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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PATRICIA BARNARD, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED, PLAINTIFF
v.
JOHNSTON HEALTH SERVICES CORPORATION D/B/A JOHNSTON HEALTH, AND ACCELERATED CLAIMS, INC., DEFENDANTS

No. COA19-290

Filed 18 February 2020

1. Insurance—medical payments coverage—assignment of benefits—automobile accident

Where plaintiff was in an automobile accident and signed a consent form authorizing defendant hospital to collect "all health and liability insurance" on her behalf to cover her medical treatment, her assignment of benefits applied to her medical payments benefits from her automobile insurance policy.

2. Insurance—medical payments coverage—overpayment credit—subrogation by health insurer

Where plaintiff's automobile insurer—through medical payments coverage—and her health insurer both made payments toward plaintiff's hospital bill after an automobile accident, resulting in an overpayment credit on plaintiff's account, plaintiff's health insurer (and not plaintiff) was entitled to receive the overpayment credit based on its equitable subrogation rights.

Appeal by plaintiffs from order entered 1 November 2018 by Judge Richard T. Brown in Johnston County Superior Court. Heard in the Court of Appeals 15 October 2019.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, III and L. Lamar Armstrong, Jr. and White & Stradley, PLLC, by J. David Stradley for plaintiff-appellant.

Yates, McLamb & Weyher, L.L.P., by Dan J. McLamb and Allison J. Becker, for defendant-appellee Johnston Health Services Corporation d/b/a Johnston Health.

Kilpatrick Townsend & Stockton LLP, by John M. Moye, for defendant-appellee Accelerated Claims, Inc.

BRYANT, Judge.

Where the clauses for assignment of benefits and subrogation properly applied to plaintiff's MedPay benefits, we affirm the trial court's judgment on the pleadings in favor of defendants.

Plaintiff Patricia Barnard sustained injuries in a motor vehicle collision on 17 October 2016 and was taken to Johnston Health Hospital ("Johnston Health") for treatment. Per Johnston Health's patient intake practice, upon entry, patients are asked to sign admission paperwork, provide proof of health insurance and confirm if treatment is sought as a result of an automobile accident. Accelerated Claims, Inc. ("ACI"), an account management company, regularly assisted Johnston Health with account management for emergency patients involved in motor vehicle accidents. Once a patient is determined to have an automobile liability policy that contains medical payments coverage, Johnston Health assigns the patient account to ACI for collection of benefits.

Upon arriving at Johnston Health's emergency department, plaintiff executed a "General Consent for Treatment" form. The consent form contained an assignment of benefits clause which stated, *inter alia*, the following:

> I request that payment of authorized benefits be made to the appropriate UNC Health Care affiliate[, Johnston Health,] on my behalf. I authorize [Johnston Health] to bill directly and assign the right to *all health and liability insurance benefits* otherwise payable to me, and I authorize direct payment to [Johnston Health].

(emphasis added).

At the time of admission, plaintiff had an automobile insurance policy with State Farm Mutual Automobile Insurance Company ("State

Farm"). The State Farm policy, in part, provided plaintiff, as the insured, with coverage for medical expenses caused by a motor vehicle accident (hereinafter "MedPay"). Plaintiff, a former state employee, was also insured by Blue Cross Blue Shield ("BCBS") through its State Health Plan.[1] After plaintiff was discharged, Johnston Health submitted claims regarding medical expenses incurred by plaintiff to both insurers. ACI was assigned plaintiff's account to manage and collect payments under the automobile insurance policy from State Farm.

On 13 January 2017, Johnston Health received a payment of $2,000 from State Farm—the maximum MedPay available under the policy. The payment was credited to plaintiff's account. On 2 May 2017, Johnston Health received payment of $694.63 from BCBS. After the BCBS payment was applied, plaintiff's account had a credit balance. Johnston Health refunded the credit to BCBS pursuant to the subrogation clause in plaintiff's BCBS policy.

In 2018, plaintiff initiated a class action lawsuit[2] against Johnston Health and ACI, alleging that defendants improperly conspired to recover payments from automobile insurance companies, who insure emergency room patients in car accidents. Plaintiff filed a complaint and an amended complaint. Defendants filed separate answers denying wrongdoing. Defendants asserted that plaintiff executed an assignment of all health and liability insurance benefits, otherwise payable to her, prior to receiving medical treatment.

On 18 October 2018, plaintiff filed for a motion for partial judgment on the pleadings arguing that defendants were not entitled to collect MedPay from State Farm. Defendants answered and moved for judgment on the pleadings as to all claims asserted by plaintiff.

On 1 November 2018, the trial court denied plaintiff's motion and granted defendants' motion for judgment on the pleadings. The trial court found that "[p]laintiff executed an [a]ssignment of [b]enefits [to Johnston Health] which [the] language included 'the right to all health and liability insurance benefits otherwise payable to [plaintiff],' " that "MedPay benefits do constitute, at least in part, health insurance benefits," and that BCBS had the right to recover any amount paid on plaintiff's behalf from other insurance.

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1. Plaintiff is a retired state employee and contracted her State Health Plan insurance with BCBS.

2. A review of the record reveals no indication that a class was ever certified, and we note plaintiff's notice of appeal is on her behalf only.

Plaintiff filed notice of appeal.

On appeal, plaintiff argues the trial court erred by: I) entering judgment in favor of defendants regarding her MedPay benefits, and II) finding that BCBS was entitled to recover the overpayment from her account.

We review the trial court's ruling for a motion for judgment on the pleadings *de novo*. *Erie Ins. Exch. v. Builders Mut. Ins. Co.*, 227 N.C. App. 238, 241, 742 S.E.2d 803, 807 (2013). "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Id.* (citation omitted). In considering a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "All well[-]pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.* "When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate." *Id.*

I

[1] First, plaintiff argues the trial court erred by finding that the assignment of "health and liability insurance" plaintiff executed at the hospital applied to her MedPay benefits with State Farm. We disagree.

"[T]he objective of construction of terms in the insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). "[T]o the extent there are any ambiguities, [we] provide a construction which a reasonable person in the position of the insured would have understood it to mean." *Wehrlen v. Amica Mut. Ins. Co.*, 118 N.C. App. 64, 69, 453 S.E.2d 557, 559 (1995) (citation and quotation marks omitted). "When the policy contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise." *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522. "In the absence of such definition, nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." *Id.*

In the instant case, plaintiff signed a consent form upon being admitted at the hospital—containing an assignment of benefits clause—which

authorized Johnston Health to collect "all health and liability insurance" on plaintiff's behalf to cover her medical treatment. The declaration page of plaintiff's State Farm policy contains the following relevant provision addressing coverage for medical payments: "[State Farm] will pay reasonable expenses incurred for necessary medical and funeral services because of bodily injury caused by accident and sustained by an insured."

The State Farm policy defined "bodily injury" as bodily harm, sickness or disease, including death. It provided the insured with MedPay only if the expenses were reasonably related to medical services; stating, "expenses are reasonable only if they are consistent with the usual fees . . . of similar medical providers in the geographical area in which the expenses were incurred for a specific medical service." The policy provision further allowed payment for services necessary "in achieving maximum medical improvement" for injuries sustained in car accidents and administered by a licensed medical provider in practice.

The purpose of MedPay in the State Farm policy is to afford financial assistance to the insured for medical services and treatment sought as a result of a car accident. By these terms, it is reasonable that a person, insured with State Farm, should interpret MedPay as providing additional health insurance benefits. Therefore, it was not error for the trial court to determine that MedPay benefits constitute—at least in part—health benefits and that plaintiff's assignment of benefits included those MedPay benefits.

Plaintiff's argument is overruled.

II

[2] Finally, plaintiff argues the trial court erred by finding that BCBS had a right to receive the overpayment on her account. Notably, plaintiff does not dispute the subrogation clause within her policy with BCBS, which allows BCBS to recover or to be reimbursed for payments towards plaintiff's injury. Rather, plaintiff argues that the subrogation clause is unenforceable towards her MedPay benefits. We disagree.

"It is well-settled in North Carolina that an insurer is subrogated to its insured's rights to recover medical expenses resulting from injuries inflicted by a tortfeasor when the insurer has paid such medical expenses pursuant to a medical payments provision in the insurance policy." *Moore v. Beacon Ins. Co.*, 54 N.C. App. 669, 670, 284 S.E.2d 136, 138 (1981).

Here, the subrogation clause in plaintiff's BCBS policy provides, in pertinent part, that BCBS "be subrogated to all rights of recovery a member has against any party potentially responsible for making payment to a member, due to a member's injuries, illness or condition, to the full extent of benefits provided[.]" Moreover, BCBS retains "the right to recover from, and be reimbursed by, the member for all amounts [BCBS] has paid and will pay as a result of the [member's] injury or illness[.]"

Plaintiff paid premiums on the BCBS policy as a part of the State Health Plan, and in exchange, was insured for accident and health insurance coverage. Following her accident, compensation was paid for medical expenses due to the injuries sustained during her accident. The compensation received by the hospital for plaintiff's medical expenses from State Farm and from BCBS resulted in a credit balance to her account. Because of the subrogation clause in the BCBS's State Health Plan, BCBS was refunded the overpayment.

Plaintiff argues the BCBS subrogation clause in the plan could not be enforced against MedPay benefits from State Farm. Plaintiff argues that N.C. Gen. Stat. § 135-48, which allows subrogation by BCBS, actually bars BCBS's right to subrogation. We find plaintiff's argument to be without merit. However, even if there was some merit afforded to plaintiff's argument, our Court has recognized that an insurer has equitable subrogation rights in recovering payments pursuant to medical payment provisions in an automobile insurance policy. *See id.* at 670–71, 284 S.E.2d at 138 ("[I]f the insurer has made payments to the insured for the loss covered by the policy and the insured thereafter recovers for such loss from the tortfeasor [or an insurance company], the insurer can recover from the insured the amount it had paid the insured, on the theory that otherwise the insured would be unjustly enriched by having been paid twice for the same loss.").

Therefore, plaintiff's coverage with State Farm entitled BCBS, not plaintiff, to be reimbursed for any overpayment of medical expenses. Plaintiff's argument is overruled.

Accordingly, for the foregoing reasons, the trial court's judgment on the pleadings for defendants is

AFFIRMED.

Judges TYSON and BROOK concur.

HOLMES v. MOORE

[270 N.C. App. 7 (2020)]

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, SHAKOYA CARRIE BROWN, AND PAUL KEARNEY, SR., PLAINTIFFS

v.

TIMOTHY K. MOORE IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DAVID R. LEWIS IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; RALPH E. HISE IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS, DEFENDANTS

No. COA19-762

Filed 18 February 2020

1. Appeal and Error—interlocutory appeal—substantial right—order denying preliminary injunction—challenge to voter ID law

An interlocutory order denying plaintiffs' motion for a preliminary injunction enjoining a voter photo ID law—which plaintiffs (all African American) alleged violated the Equal Protection Clause of the state constitution because it intentionally discriminated against African American voters in state elections—was immediately appealable because it affected plaintiffs' substantial right to vote on an equal basis with other North Carolina citizens, and this right would be lost absent immediate appeal.

2. Constitutional Law—North Carolina—equal protection—entitlement to preliminary injunction—voter ID law—racial discrimination

The trial court erred in denying plaintiffs' motion for a preliminary injunction enjoining a voter photo ID law, which plaintiffs (all African American) alleged violated the Equal Protection Clause of the state constitution because it intentionally discriminated against African American voters in state elections. Under the factors set forth in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), plaintiffs showed a likelihood of success on the merits in demonstrating that racial discrimination was a "substantial" or "motivating" factor behind the law's enactment, while the defendants (including state legislators) failed to show the law would have been enacted regardless of any discriminatory intent. Further, plaintiffs showed they were likely to suffer irreparable harm (denial of equal treatment when voting in upcoming elections) if the law were not enjoined.

Appeal by Plaintiffs from Order entered 19 July 2019 by Judges Nathaniel J. Poovey, Vince M. Rozier, Jr., and Michael J. O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 22 January 2020.

Southern Coalition for Social Justice, by Jeffrey Loperfido and Allison J. Riggs, and Paul, Weiss, Rifkind, Wharton & Garrison LLP, by Andrew J. Ehrlich, Ethan Merel, Apeksha Vora, Jane B. O'Brien, Paul D. Brachman, Jessica Anne Morton, and Laura E. Cox, pro hac vice, for plaintiffs-appellants.

Phelps Dunbar LLP, by Nathan A. Huff, and Cooper & Kirk, PLLC, by David H. Thompson, Peter A. Patterson, and Nicole Frazer Reaves, pro hac vice, and by Nicole J. Moss, for legislative defendants-appellees.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Olga E. Vysotskaya de Brito, Senior Deputy Attorney General Amar Majmundar, and Special Deputy Attorney General Paul M. Cox, for defendants-appellees the State of North Carolina and the North Carolina State Board of Elections.

HAMPSON, Judge.

Factual and Procedural Background

Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, Shakoya Carrie Brown, and Paul Kearney, Sr. (collectively, Plaintiffs)[1] appeal from an Order Denying Plaintiffs' Motion for Preliminary Injunction and Denying in Part and Granting in Part Defendants' Motions to Dismiss (Order) filed on 19 July 2019, concluding in part Plaintiffs were not entitled to a preliminary injunction enjoining Senate Bill 824, titled "An Act to Implement the Constitutional Amendment Requiring

1. On 18 September 2019, Plaintiffs filed a Motion with this Court requesting we take judicial notice of Plaintiff Shakoya Carrie Brown's Notice of Voluntary Dismissal filed with the trial court on 16 September 2019. However, Plaintiffs have failed to make a motion to amend the Record under N.C.R. App. P. 9(b)(5), which is "the proper method to request amendment of the record[.]" *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 267, 468 S.E.2d 856, 857 (1996). Further, "we will not take judicial notice of a document outside the record when no effort has been made to include it." *Id.* at 268, 468 S.E.2d at 858. Accordingly, we deny Plaintiffs' Motion. Plaintiffs also have not filed any motion in this Court requesting Ms. Brown be dismissed or permitted to withdraw from this appeal.

Photographic Identification to Vote," (S.B. 824),[2] which established, *inter alia*, photographic voter identification (photo ID) requirements for elections in North Carolina. The Record before us tends to show the following:

On 6 November 2018, a majority of North Carolina voters, approximately 55%, voted in favor of amending Article VI of the North Carolina Constitution by requiring voters to present qualifying photo ID before casting a ballot. Sections 2(4) and 3(2) of Article VI of the North Carolina Constitution now provide:

> Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

N.C. Const. art. VI, §§ 2(4), 3(2).

