P" had a chest tattoo.

A. Constitutional Right to a Fair Trial

[2] Our Supreme Court has stated the Fourteenth Amendment to the Constitution of the United States guarantees that "[e]very person charged with a crime has an absolute right to a fair trial. . . . It is the duty of both the court and the prosecuting attorney to see that this right is sustained." *State v. Williams*, 362 N.C. 628, 638, 669 S.E.2d 290, 298 (2008) (citation omitted). "The district attorney owes honesty and fervor to the State and fairness to the defendant in the performance of his duties as a prosecutor." *State v. Britt*, 288 N.C. 699, 710, 220 S.E.2d 283, 290 (1975).

However, "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); *see also* N.C. R. App. P. 10(a). Defendant did not raise a constitutional objection to any of the prosecutor's misstatements that a witness testified "the man on the porch had a tattoo on his chest."

Defendant's counsel objected to the admissibility of the photograph on multiple grounds during arguments outside the presence of the jury but made no constitutional arguments. Defendant argued the State had not laid a proper foundation for the photograph, and the danger of prejudice to Defendant by its admission substantially outweighed its probative value under N.C. R. Evid. 403. Defendant's counsel did not object on any grounds, constitutional or otherwise, to the prosecutor's statement to the court outside the presence of the jury that a "witness testified that . . . the man on the porch had a tattoo on his chest."

Defendant failed to object to any statements made during the State's closing arguments. Defendant's constitutional argument was not "raised and passed upon in the trial court" and so we do not consider this asserted basis on appeal. *Id.* Because Defendant's arguments also raise

the distinct issue of improper closing arguments, we proceed to review that issue separately.

B. Closing Argument

1. Standard of Review

[3] The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). Prosecutors' arguments must be devoid of appeals to passion or prejudice. *Id.* at 135, 558 S.E.2d at 108.

Our Supreme Court also cautioned that an appellate court should "not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976). "[F]or an inappropriate prosecutorial comment to justify a new trial, it must be sufficiently grave that it is prejudicial error." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992) (citation and internal quotation marks omitted).

2. Analysis

In North Carolina it is well settled that counsel is allowed wide latitude in the argument to the jury. Even so, counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. A prosecutor must present the State's case vigorously while at the same time guarding against statements which might prejudice the defendant's right to a fair trial.

State v. Hill, 311 N.C. 465, 472-73, 319 S.E.2d 163, 168 (1984) (citations and internal quotation marks omitted).

Later that year after the opinion in *Hill* was filed, our Supreme Court in *State v. Huffstetler* further expounded: "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E.2d 110, 122 (1984).

"The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of the accused." *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978).

If Defendant or his counsel believes the State's argument is improper, they are obliged to speak and object to preserve the error for appellate review. Our Supreme Court cautioned:

> When [a] defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.

State v. Richardson, 342 N.C. 772, 786, 467 S.E.2d 685, 693 (1996).

Here, the State argued to the jury on three occasions during closing arguments that eyewitness testimony described "P" as having a chest tattoo, when the only testimony at trial about a chest tattoo had been in reference to Defendant. Defendant argues the State's case was "exceedingly thin" and was based solely on Copeland's and Harbin's identifications of Defendant as "P." As such, Defendant asserts these three misstatements rise to the level of prejudicial error to award a new trial.

Defendant correctly quotes the State's closing argument as stating the "bottom line in this case" was: "Who is the man on the porch?" Defendant has not carried the burden of showing the repeated, mistaken invocation of supposed eyewitness testimony that "P" had a chest tattoo was so grossly improper "as would be likely to influence the verdict of the jury." *Covington*, 290 N.C. at 328, 226 S.E.2d at 640. The chest tattoo

was not the sole characteristic the State relied on to identify Defendant as "P." The eyewitness testimony describing "P" was also consistent with Defendant's height, frame, skin color, beard, and other tattoos. The State's misstatements may have given the jury greater confidence in identifying Defendant as "P," but Defendant has failed to show that the jury would have reached a different verdict without the three misstatements.

As noted, the prosecution's comments erroneously summarized the evidence and were improper. However, Defendant has also failed to show the remarks were so grossly or extremely improper for us to conclude the trial judge "abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *Richardson*, 342 N.C. at 786, 467 S.E.2d at 693. Defendant's arguments are overruled.

VI. Conclusion

When viewed in the light most favorable to the State, including the reasonable inferences thereon, the State presented sufficient evidence for all the remaining charges including possession of a firearm by a felon to be submitted to the jury. The trial court properly denied Defendant's motion to dismiss the charges submitted to the jury.

Defendant failed to raise a constitutional question or object at trial with respect to the prosecution's misstatements about eyewitness testimony. Without objection from Defendant, the State's closing argument was not prejudicial error to award a new trial. Defendant has also failed to show any error in the trial court's discretionary and asserted failure to intervene *ex mero motu*.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no prejudicial error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges DILLON and MURPHY concur.

STATE OF NORTH CAROLINA
v.
MYLEICK SHAWN PATTERSON, DEFENDANT

No. COA18-1082

Filed 4 February 2020

1. Appeal and Error—notice of appeal—failure to comply with appellate rules—writ of certiorari—criminal and civil judgments

Where defendant failed to comply with the appellate rules in appealing a criminal judgment finding him guilty of financial card theft and a civil judgment ordering him to pay court-appointed attorney fees, the Court of Appeals allowed his petition for writ of certiorari as to the criminal judgment in the interest of justice and as to the civil judgment in light of the trial court's failure to give defendant notice and the opportunity to be heard.

2. Appeal and Error—abandonment of issues—plain error—why error rose to level of plain error

Where defendant argued that the trial court committed plain error in admitting certain photographic evidence in his criminal trial but failed to explain why the alleged error rose to the level of plain error—for example, why it was an exceptional case or why the error seriously affected the fairness, integrity, or public reputation of judicial proceedings—the Court of Appeals could not conduct meaningful plain error review and deemed the issue abandoned.

3. Sentencing—aggravating factors—sufficiency of evidence—probation violation

Defendant was entitled to a new sentencing hearing where there was no evidence to support the trial court's finding of the aggravating factor of a prior willful violation of probation conditions.

4. Attorney Fees—court-appointed attorneys—notice and opportunity to be heard

The trial court erred by ordering defendant to pay attorney fees for his court-appointed attorney without giving him notice and an opportunity to be heard. The trial court did not directly ask defendant whether he wished to be heard, and there was no evidence in the record demonstrating that defendant received notice, understood he had the opportunity to be heard, and chose not to be heard.

5. Constitutional Law—effective assistance of counsel—claim prematurely asserted on direct appeal—dismissal without prejudice

Defendant's ineffective assistance of counsel claim regarding admission of certain photographic evidence was dismissed without prejudice to his ability to file a motion for appropriate relief in the trial court where the cold record revealed that further investigation was required for a decision on the merits.

Appeal by Defendant from judgment entered 10 May 2018 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 June 2019.

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

Gilda C. Rodriguez for defendant-appellant.

MURPHY, Judge.

Defendant argues the trial court committed plain error by admitting certain photos into evidence during trial, but he does not state any reason or argument for why the alleged error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. Without this, we lack the information necessary to give a meaningful review of Defendant's plain error issue. We take that argument as abandoned.

Defendant also argues, and the State concedes, the trial court erred by sentencing him in the aggravated range. There was insufficient evidence presented to the trial court to support the finding of an aggravating factor.

Next, Defendant argues, and the State concedes, the trial court erred when assessing attorney fees. Nothing in the Record indicates that Defendant was afforded any opportunity to be heard on the issue of attorney fees. We vacate Defendant's sentence and the civil judgment for attorney fees and remand to the trial court for further proceedings on both matters.

Finally, we dismiss without prejudice Defendant's claim of ineffective assistance of counsel because the cold record reveals that further investigation is required before we may pass on that issue.

BACKGROUND

This appeal arises out of two judgments: a criminal judgment finding Defendant, Myleick Patterson, guilty of financial card theft; and a civil judgment ordering him to pay court-appointed attorney fees. The jury convicted Defendant of one count of financial card theft. The trial court sentenced him to 8 to 19 months imprisonment, which was suspended, and placed him on 24 months supervised probation. Defendant stipulated to being a Prior Record Level II, and the trial court imposed a sentence in the aggravated range for a Class I Felony with a Prior Record Level II. This was based on aggravating factor 12a per N.C.G.S. § 15A-1340.16(d)(12a) (2019). The trial court also did not discuss with Defendant the assessment of attorney fees. Outside of Defendant's presence, the trial court later entered a civil judgment of $2,250.00 against him for attorney fees.

Defendant appeals under N.C.G.S. §§ 7A-27(b) and 15A-1444(a) from a final judgment of the Superior Court. A *Petition for Writ of Certiorari* was also filed asking us to allow review of his conviction in the event we deem his oral notice of appeal insufficient. Defendant also appeals from the civil judgment entered against him, but he did not file a notice of appeal that satisfies the requirements of N.C. R. App. P. 3(a). Accordingly, Defendant has filed a *Petition for Writ of Certiorari* concurrently with his brief, seeking review under N.C. R. App. P. 21.

ANALYSIS

A. Jurisdiction

1. Motion to Dismiss

[1] A threshold issue is whether we should allow the *State's Motion to Dismiss Defendant's Appeal from Civil Judgment*. We have previously determined that judgments entered against a defendant for attorney fees and appointment fees constitute civil judgments, which require a defendant to comply with Rule 3(a) of the North Carolina Rules of Appellate Procedure when appealing from those judgments. *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 697 (2008) (citing *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007) (per curiam)). Rule 3(a) provides that any party

> entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof

> upon all other parties within the time prescribed by subsection (c) of this rule.