Less than a month after approval of this constitutional Amendment and during a "lame-duck" legislative session, the General Assembly passed S.B. 824 as implementing legislation on 6 December 2018. Governor Roy Cooper (Governor Cooper) vetoed S.B. 824 on 14 December 2018. Five days later, the General Assembly reconvened and overrode Governor Cooper's veto. Thus, on 19 December 2018, S.B. 824 became law. 2018 N.C. Sess. Law 144.

At its core, S.B. 824 requires all voters, both those voting in person or by absentee ballot, "produce" an acceptable form of identification "that contain[s] a photograph of the registered voter[.]" *Id.* § 1.2(a); *see also id.* § 1.2(e). Section 1.2(a) designates ten different forms of acceptable IDs:

1. North Carolina driver's licenses;

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2. S.B. 824 was subsequently enacted as North Carolina Session Law 2018-144. *See* 2018 N.C. Sess. Law 144 (N.C. 2018) (codified as amended at N.C. Gen. Stat. §§ 20-37.7; 130A-93.1; 161-10; 163A-741, -821, -867, -869, -869.1, -913, -1133-34, -1137, -1145.1-3, -1298, -1300, -1303, -1306-10, -1315, -1368, -1389, -1411, -1520 (2018)); *see also* 2018 N.C. Sess. Law 146, § 3.1(a) (N.C. 2018) (authorizing the recodification of Chapter 163A into Chapters 163, 138A, and 120C). The challenged provisions of S.B. 824 are now found at Sections 163-82.8A (photo-ID requirement), -166.16 (list of valid photo IDs), -166.17 (student-ID requirements), -166.18 (government-ID requirements), -229 (absentee ballots), -230.2 (absentee ballots), -166.7, -227.2, and -22 of our General Statutes. *See* N.C. Gen. Stat. §§ 163-82.8A; -166.16-18; -229; -230.2; -166.7; -227.2; -22 (2019). Because the parties refer to Session Law 824 as S.B. 824, we too refer to it as S.B. 824.

2. Certain nontemporary IDs issued by the Division of Motor Vehicles (DMV);
3. United States passports;
4. North Carolina voter photo-ID cards;
5. Tribal enrollment cards issued by a state or federally recognized tribe;
6. Certain student IDs issued by post-secondary institutions;
7. Certain employee IDs issued by a state or local government entity;
8. Out-of-state driver's licenses or special ID cards for nonoperators for newly registered voters;
9. Military IDs issued by the United States government; and
10. Veterans IDs issued by the United States Department of Veterans Affairs.

Id. § 1.2(a). Under this Section, the first eight forms of ID may be used only if "valid and unexpired, or . . . expired for one year or less[.]" *Id.* Whereas, military and veterans IDs may be used "regardless of whether the identification contains a printed expiration or issuance date[.]" *Id.* Moreover, if a voter is sixty-five years old or older, any expired form of identification allowed above is deemed valid if it was unexpired on the voter's sixty-fifth birthday. *Id.* Student and government-employee IDs, however, do not automatically qualify as acceptable IDs. Instead, post-secondary institutions and public employers must apply to the North Carolina State Board of Elections for approval of their IDs. *See id.* §§ 1.2(b)-(c) (containing original approval process); *see also* 2019 N.C. Sess. Law 22, §§ 2-3 (N.C. 2019) (amending approval process).

S.B. 824 also contains two ways for voters to obtain free photo-ID cards. First, a registered voter may visit their county board of elections and receive an ID "without charge" so long as the voter provides their name, date of birth, and the last four digits of their social security number. 2018 N.C. Sess. Law 144, § 1.1(a). Second, under Section 1.3(a), voters over the age of seventeen may obtain free of charge a nonoperator-ID card from the DMV as long as the voter provides certain documentation, such as a birth certificate. *Id.* § 1.3(a). If the voter does not have this documentation, the State must supply it free of charge.

See id. § 3.2(b). Similarly, if a registered voter's driver's license has been "seized or surrendered due to cancellation, disqualification, suspension, or revocation[,]" the DMV must automatically mail the voter a "special identification card" that can be used for voting. *Id.* § 1.3(a).

Lastly, S.B. 824 contains several exemptions to its photo-ID requirements. Exemptions exist for voters who (1) have "a religious objection to being photographed," (2) are victims of a recent natural disaster, or (3) "suffer[ ] from a reasonable impediment that prevents [them] from presenting photograph identification[.]" *Id.* § 1.2(a). If one of these circumstances applies, a voter may cast a "provisional ballot" by "complet[ing] an affidavit under penalty of perjury at the voting place" affirming their identity and their reason for not presenting photo ID. *Id.* After submitting this affidavit, the county board of elections "shall find that the provisional ballot is valid unless the county board has grounds to believe the affidavit is false." *Id.* In a similar vein, if a registered voter fails to bring their acceptable ID to the polls, the voter may "cast a provisional ballot that is counted only if the registered voter brings an acceptable form of photograph identification . . . to the county board of elections no later than the end of business on the business day prior to the canvass . . . of elections[.]" *Id.*

On the same day S.B. 824 became law, Plaintiffs filed their Verified Complaint (Complaint) in this action in Wake County Superior Court against Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; David R. Lewis, in his official capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; Ralph E. Hise, in his official capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session (collectively, Legislative Defendants); the State of North Carolina; and the North Carolina State Board of Elections (collectively, State Defendants).[3] In their Complaint, Plaintiffs alleged six causes of action claiming S.B. 824 facially violates various provisions of the North Carolina Constitution. In particular, Plaintiffs alleged S.B. 824 violates the Equal Protection Clause found in Article I, Section 19 of the North Carolina Constitution, claiming S.B. 824 was enacted with racially discriminatory intent and thereby intentionally discriminates against voters of color (Discriminatory-Intent Claim). The same day, Plaintiffs also filed a Motion for Preliminary Injunction (Preliminary-Injunction Motion) seeking a preliminary injunction to

3. We refer to both Legislative and State Defendants collectively as Defendants.

prevent "Defendants from implementing in any regard, relying on, enforcing, conducting elections, or preparing to conduct any elections in conformity with the voter ID provisions of [S.B.] 824, specifically Parts I and IV." In response, Legislative and State Defendants each filed Motions to Dismiss on 22 January and 21 February 2019, respectively.

The Chief Justice of the North Carolina Supreme Court transferred this case to a three-judge panel on 19 March 2019. *See* N.C. Gen. Stat. § 1-267.1(a1) (2019) (requiring the transfer of "any facial challenge to the validity of an act of the General Assembly" to a three-judge panel of the Superior Court of Wake County). After hearing arguments from the parties, the three-judge panel entered its Order on Defendants' Motions to Dismiss and Plaintiffs' Preliminary-Injunction Motion on 19 July 2019. In its Order, the trial court dismissed all of Plaintiffs' claims except for Plaintiffs' Discriminatory-Intent Claim, concluding "Plaintiffs have made sufficient factual allegations to support" this Claim. However, a majority of the panel denied Plaintiffs' Preliminary-Injunction Motion, concluding "Plaintiffs have failed to demonstrate a likelihood of success on the merits" of their Discriminatory-Intent Claim. One judge dissented from the portion of the Order denying Plaintiffs' Preliminary-Injunction Motion because, in his opinion and based on the evidence before the panel, "Plaintiffs have shown a reasonable probability of success on the merits [of Plaintiffs' Discriminatory-Intent Claim] and that the issuance of an injunction is necessary to protect Plaintiffs' rights during the litigation." (citation omitted). On 24 July 2019, Plaintiffs filed Notice of Appeal from the trial court's Order. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019).

Appellate Jurisdiction

[1] The trial court's Order in this case both partially dismissed Plaintiffs' claims and denied the Preliminary-Injunction Motion. This Order does not contain a certification of the dismissed claims for immediate appeal under Rule 54(b), and Plaintiffs do not bring forward any arguments regarding the dismissed claims. Thus, we do not address the trial court's dismissal of those claims and leave that aspect of the Order undisturbed. Rather, Plaintiffs only contend the trial court erred in denying the Preliminary-Injunction Motion.

The denial of a preliminary injunction is interlocutory in nature. *See A.E.P. Industries v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation omitted); *see also Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) ("An interlocutory order . . . is one made during the pendency of an action which does not dispose of the case, but leaves it for further action by the trial court in order to settle

and determine the entire controversy." (citation omitted)). A party may appeal an interlocutory order if it "deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *A.E.P. Industries*, 308 N.C. at 400, 302 S.E.2d at 759.

A substantial right has consistently been defined as "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right." *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (alteration, citation, and quotation marks omitted). "The burden is on the appellant to establish that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Coates v. Durham Cty.*, ___ N.C. App. ___, ___, 831 S.E.2d 392, 394 (2019) (citation and quotation marks omitted). "We consider whether a right is substantial on a case-by-case basis." *Gilbert*, 363 N.C. at 75, 678 S.E.2d at 605.

Here, Plaintiffs assert the Order affects a substantial right of theirs—namely, "the right to vote on equal terms and free from intentional discrimination[.]" Indeed, our Supreme Court has recognized: "The right to vote is one of the most cherished rights in our system of government, enshrined in both our Federal and State Constitutions." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009) (citing U.S. Const. amend. XV; N.C. Const. art. I, §§ 9, 10, 11); *see also Wesberry v. Sanders*, 376 U.S. 1, 17, 11 L. Ed. 2d 481, 492 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). More specifically, though, Plaintiffs contend their substantial right—"to go to the polls in the March 2020 primary [and in the fall general elections] under laws that were not designed to make it harder for them and other voters of color to vote"—will be lost absent review and imposition of a preliminary injunction by this Court.

In contrast, Legislative Defendants argue no substantial right of these *individual* Plaintiffs will be lost absent review because all Plaintiffs will be able to vote under S.B. 824. However, Legislative Defendants fundamentally miss the point—and, indeed, the substantial right that would be lost absent appeal. "In decision after decision, [the United States Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an *equal basis* with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336, 31 L. Ed. 2d 274, 280 (1972) (emphasis added) (citations omitted). Thus,

where Plaintiffs have sufficiently alleged, as discussed in more detail *infra*, S.B. 824 denies Plaintiffs the "right to participate in elections on an equal basis with other citizens in [North Carolina]" because S.B. 824's restrictions, which were enacted with discriminatory intent, disproportionately impact African American voters'—and thus Plaintiffs'—ability to vote in comparison to white voters, Plaintiffs have demonstrated a substantial right that will be lost absent immediate appeal. *Id.* (citations omitted); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 229-30 (4th Cir. 2014) (addressing an interlocutory appeal from a district court's denial of a preliminary injunction where the plaintiffs challenged H.B. 589, North Carolina's previous voter-ID-requirement law, on the grounds that it violated equal protection provisions of the United States Constitution). This is so because it is the right to participate in elections on an *equal* basis that is substantial; accordingly, whether Plaintiffs could conceivably still participate in the elections—by jumping through the allegedly discriminatory hoops of S.B. 824—is, in and of itself, not determinative of whether or not S.B. 824 negatively affects the substantial right claimed by Plaintiffs in this case.[4]

Lastly, on 31 December 2019, a federal district court granted a preliminary injunction enjoining, *inter alia*, S.B. 824's voter-ID provisions, concluding the plaintiffs in that case had satisfied their burden of showing a likelihood of success on their claim that these provisions were impermissibly motivated, at least in part, by discriminatory intent in violation of the Equal Protection Clause of the United States Constitution. *See N.C. State Conference of the NAACP v. Cooper*, ___ F. Supp. 3d ___, ___ (M.D.N.C. 2019). At oral arguments in the present case, Legislative Defendants argued the federal district court's granting of a preliminary injunction divests this Court of jurisdiction because Plaintiffs can no

4. In a similar vein, Legislative Defendants assert for these same reasons—*i.e.*, Plaintiffs *could* still vote under S.B. 824—that Plaintiffs necessarily lack standing to challenge S.B. 824 because they have "shown no likelihood of harm." However, just as with the substantial-right analysis, Legislative Defendants again miss the mark regarding Plaintiffs' alleged actual injury, which is the discriminatory burdens S.B. 824 imposes on Plaintiffs' right to participate in elections on an equal basis. *See, e.g.*, *Fla. Gen. Contractors v. Jacksonville*, 508 U.S. 656, 666, 124 L. Ed. 2d 586, 597 (1993) (explaining in the context of an equal protection claim, the "injury in fact" was the "denial of equal treatment . . . not the ultimate inability to obtain the benefit" (citation omitted)). Here, Plaintiffs' alleged injury in fact is the denial of equal treatment regarding Plaintiffs' ability to comply with S.B. 824's requirements, which Plaintiffs' have sufficiently alleged were enacted with discriminatory intent and disproportionately impact African Americans. That Plaintiffs may ultimately be able to vote in accordance with S.B. 824's requirements is not determinative of whether compliance with S.B. 824's commands results in an injury to Plaintiffs.

longer show a substantial right that will be lost given the fact that an injunction will remain in place at least through the March primaries.

However, the federal district court's injunction is merely temporary, and the timing of any trial and decision on the merits in either the state or federal litigation is uncertain. Moreover, Plaintiffs' Discriminatory-Intent Claim here solely invokes protections under our state Constitution. *See Evans v. Cowan*, 122 N.C. App. 181, 183-84, 468 S.E.2d 575, 577 (requiring our state courts to make an "independent determination" of a plaintiff's claims under the North Carolina Constitution (citations omitted)), *aff'd per curiam*, 345 N.C. 177, 477 S.E.2d 926 (1996). Therefore, we conclude this Court has jurisdiction to address the merits of Plaintiffs' appeal from the denial of the Preliminary-Injunction Motion.

Issue

[2] The sole issue on appeal is therefore whether the trial court erred in denying Plaintiffs' Motion to preliminarily enjoin S.B. 824's voter-ID requirements.

Analysis

I. Standard of Review

In reviewing a trial court's order denying a preliminary injunction, our Court has explained our standard of review:

> A preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. In reviewing the denial of a preliminary injunction, an appellate court is not bound by the trial court's findings of fact, but may weigh the evidence anew and enter its own findings of fact and conclusions of law; our review is *de novo*. *De novo* review requires us to consider the question anew, as if not previously considered or decided, and such a review of the denial of a preliminary injunction is based upon the facts and circumstances of the particular case.

Kennedy v. Kennedy, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333 (2003) (citations and quotation marks omitted).

II. Discriminatory-Intent Claim

Plaintiffs allege S.B. 824 violates the Equal Protection Clause of the North Carolina Constitution because it intentionally discriminates against African American voters. *See* N.C. Const. art. I, § 19 (guaranteeing "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin").[5] Specifically, Plaintiffs assert S.B. 824 "is unconstitutional because it was enacted with the discriminatory intent to exclude voters of color from the electoral process."