N.C. R. App. P. 3(a) (2019). Under Rule 3(c), a party must file and serve notice of appeal within thirty days after entry of judgment. N.C. R. App. P. 3(c) (2019). "Failure to give timely notice of appeal in compliance with . . . and [this rule] of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983).

Here, the criminal judgment against Defendant was entered on 10 May 2018, while the civil judgment granting attorney fees was entered on 28 June 2018. Defendant gave oral notice of appeal from the criminal judgment in open court on 10 May 2018. The Record, however, does not indicate that Defendant gave written notice of appeal from the 28 June 2018 civil judgment in accordance with the requirements of Rule 3(a).

Defendant concedes in his *Petition for Writ of Certiorari*, "[t]he time for filing a valid notice of appeal has now expired and [Defendant] may lose his appeal of right." We allow the *State's Motion to Dismiss Defendant's Appeal from Civil Judgment* imposing attorney fees. As the State's motion to dismiss is allowed, we turn to whether we should allow Defendant's *Petition for Writ of Certiorari*.

2. Petition

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1) (2019). We have discretion to allow certiorari to review all judgments. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320 (2005) ("While this Court cannot hear defendant's direct appeal [for failure to comply with Rule 4], it does have the discretion to consider the matter by granting a petition for writ of *certiorari*[.]"). As discussed above, Defendant failed to comply with the requirements for appealing the civil judgment. He also failed to meet the Rule 4 requirements for appealing a criminal judgment because, as he admits, "the oral notice of appeal may have been insufficient and a written notice of appeal was not filed pursuant to Rules 4(b) and 4(c) of the North Carolina Rules of Appellate Procedure[.]" Defendant may also be denied his right to appeal the 10 May 2018 criminal judgment for not meeting these requirements, but Defendant contends it would be in the interest of justice for us to allow his appeals of the criminal and civil judgments entered against him.

In the exercise of our discretion, we allow the *Petition for Writ of Certiorari* here as it relates to Defendant's criminal conviction and sentencing. Whether we should allow the *Petition for Writ of Certiorari* as it relates to the civil judgment for attorney fees is a separate question.

We have stated that, under N.C.G.S. § 7A-455(b), "the trial court may enter a civil judgment against a convicted indigent defendant for the amount of fees incurred by the defendant's court-appointed attorney." *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005). We have declared that a defendant is entitled to notice and the opportunity to be heard regarding the amount of the fee award:

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C.G.S. § 7A-455, trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue. Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

State v. Friend, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018).

After Defendant's sentencing, the transcript reveals that Defendant's counsel's total hours and corresponding fees were not yet available and that the trial court did not engage Defendant in a colloquy to afford him the opportunity to be heard on his court-appointed attorney fee. We allow the petition and issue the writ to review the civil judgment.

B. Plain Error

[2] The first substantive issue on appeal is whether the trial court committed plain error when it admitted two photos into evidence under Rules 901 and 403. We "apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018) (reaffirming the plain error standard from *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)). One element of plain error is the alleged error "must seriously affect the fairness, integrity or public reputation of judicial proceedings." *State v. Thompson*, 254 N.C. App. 220, 224, 801 S.E.2d 685, 693 (2017) (internal marks and citations omitted); see *State v. Juarez*, 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (holding our "analysis was insufficient to conclude that the alleged error rose to the

level of plain error" when we "failed to analyze whether such error had the type of prejudicial impact that seriously affected the fairness, integrity or public reputation of the judicial proceeding") (internal marks and citation omitted). "[P]lain error is to be 'applied cautiously and only in the exceptional case.' " *Maddux*, 371 N.C. at 564, 819 S.E.2d at 371 (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

Moreover, "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. 28(b)(6) (2019); *see State v. Steen*, 352 N.C. 227, 264, 536 S.E.2d 1, 23 (2000) (concluding that a defendant abandoned an assignment of error when the defendant made "no such assessment or argument with cited authorities" and did "not present [the] assignment of error in a way for this Court to give it meaningful review"). It is not our role "to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). "That burden rests solely with the appellant." *Krause v. RK Motors, LLC*, 252 N.C. App. 135, 140, 797 S.E.2d 335, 339 (2017). Defendant is missing necessary reasons or arguments as to why the alleged error rises to plain error. He offers nothing on why this is an exceptional case or why this will seriously affect the fairness, integrity, or public reputation of judicial proceedings. Even if there are no magic words required to invoke our plain error analysis, we do not see the words "exceptional," "fairness," "integrity," or "reputation" anywhere in Defendant's briefs. Without any information on this portion of plain error review, we cannot impart any meaningful review for plain error. Thus, this issue is taken as abandoned and is dismissed.

C. Sentencing

[3] Defendant argues that he is entitled to a new sentencing hearing. He contends the trial court erred in finding an aggravating factor beyond a reasonable doubt. Sentencing errors are preserved for appellate review even if the defendant fails to object at the sentencing hearing. *State v. Jeffery*, 167 N.C. App. 575, 579, 605 S.E.2d 672, 674 (2004). We review sentencing errors for "whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Deese*, 127 N.C. App. 536, 540, 491 S.E.2d 682, 685 (1997). Whether the sentence is supported by sufficient evidence is a question of law, *see State v. Williams*, 92 N.C. App. 752, 753, 376 S.E.2d 21, 22 (1989), we review de novo. *State v. Cox*, 367 N.C. 147, 151, 749 S.E.2d 271, 275 (2013).

The State has the burden of proof to establish the existence of an aggravating factor beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(a) (2019). If "the trial judge errs in finding an aggravating factor and

imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing." *State v. Wilson*, 338 N.C. 244, 259, 449 S.E.2d 391, 400 (1994).

Here, the State sought to use aggravating factor 12a at sentencing, requiring it to prove that "[t]he defendant ha[d], during the 10-year period prior to the commission of the offense for which the defendant [was] being sentenced, been found by a court of this State to [have been] in willful violation of the conditions of probation imposed pursuant to a suspended sentence[.]" N.C.G.S. § 15A-1340.16(d)(12a) (2015). However, as the State admits, the prosecutor "did not present evidence at trial that defendant violated conditions of probation at any time prior to the commission of the current offense." The State concedes, and we agree, there was insufficient evidence presented at trial to support the finding of an aggravating factor. We thus vacate the sentence imposed and remand to the trial court for resentencing.

D. Attorney Fees

[4] Defendant argues the trial court erred in ordering the payment of court appointed attorney fees without affording him a direct opportunity to be heard on the issue. Whether the trial court gave a defendant adequate "notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney" is a question of law, *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317, we review de novo. *Cox*, 367 N.C. at 151, 749 S.E.2d at 275. To have been given an "opportunity to be heard," "trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *See Friend*, 257 N.C. App. at 523, 809 S.E.2d at 907.

> Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.

Id.

The State admits that neither "the transcript nor the Record on Appeal in this case indicate that [D]efendant was afforded any opportunity to be heard on this issue." It also "concedes that if the [Petition for Writ of Certiorari] is granted, the civil judgment for attorney[] fees must be vacated and remanded to the trial court for further proceedings." We agree with the State's concession where the trial court never directly

asked Defendant whether he wished to be heard on the issue and there is no other evidence that the *Friend* structure was satisfied. At best, the trial court asked Defendant's lawyer to "guesstimate [the number of hours worked] so [Defendant] will have an idea as to what the legal fees will be?" The trial judge then said, "I don't know if [Defendant] is aware, to the extent you can separate his out from the others." This question and statement to Defendant's counsel is insufficient evidence to demonstrate that Defendant received notice, was aware of the opportunity to be heard on the attorney fees issue, or chose not to be heard. Thus, we vacate the civil judgment for attorney fees and remand to the trial court for further proceedings.

E. Ineffective Assistance of Counsel

[5] Defendant last argues that, in the event we do not find plain error, we should analyze whether his defense counsel at trial invited error by stating he "had no objection for illustrative purposes" to the admission of certain pictures. Defendant argues his constitutional right to receive effective assistance of counsel was violated if defense counsel's actions invited error.

"To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674 (1984)). However, "[i]t is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits [only] when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Burton*, 251 N.C. App. 600, 604, 796 S.E.2d 65, 68 (2017) (quoting *State v. Turner*, 237 N.C. App. 388, 395, 765 S.E. 2d 77, 83 (2014)). "[S]hould [we] determine that IAC claims have been prematurely asserted on direct appeal, [we] shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent motion for appropriate relief proceeding." *State v. Stimson*, 246 N.C. App. 708, 713, 783 S.E.2d 749, 752 (2016) (quoting *State v. Fair*, 354 N.C. 131, 167, 557 S.E.2d 500, 525 (2001) (alterations omitted)).

Here, defense counsel did object to the admission of two pictures "for substantive purposes," but he had "no objection for illustrative purposes." Defendant makes no argument about what the prevailing professional norms are in that situation, nor does he argue that an objection

to the admission of evidence for substantive purposes is insufficient to uphold such norms. The cold record reveals that further investigation is required. Hence, we decline to reach this issue and dismiss without prejudice to Defendant's ability to file a motion for appropriate relief in the trial court.

CONCLUSION

We conclude Defendant has abandoned his plain error argument because Defendant has not argued whether the alleged error would seriously affect the fairness, integrity, or public reputation of judicial proceedings. We vacate the civil judgment for attorney fees, vacate Defendant's aggravated sentence, and remand to the trial court for further proceedings on both matters. We also dismiss without prejudice Defendant's ineffective assistance of counsel claim.

DISMISSED IN PART; VACATED AND REMANDED IN PART.

Judges TYSON and YOUNG concur.