The parties generally agree the United States Supreme Court's decision in *Arlington Heights v. Metropolitan Housing Corp.* and its progeny control the question of whether Plaintiffs are entitled to a preliminary injunction based on their Discriminatory-Intent Claim. *See* 429 U.S. 252, 50 L. Ed. 2d 450 (1977).

> In [*Arlington Heights*], the Supreme Court addressed a claim that racially discriminatory intent motivated a facially neutral governmental action. The Court recognized that a facially neutral law, like the one at issue here, can be motivated by invidious racial discrimination. *Id.* at 264-66[, 50 L. Ed. 2d at 464-65]. If discriminatorily motivated, such laws are just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race. *Id.*
>
> When considering whether discriminatory intent motivates a facially neutral law, a court must undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." [*Id.* at 266, 50 L. Ed. 2d at 465.] Challengers need not show that discriminatory purpose was the "sole[ ]" or even a "primary" motive for the legislation, just that it was "*a* motivating factor." *Id.* at 265-66[, 50 L. Ed. 2d at 465] (emphasis added).

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5. Although Plaintiffs only allege violations of our state Constitution and not the federal Constitution, our Supreme Court has recognized the "Equal Protection Clause of Article I, § 19 of the Constitution of North Carolina is functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States." *White v. Pate*, 308 N.C. 759, 765, 304 S.E.2d 199, 203 (1983) (citation omitted). Accordingly, we utilize decisions under both Constitutions to analyze the validity of Plaintiffs' Discriminatory-Intent Claim. *See, e.g.*, *Libertarian Party of N.C. v. State*, 365 N.C. 41, 42, 707 S.E.2d 199, 200-01 (2011) ("adopt[ing] the United States Supreme Court's analysis for determining the constitutionality of ballot access provisions").

Discriminatory purpose "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." [*Washington v. Davis*, 426 U.S. 229, 242, 48 L. Ed. 2d 597, 608-09 (1976).] But the ultimate question remains: did the legislature enact a law "because of," and not "in spite of," its discriminatory effect. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, [60 L. Ed. 2d 870, 888] (1979) [(footnote omitted)].

In *Arlington Heights*, the Court set forth a nonexhaustive list of factors to consider in making this sensitive inquiry. These include: "[t]he historical background of the [challenged] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from normal procedural sequence"; the legislative history of the decision; and of course, the disproportionate "impact of the official action—whether it bears more heavily on one race than another." *Arlington Heights*, 429 U.S. at 266-67[, 50 L. Ed. 2d at 465-66] (internal quotation marks omitted).

In instructing courts to consider the broader context surrounding the passage of legislation, the Court has recognized that "[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence." In a vote denial case such as the one here, where the plaintiffs allege that the legislature imposed barriers to minority voting, this holistic approach is particularly important, for "[d]iscrimination today is more subtle than the visible methods used in 1965." Even "second-generation barriers" to voting, while facially race neutral, may nevertheless be motivated by impermissible racial discrimination. [*Shelby County v. Holder*, 570 U.S. 529, 563-64, 186 L. Ed. 2d 651, 677 (2013)] (Ginsberg, J., dissenting) (cataloguing ways in which facially neutral voting laws continued to discriminate against minorities even after passage of Voting Rights Act).

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." [*Hunter v. Underwood*, 471 U.S. 222, 228, 85

> L. Ed. 2d 222, 228 (1985) (citation omitted).] When determining if this burden has been met, courts must be mindful that "racial discrimination is not just another competing consideration." *Arlington Heights*, 429 U.S. at 265-66[, 50 L. Ed. 2d at 465]. For this reason, the judicial deference accorded to legislators when "balancing numerous competing considerations" is "no longer justified." *Id.* Instead, courts must scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices. If a court finds that a statute is unconstitutional, it can enjoin the law.

N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 220-21 (4th Cir. 2016) (alterations in original) (citations omitted).

Both Defendants, however, take issue with several parts of this analysis and suggest differing standards should apply. First, Legislative Defendants, citing *Arlington Heights*, argue that for Plaintiffs to carry their burden of proving S.B. 824 is racially discriminatory, "Plaintiffs must prove *both* racially discriminatory impact *and* 'racially discriminatory intent or purpose.' " Whereas, State Defendants contend that because Plaintiffs raise a facial challenge to S.B. 824, which generally requires a showing that "there are no circumstances under which the statute might be constitutional" to prevail, quoting *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 180, 814 S.E.2d 67, 74 (2018) (citation and quotation marks omitted), and because we must presume S.B. 824, a North Carolina statute, is constitutional and therefore afford it "great deference," quoting *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) (citation and quotation marks omitted), "Plaintiffs must show that it is impossible to enforce [S.B.] 824 in a way that does *not* discriminate against voters based on race" in order to succeed on the merits. However, both Defendants misinterpret Plaintiffs', and their own, burden under a challenge, such as this, to a facially neutral law allegedly motivated by a discriminatory purpose.

First, Legislative Defendants misconstrue the initial burden under the burden-shifting framework established by *Arlington Heights*, which first requires "[p]roof of racially discriminatory intent or purpose . . . to show a violation of the Equal Protection Clause." 429 U.S. at 265, 50 L. Ed. 2d at 464. To aid in this task, *Arlington Heights* provides a list of nonexhaustive factors for courts to consider, and one of those factors is the disproportionate "impact of the official action—whether it bears more heavily on one race than another[, *i.e.*, discriminatory impact.]" *Id.* at 266, 50 L. Ed. 2d at 465 (citation and quotation marks omitted). Stated

another way, discriminatory *impact* can support an inference of discriminatory *intent or purpose*; however, only "discriminatory *intent or purpose is required* to show a violation of the Equal Protection Clause." *Id.* at 265, 50 L. Ed. 2d at 464 (emphasis added); *see also Davis*, 426 U.S. at 242, 48 L. Ed. 2d at 608-09 (holding discriminatory intent or purpose "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that *the law bears more heavily on one race than another*" (emphasis added)).[6]

Second, State Defendants misunderstand the presumptions, or lack thereof, afforded to the law's defenders at the second stage of the *Arlington Heights* analysis. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228, 85 L. Ed. 2d at 228 (citation omitted). Although State Defendants correctly point out North Carolina caselaw generally "gives acts of the General Assembly great deference," *Rhyne*, 358 N.C. at 167, 594 S.E.2d at 7 (citation and quotation marks omitted), such deference is not warranted when the burden shifts to a law's defender after a challenger has shown the law to be the product of a racially discriminatory purpose or intent. *See Arlington Heights*, 429 U.S. at 265-66, 50 L. Ed. 2d at 465 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . *judicial deference is no longer justified*." (emphasis added) (footnote omitted)).[7] Accordingly, the general standard applied

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6. Legislative Defendants' argument rests almost entirely on the United States Supreme Court's pronouncement in *Palmer v. Thompson*—"[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it." 403 U.S. 217, 224, 29 L. Ed. 2d 438, 444 (1971). We first note *Palmer* was decided before both *Davis* and *Arlington Heights* and that both decisions seem to nullify *Palmer*'s pronouncement. Furthermore, although the Supreme Court has never expressly overturned *Palmer*, the Eleventh Circuit has previously noted the decision's "holding simply has not withstood the test of time, even in the Fourteenth Amendment equal protection context." *Church of Scientology v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993) (citations omitted). In any event and as discussed *infra*, Plaintiffs have sufficiently alleged *some* disproportionate impact caused by S.B. 824, which is sufficient, along with the presence of the other *Arlington Heights* factors, to support a showing of discriminatory intent under *Arlington Heights*'s totality-of-the-circumstances test. *See McCrory*, 831 F.3d at 231 ("Showing disproportionate impact, even if not overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent." (footnote omitted)).

7. In this sense, *Arlington Heights*'s burden-shifting framework is congruent with our Supreme Court's "strong presumption that acts of the General Assembly are constitutional[.]" *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002) (citations omitted). Under an *Arlington Heights* analysis, a plaintiff must *first* show discriminatory

to facial constitutional challenges is also inapplicable because the *Arlington Heights* framework dictates the law's defenders must instead "demonstrate that the law would have been enacted without" the alleged discriminatory intent. *Hunter*, 471 U.S. at 228, 85 L. Ed. 2d at 228 (citation omitted).

Therefore, we apply the framework created by *Arlington Heights* and succinctly summarized by *McCrory*. Accordingly, we turn to the *Arlington Heights* factors to determine whether Plaintiffs have shown—at this preliminary stage on the current Record—a likelihood of prevailing on the merits of their Discriminatory-Intent Claim.

A. Historical Background

Under *Arlington Heights*, a court reviewing a discriminatory-intent claim should consider "[t]he historical background of the decision" challenged as racially discriminatory. 429 U.S. at 267, 50 L. Ed. 2d at 465 (citations omitted). "A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223-24 (citation omitted). As the *McCrory* Court stated: "Examination of North Carolina's history of race discrimination and recent patterns of official discrimination, combined with the racial polarization of politics in the state, seems particularly relevant in this inquiry." *Id.* at 223.

Both the United States Supreme Court and the Fourth Circuit have recently summarized the historical context in which this case arises. *See Shelby Cty.*, 570 U.S. at 552, 186 L. Ed. 2d at 670; *McCrory*, 831 F.3d at 223-25. As *Shelby County* recognized, "[i]t was in the South that slavery was upheld by law until uprooted by the Civil War, that the reign of Jim Crow denied African-Americans the most basic freedoms, and that state and local governments worked tirelessly to disenfranchise citizens on the basis of race." 570 U.S. at 552, 186 L. Ed. 2d at 670. Just as with other states in the South, "North Carolina has a long history of race

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intent motivated the challenged act, and once this initial burden has been overcome, "judicial deference is no longer justified." 429 U.S. at 265-66, 50 L. Ed. 2d at 465 (footnote omitted). Similarly, although under our caselaw we initially afford a "strong presumption" in favor of a law's constitutionality, this presumption nevertheless can be overcome, at which point deference is likewise not warranted. *See Stephenson*, 355 N.C. at 362, 562 S.E.2d at 384 ("Although there is a strong presumption that acts of the General Assembly are constitutional, *it is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional*." (emphasis added) (citations omitted)).

discrimination generally and race-based vote suppression in particular." *McCrory*, 831 F.3d at 223.

To help combat this "extraordinary problem" and ensure African Americans and other minorities the right to vote, Congress enacted the Voting Rights Act of 1965 (VRA). *Shelby Cty.*, 570 U.S. at 534, 186 L. Ed. 2d at 659. Under the VRA, Congress "required [certain] States to obtain federal permission before enacting any law related to voting[.]" *Id.* at 535, 186 L. Ed. 2d at 659. In order to obtain "preclearance," the State had to demonstrate that their proposed legislation "had neither the purpose nor effect of diminishing the ability of any citizens to vote on account of race or color." *McCrory*, 831 F.3d at 215 (citation and quotation marks omitted). "Forty North Carolina jurisdictions were covered under" this preclearance regime. *Id.* (citation omitted). "During the period in which North Carolina jurisdictions were [subjected to preclearance], African American electoral participation dramatically improved." *Id.*[8] "After years of preclearance and expansion of voting access, by 2013 African American registration and turnout rates had finally reached near-parity with white registration and turnout rates." *Id.* at 214.

The General Assembly's first attempt at a photo-ID law began in 2011. While still subject to preclearance, the General Assembly passed a photo-ID law along strict party lines; however, then-Governor Beverly Perdue vetoed the proposed bill. In her statement accompanying her veto, then-Governor Perdue expressed concern that the "bill, as written, will unnecessarily and unfairly disenfranchise many eligible and legitimate voters." Approximately two years later, the General Assembly again began discussions of another photo-ID law—House Bill 589 (H.B. 589). *See id.* at 227. In its initial form, H.B. 589's photo-ID requirements were "much less restrictive" than a later version passed after the United States Supreme Court's decision in *Shelby County*. *Id.*; *see also Shelby Cty.*, 570 U.S. at 529, 186 L. Ed. 2d at 651. Indeed, the pre-*Shelby County* version of H.B. 589 included several types of acceptable IDs—such as community college IDs; public-assistance IDs; and federal, state, and

8. In addition to preclearance, challenges to various election laws in North Carolina have also aided in creating more favorable voting conditions for African Americans. For instance, from 1980 to 2013, the Department of Justice "issued over fifty objection letters to proposed election law changes in North Carolina . . . because the State had failed to prove the proposed changes would have no discriminatory purpose or effect." *Id.* at 224 (citations omitted). "During the same period, private plaintiffs brought fifty-five successful cases under [the VRA, resulting in t]en cases end[ing] in judicial decisions finding that electoral schemes . . . across the state had the effect of discriminating against minority voters." *Id.* (citations omitted). "Forty-five cases were settled favorably for plaintiffs out of court or through consent [decrees] that altered the challenged voting laws." *Id.* (citations omitted).

local government IDs—that were either removed or limited in the final versions of both H.B. 589 and S.B. 824. *Compare* H.B. 589 (5th ed.), § 4 (N.C. 2013), *with* 2013 N.C. Sess. Law 381, § 2.1 (N.C. 2013), *and* 2018 N.C. Sess. Law 144, § 1.2(a).

On 25 June 2013, the United States Supreme Court issued its opinion in *Shelby County*, which invalidated the preclearance coverage formula and meant "North Carolina no longer needed to preclear changes in its election laws." *McCrory*, 831 F.3d at 216. In response, the General Assembly "requested and received racial data" on the various voting practices within the state and on the types of IDs commonly possessed by its citizenry. *Id.* at 216 (citation omitted). With this racial data in hand, the General Assembly "swiftly expanded an essentially single-issue bill into omnibus legislation[.]" *Id.* (footnote omitted). The result, as described by the Fourth Circuit, was a bill that, *inter alia*, "exclude[d] many of the alternative photo IDs used by African Americans" and "eliminated or reduced registration and voting access tools that African Americans disproportionately used." *Id.* (citations omitted). H.B. 589 was "quickly ratified . . . by strict party-line votes . . . [, and t]he Governor, who was of the same political party as the party that controlled the General Assembly, promptly signed the bill into law on August 12, 2013." *Id.* at 218 (citations omitted).

Legal challenges to H.B. 589 quickly ensued, alleging the law was "motivated by discriminatory intent" in violation of, *inter alia*, the Fourteenth Amendment's Equal Protection Clause. *Id.* (citation omitted). In *McCrory*, the Fourth Circuit recognized that voting in North Carolina, both historically and currently, is "racially polarized"—*i.e.*, "the race of voters correlates with the selection of a certain candidate or candidates." *Id.* at 214 (citation and quotation marks omitted) (noting African American voters overwhelmingly support Democratic candidates). Such polarization offers a "political payoff for legislators who seek to dilute or limit the minority vote." *Id.* at 222. *McCrory* noted the historical background evidence of H.B. 589 suggested racial polarization played an important role in the enactment of H.B. 589, which "target[ed] African Americans with almost surgical precision[.]" *Id.* at 214, 226.