STATE OF NORTH CAROLINA
v.
REGINALD TREMAINE WILSON

No. COA19-184

Filed 4 February 2020

Drugs—possession with intent to sell or deliver cocaine—intent—sufficiency of evidence

In a prosecution for possession with intent to sell or deliver cocaine, the State presented sufficient evidence from which the jury could infer that defendant had the intent to commit the offense, including the not insubstantial amount of cocaine (.34 grams in a small baggie and 11.19 grams in a larger package), the fact that the cocaine was packaged in two bags, one with an amount suitable for personal use and another containing a much larger amount, and defendant's evasive actions in avoiding a traffic stop and then trying to hide the larger bag but not the personal bag from the officer.

Appeal by Defendant from Judgments entered 24 May 2018 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 5 September 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Law Office of Kellie Mannette, PLLC, by Kellie Mannette, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Reginald Tremaine Wilson (Defendant) appeals from his convictions for Possession with Intent to Sell or Deliver Cocaine (PWISD Cocaine), Felony Possession of Cocaine, and attaining Habitual-Felon status. The evidence presented at trial and Record before us tend to show the following:

On 3 August 2017, while patrolling on Old U.S. 70 in Buncombe County, Officer Joseph Moore of the Black Mountain Police Department (Officer Moore) observed a car driven by Defendant heading in the opposite direction. Officer Moore recognized Defendant and knew Defendant's driver's license was suspended. Officer Moore turned his patrol car around and activated his emergency equipment to begin a traffic stop of Defendant's vehicle. Rather than stop or slow down, Defendant accelerated away from Officer Moore and then turned off the road onto another street. Officer Moore continued his pursuit, and Defendant pulled into a parking lot of an apartment complex and parked his car. An unoccupied car was parked in the parking spot to the immediate left of Defendant's vehicle. Upon stopping, Defendant got out of his car. Officer Moore testified that in his experience it was very unusual for someone to get out of their vehicle when stopped for a traffic stop. Officer Moore testified a driver will normally stop quickly and remain in the vehicle.

As Defendant was getting out of his car, Officer Moore parked behind Defendant's car, got out of his vehicle, and ordered Defendant to return to his car; however, Defendant refused. Officer Moore attempted to approach Defendant, but Defendant moved around to the front of the other unoccupied parked car. Officer Moore repeated his command for Defendant to return to his car, and Defendant again refused. Officer Moore and Defendant briefly continued to argue back and forth about

Defendant returning to his car. Defendant then began ducking down in front of the other unoccupied car.

At one point, Defendant stood up and stuck both hands into his waistband. Officer Moore unholstered his firearm and ordered Defendant to show his hands. Instead, Defendant "ducked to where [Officer Moore] couldn't see [Defendant] or his hands in front of a parked vehicle that he was in front of." Officer Moore testified, "[Defendant] eventually stood up and continued to argue, and then began to comply and walk back to the driver door of his vehicle." Officer Moore then tried to handcuff Defendant. However, after Officer Moore got one of Defendant's hands behind his back, Defendant refused to provide his other hand, resulting in a "tussle" between the two. At this point, Officer Moore's partner arrived and helped with detaining Defendant.

Officer Moore placed Defendant in the back of his patrol car and returned to Defendant's vehicle. Officer Moore "observed on the driver's seat a clear plastic baggie. Looked like a corner bag with an off-white, yellow substance in it." While Officer Moore continued searching Defendant's vehicle, the owner of the other unoccupied parked car came out of her apartment and asked Officer Moore if she could leave to go to work, which Officer Moore allowed. After the owner of the other parked car left, Officer Moore's partner pointed out "there was a large bag containing an off-white substance that was underneath" where the other car had been parked. Officer Moore testified this large bag was found near the front of where that car had been parked and where Defendant had been ducking down.

At Defendant's trial, Elizabeth Reagan (Agent Reagan), a Special Agent and Forensic Chemist with the North Carolina State Crime Laboratory, testified as an expert witness in forensic chemistry. Agent Reagan analyzed and weighed the contents of the two baggies. According to Agent Reagan, the corner bag contained .34 grams, plus or minus .02 grams, of cocaine base; whereas, the larger bag contained 11.19 grams, plus or minus .02 grams, of cocaine base. Both bags were admitted into evidence. Officer Moore also testified, based on his training and experience, a bag containing less than half a gram of cocaine is "a small amount, personal use amount."

In his own testimony, Defendant denied possessing any illegal substances on 3 August 2017. Defendant testified he was driving to his brother's residence and did not see any police vehicle until after he had already turned into his brother's apartment complex and gotten out of his car. Defendant denied ducking in front of the other vehicle

and admitted only that he possessed a bottle of gin and that he had been drinking.

On 8 January 2018, Defendant was indicted on charges of PWISD Cocaine, Felony Possession of Cocaine, Maintaining a Vehicle or Dwelling Place for Keeping or Selling Cocaine, Driving While Driver's License Revoked, Resisting a Public Officer, and attaining Habitual-Felon status. Prior to trial, the State dismissed the charges of Maintaining a Vehicle or Dwelling Place for Keeping or Selling Cocaine, Driving While Driver's License Revoked, and Resisting a Public Officer.

Defendant's trial in Buncombe County Superior Court began on 22 May 2018. At the close of the State's evidence, Defendant, acting *pro se*, requested "all cases, cause, claim and/or charges be dissolved, dismiss, quash." Interpreting this request as a motion to dismiss for insufficiency of the evidence, the trial court denied the motion. At the close of Defendant's evidence and again prior to final judgment being entered, Defendant requested dismissal of his case. In each instance, the trial court interpreted Defendant's arguments as a motion to dismiss for insufficiency of the evidence and denied Defendant's motions.

On 23 May 2018, the jury returned verdicts finding Defendant guilty of PWISD Cocaine, Felony Possession of Cocaine, and, subsequently, attaining Habitual-Felon status. The following day, the trial court entered Judgments against Defendant, sentencing him as a prior-record level IV to active, consecutive sentences of 97 to 129 months' imprisonment for the PWISD-Cocaine conviction and 38 to 58 months' imprisonment for the Felony-Possession-of-Cocaine conviction.[1] Defendant gave Notice of Appeal in open court.

Issue

The sole issue on appeal is whether there was sufficient evidence of an intent to sell or deliver cocaine to support the trial court's denial of Defendant's motions to dismiss the PWISD-Cocaine charge.

Analysis

I. Standard of Review

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

1. Defendant does not challenge his separate conviction for Felony Possession of Cocaine. Defendant also raises no independent challenge to his conviction of attaining Habitual-Felon status. Accordingly, we do not address those convictions on appeal.

(citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and quotation marks omitted); *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) ("Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (citation omitted)). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation and quotation marks omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). However, "[w]hether the State has offered such substantial evidence is a question of law for the trial court." *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

II. Motion to Dismiss

Defendant contends the trial court erred in denying his motions to dismiss the charge of PWISD Cocaine. "The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; and (3) there must be intent to sell or distribute the controlled substance." *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) (citations omitted). Specifically, Defendant argues the State failed to demonstrate the third element—intent. Because Defendant does not challenge the remaining two elements of this offense, we limit our analysis to whether the State presented sufficient evidence of intent.[2]

"While intent may be shown by direct evidence, it is often proven by circumstantial evidence from which it may be inferred." *State v. Nettles*, 170 N.C. App. 100, 105, 612 S.E.2d 172, 175-76 (2005) (citation omitted). "Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a

2. In particular, Defendant does not argue there was insufficient evidence he actually or constructively possessed either the smaller bag of cocaine found in his car or the larger bag found in the parking space where the other car had been parked.

substantial amount." *Id.* at 105, 612 S.E.2d at 176 (citation and quotation marks omitted). This Court has recognized "the intent to sell or distribute may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant's activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia." *Id.* at 106, 612 S.E.2d at 176 (citations omitted). "Moreover, our case law demonstrates that this is a fact-specific inquiry in which the totality of the circumstances in each case must be considered unless the quantity of drugs found is so substantial that this factor—by itself—supports an inference of possession with intent to sell or deliver." *State v. Coley*, 257 N.C. App. 780, 788-89, 810 S.E.2d 359, 365 (2018). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury[.]" *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citations omitted); *see also State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989) ("If there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." (citation and quotation marks omitted)), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990).

Here, the evidence reveals Defendant was in possession of cocaine contained in two packages: a corner bag containing .34 grams and a package containing 11.19 grams. "Although quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell, or deliver, it must be a substantial amount." *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 176 (citation and quotation marks omitted). This Court has previously held "a controlled substance's substantial amount may be determined by comparing the amount possessed to the amount necessary to constitute a trafficking offense." *Id.* at 106, 612 S.E.2d at 176. Possession of cocaine rises to the level of a trafficking offense where the amount possessed is at least 28 grams. *See* N.C. Gen. Stat. § 90-95(h)(3) (2019).

The amount of cocaine at issue in this case is thus less than half of the amount giving rise to a trafficking offense. It is also less than amounts our courts have previously recognized as a substantial amount beyond what a typical user would possess for personal use. *See State v. Morgan*, 329 N.C. 654, 660, 406 S.E.2d 833, 836 (1991) (an ounce or 28.3 grams); *State v. Davis*, 160 N.C. App. 693, 696, 586 S.E.2d 804, 806 (2003) (recognizing approximately 20 grams of cocaine "far exceeds the amount a typical user would possess for personal use"). However, within the context of our case law, it is not an insubstantial amount and well exceeds amounts that have previously been recognized as supportive of a PWISD-Cocaine conviction under appropriate circumstances. *See State v. Carr*,

122 N.C. App. 369, 373, 470 S.E.2d 70, 73 (1996) (indicating an intent to sell or deliver cocaine could be inferred from observations of defendant conversing through car windows with known drug users—one of whom was in possession of a pipe used for smoking crack cocaine—the discovery of two pill bottles with nine rocks of crack cocaine in the defendant's possession, and the defendant's attempts to disguise his identity when questioned by police); *State v. Alston*, 91 N.C. App. 707, 711, 373 S.E.2d 306, 310 (1988) (finding no error in the defendant's conviction for possession with intent to sell where there were 4.27 grams of cocaine in twenty separate envelopes along with large rolls of currency); *State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (indicating an intent to sell cocaine was established where there were 5.5 grams of crack cocaine, individually packaged in twenty-two pieces, placed in the corner of a paper bag), *aff'd*, 359 N.C. 800, 617 S.E.2d 271 (2005). *But see Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176 (possession of 1.2 grams of cocaine was insufficient to infer intent to sell or distribute); *State v. Battle*, 167 N.C. App. 730, 733, 606 S.E.2d 418, 421 (2005) (possession of 1.9 grams of cocaine was insufficient to infer intent to sell or distribute); *State v. Turner*, 168 N.C. App. 152, 154, 158-59, 607 S.E.2d 19, 21, 23-24 (2005) (evidence of ten rocks of cocaine in a tube weighing a total of 4.8 grams valued at approximately $150.00 to $200.00 was insufficient, standing alone, to support PWISD conviction); *In re I.R.T.*, 184 N.C. App. 579, 588, 647 S.E.2d 129, 137 (2007) (a single rock of crack cocaine wrapped in cellophane as well as $271.00 in cash on juvenile's person were insufficient to support adjudication for PWISD).

Assuming, without deciding, the amount of cocaine in Defendant's possession in this case was not such a substantial amount standing alone to support an inference of Defendant's intent to sell or deliver, the amount of cocaine possessed by Defendant remains a significant amount and much more than has been typically recognized as for personal use. Thus, in weighing the totality of the circumstances in this case, the evidence Defendant possessed over 11 grams of cocaine is nevertheless an important circumstance.

Moreover, evidence of the packaging also supports an inference of intent to sell or deliver. The evidence reflected the cocaine was divided into two packages: one smaller corner bag indicative of packaging for personal use and the larger package containing the bulk (over 11 grams) of the cocaine. Defendant's actions further support an inference of an intent to sell and distribute. Defendant was driving (and thus transporting the cocaine) to his brother's apartment complex. Defendant failed to stop for Officer Moore and, indeed, accelerated away from him, only

stopping once he reached the apartment complex. Defendant got out of his car, refused to comply with Officer Moore's directions, and instead ducked behind the other parked car where the larger bag of cocaine was later found. Thus, the evidence supports an inference Defendant attempted to hide the larger amount of cocaine while leaving the smaller corner bag—associated with only personal use—in plain view.

We acknowledge there is no evidence of any cash, other drug paraphernalia, or tools of the drug trade—such as scales or additional baggies or containers—which have otherwise generally supported a conviction for PWISD. However, when viewed in its entirety, the amount of cocaine, the packaging divided into a personal-use size and a much larger package, and Defendant's evasive behavior and attempts to secrete the larger bag establish, at a minimum, a borderline case to support submission of the PWISD-Cocaine charge to the jury by providing "more than a scintilla of competent evidence to support [the] allegations in the . . . indictment"; therefore, "it [was] the [trial] court's duty to submit the case to the jury." *Everhardt*, 96 N.C. App. at 11, 384 S.E.2d at 568 (citation and quotation marks omitted). Accordingly, we hold the trial court did not err in denying Defendant's motions to dismiss.

Conclusion

For the foregoing reasons, we conclude there was no error in the denial of Defendant's motions to dismiss and in the submission of the PWISD-Cocaine charge to the jury.

NO ERROR.

Judges ZACHARY and ARROWOOD concur.

WAGNER v. CITY OF CHARLOTTE

[269 N.C. App. 656 (2020)]

MATTHEW WAGNER, ET AL., PLAINTIFFS
v.
CITY OF CHARLOTTE, DEFENDANT

No. COA18-1084

Filed 4 February 2020

1. Eminent Domain—inverse condemnation—broken city water pipe—home flooding—no taking

In a dispute between a city and four homeowners whose houses flooded after one of the city's water main pipes burst, the trial court properly granted summary judgment in favor of the city on the homeowners' inverse condemnation claim under the North Carolina Constitution because the one-time, temporary flooding incident resulting in temporary damage did not constitute a governmental taking, especially where the damage was neither intentional nor a foreseeable result of the water pipes' installation.

2. Negligence—duty to inspect, maintain, or repair—broken city water pipe—home flooding—city not liable

In a dispute between a city and four homeowners whose houses flooded after one of the city's water main pipes burst, the trial court properly granted summary judgment in favor of the city on the homeowners' claim that the city was negligent by failing to inspect, maintain, or repair the pipe to prevent the leak. There was no evidence that the city had prior notice of any defect in the water pipe, and the homeowners' own experts testified that the city had no duty to inspect the water pipes absent any reported issues and that there was nothing the city could have done to prevent the leak in this instance.

3. Negligence—broken city water pipe—home flooding—city's failure to respond on time—summary judgment

In a dispute between a city and four homeowners whose houses flooded after one of the city's water main pipes burst, where the homeowners alleged that the city was negligent in failing to timely respond to the water leak, summary judgment in favor of the city was proper as to the homeowners occupying the first flooded house but not as to the homeowners occupying the second flooded house. Where expert testimony established that it should have taken the city about one hour (after receiving notice of the leak) to send a shut-off crew and cut off the water flow, the evidence showed that the first house would have flooded anyway but that genuine issues of material

fact existed as to when the second house flooded and whether timelier action by the city would have prevented the flooding.

4. Nuisance—single incident—broken city water pipe—home flooding—negligence versus nuisance

In a dispute between a city and four homeowners whose houses flooded after one of the city's water main pipes burst, the trial court properly granted summary judgment in favor of the city on the homeowners' private nuisance claim, because damage arising from a single incident of flooding causing a single, nonrecurring injury can give rise only to claims sounding in negligence rather than nuisance.

5. Trespass—broken city water pipe—home flooding—alleged negligence by the city—summary judgment

In a dispute between a city and four homeowners whose houses flooded after one of the city's water main pipes burst, where the homeowners relied on their negligence claims against the city in raising additional claims for trespass, the Court of Appeals affirmed the grant of summary judgment to the city on the first two homeowners' trespass claims but reversed the grant of summary judgment to the city on the last two homeowners' trespass claims, because summary judgment was properly granted to the city on the first two homeowners' negligence claims but was not properly granted to the city on the last two homeowners' negligence claims.

6. Constitutional Law—due process—equal protection—broken city water pipe—home flooding

In a dispute between a city and two pairs of homeowners whose houses flooded after one of the city's water main pipes burst, the trial court properly granted summary judgment in favor of the city on the homeowners' constitutional claims alleging the city violated their rights to due process and equal protection when it denied their claims for compensation arising from the flooding. The homeowners failed to show that the city treated them differently from other similarly situated residents who submitted claims for flood damage, and the evidence showed the city applied the same review process to the homeowners' claims that it applied to others.

Judge MURPHY concurring in part and in result only in part in a separate opinion.

Appeal by Plaintiffs from Orders entered 2 April 2018 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 April 2019.

The Odom Firm, PLLC, by Thomas L. Odom, Jr., and David W. Murray, for plaintiffs-appellants.

Law Offices of Lori Keeton, by Lori R. Keeton, and Charlotte City Attorney's Office, by R. Harcourt Fulton, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Matthew Wagner (Wagner), Lianne Lichstrahl (Lichstrahl), Brad Henke (Henke), and Victoria Siravo (Siravo) (collectively, Plaintiffs) appeal from an Order entered 29 March 2018: (1) granting Summary Judgment to the City of Charlotte (the City) on Plaintiffs' claims for Inverse Condemnation, Negligence, Private Nuisance, Trespass, and violations of Due Process and Equal Protection under the North Carolina Constitution and dismissing Plaintiffs' claims in both 16 CVS 19141 and 17 CVS 21467; and (2) dismissing as moot, *inter alia*, Plaintiffs' Motion for Partial Summary Judgment on Inverse Condemnation, Plaintiffs' Motion to Strike the City's Affirmative Defenses or, in the alternative, for Summary Judgment as to the City's Affirmative Defenses, Plaintiffs' Motion for Protective Order, and Plaintiffs' request to consolidate the related actions. Plaintiffs also appeal from a separate Order entered on the same day denying their Motion for Reconsideration but, in briefing, raise no distinct arguments regarding this separate Order. The Record before us tends to show the following:

As of 23 November 2014, Wagner and Lichstrahl owned and resided at 3414 Carmel Road, although they subsequently sold this property in 2016 prior to commencing this litigation. Henke and Siravo were the owners and residents of 3418 Carmel Road, which they continued to own during the litigation.

In the early morning hours of 23 November 2014, a City water main pipe burst in the 4100 block of Carmel Road in Charlotte. The City Fire Department received a 911 call at around 6:20 a.m. and in turn alerted the City's water department (City Water). At 6:24 a.m., a dispatcher for City Water contacted team leaders regarding a potential hydrant leak. At 6:48 a.m., the team leaders instructed the dispatcher to send a crew to make repairs. No crew was immediately available, so an on-call repair

crew from Huntersville was paged between 6:45 and 7:00 a.m. The first crewmember reported to Huntersville at 7:19 a.m. The Huntersville crew did not arrive and begin cutting off water until 8:40 a.m.

As a result of a separate call to 311 by a neighboring homeowner at 7:16 a.m., a City Water Customer Service Technician also reported to the scene, arriving at 7:40 a.m. The Customer Service Technician called in an emergency requiring additional crew between 7:45 and 8:00 a.m. with a second call being made between 8:30 and 8:35 a.m.