In light of the historical background of the law, the "hurried pace" with which H.B. 589 was enacted after being relieved of preclearance requirements, the legislature's use of racial data in crafting H.B. 589, and the recent surge in African American voting power, the *McCrory* Court concluded, in enacting H.B. 589, the Republican-controlled General Assembly "unmistakably" sought to "entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party."

Id. at 223-33. Accordingly, the Fourth Circuit struck down H.B. 589 as unconstitutional, recognizing the "General Assembly enacted the challenged provisions of [H.B. 589] with discriminatory intent." *Id.* at 215.

In accordance with *McCrory*, the "important takeaway" from this historical background is "that state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day." *Id.* at 225. Further, these cases "highlight the manner in which race and party are inexorably linked in North Carolina[,]" which, according to the Fourth Circuit, "constitutes a critical—perhaps the most critical—piece of historical evidence here." *Id.* As *McCrory* recognized, racial polarization—which creates an "incentive for intentional discrimination in the regulations of elections"—existed in 2013 and played a key role in the General Assembly's decision to enact H.B. 589. *Id.* at 222. The proposed constitutional Amendment, and subsequently S.B. 824, followed on the heels of the *McCrory* decision with little or no evidence on this Record of any change in this racial polarization.[9] More to the point, Plaintiffs' evidence tends to show legislators relied on the same data in enacting S.B. 824 as they did in enacting H.B. 589. Accordingly, the historical context in which S.B. 824 was enacted provides support for Plaintiffs' Discriminatory-Intent Claim and warrants further scrutiny of the intent behind S.B. 824.

B. Sequence of Events

Arlington Heights also directs a court reviewing a discriminatory-intent challenge to consider the "specific sequence of events leading up to the challenged decision[.]" 429 U.S. at 267, 50 L. Ed. 2d at 466 (citations omitted). "In doing so, a court must consider departures from the normal procedural sequence, which may demonstrate that improper purposes are playing a role." *McCrory*, 831 F.3d at 227 (alteration, citation, and quotation marks omitted). These considerations "may shed some light on the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267, 50 L. Ed. 2d at 466 (citation omitted).

Here, Plaintiffs contend the "unusual sequence of events leading to the passage [of S.B.] 824 support the inference that it was motivated by an improper discriminatory intent." In support of this contention, Plaintiffs point to the testimony in an affidavit of Representative Mary

9. The Middle District of North Carolina, in its order preliminarily enjoining S.B. 824, actually found "the evidence still shows that the state's electorate was extremely polarized at the time S.B. 824 was enacted and will predictably remain so in the near future[.]" *Cooper*, ___ F. Supp. 3d at ___ (citation omitted).

Price "Pricey" Harrison (Representative Harrison) summarizing the legislative process of S.B. 824:

> 8. I also believe that the legislative process leading to the enactment of [S.B.] 824 deviated significantly from proper substantive and procedural legislative practices. The legislative process for [S.B.] 824 followed an abbreviated and inadequately-deliberative pattern that the General Assembly has only in recent years seemed to have adopted for controversial legislation. Instead of allowing for a proper and thorough debate, the legislative process was truncated.
>
> 9. Though North Carolinians approved the ID constitutional amendment in November 2018, mandating voters to show identification upon voting, voters also expressed a desire to see significant changes in the General Assembly. Republicans lost their veto-proof supermajorities in both the State House and Senate during the 2018 midterm.
>
> 10. Yet, instead of allowing newly elected officials to craft enabling legislation in accordance with the approved ID constitutional amendment once they took office, the lame-duck legislature reconvened the 2017-2018 Session in late November of 2018 to take up the task. Legislative leaders expedited the passage of [S.B.] 824 rather than taking the time to ensure the protections of voters' constitutional rights. Consequently, the General Assembly enacted enabling legislation affecting over 7 million registered North Carolina voters—overrode a gubernatorial veto of that legislation—in just over 21 days.
>
> 11. Consideration of the enabling legislation for the constitutional amendment began on November 27, 2018 and [S.B.] 824 passed the North Carolina House by a vote of 67-40 on December 5, 2018. Over a span of only 8 days—with only limited debate and outdated data to inform legislative decisions—the General Assembly enacted enabling legislation impacting millions of North Carolinians for years to come.
>
> 12. Because of the legislature's failure to consider public input, failure to use updated data, failure to allow

a thorough debate, and failure to take into account all implications of the bill's potential impacts on voters, it is my belief that [S.B.] 824 as passed fails to sufficiently balance the need to legislatively implement the ID constitutional amendment with the need to preserve all other rights that the North Carolina Constitution affords.

13. Specifically, the House failed to give adequate notice of the meeting to discuss the proposed language for [S.B.] 824, and circulated the proposed language only the night before its consideration. Several House members, including myself, had to arrange last minute travel back to Raleigh and cancel other scheduled events and meetings in order to attend the Session.

14. Further, public comment was limited to allow only 30 individuals to speak on the proposed bill. Such a limitation deviates from typical procedure for a bill of this magnitude that relates to fundamental constitutional rights. In my experience, with regard to bills of this magnitude that affect issues such as voting rights or redistricting, the legislature has provided much more opportunity for lengthy and balanced public comment. In this instance, only a few individuals had the opportunity to speak in opposition to the proposed bill. Again, this is a deviation from standard procedure.

15. In my experience, it is a deviation from normal procedure to limit discussion of a bill of this magnitude to just a few hours. The scope of [S.B.] 824 necessitated a significantly extended timeline in order to properly understand its far-reaching implications on the ability of North Carolina citizens to vote.

16. Given the expedited timeline that the General Assembly pursued in passing [S.B.] 824, there was no opportunity—as would be available during a normal legislative process—to access relevant and critical data regarding voter information. It is my understanding that much of the data available to us was outdated. As such, the particulars of [S.B.] 824 fail to accurately reflect the current state of voter specific information in North Carolina.

17. Legislators were presented with data from 2015 for their consideration when enacting [S.B.] 824, rather than more appropriate, up-to-date figures. For example, the General Assembly was presented with significantly outdated "no-match" data demonstrating how many North Carolina voters lacked photo ID as of 2015, and to my knowledge did not even attempt to ascertain how many voters lacked such ID at the time [S.B.] 824 was on the floor for discussion.

18. By contrast, the General Assembly was made aware of data—through a presentation delivered to the Joint Legislative Elections Oversight Committee—that showed [S.B.] 824 would disenfranchise thousands of voters. Nevertheless, the General Assembly enacted [S.B.] 824.

In response, Defendants assert there was nothing unusual about this process because the General Assembly followed its normal protocol in passing S.B. 824. For instance, Senator Joel Ford (Senator Ford) countered it was "not unusual or a departure from the normal political process for the General Assembly to reconvene its 2017-2018 Regular Session to consider" S.B. 824. Senator Ford further iterated the enactment of "S.B. 824 followed a normal legislative process" and that the General Assembly "followed all of its normal rules and procedures in considering and enacting S.B. 824." He also stated the timeframe of its passage and the fact that a "lame-duck legislature" passed the legislation were both "not unusual[.]" However, "a legislature need not break its own rules to engage in unusual procedures." *McCrory*, 831 F.3d at 228.

Specifically, here, as Plaintiffs point out, sixty-one of the legislators who voted in favor of S.B. 824 had previously voted to enact H.B. 589, which was struck down by the Fourth Circuit as motivated by a discriminatory intent. We acknowledge individual legislator's views and motivations can change. However, "discriminatory intent does tend to persist through time[.]" *United States v. Fordice*, 505 U.S. 717, 747, 120 L. Ed. 2d 575, 604 (1992) (Thomas, J., concurring) (citation omitted). Therefore, given the "initially tainted policy of [H.B. 589], it is eminently reasonable to make the [General Assembly] bear the risk of nonpersuasion with respect to intent at some future time[.]" *Id.* at 746, 120 L. Ed. 2d at 604 (citation omitted).

Also persuasive is the fact S.B. 824 was passed in a short timeframe by a lame-duck-Republican supermajority, especially given Republicans

would lose their supermajority in 2019 because of seats lost during the 2018 midterm election. At a minimum, this shows an intent to push through legislation prior to losing supermajority status and over the governor's veto. Moreover, the quick passage of S.B. 824 was undertaken with limited debate and public input and without further study of the law's effects on minority voters—notwithstanding the fact H.B. 589 had been recently struck down. Plaintiffs' forecasted evidence demonstrates a number of amendments seeking to ameliorate the impacts of S.B. 824 were also summarily rejected. Thus, Plaintiffs have made a sufficient preliminary showing that even if the General Assembly followed its rules, the process employed in enacting S.B. 824 was nevertheless unusual. *See McCrory*, 831 F.3d at 229.

C. Legislative History

Indeed, *Arlington Heights* specifically recognizes that legislative history leading to a challenged law "may be highly relevant [to the question of discriminatory intent], especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." 429 U.S. at 268, 50 L. Ed. 2d at 466. Here, given the lack of a fully developed record at this preliminary-injunction stage, our review of the legislative history is somewhat limited. However, a few observations about S.B. 824's legislative history provide important context to our analysis, further supporting Plaintiffs' claim that discriminatory intent was a motivating factor behind the passage of S.B. 824.

When debating and enacting S.B. 824, the General Assembly neither requested nor received any new, updated data showing the percentages of likely voters who possessed qualifying IDs under S.B. 824. Instead, Plaintiffs have presented evidence showing the General Assembly relied on outdated data from 2015 "rather than seeking out more recent information so as to better understand the implications of [S.B.] 824." In addition, Senator Mike Woodard (Senator Woodard) alleged "the expedited timeline that the General Assembly pursued in passing [S.B.] 824 failed to provide the opportunity—as would be available during a normal legislative process—to access relevant and critical data regarding voter information." Senator Woodard suggested because of "this unnecessarily rushed legislative process that failed to account for the full scope of relevant information[,]" S.B. 824 will likely disenfranchise North Carolina voters.

Further, *McCrory* recognized, as particularly relevant to its discriminatory-intent analysis, "the removal of public assistance IDs in particular was suspect, because a reasonable legislator . . . could have surmised

that African Americans would be more likely to possess this form of ID." 831 F.3d at 227-28 (citation and quotation marks omitted). According to Representative Harrison's affidavit, an amendment to S.B. 824 that "would have enabled the recipients of federal and state public assistance to use their public assistance IDs for voting purposes . . . [was] also rejected." Representative Harrison's affidavit states Representative David Lewis (Representative Lewis) rejected this amendment on the basis "the General Assembly does not have the ability to impose its standards on the federal government[.]" However, "Representative Lewis [also] acknowledged that the same is true for military IDs, [which were] nonetheless included as an acceptable form of photo ID." Defendants counter their proffered reason for not including public-assistance IDs was because they do not always include photographs. However, in light of the express language in *McCrory* and at this stage of the proceeding, the inference remains the failure to include public-assistance IDs was motivated in part by the fact that these types of IDs were disproportionately possessed by African American voters.

Accordingly, at this stage of the proceeding, Plaintiffs have presented some evidence suggesting the General Assembly refused to obtain updated data on the effects of S.B. 824's voter-ID provisions, instead relying on outdated data from 2015, and chose not to include certain types of ID disproportionately held by African Americans. When viewed in context, this legislative history supports Plaintiffs' claim of an underlying motive of discriminatory intent in the enactment of S.B. 824. *See id.* at 230 (recognizing "the choices the General Assembly made with this [racial] data in hand" suggested a discriminatory intent where the General Assembly excluded types of IDs disproportionately possessed by African Americans).

D. Impact of the Official Action

Further, "*Arlington Heights* instructs that courts also consider the 'impact of the official action'—that is, whether 'it bears more heavily on one race than another.' " *Id.* (quoting *Arlington Heights*, 429 U.S. at 266, 50 L. Ed. 2d at 465). On this fourth *Arlington Heights* factor, the *McCrory* Court stated:

> When plaintiffs contend that a law was motivated by discriminatory intent, proof of disproportionate impact is not the sole touchstone of the claim. Rather, plaintiffs asserting such claims must offer other evidence that establishes discriminatory intent in the totality of the circumstances. Showing disproportionate impact, even if not

> overwhelming impact, suffices to establish *one* of the circumstances evidencing discriminatory intent.

Id. at 231 (footnote, citations, and quotation marks omitted).

Here, in support of a showing of disparate impact, Plaintiffs point to the affidavit of their expert witness, Professor Kevin Quinn (Professor Quinn). In his affidavit, Professor Quinn explained his task was "to examine North Carolinians' possession rates of forms of photo identification that comply with the requirements of [S.B.] 824 ("acceptable ID") and to determine whether changes in the voter ID requirement disproportionately impact certain types of North Carolina voters." To aid in this task, Professor Quinn analyzed data from 2014 used in crafting H.B. 589—contained in a report he created in 2015—because no data on all 2019 ID-possession rates existed, although he did have some data on voter registration in 2019. Professor Quinn averred: "Given the data available to me now, my expert opinion is that the rates of photo ID possession by race and active/inactive status that I documented in my 2015 report remain accurate estimates of the corresponding rates of photo ID possession in 2019." "In 2015, African Americans were more than twice as likely as whites to lack identification required to vote under [H.B.] 589." After looking at the changes between acceptable IDs under H.B. 589 and S.B. 824, Professor Quinn opined, "given the information available at this time, that the differences that do exist are unlikely to have an appreciable effect on the racial disparities in ID possession that I found in my 2015 analysis." Accordingly, Professor Quinn stated S.B. 824 would still have a disproportional impact on African Americans because this class lacks acceptable IDs at a greater rate than white voters. As *McCrory* explained, such a "[s]howing of disproportionate impact, *even if not overwhelming impact*, suffices to establish *one* of the circumstances evidencing discriminatory intent." 831 F.3d at 231 (emphasis added) (footnote omitted). We also note, as the dissenting judge below recognized, the General Assembly's decision to exclude public-assistance and federal-government-issued IDs will likely have a negative effect on African Americans because such types of IDs are "disproportionately held by African Americans." *Id.* at 236 (citation omitted).