Henke awoke at around 6:30 a.m. to discover the Henke/Siravo residence had already flooded. Wagner testified the Wagner/Lichstrahl residence began to flood around 8:15 or 8:30 a.m., although he had also previously reported flooding began between 7:15 and 8:00 a.m. The City contends the flooding likely began even earlier than that.

The water was not cut off at the main and did not begin to recede from the homes until between 9:30 and 10:00 a.m. As a result of the burst water main, both residences flooded and suffered flood damage. Plaintiffs were required to temporarily move out of their homes while the homes underwent substantial repair and renovation.

In the days following, Plaintiffs submitted claims to the City for their respective damages. On 19 December 2014, the City denied those claims based on its own investigation determining there was no negligence on the part of the City. Plaintiffs met with City representatives on 28 January 2015, where the City reiterated its position. Plaintiffs submitted public records requests to the City seeking documents related to their claims, and the City responded to those records requests in January and April 2015. On 10 September 2015, Plaintiffs, through counsel, wrote to the City informing the City that Plaintiffs were represented by counsel and were pursuing claims. This letter also requested the City preserve all evidence related to the claims including the section of the broken pipe. After receiving this letter, the City instituted a litigation hold on 30 September 2015. At some point between the January 2015 meeting and the City's receipt of Plaintiffs' letter, however, the City had already disposed of the section of broken pipe through its usual scrap sale process.

On 24 October 2016, Plaintiffs filed their first Complaint against the City in Mecklenburg County Superior Court[1] (the 2016 Lawsuit). This Complaint alleged claims including: Negligence, due to the City's failure to properly install or maintain the pipe and failure to promptly cut off water to and repair the pipe when it ruptured; Private Nuisance; Inverse

1. Mecklenburg County Superior Court file number 16 CVS 19141.

Condemnation of a Temporary Drainage Easement; Unlawful Taking under the Fifth Amendment of the United States Constitution; violation of Equal Protection pursuant to the Fourteenth Amendment; and Unlawful Taking under the North Carolina Constitution. The Complaint further alleged spoliation of evidence arising from the City's disposal of the broken section of pipe.

On 21 November 2016, the City filed a Notice of Removal to the United States District Court for the Western District of North Carolina, asserting the case invoked a federal question citing Plaintiffs' claims under the United States Constitution. On 29 December 2016, Plaintiffs filed a Motion for Leave to File an Amended Complaint in the United States District Court along with a Motion to Remand to State Court. The proposed Amended Complaint abandoned Plaintiffs' claims under the United States Constitution. The United States District Court granted both Motions on 27 February 2017. Upon remand to state court, Plaintiffs filed their Amended Complaint on 10 March 2017. On 4 April 2017, the City filed an Answer to the Amended Complaint, including a Motion to Dismiss and multiple affirmative defenses.

On 21 November 2017, Plaintiffs initiated a second action (the 2017 Lawsuit) by filing a Complaint asserting a trespass-based claim.[2] Meanwhile in the 2016 Lawsuit, on the same day, Plaintiffs filed a Motion to Amend their Complaint to add Trespass as a cause of action.

On 4 December 2017, Plaintiffs filed a Motion for Partial Summary Judgment in the 2016 Lawsuit as to their claims for Inverse Condemnation, Private Nuisance, and Trespass. Plaintiffs also filed a Motion to Strike Defendant's Affirmative Defenses, or in the alternative, Motion for Summary Judgment to Dismiss Defendant's Affirmative Defenses. In a Motion, filed the same day, in the 2017 Lawsuit, Plaintiffs requested the 2017 Lawsuit be consolidated with the 2016 Lawsuit. On 12 December 2017, the City filed its own Motion for Summary Judgment. On 19 December 2017, the City also filed a separate Motion to Dismiss the 2017 Lawsuit.

The matter came on for hearing before the trial court on 26 February 2018, and the trial court rendered its ruling on 9 March 2018, granting the City's Motion for Summary Judgment. On 14 March 2018, Plaintiffs filed a Motion for Reconsideration of this ruling. On 2 April 2019, the trial court entered its Order granting the City's Motion for Summary Judgment and denying the remaining motions as moot. The trial court determined the

2. 17 CVS 21467.

City was entitled to summary judgment as to all claims—specifically, Plaintiffs' claims for Inverse Condemnation, Negligence, Trespass,[3] Private Nuisance, Equal Protection, Due Process, and Spoliation. This Order dismissed both the 2016 and 2017 Lawsuits. The same day, the trial court entered a separate Order denying Plaintiffs' Motion for Reconsideration. On 12 April 2018, Plaintiffs timely filed Notice of Appeal from both Orders entered on 2 April 2018.

Issues

On appeal, the dispositive issues are whether the trial court properly granted Summary Judgment for the City on Plaintiffs': (I) Inverse Condemnation claim based on a single, nonrecurring incidence of flooding resulting in temporary damage arising from the broken water pipe; (II) Negligence claims; (III) Private Nuisance claims; (IV) Trespass claims; and (V) the remaining state constitutional claims. We also, however, address the trial court's denial based on mootness of the remaining peripheral motions.

Standard of Review

"This Court reviews the trial court's grant of summary judgment de novo." *Asheville Sports Properties, LLC v. City of Asheville*, 199 N.C. App. 341, 344, 683 S.E.2d 217, 219 (2009). "Summary judgment is appropriate only 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.' " *Id.* (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)).

Analysis

I. Inverse Condemnation

[1] Plaintiffs first contend the trial court erred in granting Summary Judgment in favor of the City and denying Summary Judgment in favor of Plaintiffs, on Plaintiffs' Inverse-Condemnation claim. Plaintiffs asserted claims for Inverse Condemnation both under statutory grounds pursuant to N.C. Gen. Stat. § 40A-41 and under the Law of the Land Clause found in Article I, Section 19 of the North Carolina Constitution.

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3. The parties and the trial court treated Plaintiffs' Motion to Amend the Complaint to add Trespass as a claim in the 2016 Lawsuit as having been granted for purposes of the Summary Judgment Hearing. As such, we too operate on the basis the Motion to Amend the Complaint was granted.

Under the North Carolina Constitution:

> We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution.

Long v. City of Charlotte, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982).

> " '[I]nverse condemnation [ ]' [is] a term often used to designate 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' "

Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 552, 809 S.E.2d 853, 861-62 (2018) (alterations in original) (quoting *City of Charlotte v. Spratt*, 263 N.C. 656, 662-63, 140 S.E.2d 341, 346 (1965)). "Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so." *Smith v. City of Charlotte*, 79 N.C. App. 517, 521, 339 S.E.2d 844, 847 (1986). Section 40A-51 of our General Statutes provides for the remedy of inverse condemnation when "property has been taken by an act or omission of a condemnor listed in [N.C. Gen. Stat §] 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed[.]" N.C. Gen. Stat. § 40A-51 (2017).

In this case, there is no dispute as to the applicability of the statutory inverse condemnation procedure. Rather, the primary issue between the parties is whether any taking took place giving rise to a claim for inverse condemnation. Specifically, Plaintiffs contend the broken water pipe and resultant, one-time flooding of their properties constituted a governmental taking entitling them to compensation. On the other hand, the City argues a one-time, temporary flooding incident caused by a broken water pipe should not constitute a taking under our existing case law.

Indeed, our Courts have, on several occasions, addressed whether flooding of private property resulted in a taking. In *Eller v. Board of Education of Buncombe County*, our Supreme Court held property

owners stated a takings claim where they alleged construction of a school building impeded the flow of a natural spring causing it to back up on to the private property and that the installation of a sewage disposal device contaminated the natural spring, rendering both it and the property owners' dwelling unfit. 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955). Similarly, in *Department of Transportation v. Bragg*, our Supreme Court held a property owner was entitled to present evidence of damages resulting from a highway construction project that resulted in a spring being diverted to drain onto the defendants' property and running underneath their motel. 308 N.C. 367, 369, 302 S.E.2d 227, 229 (1983) (holding "[e]vidence of damage caused by the alleged water diversion is relevant to a determination of the amount of just compensation due for the taking of the property" either as a permanent or temporary drainage easement).

In *Midgett v. North Carolina State Highway Commission*, our Supreme Court held property owners stated a takings claim where highway construction resulted in the damming of ocean water flowing over dunes and inundating private property. 260 N.C. 241, 248, 132 S.E.2d 599, 607 (1963), *overruled on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983). The *Midgett* Court set out the following controlling principles of law:

> There need not be a seizure of the property or dispossession of the owners; it is a taking if the value is substantially impaired. Permanent liability to intermittent, but inevitably recurring, overflows constitutes a taking. In order to create an enforceable liability against the government it is, at least, necessary that the overflow of water be such as was reasonably to have been anticipated by the government, to be the *direct* result of the structure established and maintained by the government, and constitute an actual permanent invasion of the land, or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property.

Id. (citations omitted). The *Midgett* Court further described the necessity for a "permanent" taking:

> To constitute a permanent invasion of property rights and an impairment of the value thereof the obstruction or structure need not be permanent in fact, but it must be permanent in nature. A permanent structure is one which may not be readily altered at reasonable expense so as to

> remedy its harmful effect, or one of a durable character evidently intended to last indefinitely and costing practically as much to alter or remove as to build in the first place.

Id. However, the Court also made clear:

> The removal of the permanent structure during the pendency of the action and after direct damage has resulted from its construction and maintenance would not abate the action or prevent the recovery of permanent damages. Once the cause of action has occurred by the infliction of damage to the property, the taking is a *fait accompli*.

Id. at 248-49, 132 S.E.2d at 607 (citations omitted).