Defendants, however, counter by pointing to the fact that under S.B. 824 all voters can obtain a photo ID free of charge or alternatively cast a provisional ballot under the reasonable-impediment provision, contending these ameliorating provisions remedy any disproportionate impact caused by the photo-ID requirements. It is true that S.B. 824 allows a registered voter to visit their county board of elections and receive an ID "without charge" so long as the voter provides their name, date of birth,

and the last four digits of their social security number. 2018 N.C. Sess. Law 144, § 1.1(a).

Plaintiffs, however, presented evidence showing the burdens of obtaining a free ID are "significant . . . [and] fall disproportionately on voters of color." For instance, Noah Read (Read), a member of the Alamance County Board of Elections, stated in his affidavit: "Because of the location and lack of transportation to the [County Board of Elections] office, I think that providing free Voter IDs . . . will do little to make it easier for Alamance County citizens who do not have ID from the DMV to obtain a free ID for voting." The Chair of the Lenoir County Board of Elections expressed similar concerns that those without access to public transportation could not obtain a free ID in Lenoir County. As Plaintiffs allege, those who lack public transportation or the means to travel are generally working class and poor voters. Plaintiffs also presented evidence showing African Americans in North Carolina are disproportionately more likely to live in poverty than white citizens. Accordingly, Plaintiffs' evidence at this stage shows the availability of free IDs does little to alleviate the additional burdens of S.B. 824 where African Americans disproportionately lack the resources to travel and acquire such IDs in comparison to white voters.

As for the reasonable-impediment provision, S.B. 824 allows a voter who lacks qualifying ID to cast a provisional ballot if the voter completes an affidavit under penalty of perjury affirming their identity and identifying their reasonable impediment. 2018 N.C. Sess. Law 144, § 1.2(a). S.B. 824 provides the following types of reasonable impediments:

(1) Inability to obtain photo identification due to:

   a. Lack of transportation.

   b. Disability or illness.

   c. Lack of birth certificate or other underlying documents required.

   d. Work schedule.

   e. Family responsibilities.

(2) Lost or stolen photo identification.

(3) Photo identification applied for but not yet received by the registered voter voting in person.

(4) Other reasonable impediment. If the registered voter checks the "other reasonable impediment" box, a

> further brief written identification of the reasonable impediment shall be required, including the option to indicate that State or federal law prohibits listing the impediment.

Id. Once submitted, the voter may cast a provisional ballot that the county board of elections "shall find . . . is valid unless the [five-member, bipartisan] county board has grounds to believe the affidavit is false." *Id.* Defendants allege this reasonable-impediment provision renders S.B. 824 constitutional because it allows all voters to vote.

While it may be true that African American voters without a qualifying ID could still be able to vote by using the reasonable-impediment provision, this fact does not necessarily fully eliminate the disproportionate impact on African American voters resulting from both S.B. 824's voter-ID provisions and the reasonable-impediment provision. As Plaintiffs have shown, the voter-ID provisions likely will have a negative impact on African Americans because they lack acceptable IDs at a greater rate than white voters. Accordingly, it follows African American voters will also then have to rely on the reasonable-impediment provision more frequently than white voters. Although the reasonable-impediment provision casts a wide net in defining the types of reasonable impediments that qualify under the law, which Defendants contend will result in almost every reason for lacking an acceptable ID to constitute a reasonable impediment, a voter using this provision must still undertake the additional task of filling out the reasonable-impediment form and submitting an affidavit verifying its veracity to cast a *provisional* ballot, which is subject to rejection if the county board believes the voter's affidavit and reasonable impediment are false. *See id.* Although Defendants assert these additional steps to vote are not overly burdensome, the use of the reasonable-impediment provision is still one more obstacle to voting, which Plaintiffs have shown will be an obstacle that African Americans will have to overcome at a rate higher than white voters, given their disproportionately lower rates of possessing qualifying IDs. Accordingly, even though at this stage the evidence shows it is "not [an] overwhelming impact," the reasonable-impediment provision nevertheless suffices as a "[s]howing [of] disproportionate impact," establishing another circumstance evidencing discriminatory intent. *McCrory*, 831 F.3d at 231 (footnote omitted).

Defendants also cite to several federal court decisions upholding similar voter-ID laws, some of which contain comparable reasonable-impediment provisions. *See*, *e.g.*, *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 594 (4th Cir. 2016) (upholding Virginia's voter-ID law against

both discriminatory-results and discriminatory-intent challenges); *South Carolina v. U.S.*, 898 F. Supp. 2d 30 (D.D.C. 2012) (preclearing South Carolina's updated voter-ID law, which contained a similar reasonable-impediment provision, concluding there was no discriminatory retrogressive effect or discriminatory purpose). However, these decisions are distinguishable from the present case and in many ways inapplicable given the different claims brought by Plaintiffs in this case.

For instance, the fact that a three-judge panel precleared South Carolina's voter-ID law is inapplicable to Plaintiffs' claim here because the standard for obtaining preclearance under Section Five of the VRA requires the state to prove the proposed changes neither have the purpose nor effect of denying or abridging the right to vote on account of race. *See South Carolina*, 898 F. Supp. 2d at 33 (citation omitted). In this regard, the analysis under the effects test of Section Five is similar to a discriminatory-results analysis under Section Two of the VRA, which requires a greater showing of disproportionate impact than a discriminatory-intent claim. *See McCrory*, 831 F.3d at 231 n.8.[10] Accordingly, *South Carolina*'s analysis is inapplicable to our discriminatory-intent analysis of S.B. 824.

In addition, the facts of *Lee* are markedly different than the present. When analyzing the plaintiffs' discriminatory-intent claim against Virginia's voter-ID law, the Fourth Circuit contrasted the passage of Virginia's law against the facts in *McCrory* and observed "the legislative process contained no events that would 'spark suspicion[,]' " the Virginia legislature did not depart from the normal legislative process and allowed "full and open debate[,]" the legislature did not use racial data in crafting its legislation, and the provisions of its voter-ID law did not target any group of voters. 843 F.3d at 604 (citations omitted). Accordingly, the *Lee* Court held the plaintiffs had not shown any discriminatory intent under *Arlington Heights*. *Id.* As previously discussed, however, an analysis of S.B. 824 utilizing the *Arlington Heights* factors

10. Under the legislative-purpose prong of Section Five, the *South Carolina* Court utilized a limited *Arlington Heights* analysis and determined South Carolina's voter-ID law was not enacted with a discriminatory purpose. 898 F. Supp. 2d at 46. When drafting and enacting this law, the South Carolina legislature "no doubt knew . . . that photo ID possession rates varied by race in South Carolina." *Id.* at 44. Importantly, and what distinguishes *South Carolina* from the present case, the *South Carolina* Court noted, "critically, South Carolina legislators did not just plow ahead in the face of the data showing a racial gap." *Id.* Instead, the South Carolina legislature slowed down the process and sought out input from both political parties to alleviate any potential discriminatory impact the new law might create. *Id.* at 44-46.

and in light of *McCrory* suggests there is evidence here that discriminatory intent was a motivating factor behind the passage of this act.

After analyzing S.B. 824 under the *Arlington Heights* factors and the Record before us, we conclude, based on the totality of the circumstances, Plaintiffs have shown a likelihood of success on the merits in demonstrating that discriminatory intent was a motivating factor behind enacting S.B. 824. Plaintiffs' evidence at this point supports this conclusion. For instance, Plaintiffs have sufficiently shown the historical background of S.B. 824, the unusual sequence of events leading up to the passage of S.B. 824, the legislative history of this act, and some evidence of disproportionate impact of S.B. 824 all suggest an underlying motive of discriminatory intent in the passage of S.B. 824. *See Arlington Heights*, 429 U.S. at 265-68, 50 L. Ed. 2d at 464-66.

E. Defendants' Proffered Nonracial Motivations

Because Plaintiffs have adequately met their initial burden of showing S.B. 824 was likely motivated by discriminatory intent, the burden shifts to Defendants "to demonstrate that the law would have been enacted without this factor." *McCrory*, 831 F.3d at 221 (citation and quotation marks omitted). Because "racial discrimination is not just another competing consideration[,]" judicial deference is "no longer justified." *Id.* (citations and quotation marks omitted). We must instead "scrutinize the legislature's *actual* non-racial motivations to determine whether they *alone* can justify the legislature's choices." *Id.* (citations omitted). Defendants' only proffered justification for S.B. 824 is that this act was crafted and enacted to fulfill our Constitution's newly added mandate that North Carolinians must present ID before voting.[11] *See* N.C. Const. art. VI, §§ 2(4), 3(2).

We recognize that in 2018 a majority of North Carolina voters voted in favor of amending Article VI of the North Carolina Constitution, requiring voters in North Carolina to present ID before voting. Indeed, this Amendment dictates the "General Assembly shall enact general laws governing the requirements of such photographic identification[.]" *Id.* Importantly, however, this same Amendment grants the General

11. We are cognizant of the fact neither party briefed this issue extensively and that additional justifications for S.B. 824, such as prevention of voter fraud and inspiring confidence in elections, were presented by the defendants in the federal district court case. *See Cooper*, ___ F. Supp. 3d at ___. However, because these justifications have not been raised on appeal, we decline to consider them in our analysis on this point. *See* N.C.R. App. P. 28(b)(6). We also acknowledge additional justifications may be brought out in a subsequent trial on the merits in this case.

Assembly the authority to "include exceptions" when enacting a voter-ID law. *Id.*

Although the General Assembly certainly had a duty, and thus a proper justification, to enact some form of a voter-ID law, we do not believe this mandate "*alone* can justify the legislature's choices" when it drafted and enacted S.B. 824 specifically. *McCrory*, 831 F.3d at 221 (citations omitted). As detailed above, the General Assembly's history with voter-ID laws, the legislative history of the act, the unusual sequence of events leading to its passage, and the disproportional impact on African American voters likely created by S.B. 824 all point to the conclusion that discriminatory intent remained a primary motivating factor behind S.B. 824, not the Amendment's directive to create a voter-ID law. This is especially true where the Amendment itself allows for exceptions to any voter-ID law, yet the evidence shows the General Assembly specifically included types of IDs that African Americans disproportionately lack. Such a choice speaks more of an intention to target African American voters rather than a desire to comply with the newly created Amendment in a fair and balanced manner. Accordingly, we conclude, on this Record, Defendants have yet to show S.B. 824 would have been enacted in its current form irrespective of any alleged underlying discriminatory intent. *See id.* (citation omitted). At this stage of the proceedings, Plaintiffs have thus shown a clear likelihood of success on the merits of their Discriminatory-Intent Claim for the voter-ID provisions of S.B. 824. Therefore, the majority of the three-judge panel below erred by finding Plaintiffs failed to prove a likelihood of success on the merits.

III. Preliminary Injunction

Having concluded Plaintiffs have shown a likelihood of success on the merits of their Discriminatory-Intent Claim, we now turn to the question of whether Plaintiffs are "likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [Plaintiffs'] rights during the course of litigation." *Kennedy*, 160 N.C. App. at 8, 584 S.E.2d at 333 (citation and quotation marks omitted). In undertaking this analysis, we "weigh the equities" for and against a preliminary injunction. *Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 427, 571 S.E.2d 8, 13 (2002).

Plaintiffs contend they are likely to sustain irreparable harm because, *inter alia*, S.B. 824 violates Plaintiffs' constitutional right to vote on equal terms. As discussed previously, Plaintiffs have a fundament right to participate in elections on an equal basis. *See Blankenship*, 363 N.C. at 522, 681 S.E.2d at 762 ("The right to vote is one of the most

cherished rights in our system of government, enshrined in both our Federal and State Constitutions." (citations omitted)); *see also Dunn*, 405 U.S. at 336, 31 L. Ed. 2d at 280 (citations omitted). The Fourth Circuit has recognized: "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C.*, 769 F.3d at 247 (citations omitted). Further, "discriminatory voting procedures in particular are the kind of serious violation of the Constitution . . . for which courts have granted immediate relief." *Id.* (citation and quotation marks omitted). The need for immediate relief is especially important in this context given the fact that "once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin [the] law." *Id.* (footnote omitted).

With these principles in mind, we agree with Plaintiffs that absent an injunction, Plaintiffs have shown they are likely to suffer irreparable harm. As demonstrated *supra*, S.B. 824's voter-ID requirements are likely to disproportionately impact African American voters to their detriment. Although Plaintiffs may still have their vote counted by utilizing the reasonable-impediment provision, such a fact does not automatically negate the injury Plaintiffs still will have suffered—the denial of equal treatment in voting—based on a law allegedly motivated by discriminatory intent. *See id.* (citation omitted).

In addition, enjoining the voter-ID provisions furthers "the public interest[, which] favors permitting as many qualified voters to vote as possible." *Id.* (alterations, citation, and quotation marks omitted). Furthermore, S.B. 824 has already been enjoined at least for the March primaries by the federal district court. While the future of that injunction and litigation is uncertain, enjoining the law during the litigation of this action, which the parties acknowledged would still be ongoing after these primaries, further helps prevent voter confusion leading up to the general election this fall and during the pendency of this litigation, which voter confusion has a strong potential to negatively impact voter turnout. Balancing the equities in this case, Plaintiffs have adequately shown they are "likely to sustain irreparable loss unless the injunction is issued[.]" *Kennedy*, 160 N.C. App. at 8, 584 S.E.2d at 333 (citation and quotation marks omitted). Therefore, Plaintiffs have shown they are entitled to a preliminary injunction enjoining the voter-ID provisions of S.B. 824. *See id.* (citation omitted).

As for the scope of this injunction, Legislative Defendants assert the injunction should be limited solely to the individual Plaintiffs, and not statewide, because "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs."

Califano v. Yamasaki, 442 U.S. 682, 702, 61 L. Ed. 2d 176, 193 (1979). However, *Califano* also noted one of the "principles of equity jurisprudence" is that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.* (citation omitted). Accordingly, *Califano* supports the proposition that injunctive relief should extend statewide because the alleged violation—the alleged facial unconstitutionality of S.B. 824—impacts the entire state of North Carolina. *See id.*; *see also Rodgers v. Bryant*, 942 F.3d 451, 458 (8th Cir. 2019) (upholding a district court's grant of a statewide preliminary injunction of an Arkansas anti-loitering statute where only two individual plaintiffs brought a facial challenge to the statute under the First Amendment). Thus, Plaintiffs have shown the need for a statewide preliminary injunction barring Defendants from implementing or enforcing the voter-ID provisions of S.B. 824 as to all North Carolina voters pending a ruling on the merits of Plaintiffs' facial challenge under the North Carolina Constitution. Consequently, we reverse the trial court's denial of Plaintiffs' Preliminary-Injunction Motion.

Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's decision to deny Plaintiffs' Preliminary-Injunction Motion and remand to the trial court with instructions to grant Plaintiff's Motion and preliminarily enjoin Defendants from implementing or enforcing the voter-ID provisions of S.B. 824—including, specifically, Parts I and IV of 2018 N.C. Sess. Law 144—until this case is decided on the merits.

REVERSED AND REMANDED.

Judges ARROWOOD and COLLINS concur.

PAUL KIPLAND MACE, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF INSURANCE, RESPONDENT

No. COA19-710

Filed 18 February 2020

Insurance—insurance agent—duty to report criminal convictions—meaning of "conviction"—guilty verdict followed by prayer for judgment continued

Where an insurance agent was found guilty of simple assault in district court after pleading not guilty, his guilty verdict—regardless of the district court's subsequent entry of a prayer for judgment continued—was "an adjudication of guilt" and therefore a "conviction" for purposes of N.C.G.S. § 58-2-69(c). Thus, the insurance agent violated section 58-2-69(c) by failing to report the conviction to the Department of Insurance.

Appeal by Petitioner from order and judgment entered 4 April 2019 by Judge David A. Phillips in Alexander County Superior Court. Heard in the Court of Appeals 22 January 2020.

Wyatt Early Harris Wheeler LLP, by Donavan J. Hylarides, for Petitioner-Appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General M. Denise Stanford and Assistant Attorney General LaShawn S. Piquant, for Respondent-Appellee.

COLLINS, Judge.

Paul Kipland Mace appeals from the trial court's order affirming an order and final agency decision of the North Carolina Department of Insurance. The issue before this Court is whether a verdict of guilty of simple assault after a plea of not guilty, and the district court's subsequent entry of a prayer for judgment continued, is an "adjudication of guilt" and thus a "conviction" for purposes of N.C. Gen. Stat. § 58-2-69(c). Because we answer this question in the affirmative, we discern no legal error in the agency's decision. Accordingly, we affirm the trial court's order.

I. Procedural and Factual History

Paul Kipland Mace ("Petitioner") is an insurance agent who has been licensed by Respondent North Carolina Department of Insurance ("DOI") since 1993. In May 2013, Petitioner was charged with simple assault, a class 2 misdemeanor offense. Petitioner pled not guilty.

After a bench trial in district court on 17 January 2017, Petitioner was found guilty of simple assault. Judgment was continued upon payment of court costs ("prayer for judgment continued" or "PJC"). Petitioner did not report the case to the DOI.

Soon after the guilty verdict and PJC were entered, the DOI received an anonymous communication stating that Petitioner had been convicted of assault. The DOI contacted Petitioner to ask why he had not reported the conviction under N.C. Gen. Stat. § 58-2-69(c) ("the reporting statute"), which requires a licensee to notify the Commissioner of Insurance in writing of a conviction within 10 days after the date of the conviction. Petitioner replied, "I never knew I was supposed to report this prayer for judgment of simple assault or I would have right away."

Petitioner's attorney advised him that he did not need to notify the DOI because the district court had entered a PJC, and "there had been no adjudication of guilt, plea of guilty, or plea of no contest." After further communication with the DOI, Petitioner requested an administrative hearing.

An administrative hearing was conducted by the DOI on 23 May 2018 and an Order and Final Agency Decision ("Decision") was issued on 23 July 2018. The hearing officer found that Petitioner had been charged with simple assault, pled not guilty, was found guilty in district court, was required but failed to report the conviction to the DOI, and relied on the advice of his attorney that he was not required to report the case to the DOI. The hearing officer concluded that "the judge's rendering of a guilty verdict . . . is a 'conviction' under N.C. Gen. Stat. § 58-2-69(c)"; "judgment on the conviction was continued upon the payment of court costs"; Petitioner was required to report the conviction regardless of the judgment issued; and Petitioner violated the reporting statute by not reporting the conviction. Based in part on the fact that Petitioner had relied on the advice of counsel in not reporting the conviction, Petitioner was ordered to pay a $100 civil penalty instead of having his license revoked or suspended.

On 31 July 2018, Petitioner filed in superior court a petition for judicial review of the Decision, seeking, inter alia, a stay of the Decision

and an order setting aside the Decision. The superior court stayed the Decision pending judicial review. After a hearing on 4 March 2019, the superior court entered an Order and Judgment ("Order") on 4 April 2019, affirming the Decision.

Petitioner filed timely notice of appeal to this Court.

II. Discussion

Petitioner argues that the trial court erred when it held that a PJC following a plea of not guilty is a conviction under the reporting statute. Petitioner's argument is misguided.

In reviewing a trial court's order concerning an agency decision, this Court must (1) "determin[e] whether the trial court exercised the appropriate scope of review and, if appropriate, (2) decid[e] whether the court did so properly." *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (internal quotation marks and citation omitted). A trial court should apply a de novo standard of review when the nature of the petitioner's challenge to the agency decision is that it was based on an error of law. *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 677, 443 S.E.2d 114, 119 (1994). "[W]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may substitute its own judgment for that of the agency and employ de novo review." *Id.* at 678, 443 S.E.2d at 120 (internal quotation marks, brackets, emphasis, and citation omitted). Accordingly, we consider de novo whether the DOI erred in concluding that "the judge's rendering of a guilty verdict . . . is a 'conviction' under N.C. Gen. Stat. § 58-2-69(c)" such that Petitioner violated the reporting statute by not reporting the conviction.

Under N.C. Gen. Stat. § 58-2-69(c),

> If a licensee is convicted in any court of competent jurisdiction for any crime or offense other than a motor vehicle infraction, the licensee shall notify the Commissioner in writing of the conviction within 10 days after the date of the conviction. As used in this subsection, "conviction" includes an adjudication of guilt, a plea of guilty, or a plea of nolo contendere.

N.C. Gen. Stat. § 58-2-69(c) (2017). Accordingly, "an adjudication of guilt" is a "conviction" for purposes of this statute. *Id.* "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and

limitations not contained therein." *Walters v. Cooper*, 226 N.C. App. 166, 169, 739 S.E.2d 185, 187, *aff'd*, 367 N.C. 117, 748 S.E.2d 144 (2013) (internal quotation marks and citation omitted).

"Adjudication" is defined as "the process of judicially deciding a case." *Adjudication*, *Black's Law Dictionary* (11th ed. 2019); *see also Adjudication*, *Ballentine's Law Dictionary* (3d ed. 2010) (defining "adjudication" as "[t]he determination of the issues in an action according to which judgment is rendered; a solemn, final, and deliberate determination of an issue by the judicial power, after a hearing in respect to the matters determined"). "Guilt" is defined as "[t]he fact, state, or condition of having committed a . . . crime." *Guilt*, *Black's Law Dictionary* (11th ed. 2019); *see also Guilt*, *Ballentine's Law Dictionary* (3d ed. 2010) (defining "guilt" as "[c]riminality; culpability; guiltiness; the antithesis of innocence"). Based on this plain meaning of the phrase "adjudication of guilt," the language of the statute is clear and unambiguous that a finding of guilty by verdict of a judge is an adjudication of guilt, and thus a conviction, under N.C. Gen. Stat. § 58-2-69(c).

Here, the fact that the trial court issued a prayer for judgment continued does not alter the plain language of this statute; nothing in the statute suggests that "conviction" means and includes a guilty verdict only in those instances in which the trial court does not enter a prayer for judgment continued. *See Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 577, 501 S.E.2d 75, 77 (1998) (holding that an agency properly interpreted "conviction" as defined by the relevant administrative regulation to include a plea of no contest, despite the fact that defendant's plea of no contest was followed by a prayer for judgment continued). "A judgment of conviction is one step beyond conviction. A judgment of conviction involves not only conviction but also the imposition of a sentence. This distinction has been recognized in both North Carolina statutes and case law." *N.C. State Bar v. Wood*, 209 N.C. App. 454, 456-57, 705 S.E.2d 782, 784 (2011).

"For the purpose of imposing sentence" under the North Carolina Criminal Procedure Act, "a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." N.C. Gen. Stat. § 15A-1331(b) (2019). "This Court has interpreted N.C. Gen. Stat. § 15A-1331(b) to mean that formal entry of judgment is not required in order to have a conviction." *Wood*, 209 N.C. App. at 457, 705 S.E.2d at 784 (internal quotation marks and citation omitted).

In *Wood*, this Court held that the Disciplinary Hearing Commission of the North Carolina State Bar ("DHC") properly entered an order of

discipline disbarring defendant based upon his criminal convictions, despite the fact that no judgment of conviction had been entered. *Id.* at 455, 705 S.E.2d at 783. Defendant was convicted in federal district court of several crimes. *Id.* at 455, 705 S.E.2d at 784. The DHC disbarred defendant based upon his violations of N.C. Gen. Stat. § 84-28(b)(1) and (2), which read, in pertinent part, as follows:

> (b) The following acts or omissions by a member of the North Carolina State Bar . . . shall constitute misconduct and shall be grounds for discipline . . . :
>
> (1) *Conviction* of, or a tender and acceptance of a plea of guilty or no contest to, a criminal offense showing professional unfitness;
>
> (2) The violation of the Rules of Professional Conduct . . . .

Id. at 457, 705 S.E.2d at 785 (quoting N.C. Gen. Stat. § 84-28(b)(1) and (2) (2006)).

Following the return of the verdict, the district court granted defendant's motion for judgment of acquittal and conditionally granted defendant's motion for a new trial, should the judgment of acquittal be reversed or vacated. *Id.* at 456, 705 S.E.2d at 784. Based upon this order, the DHC conditionally vacated defendant's disbarment. The appellate court reversed the district court's judgment of acquittal and conditional grant of a new trial, and remanded the matter to the district court for further proceedings consistent with its opinion. Based upon the appellate court's reversal, the DHC reinstated the order of disbarment. *Id.*

On appeal to this Court, defendant argued that the DHC erred in disbarring him and reinstating this disbarment based upon his conviction of criminal offenses when no judgment of conviction had been entered. This Court noted, "[d]efendant's argument conflates a conviction and a judgment of conviction." *Id.* This Court held that the DHC properly disciplined defendant because "[t]he plain language of this statute requires that an attorney be '*convicted of* . . . a criminal offense showing professional unfitness,' not that a judgment of conviction be entered." *Id.* at 457, 705 S.E.2d at 785.

Here, as in *Wood*, Petitioner's "argument conflates a conviction and a judgment of conviction." *Id.* at 456, 705 S.E.2d at 784. Petitioner was found guilty of simple assault by verdict of a judge in district court. This judicial verdict of guilt was an "adjudication of guilt" under N.C. Gen. Stat. § 58-2-69(c). This adjudication of guilt was, in turn, a "conviction" for purposes of N.C. Gen. Stat. § 58-2-69(c). The plain language of the

reporting statute requires that a licensee be "convicted in any court of competent jurisdiction for any crime or offense other than a motor vehicle infraction[,]" N.C. Gen. Stat. § 58-2-69(c), "not that a judgment of conviction be entered," *Wood*, 209 N.C. App. at 457, 705 S.E.2d at 785. Thus, Petitioner was required to notify the Commissioner in writing of his conviction of simple assault by 27 January 2017, 10 days after the date of the conviction.

Petitioner argues that,

> [b]ased on *expressio unius est exclusio alterius*, a "conviction" for purposes [N.C. Gen. Stat.] § 58-2-69(c) can mean only one of three things: 1) an adjudication of guilt; 2) a plea of guilty; or 3) a plea of nolo contendere (no contest). There is no dispute that [Petitioner] did not plead guilty or nolo contendere. He pled "not guilty". . . . Therefore, [Petitioner's] continued judgment, or prayer for judgment continued, can only be a "conviction" for purposes of [N.C. Gen. Stat.] § 58-2-69(c) if it is "an adjudication of guilt".

By this argument, Petitioner completely disregards the fact that he was *found guilty* by verdict of a judge in district court. It is this guilty verdict that is an adjudication of guilt and thus a conviction under the statute.

Petitioner further contends that a PJC upon payment of costs, without more, does not constitute an entry of judgment. Without a judgment, Petitioner's argument continues, there has been no adjudication of guilt. Petitioner relies on cases in which our appellate courts have held that a PJC is not a conviction for purposes of other statutes. Those cases are readily distinguishable from the present case.

In *State v. Southern*, 71 N.C. App. 563, 322 S.E.2d 617 (1984), *aff'd*, 314 N.C. 110, 331 S.E.2d 688 (1985), this Court held that, based on the statutory definition of "prior conviction" in the Fair Sentencing Act, a conviction with prayer for judgment continued cannot support a finding of prior convictions as an aggravating factor. We stated:

> The definition of "prior conviction" appears in [N.C. Gen. Stat. §] 15A-1340.2(4):
>
> > A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, *and judgment has been entered thereon and the time for appeal has expired*, or the conviction has been finally upheld on direct appeal. (Emphasis added.)

> Thus, an offense is a "prior conviction" under the Fair Sentencing Act only if the judgment has been entered and the time for appeal has expired, or the conviction has been upheld on appeal. When an accused is convicted with prayer for judgment continued, no judgment is entered, and no appeal is possible (until judgment is entered). Such a conviction therefore may not support a finding of an aggravating circumstance under [N.C. Gen. Stat. §] 15A-1340.4(a)(1)(o).

Id. at 565-66, 322 S.E. 2d at 619 (internal citation omitted).

In contrast to N.C. Gen. Stat. § 15A-1340.2(4) at issue in *Southern*, which specifically required both an adjudication of guilt and entry of judgment thereupon, the reporting statute at issue in this case defines conviction solely as an adjudication of guilt, and does not require entry of judgment upon that adjudication.

In *Florence v. Hiatt*, 101 N.C. App. 539, 400 S.E.2d 118 (1991), this Court considered the meaning of "final conviction" in the context of our motor vehicle statutes. Defendant was convicted of operating a motor vehicle without a license. *Id.* at 540, 400 S.E.2d at 119. He received a PJC from the trial court, which included certain non-punitive conditions. The Department of Motor Vehicles ("DMV") subsequently revoked defendant's license pursuant to the then-applicable version of N.C. Gen. Stat. § 20-28.1, which mandated that the DMV revoke an individual's driver's license upon his conviction of a moving violation during a period of revocation. At that time, N.C. Gen. Stat. § 20-24(c) defined "conviction" as a "final conviction of a criminal offense." *Id.* at 540-41, 400 S.E.2d at 119-20; N.C. Gen. Stat. § 20-24(c) (1987).

Defendant obtained a permanent injunction against the DMV, enjoining it from suspending his license. *Florence*, 101 N.C. App. at 540, 400 S.E.2d at 119. The DMV appealed. "The issue on appeal [was] whether the conditional language in [the trial court's] order render[ed] the putative 'prayer for judgment continued' a final conviction." *Id.* This Court held that a true PJC does not operate as a "final conviction" for purposes of our motor vehicle statutes. *Id.* at 542, 400 S.E.2d at 121.