Subsequently, in *Lea Co.*, our Supreme Court upheld a judgment in favor of a landowner where "the evidence tended to show that the structures built and maintained by the defendant caused increased flooding and substantial injury to the plaintiff's relatively high density apartments in an urban area." 308 N.C. at 620-21, 304 S.E.2d at 176. Building on *Midgett*, the Court emphasized: "Ordinarily, a mechanical approach should not be taken with regard to the frequency of flooding required to constitute a taking by '[p]ermanent liability to intermittent but inevitably recurring overflows . . . .' " *Id.* (quoting *Midgett*, 260 N.C. at 248, 132 S.E.2d at 606).

On the other hand, in *Akzona, Inc. v. Southern Railway Co.*, our Supreme Court, applying *Lea Co.*, held it was error to submit an inverse-condemnation claim to a jury where an earth and gravel embankment constructed by the railway caused a creek to back up during a rainstorm flooding upstream property. *Akzona, Inc. v. S. Ry. Co.*, 314 N.C. 488, 494, 334 S.E.2d 759, 763 (1985) The Court noted: "Under pressure caused by relentless rainfall and the inability of a saturated ground to absorb moisture, the dam burst. It was not replaced after it burst. Railroad's embankment, therefore, cannot subject plaintiff's property to '[p]ermanent liability to intermittent, but inevitably recurring, overflows . . . .' " *Id.* (quoting *Lea Co.*, 308 N.C. at 618, 304 S.E.2d at 175). The Court stated its rule: "A single instance of flooding with no possibility of recurrence, even if the direct result of [the condemnor's] structure, is not a taking of [private] property." *Id.* at 494, 334 S.E.2d at 763.

In light of our Supreme Court's decision in *Akzona*, it would seem clear a single instance of flooding from a broken water pipe that was repaired within hours would not give rise to an inverse-condemnation claim. Plaintiffs, however, argue the United States Supreme Court's

decision in *Arkansas Game & Fish Commission v. United States* altered the waterfront for analyzing inverse-condemnation claims arising from flooding. We disagree. To the contrary, *Arkansas Game & Fish Commission* is generally consistent with the analysis historically employed by our state courts.

In that case, over a period of approximately seven years, the U.S. Army Corps of Engineers periodically authorized flooding of forest land owned and managed by the Commission resulting in a loss of a substantial amount of timber. The Commission brought an action alleging a taking under the Fifth Amendment of the United States Constitution. *Arkansas Game & Fish Comm'n*, 568 U.S. 23, 26, 184 L. Ed. 2d 417, 423 (2012). The U.S. Supreme Court stated the question presented in that case as "whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are temporary." *Id.* The Court concluded "recurrent floodings, even if of finite duration, are not categorically exempt from Takings Clause liability." *Id.* at 27, 184 L. Ed. 2d at 423. The Court clarified its ruling "that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." *Id.* at 38, 184 L. Ed. 2d at 430-31. Instead, the Court pointed to a number of factors under which to conduct the analysis, including the time or duration of the alleged taking, "the degree to which the invasion is intended or is the foreseeable result of authorized government action[,]" the character of the land and the owner's reasonable investment-backed expectations for the use of the land, and the severity of the interference with that use. *Id.* at 38-39, 184 L. Ed. 2d at 431.

This analysis is generally in harmony with our Supreme Court's decision in *Lea Co.*, which acknowledged even earlier U.S. Supreme Court precedent was not "intended to establish a requirement that flooding caused by government structures must be shown to occur with any particular frequency before a taking will have occurred." *Lea Co.*, 308 N.C. at 619, 304 S.E.2d at 175. Rather, the *Lea Co.* Court observed the focus should be on "the substantiality of the injury[.]" *Id.* Our Supreme Court then put the key question as "whether it had been shown that substantial injury had been caused as the foreseeable direct result of the structure built and maintained by the government." *Id.* at 620, 304 S.E.2d at 176.

Thus, our Supreme Court's decision in *Lea Co.* is generally consistent with *Arkansas Game & Fish Commission* and, in fact, largely foreshadowed that decision. As such, *Arkansas Game & Fish Commission* does not alter our course here. *Akzona* followed the reasoning from *Lea Co.*

and remains binding on this Court. Thus, we conclude a single instance of temporary flooding of Plaintiffs' properties without the possibility of recurrence did not constitute a taking for purposes of an inverse-condemnation claim. *See Akzona, Inc.*, 314 N.C. at 493-94, 334 S.E.2d at 762-63; *see also Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30, 67 L.Ed. 287, 289 (1922) ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence.");[4] *Barnes v. United States*, 538 F.2d 865, 870 (Ct. Cl. 1976) ("Government-induced flooding not proved to be inevitably recurring occupies the category of mere consequential injury, or tort.").

Our conclusion is further bolstered by the foreseeability analysis employed by both the *Lea Co.* and *Arkansas Game & Fish Commission* Courts. In *Lea Co.*, our Supreme Court noted in order to establish a takings claim, the plaintiff was "required to show that the increased overflow of water was such as was reasonably to have been anticipated by the State to be the direct result of the structures it built and maintained." 308 N.C. at 614, 304 S.E.2d at 172. Specifically, the Court stated: "Injury properly may be found to be a foreseeable direct result of government structures when it is shown that the increased flooding causing the injury would have been the natural result of the structures at the time their construction was undertaken." *Id.* at 617, 304 S.E.2d at 174 (emphasis omitted); *see Arkansas Game & Fish Comm'n*, 568 U.S. at 39, 184 L. Ed. 2d at 431 (stating a relevant factor in the analysis is "the degree to which the invasion is intended or is the foreseeable result of authorized government action").

Here, it certainly cannot be said the City's installation of water pipes was intended to flood Plaintiffs' properties. Under *Lea Co.*, it also cannot be said the flooding was a foreseeable direct or natural result at the time of installation of those water pipes. *See Lea Co.*, 308 N.C. at 614, 304 S.E.2d at 172. Moreover, the installation of the water pipes predated the construction of the residential subdivision where Plaintiffs' homes were located. *See id.* at 617, 304 S.E.2d at 174 ("To require the State to anticipate the shifting of business and population centers and the attendant acts or construction by others contemporaneous with or subsequent to the State's construction, and to hold the State liable for a taking if it fails to do so, would place an unreasonable and unjust burden upon public funds. No such result is required by the Constitution of the United States

4. Cited with apparent approval in *Arkansas Game & Fish Comm'n*, 568 U.S. at 39, 184 L. Ed. 2d at 431.

or the Constitution of North Carolina").[5] Consequently, the trial court properly granted Summary Judgment to the City on Plaintiffs' Inverse-Condemnation claims.[6]

II. Negligence

Plaintiffs also argue the trial court erred in granting Summary Judgment for the City on Plaintiffs' Negligence claims. Plaintiffs advance theories that the City was negligent in failing to properly maintain or repair the pipe so as to prevent the leak and/or in its response to the leak once it occurred. A municipality operating a water system "is acting in its proprietary or corporate capacity and is liable for injury or damage resulting from such operation to the same extent and upon the same basis as a privately owned water company would be." *Mosseller v. Asheville*, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966) (citations omitted). "It is not an insurer against injury or damage by water leaking from such system." *Id.* "It is liable only if the escape of the water was due to its negligence either as to the initial break in the water line or in its failure to repair or cut off the line so as to stop the flow." *Id.* (citation omitted).

A. Failure to Maintain or Repair

[2] In *Mosseller*, the North Carolina Supreme Court set forth a municipality's duty of reasonable care in discovering and repairing breaks in its lines:[7]

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5. We acknowledge Plaintiffs' efforts to direct us to California case law they argue is analogous. Specifically, Plaintiffs assert that rather than take a proactive approach to locating and replacing defective pipes, the City has taken a wait-and-see approach; repairing pipes only when a problem is discovered. Plaintiffs contend this was done as a cost-saving measure for the City and, thus, Plaintiffs advocate, the commensurate risk should be borne by the City, which may then spread out the cost among ratepayers. This approach was endorsed by the California Court of Appeals in *Pacific Bell v. City of San Diego*, 81 Cal. App. 4th 596, 613-14, 96 Cal. Rptr. 2d. 897, 912-13 (2000), where, despite knowing its entire water infrastructure was obsolete and in need of full replacement, the City Council in San Diego actively chose not to raise rates and replace decrepit pipes. However, that case, in light of its predecessors under California law, rejected the foreseeability analysis in favor of a standard more akin to strict liability of water systems for damage caused by leaking pipes. We decline to divert from the standard set by our Supreme Court in *Midgett* and *Lea Co.* and the decisions flowing therefrom.

6. Because of this result, we do not reach the City's alternative argument that the inverse-condemnation claim brought by Wagner and Lichstrahl should be dismissed for failure to follow the requirements of N.C. Gen. Stat. § 40A-51.

7. Plaintiffs argue *Mosseller* was distinguished and limited by *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 695 S.E.2d 437 (2010). We disagree that *Fussell* limited *Mosseller*; rather, it simply highlighted the two cases presented different facts. *Id.*

> The reasonable care which is required of the city when engaged in such operation, like that required of a privately owned water company, includes the exercise of ordinary diligence to discover breaks in its lines and to correct such defects of which it has notice, or which it could have discovered by the exercise of reasonable inspection.

Id.

Here, there is no evidence the City had prior actual notice of any defect or problem with the water main resulting in the leak. Plaintiffs point to an interrogatory answer by the City which reflected "[d]ating back to 2012, Defendant is showing one repair at 3410 Carmel Road." Plaintiffs contend this interrogatory answer shows the City had prior knowledge of a problem with the water main in the vicinity of the leak at issue in this case. Additional evidence, including deposition testimony of a City employee who pointed to the specific work order, reflected this was a service call to locate pipes and not actually a repair. Plaintiffs point to no other evidence that this was a repair to create any issue of fact. Moreover, taken at face value, the interrogatory answer reflects a leak that was repaired and would not create direct notice to the City of a subsequent leak at a different point in the lines.[8] Thus, even taking the evidence in the light most favorable to Plaintiffs, this does not create a genuine issue of material fact supporting denial of summary judgment.