Similarly, in *Walters*, this Court confronted the question of whether a PJC entered on a conviction "makes that conviction a 'final conviction,' and thus a 'reportable conviction,' " for purposes of the sex offender registration statute. *Walters*, 226 N.C. App. at 168, 739 S.E.2d at 186-87. This Court noted that "the term 'final conviction' has no ordinary meaning, and is not otherwise defined by the [sex offender registration] statute."

Id. at 169, 739 S.E.2d at 187. This Court "assume[d] that the legislature enacted Section 14-208.6 with an awareness of *Florence*, and yet chose not to articulate whether PJCs are 'final convictions' for the purposes of the registration statute. This suggests that the legislature saw no need to do so, even in light of case law holding PJCs are not 'final convictions' in the context of another statutory scheme employing similar language." *Id.* at 170, 739 S.E.2d at 188. Accordingly, we held that "a true PJC does not operate as a 'final conviction' for the purposes of" the sex offender registration statute. *Id.* at 171, 739 S.E.2d at 188.

In contrast to the motor vehicle statutes at issue in *Florence* and the sex offender registration statute at issue in *Walters*, both of which required a "final conviction," the reporting statute at issue in this case requires only a "conviction," which is specifically defined as "an adjudication of guilt." Thus, Petitioner's reliance on these distinguishable cases to support his argument that there has been no conviction under the reporting statute due to the trial court's entry of a PJC is without merit.

III. Conclusion

Because we conclude that a verdict of guilty of simple assault, regardless of the district court's subsequent entry of a PJC, is an "adjudication of guilt" and thus a "conviction" for purposes of N.C. Gen. Stat. § 58-2-69(c), we affirm the trial court's Order affirming the Decision of the DOI.

AFFIRMED.

Judges ARROWOOD and HAMPSON concur.

POINDEXTER v. EVERHART

[270 N.C. App. 45 (2020)]

KIMBERLY DAWN POINDEXTER, PLAINTIFF
v.
CARLTON D. EVERHART, II, DEFENDANT

No. COA19-646

Filed 18 February 2020

1. Appeal and Error—notice of appeal—timeliness—no certificate of service in the record—no argument from appellee

In an action between divorced spouses, where there was no certificate of service in the record on appeal showing when appellant was served with the trial court's judgment in the case, appellant's notice of appeal from that judgment was still deemed timely filed because appellee neither argued that the notice was untimely nor offered proof that appellant received actual notice of the judgment more than thirty days before filing notice of appeal (which would have warranted dismissing the appeal).

2. Divorce—subject matter jurisdiction—action to enforce separation agreement—division of military pension benefits

In an action between spouses who divorced in Oklahoma, where the ex-wife sued in a North Carolina district court to enforce a separation agreement the parties entered into in North Carolina that provided for division of the ex-husband's military pension benefits, the district court improperly dismissed the action for lack of subject matter jurisdiction. The federal code provision governing division of military pension benefits (10 U.S.C. § 1408(c)(4)) did not dictate subject matter jurisdiction over the case, but rather it contained requirements for personal jurisdiction over the ex-husband, which were satisfied where he consented to personal jurisdiction in North Carolina by entering the agreement (designating the district court as the forum for any related litigation). Further, subject matter jurisdiction was proper in the district court under N.C.G.S. § 7A-244.

Appeal by plaintiff from order entered 12 April 2019 by Judge Thomas B. Langan in Surry County District Court. Heard in the Court of Appeals 21 January 2020.

Law Offices of Mark E. Sullivan, P.A., by Mark E. Sullivan and Kristopher J. Hilscher, for plaintiff-appellant.

Lewis, Deese, Nance & Ditmore, LLP, by Renny W. Deese, for defendant-appellee.

TYSON, Judge.

Kimberly Dawn Poindexter ("Plaintiff") appeals from an order entered granting Carlton D. Everhart, II's ("Defendant") motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. We reverse and remand.

I. Background

Plaintiff and Defendant were married on 14 May 1983 and separated on 9 August 2004. The parties entered into a Separation Agreement and Property Settlement ("Agreement") in Surry County on 17 November 2005.

Plaintiff and Defendant agreed to divide their marital property per the provisions in the Agreement. The Agreement designates the court in Surry County as the forum for issues arising out of the Agreement, North Carolina law as the choice of law, and provides under "Situs and Jurisdiction":

> This Agreement shall be construed and governed in accordance with the laws of the State of North Carolina and each party agrees and does hereby consent and submit himself/herself to the jurisdiction of the General Court of Justice of Surry County of the State of North Carolina for any suits or any other legal action based upon or arising out of or in connection with this Agreement.

The Agreement also provides Plaintiff is to obtain a spousal share of Defendant's military pension. The Agreement under "Military Retirement" provides:

> The husband is currently a member of the United States Armed Forces. The parties agree and desire that his military retirement be divided using the following formula to determine the wife's entitlement. The former spouse (wife) is awarded a percentage of the member's disposable military retired pay, to be computed by multiplying 43.5% times a fraction, the numerator of which is 245 months of marriage during the member's creditable military serve (sic), divided by the member's total number of months of creditable military service.
>
> The husband shall be required to select the survivor benefit plan. In the event the wife remarries at any time prior to the husband's death or retirement, she shall lose the right to the survivor benefit plan and shall, immediately after

> becoming married, file a document with the appropriate authorities, waiving any future SBP claim. If the wife fails to file such document with the appropriate authority, then the husband may file a copy of her marriage certificate or any other document that is satisfactory proof to DFAS, at such time the Wife shall lose her survivor benefits.
>
> There will be no further claims of future retirements or no future monetary claims against husband.

The Agreement also provides under "Enforcement of Agreement":

> The parties agree that, in the event there is a non-compliance with any of the provisions of this Agreement, the complying party may initiate an action in any court where jurisdiction over the parties may be obtained, asking for specific performance of the terms and/or conditions so sought to be enforced. The non-complying party shall be responsible to the complying party for any and all expenses incurred by the complying party in the attempt to obtain specific performance, including attorney's fees. Any amount so awarded shall be in the sole discretion of the presiding judge and the award shall be made without regard to the financial ability of either party to pay, but rather shall be based upon the fees and expenses determined by the court to be reasonable and incurred by the complying party. It is the intent of this paragraph to induce both Husband and Wife to comply with the terms of this Agreement to the end that no litigation as between the parties is necessary in the areas dealt with by this Agreement. In the event of litigation, it is the further intent to specifically provide that the non-complying party shall pay all reasonable fees and costs that either party may incur. The right to specific performance of this Agreement shall be in addition to and not in substitution for all other rights and remedies either party may have at law or in equity arising by reason of any breach of the Agreement by the non-complying party.

After the Agreement was signed on 17 November 2005, Plaintiff and Defendant were divorced the following month on 22 December 2005 in Oklahoma. Defendant herein sought and was the plaintiff in the divorce action, and Plaintiff herein did not contest the divorce. The Oklahoma divorce decree states: "The property owned by the parties shall be

divided according to the orders issued in the State of North Carolina." Both parties signed and acknowledged the provisions contained within the divorce decree. Plaintiff is a resident of North Carolina. Defendant is a resident of Texas.

Defendant sued Plaintiff on 23 January 2006 for specific performance of the Agreement in Surry County, North Carolina. In Defendant's complaint, he asserted the "Enforcement of Agreement" provisions of the Agreement to support his claim for specific performance.

Plaintiff's attorney drafted a military pension division order for Defendant to execute. Defendant asserted it did not reflect the terms of the Agreement and refused to execute Plaintiff's proposed order.

Plaintiff initiated the present action by filing a complaint in the Surry County District Court on 30 August 2018. Without answering Plaintiff's complaint, Defendant filed a motion to dismiss for lack of subject matter jurisdiction pursuant to North Carolina Rules of Civil Procedure 12(b)(1) on 1 October 2018. The trial court granted Defendant's Rule 12(b)(1) motion and dismissed Plaintiff's complaint for lack of subject matter jurisdiction. Plaintiff filed notice of appeal on 13 May 2019.

II. Jurisdiction

[1] The timeliness of Plaintiff's 13 May 2019 notice of appeal requires analysis. No information in the record shows when Plaintiff was served with the trial court's judgment. Our Court has held: "where . . . there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, appellee must show that appellant received actual notice of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal." *Brown v. Swarn*, 257 N.C. App. 418, 422, 810 S.E.2d 237, 240 (2018) (alteration in original).

Applying the reasoning in *Brown*, unless the appellee contests the notice of appeal as untimely and proffers actual proof of service, this Court may not dismiss the appeal. *Id.* Defendant has not argued Plaintiff's 13 May 2019 notice of appeal is untimely nor proffered proof of Plaintiff's receipt of actual notice of the 12 April 2019 order to dismiss her appeal.

Plaintiff's notice of appeal from that order is deemed timely filed. *See id.* This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 1-277 and 7A-27(b)(2) (2019).

III. Issue

[2] Plaintiff argues the trial court erred in granting Defendant's Rule 12(b)(1) motion and dismissing Plaintiff's complaint for lack of subject matter jurisdiction.

IV. Defendant's Rule 12(b)(1) Motion

A. Standard of Review

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

B. Enforceability of Agreement

Plaintiff and Defendant entered into the Agreement on 17 November 2005. According to its express terms, the Agreement was not incorporated into the 22 December 2005 Oklahoma divorce decree. However, the Oklahoma decree specifically addressed the property division: "The property owned by the parties shall be divided according to the orders issued in the State of North Carolina."

> These agreements are favored in this state, as they serve the salutary purpose of enabling marital partners to come to a mutually acceptable settlement of their financial affairs. A valid separation agreement that waives rights to equitable distribution will be honored by the courts and will be binding upon the parties.

Hagler v. Hagler, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987) (citations omitted).

"A marital separation agreement is generally subject to the same rules of law with respect to its enforcement as any other contract. The equitable remedy of specific enforcement of a contract is available only when the plaintiff can establish that an adequate remedy at law does not exist." *Moore v. Moore*, 297 N.C. 14, 16, 252 S.E.2d 735, 737 (1979) (citations omitted).

Our Court has long held separation agreements are enforceable as contracts, even if the separation agreements create rights and duties not expressly provided for by statute. *Blount v. Blount*, 72 N.C. App. 193, 195, 323 S.E.2d 738, 740 (1984). "Where the terms are plain and explicit the court will determine the legal effect of a contract and enforce it as written by the parties." *Church v. Hancock*, 261 N.C. 764, 766, 136 S.E.2d 81, 83 (1964) (citations omitted).

Parties retain the right and ability, and are encouraged to resolve and privately settle their disputes, in a written agreement for payment and performance. The Agreement before us expresses: "It is the intent of this [Enforcement Section] to induce both Husband and Wife to comply with the terms of this Agreement to the end that no litigation as between the parties is necessary in the areas dealt with by this Agreement." While expressing the intent and hope that no further "litigation as between the parties is necessary," the Agreement is not self-executing. Plaintiff carries the burden to show an enforceable contract, breach thereof, and damages.

C. Military Pension

Division of a military service member's pension and payment thereof to a former spouse is allowed, subject to 10 U.S.C. § 1408(c):

> Authority for court to treat retired pay as property of the member and spouse.
>
> (1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.
>
> . . . .
>
> (4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) *unless the court has jurisdiction over the member by reason of* (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the

> territorial jurisdiction of the court, *or* (C) *his consent to the jurisdiction of the court.*

10 U.S.C. § 1408 (2017) (emphasis supplied).

Subject to the provisions of 10 U.S.C. § 1408, state courts may treat a military service member's pension as the property of the service member and their spouse, in accordance with the laws of the state. Defendant asserts 10 U.S.C. § 1408(c)(4) articulates requirements for subject matter jurisdiction.

In *Judkins v. Judkins*, this Court examined 10 U.S.C. § 1408(c)(4) to determine whether this federal code provision establishes and requires personal or subject matter jurisdiction over the claim. *Judkins v. Judkins*, 113 N.C. App. 734, 736-37, 441 S.E.2d 139, 140 (1994). The defendant in *Judkins*, who had made a general appearance in the courts of North Carolina, argued that the federal statute, 10 U.S.C. § 1408(c)(4), limited the state court's subject matter jurisdiction. *Id.* at 737, 441 S.E.2d at 140. We held: "We read this provision as establishing the requirements for personal jurisdiction and proceed to determine whether the trial court properly obtained *in personam* jurisdiction over defendant as required by § 1408(c)(4)." *Id.*

Both the Supreme Court of North Carolina and this Court have long recognized that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). This Court recently discussed *In re Civil Penalty* in *State v. Gonzalez* and held:

> *In re Civil Penalty* stands for the proposition that, where a panel of this Court has decided a legal issue, future panels are bound to follow that precedent. This is so even if the previous panel's decision involved narrowing or distinguishing an earlier controlling precedent—even one from the Supreme Court—as was the case in *In re Civil Penalty*. Importantly, *In re Civil Penalty* does not authorize panels to overrule existing precedent on the basis that it is inconsistent with earlier decisions of this Court.

State v. Gonzalez, __ N.C. App. __, __, 823 S.E.2d 886, 888-89 (2019).

We are without authority to overturn the ruling of a prior panel of this Court on the same issue. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. Prior precedent of this Court has interpreted 10 U.S.C.

§ 1408(c)(4) as referencing requirements for *in personam* and not subject matter jurisdiction. *Judkins*, 113 N.C. App. at 736-37, 441 S.E.2d at 140.

Subject matter jurisdiction is conferred upon our state's courts by North Carolina's Constitution and by statute. N.C. Gen. Stat. § 7A-244 confers subject matter jurisdiction over domestic actions in the district court:

> The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the *enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.*

N.C. Gen. Stat. § 7A-244 (2019) (emphasis supplied).

N.C. Gen. Stat. § 7A-244, not the federal code provision, provides the district court in North Carolina with subject matter jurisdiction over this Agreement. No supremacy nor preemption issue exists between the state statute and the federal code. Defendant's consent to personal jurisdiction in North Carolina is expressly contained in the Agreement and the divorce decree. Defendant also stipulated that North Carolina courts possess personal jurisdiction over him, which satisfies the personal jurisdictional consent requirements set forth in 10 U.S.C. § 1408(c)(4).

This action is not to determine whether there will be a division of "retired pay payable to a [service] member," which the parties' consented to in the Agreement. 10 U.S.C. § 1408. Plaintiff, a resident of North Carolina and a party to the Agreement, seeks enforcement for breach of an asserted prior mutually agreed-upon division, which N.C. Gen. Stat. § 7A-244 confers in the district court of North Carolina.