Plaintiffs further contend the City's disposal of the pipe constitutes spoliation of evidence, justifying a negative inference against the City and entitling them to a jury trial on this issue. However, "it is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation. It is not an issue to be decided as a matter of law, and cannot, by its mere existence, be determinative of a claim." *Sunset Beach Dev., LLC v. AMEC, Inc.*, 196 N.C. App. 202, 220, 675 S.E.2d 46, 58 (2009) (citation omitted). This is because "the inference does not supply the place of evidence of material facts and does not shift the burden of proof

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at 226-27, 695 S.E.2d at 440-41 (citation omitted). In *Fussell*, the Supreme Court held homeowners stated a claim for negligence for the flooding of a home where a Town of Apex employee actively turned on water service while the owners were not home and then failed to wait to see if it was working properly. *Id.* at 223, 695 S.E.2d at 438-39. Indeed, the facts of *Fussell* are different than the present case, which did not involve direct action by a City employee in starting the flow of water.

8. Of note is that the Record also reflects evidence that the leak at issue in this case had less impact on 3410 Carmel Road than Plaintiffs' properties. The owner of 3410 Carmel Road reported only some water intruding into his garage and yard.

so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced." *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 184, 527 S.E.2d 712, 716 (2000) (citation and quotation marks omitted).

Moreover, Plaintiffs' own expert testified the City had no duty to inspect underground water lines if there had been no reported issues. Plaintiffs' expert further testified: "I would not think that the [C]ity would have to worry about every inch of water line . . . if they did not have a reason to expect that the water line was ready to be broken or . . . is in poor repair[.]" Another Plaintiffs' expert, when asked if in his opinion there was anything the City could have done to prevent this leak, testified in deposition: "Not this specific event, no." Plaintiffs' evidence thus falls short of establishing a triable issue of fact as to whether the City exercised "ordinary diligence to discover breaks in its lines and to correct such defects of which it has notice, or which it could have discovered by the exercise of reasonable inspection." *Mosseller*, 267 N.C. at 107, 147 S.E.2d at 561. Consequently, the trial court properly granted Summary Judgment for the City on Negligence claims related to failure to inspect, repair, or maintain the pipe at issue in this case.

B. The City's Response

[3] Plaintiffs further advance the theory the City was negligent in failing to timely respond to the water main break both by failing to have an emergency shut-off crew on standby to respond immediately to such incidents and by failing to timely cut off the flow of water. Plaintiffs' forecast of evidence demonstrated City Water was first notified of a leak following a 911 call at around 6:20 a.m. At 6:24 a.m., a dispatcher for City Water contacted team leaders regarding a potential hydrant leak. At 6:45 a.m., the team leaders instructed the dispatcher to send a crew to make repairs. No crew was immediately available, so an on-call repair crew from Huntersville was paged between 6:45 and 7:00 a.m. The first crewmember reported to Huntersville at 7:18 a.m. The Huntersville crew did not arrive and begin cutting off water until 8:40 a.m.

As a result of a separate call to 311 by a neighboring homeowner at 7:16 a.m., a City Water Customer Service Technician also reported to the scene, arriving at 7:40 a.m. The Customer Service Technician called in an emergency requiring additional crew between 7:45 and 8:00 a.m. with a second call being made between 8:30 and 8:35 a.m. The water was cut off and began receding from the homes sometime between 9:30 and 10:00 a.m.

Plaintiffs introduced expert testimony that it would be reasonable to have a repair crew on immediate standby to respond to such an incident, a reasonable response time to arrive on scene would have been approximately 30 minutes, and further, it should have taken only approximately 30 minutes to shut off the water once the crews arrived on scene. Thus, it can be inferred from the evidence proffered by Plaintiffs' expert that the City could have shut off the water by as early as approximately 7:30 a.m.

Plaintiffs concede even under their proffered standard, the Henke/Siravo residence would have flooded, as Henke's own testimony established he woke up at 6:30 a.m. to floodwaters already in the house. Thus, Summary Judgment on this theory was appropriately granted to the City as to Henke and Siravo.

However, the evidence reflects the Wagner/Lichstrahl residence, on the other hand, may not have flooded until as late as between 8:15 and 8:30 a.m. To be sure, the evidence, as the City points out, is conflicting, and the home may well have, in fact, flooded much earlier. The City further contends the evidence reflects a reasonable response time in shutting off the water under the circumstances. However, this creates disputes of material facts as to when the Wagner/Lichstrahl home actually flooded and if, in fact, the City's response time and/or diligence in shutting off the water was unreasonable, would swifter action have prevented flooding of the home. Consequently, on this limited theory of negligence applicable solely to Wagner and Lichstrahl, we conclude Summary Judgment was improper and reverse summary judgment on this claim.

III. Private Nuisance

[4] Plaintiffs argue the trial court erred in granting Summary Judgment on their claims for Private Nuisance. "In order to establish a claim for nuisance, a plaintiff must show the existence of a substantial and unreasonable interference with the use and enjoyment of its property." *Shadow Grp., LLC v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 200, 579 S.E.2d 285, 287 (2003) (citation omitted). Indeed, Plaintiffs point to *Shadow Group, LLC* as supporting their position. In that case, after a bench trial, the trial court found the homeowners' association liable for creating a nuisance where water from the common areas of a subdivision flowed into townhomes within the subdivision. Efforts by the homeowners' association to remedy the problem only made matters worse. *Id.* at 198-99, 579 S.E.2d at 286. In affirming the trial court, this Court noted "one's action in interfering with the flow of water resulting

in damage to another's property can constitute a private nuisance." *Id.* at 200, 579 S.E.2d at 287 (citation omitted).

The City, however, argues *Shadow Group, LLC* is distinguishable because it involved recurrent or ongoing flooding—not a single incident of flooding causing a single distinct injury to property. Rather, the City contends, Plaintiffs, if they have any remedy here, should be limited to negligence claims. To be sure, divining the difference between a private-nuisance and a negligence claim is not easy, and the distinctions appear murky at best. However, this Court has indicated where "the damage the plaintiffs complained of arose out of single physical injury, instead of an on-going injury[,]" the action sounds in negligence and not nuisance. *Walden v. Morgan*, 179 N.C. App. 673, 683, 635 S.E.2d 616, 624 (2006) (citation omitted); *see Boldridge v. Construction Co.*, 250 N.C. 199, 203, 108 S.E.2d 215, 218 (1959) ("Indeed, taking the evidence according to its reasonable inferences, the nuisance, if it may be called such, was negligence-born, and must, in the legal sense, make obeisance to its parentage." (citation and quotation marks omitted)). Furthermore, in an analogous case, this Court held where a municipality's faulty sewage system resulted in an ongoing situation where raw sewage flowed into a homeowner's basement, this claim did constitute a nuisance, particularly after the municipality abandoned efforts to fix the problem. *Hughes v. City of High Point*, 62 N.C. App. 107, 109, 302 S.E.2d 2, 3 (1983). However, this Court also pointed out the critical distinction:

> As we understand the law, it is the maintenance of a structure or condition permanent in nature which constitutes a nuisance. The defendant would not be liable for a nuisance if it had negligently maintained or performed some work on a structure which caused some temporary inconvenience to the plaintiffs.

Id.

In this case, Plaintiffs' claim arises from a single incident of a burst water main resulting in temporary damage to their properties. As such, we conclude Plaintiffs' claims do not sound in nuisance. Thus, we affirm the trial court's grant of Summary Judgment to the City on Plaintiffs' Private-Nuisance claims.

IV. Trespass

[5] Plaintiffs also argue the trial court erred in granting Summary Judgment on their Trespass claims in the 2016 Lawsuit and, in turn, dismissing their separate 2017 Complaint. "In order to establish a trespass

to real property, a plaintiff must show: (1) his possession of the property at the time the trespass was committed; (2) an unauthorized entry by the defendant; and (3) resulting damage to the plaintiff." *Shadow Group, LLC*, 156 N.C. App. at 201, 579 S.E.2d at 287 (citation omitted). Specifically, "[o]ne's action of causing water to flow onto another's property can constitute such a trespass." *Id.* (citation omitted). However,

> [e]xcept where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.

Smith v. VonCannon, 283 N.C. 656, 661, 197 S.E.2d 524, 528 (1973) (citations and quotation marks omitted).

Here, there is no contention the City committed an intentional trespass. Rather, Plaintiffs rely on their claims for Negligence. As we have already concluded Summary Judgment was proper for the City as to Henke and Siravo on both theories of Negligence, we affirm Summary Judgment as to them on their Trespass claims in the 2016 Lawsuit and dismissal of the same claim in the 2017 Lawsuit. Likewise, we affirm Summary Judgment to the City as to Wagner and Lichstrahl on the theory the City negligently maintained the water main. However, we reverse Summary Judgment as to Wagner and Lichstrahl on the theory the City was negligent in their response to the water main burst resulting in flooding of their property in the 2016 Lawsuit and reverse dismissal of the 2017 Lawsuit on this limited theory.

V. Constitutional Claims

[6] Finally, Plaintiffs argue the trial court erred in granting Summary Judgment to the City on Plaintiffs' claims arising from alleged violations of their State constitutional protections affording the right to due process and equal protection when the City denied their claims for compensation arising from the flooding. Specifically, Plaintiffs contend the forecast of evidence reveals they were afforded different treatment than other similarly situated residents who submitted claims to the City for flood damage solely because Plaintiffs had property casualty insurance, and this constituted the basis for the City's denial. While it is true the City denied their claims and the evidence reflects Plaintiffs did have such

insurance, we see no evidence in the Record to support any correlation between these two facts. To the contrary, our review of the evidence reflects the City applied the same process to Plaintiffs' claims as it did to others identified in the Record. Thus, the trial court properly granted Summary Judgment on Plaintiffs' remaining constitutional claims.

VI. Other Motions

In light of our decision resulting in reversal, in limited part, of the trial court's grant of Summary Judgment to the City, we also vacate the trial court's dismissal of the remaining Motions as moot. On remand, the trial court, with the assistance of the parties, should determine which of those Motions now require a decision.

Conclusion

Consequently, for the foregoing reasons, we affirm Summary Judgment for the City on Plaintiffs' Inverse-Condemnation claims, Nuisance claims, and remaining constitutional claims. We affirm Summary Judgment for the City on the Negligence claims by Henke and Siravo. We affirm Summary Judgment for the City on the Negligence claim of Wagner and Lichstrahl on the theory of negligent maintenance of the water main but reverse Summary Judgment on the theory of the City's alleged negligent response to the water main break. Likewise, we affirm Summary Judgment in the 2016 Lawsuit and dismissal of the 2017 Lawsuit as to the Trespass claims brought by Henke and Siravo and reverse Summary Judgment in the 2016 Lawsuit and dismissal of the 2017 Lawsuit on the Trespass claims of Wagner and Lichstrahl based on the theory of the City's alleged negligence in responding to the water main break. Accordingly, we also vacate the trial court's dismissal of the remaining Motions as moot and remand this matter to the trial court to proceed on those Motions as necessary and to proceed with the remaining claims of Wagner and Lichstrahl.

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

Judge DILLON concurs.

Judge MURPHY concurs in part and in result only in part in a separate opinion.

MURPHY, Judge, concurring in part and concurring in result only in part.

I fully join the Majority as to Parts II, III, and IV of its Analysis. However, I concur in the result only as to Part I. Although I join in the bulk of the Majority's Part I analysis, I must throw cold water on the portion that attempts to harmonize our Supreme Court's opinion in *Lea Co.* with the United States Supreme Court's opinion in *Ark. Game & Fish Comm'n*. The U.S. Supreme Court considered more factors in *Ark. Game & Fish Comm'n* than our Supreme Court did in *Lea Co.*[1] The Majority focuses on only one factor in its attempt to synthesize *Lea Co.* and disregards the United States Supreme Court's holding:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause Inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed *a factor* in determining the existence *vel non* of a compensable taking.

Ark. Game & Fish Comm'n, 568 U.S. at 38, 184 L. Ed. 2d at 430-31 (emphasis added).

By contrast, and as the Majority outlines, *Lea Co.* only considered two elements. The first was "the substantiality of the injury." *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 619, 304 S.E.2d 164, 175 (1983). The second was "whether it had been shown that substantial injury had been

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1. The U.S. Supreme Court outlined at least five considerations:

> [(1)] When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed *a factor* in determining the existence *vel non* of a compensable taking.
>
> [(2)] Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action.
>
> [(3)] So, too, [is] the character of the land at issue. . . .
>
> [(4) A]nd the owner's reasonable investment-backed expectations regarding the land's use.
>
> [(5) The s]everity of the interference figures in the calculus as well.

Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38-39, 184 L. Ed. 2d 417, 430-31 (2012) (emphasis added and internal marks and citations omitted).

caused as the foreseeable direct result of the structure built and maintained by the government." *Lea Co.*, 308 N.C. at 620, 304 S.E.2d at 176. This two-part analysis is, at best, a watered-down version of *Ark. Game & Fish Comm'n*.

The *Ark. Game & Fish Comm'n* factors must be calculated together with Lea Co.'s elements. I would find the *Ark. Game & Fish Comm'n* factors were also required to be "figure[d] in the calculus." *Ark. Game & Fish Comm'n*, 568 U.S. at 39, 184 L. Ed. 2d at 431. When "assessed by case-specific factual inquiry," *id.* at 38, 184 L. Ed. 2d at 431 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, n. 12, 73 L. Ed. 2d 868, 895 (1982)), that analysis would result in finding an inverse condemnation here.

Despite this, the procedural posture of this case requires my concurrence and does not present an opportunity to dissent on an issue of which I have great passion. If we were considering whether or not there was a taking under the United States Constitution, then I would provide a full dissent and discuss why, in the light most favorable to Plaintiffs, the claims for inverse condemnation survive at this stage of the litigation. However, on 29 December 2016, while this matter was before the United States District Court for the Western District of North Carolina, Plaintiffs filed their *Memorandum of Law in Support of Motion to Remand* informing the District Court that

> Plaintiffs' Proposed Amended Complaint contains no federal claims and no federal questions. The [District] Court should decline to exercise supplemental jurisdiction over the state law claims. Remanding this case to state court promotes the values of economy, convenience, fairness and comity.

Defendant subsequently agreed with Plaintiffs and consented to the Proposed Amended Complaint and the remand to state court in a filing dated 12 January 2017. On 27 February 2017, the federal court accepted the positions of the parties and ordered this matter remanded to state court as the Amended Complaint "eliminat[ed] Plaintiffs' federal claims."

The U.S. Supreme Court's opinion in *Ark. Game & Fish Comm'n* dealt with a violation of the Takings Clause under the United States Constitution. Therefore, the framework set out therein only applies to takings under the Fifth Amendment as applied to North Carolina through the Fourteenth Amendment. Plaintiffs openly abandoned any claim thereunder when it sought to have this matter remanded to state court. *Lea Co.* cannot be harmonized with *Ark. Game & Fish Comm'n*

in the way the Majority attempts, and properly applying the *Ark. Game & Fish Comm'n* factors in this case would lead to the opposite result.

However, as we are only applying North Carolina's analysis of a taking without reference to the United States Constitution, we are bound by *Lea Co.* as our high court's controlling consideration of what does and does not constitute a taking in these circumstances. Even so, I cannot agree with the Majority that "*Arkansas Game & Fish Commission* is generally consistent with the analysis historically employed by our state courts[,]" that its "analysis is in harmony with our Supreme Court's decision in *Lea Co.*[,]" that *Lea Co.* "largely foreshadowed *Arkansas Game & Fish Commission*[,]" or that *Ark. Game & Fish Comm'n* would "not alter our course here." Therefore, based upon the unique procedural history in this Record, I concur in the result only as to the claims for inverse condemnation.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 4 February 2020)

B.V. BELK, JR. v. VRS MAGNOLIA PLAZA, LLC No. 19-563	Mecklenburg (17CVS23389)	Affirmed
CALATLANTIC GRP., INC. v. CNTY. OF UNION No. 19-577	Union (18CVS1725)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED
CARRINGTON v. CAROLINA DAY SCH., INC. No. 19-666	Buncombe (18CVS4926)	Affirmed
DAVIDSON v. LAWS No. 18-780	Davidson (17CVD2512)	Vacated and Remanded
EASTWOOD CONSTR. CO. v. CNTY. OF UNION No. 19-579	Union (16CVS2932)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED
IN RE A.J.A-D. No. 19-270	Franklin (18JT20)	Affirmed
IN RE Z.S. No. 19-74	Mecklenburg (17JA522)	Affirmed
LENNAR CAROLINAS, LLC v. CNTY. OF UNION No. 19-576	Union (16CVS2654)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED
LIGHT v. PRASAD No. 19-720	Wake (15CVS16972)	Affirmed
M/I HOMES OF CHARLOTTE, LLC v. CNTY. OF UNION No. 19-575	Union (17CVS2544)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED
McINNIS CONSTR. CO. v. CNTY. OF UNION No. 19-578	Union (16CVS3148)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED
NOVACK v. KOSCIUSZKO No. 19-383	Mecklenburg (17CVS21740)	Affirmed

PACE/DOWD PROPS., LTD v. CNTY. OF UNION No. 19-580	Union (17CVS781)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED.
POWELL v. HAMILTON No. 19-325	Mecklenburg (17CVD10705)	Affirmed
S&S FAM. BUS. CORP. v. CLEAN JUICE FRANCHISING, LLC No. 19-264	New Hanover (18CVS1707)	Reversed and Remanded
SAUNDERS v. CRYSTAL SPRINGS PARK, INC. No. 19-526	Randolph (17CVS254)	Dismissed
SHEA HOMES, LLC v. CNTY. OF UNION No. 19-573	Union (17CVS1563)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED.
SHOPS AT CHESTNUT, LLC v. CNTY. OF UNION No. 19-574	Union (17CVS1698)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED
STATE v. ELLIOTT No. 19-123	Craven (15CRS52922) (16CRS387) (17CRS680)	No Error
STATE v. ESPINOSA No. 19-305	Wake (15CRS201561) (15CRS201562)	No Error
STATE v. HALL No. 19-110	Wake (15CRS228062)	No Error
STATE v. MAYFIELD No. 19-606	Catawba (18CRS14)	Affirmed
STATE v. McCORMICK No. 19-680	Robeson (14CRS51181)	No Error
STATE v. SANDERS No. 19-248	Durham (17CRS53079)	Affirmed
STATE v. STACY No. 19-465	Alexander (17CRS50848-49)	No Plain Error in Part; Vacated and Remanded in Part

STATE v. TAYLOR No. 19-593	Wilson (17CRS50074) (17CRS50087)	No Error
STATE v. WATSON No. 19-553	Gaston (17CRS63353)	No Error
STATE v. WILSON No. 19-620	Lincoln (18CRS780)	No Plain Error
TRUE HOMES, LLC v. CNTY. OF UNION No. 19-572	Union (16CVS2675)	APPEAL DISMISSED; PETITION FOR WRIT OF CERTIORARI DENIED.
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