Defendant consented to *in personam* jurisdiction in North Carolina. The parties contest how, when, and to what extent the division of "retired pay payable to a [service] member" is to occur and whether the terms in the Agreement are ambiguous. *Id.* As such, the district court possesses subject matter jurisdiction over the Agreement, personal jurisdiction over the parties, and is a proper forum to adjudicate Plaintiff's and Defendant's disputed claims. N.C. Gen. Stat. § 7A-244. The trial court's grant of Defendant's Rule 12(b)(1) motion was error.

V. Conclusion

N.C. Gen. Stat. § 7A-244 confers subject matter jurisdiction over the Agreement in the North Carolina district court. 10 U.S.C. § 1408(c)(4) requires Defendant's consent and, based upon Defendant's consent in the Agreement and stipulation, confers personal jurisdiction in North Carolina to resolve disputes over the Agreement's allocation of Defendant's service member's retirement with Plaintiff, a former spouse. *See Judkins*, 113 N.C. App. at 736-37, 441 S.E.2d at 140.

The trial court's grant of Defendant's motion to dismiss Plaintiff's pleading for lack of subject matter jurisdiction is reversed. North Carolina's courts possess subject matter jurisdiction over the Agreement, possess personal jurisdiction over the parties by residence of the Plaintiff and by consent of the Defendant. North Carolina is a proper forum to resolve any disputed issues in the Agreement. The case is remanded for further proceedings, which are not inconsistent with this opinion. *It is so ordered*.

REVERSED AND REMANDED.

Judges DIETZ and INMAN concur.

STARR LYNN SHEPARD, Plaintiff
v.
CATAWBA COLLEGE, Defendant

No. COA19-101

Filed 18 February 2020

Negligence—notice of defective condition—proximate cause—forecast of evidence—fall from wooden bleachers

In a negligence action arising from injuries sustained after plaintiff fell from old wooden bleachers at a baseball game, summary judgment for defendant college was inappropriate where plaintiff presented sufficient evidence from which a jury could infer that defendant had constructive notice that the bleachers were rotting and in disrepair and that defendant's failure to properly maintain the bleachers proximately caused plaintiff's injury.

Judge BERGER concurring in the result only.

Appeal by plaintiff from order entered 10 July 2018 by Judge Adam M. Conrad in Superior Court, Mecklenburg County. Heard in the Court of Appeals 16 October 2019.

Tin, Fulton, Walker & Owen, PLLC, by Cheyenne N. Chambers, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Luke P. Sbarra, and Leila W. Rogers, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals trial court order allowing defendant's motion for summary judgment and thus dismissing plaintiff's action. Because plaintiff has forecast evidence -- viewed in the light most favorable to her and giving her the benefit of any inferences from the evidence -- which presents a genuine issue of material fact as to defendant's negligence as the proximate cause of her injuries sustained in her fall on defendant's bleachers, we reverse and remand for further proceedings.

I. Background

On 6 October 2017, plaintiff filed a complaint against defendant alleging that she was injured by defendant's negligence in maintaining its bleachers. Plaintiff alleged she was attending a baseball game, and when she stood up and began to move from her seat, a "wooden slat . . . moved in such a way that it allowed her foot to get caught under an adjacent wooden slat and caused her to be thrown off balance and she fell down the bleachers and was severely and permanently injured." Defendant answered plaintiff's complaint, denying the allegations of negligence and alleging plaintiff's contributory negligence as a defense.[1] On 18 May 2018, defendant filed a motion for summary judgment under North Carolina Civil Procedure Rule 56. On 10 July 2018, the trial court granted summary judgment in favor of defendant. Plaintiff appeals.

II. Summary Judgment

Plaintiff contends the trial court erred in granting summary judgment in favor of defendant.

1. The defense of contributory negligence is not at issue on appeal, and we will not address it.

A. Standard of Review

> The standard of review for a motion for summary judgment requires that all pleadings, affidavits, answers to interrogatories and other materials offered be viewed in the light most favorable to the party against whom summary judgment is sought. Summary judgment is properly granted where there is no genuine issue of material fact to be decided and the movant is entitled to a judgment as a matter of law.

Harrington v. Perry, 103 N.C. App. 376, 378, 406 S.E.2d 1, 2 (1991) (citation omitted).

> A defendant is entitled to summary judgment as to all or any part of a claim, N.C.G.S. § 1A–1, Rule 56(b) (1990), 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 defendant is entitled to judgment as a matter of law. Specifically, a premises owner is entitled to summary judgment in a slip and fall case if it can show either the non-existence of an essential element of the plaintiff's claim or that the plaintiff has no evidence of an essential element of her claim. Only if the movant-defendant makes its showing is the nonmovant-plaintiff required to present evidence. If the defendant makes its showing, the plaintiff is required to produce a forecast of evidence showing that there are genuine issues of material fact for trial. All inferences of fact must be drawn against the movant and in favor of the nonmovant.

Nourse v. Food Lion, Inc., 127 N.C. App. 235, 239, 488 S.E.2d 608, 611 (1997) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 347 N.C. 666, 496 S.E.2d 379 (1998); *see Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79 (2002) ("Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case.").

B. Factual Background

Viewing the forecast of evidence in the light most favorable to plaintiff, *see Nourse*, 127 N.C. App. at 239, 488 S.E.2d at 611, the evidence tends to show that on 18 March 2016, plaintiff was a spectator at

a college baseball game at Newman Park. Plaintiff's son was the pitcher in his second season of playing for defendant, Catawba College. The spectators were seated on wooden bleachers which were constructed in 1934.

Plaintiff was seated in her "usual spot" near the press box, further up in the bleachers than her husband, who customarily sat closer to the field at their son's games, but he was close enough to plaintiff to have a "perfect view" of her. Plaintiff testified that she stood up from her seat when she suddenly fell, falling about 13 to 15 feet down the bleachers and landing on the pavement, breaking her back as her "head went into the fence." Plaintiff does not remember the fall itself as she suffered major injuries that caused memory loss.

Plaintiff did not recall what happened between her fall and regaining consciousness in the hospital, but she stated during her deposition that she remembered she felt an issue with her foot being "trapped" immediately before her fall occurred. Plaintiff stated in her deposition that "I was seated in the bleachers along the first base side three rows down from the press box. I stood up, stepped to the right; the board flexed, caught my toe and I fell down the bleachers to the ground below." Plaintiff recalled that her foot felt "heavy, trapped, heavy, something stuck, something not right about it, like something was hanging onto it or it couldn't -- it couldn't go anywhere."

Plaintiff's husband testified that he saw plaintiff stand up, then he turned his head toward the field, and in the next moment saw that his wife had fallen down the bleachers. Plaintiff's husband stated she told him "[t]hat her foot got caught, that she couldn't get her foot -- evidently a board gave way and her foot fell underneath and that propelled her down the steps." Due to the severity of plaintiff's injuries, she was immediately taken to the hospital by an ambulance and her husband went with her so neither she nor her husband examined or took photographs of the exact spot where she fell at the time. Although plaintiff could not identify a specific board she fell on, at her deposition, plaintiff identified the place where she had been sitting by marking the "[g]eneral area" with a green X on a photograph of the bleachers.

On 7 December 2016, plaintiff's expert witness, Mr. David Harlowe, examined the bleachers. Mr. Harlowe noted in his report that he had "been performing risk management work in the athletic and fitness industries for over 21 years." Mr. Harlowe stated in his deposition that his inspection was delayed until December 2016 because plaintiff's counsel had been unable to get permission from defendant for him to do an inspection.

Plaintiff's counsel had notified defendant of plaintiff's claim by certified mail on 11 May 2016, within two months after her fall, and specifically requested "access to the stadium so that our expert witness can inspect the stadium." Plaintiff's counsel also asked defendant to

> accept this letter as our formal request to inspect and notice, pursuant to the law prohibiting spoliation, to not alter, repair, destroy, change, modify or take any remedial measure to change the condition of the stadium as it existed on the date in question prior to our opportunity to conduct a full inspection of the facility.

Plaintiff's counsel sent another certified letter to defendant on 14 June 2016, again repeating his request for access to the stadium for inspection by plaintiff's expert witness.[2] The letter stated, "I again point out Catawba College is on notice to not alter, repair, destroy, change, modify or take any remedial measures to change the condition of Newsome Park as it existed on the date in question prior to our opportunity to conduct a full inspection and analysis of the facility." In August 2016, plaintiff's counsel repeated his request to defendant's insurance carrier.

Despite plaintiff's repeated requests for defendant to preserve the condition of the bleachers pending an inspection, on 7 December 2016, the day Mr. Harlowe went to do the inspection, the bleachers in the area noted by plaintiff as where she fell were being disassembled. Mr. Harlowe saw workers and equipment in the area where they were disassembling "where the incident happened." Because several rows of boards in the area had already been removed, Mr. Hawlowe had to do the inspection of that area "from the sidewalk at the bottom." Mr. Harlowe stated in his deposition that the bleachers in that area were disassembled either that day or the day before his arrival. "Only the metal frame" was left in the area where plaintiff had fallen.

In his inspection of the rest of the stadium, Mr. Harlowe "discovered multiple examples of rot and decay in other sections of the stadium where spectators were exposed to dangerous conditions." Mr. Harlowe's report noted that "[o]n initial viewing, the stadium looked like a relic from the World War II era in which it was constructed. My first impression was that it was a stadium in disrepair that had been neglected for many years." "According to the Catawba College athletic website, the Newman Park grandstand was erected in 1934. The site also states

2. The record indicates that defendant received both certified letters.

the 'recent' improvements were completed in 1996 and 2004, but does not state that the bleachers were updated in either of those projects."

Because the bleachers in the area where plaintiff fell had been disassembled just prior to his arrival, Mr. Harlowe was unable to take photographs of that area of the bleachers as it had existed when plaintiff fell, but he had access to photographs of the area taken prior to December 2016. The photos attached to the report show discolored wooden boards on a metal frame. "[T]he boards that made up the walkways and stairs for the stadium were old and rotting. Make-shift steps had been created by someone over the years to fill the large gap between seatboards and footboards." "[T]he wood used for stairs, footboards and seatboards was in poor condition throughout the stadium and particularly in the section where the plaintiff fell." "The gap between seatboards and footboards in the stadium averaged approximately 13 1/2". This is three times larger than the recommended 4" gap stated by the [Consumer Product Safety Commission]." Mr. Harlowe opined "that the bleachers in Newman Park have never been inspected by a qualified person." "When viewing the wood used it is my opinion that the wood was either untreated or had surpassed its life-expectancy for safe use because of the visible rotting viewed at the time of the inspection." Mr. Harlowe concluded from his inspection

> that Catawba College has severely neglected the bleachers in the Newman Park baseball stadium which directly led to the plaintiff being injured. The inspection showed that most of the footboards, seatboards, and make-shift steps have been present for many years and show advanced signs of rot and lost rigidity when stepped on. It is evident from the condition of the bleachers that no safety inspections have ever occurred or if they have then the school has never taken any actions to correct the hazards. It is my opinion that the bleachers should have been condemned many years ago and replaced with aluminum bleachers.
>
> Additionally, the fact that a work crew was in the process of dismantling the bleachers while I was inspecting the stadium, and without any visible permit, shows that the school was trying to fix the problem under the radar to potentially reduce their liability in this case. In my opinion this was a direct admission of guilt on their part for their negligence in taking care of the stadium bleachers.

Defendant's forecast of evidence contradicts some of plaintiff's evidence regarding her location and actions at the time of the fall. For

example, Mr. Jeffrey Childress, defendant's assistant athletic director and director of tennis at the time of plaintiff's fall, testified that plaintiff was standing on the steps and holding the railing when she turned to look back, perhaps watching a foul ball, and missed a step and fell. Mr. Childress did not believe the condition of the steps contributed to her fall. Two other witnesses, both Catawba College students who were working at the game, also testified plaintiff was quickly descending the steps when she fell and that they had attended other games at this stadium and had never had any issues nor known of any issues with the bleachers. But no matter which witnesses a jury finds most credible, for purposes of summary judgment, we must view the evidence in the light most favorable to plaintiff. *See id.*

C. Negligence Claim

Plaintiff contends the trial court erred in granting summary judgment in favor of defendant because she established a *prima facie* case of negligence.

> In order for a negligence claim to survive summary judgment, the plaintiff must forecast evidence tending to show (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. . . .
>
> The ultimate issue which must be decided in evaluating the merits of a premises liability claim is determining whether Defendants breached the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. In order to prove a defendant's negligence, a plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or constructive notice of its existence. A landowner is under no duty to protect a visitor against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered and need not warn of any apparent hazards or circumstances of which the invitee has equal or superior knowledge. However, if a reasonable person would anticipate an unreasonable risk of harm to a visitor on his property, notwithstanding the lawful visitor's knowledge

> of the danger or the obvious nature of the danger, the landowner has a duty to take precautions to protect the lawful visitor.

Burnham v. S&L Sawmill, Inc., 229 N.C. App. 334, 339–40, 749 S.E.2d 75, 79–80 (2013) (citations, quotation marks, ellipses, and brackets omitted). Further,

> [w]hile not an insurer of its customers' safety, defendant is charged with knowledge of unsafe conditions of which it has notice and is under a duty of ordinary care to give warning of hidden dangers. Evidence that the condition (causing the fall) on the premises existed for some period of time prior to the fall can support a finding of constructive notice.

Carter v. Food Lion, Inc., 127 N.C. App. 271, 275, 488 S.E.2d 617, 620 (1997).

> The owner or proprietor of premises is not an insurer of the safety of his invitees. But he is under a duty to exercise ordinary care to keep that portion of his premises designed for their use in a reasonably safe condition so as not to expose them unnecessarily to danger, (but not that portion reserved for himself and his employees), and to give warning of hidden dangers or unsafe conditions of which he has knowledge, express or implied.

McElduff v. McCord, 10 N.C. App. 80, 82, 178 S.E.2d 15, 17 (1970) (citation and quotation marks omitted).

Defendant contends plaintiff failed to establish two key requirements for her claim: proximate cause and notice of the alleged defective condition. Both of defendant's arguments focus on plaintiff's inability to identify the exact place where she fell and the condition of the exact board at issue. Defendant contends that since plaintiff cannot identify the exact place where her foot was trapped, she cannot show either defendant's notice of a defective condition in that spot or that a defective condition in that spot was the proximate cause of her fall. We turn first to notice of the alleged defective condition.

1. Notice of Defective Condition

Defendant argues plaintiff did not present any

> conclusive evidence demonstrating where she fell, or identified any specific condition of the bleachers that contributed to her fall. Since Mrs. Shepard and her expert did not

> identify the location and cause of her fall, it is impossible for Catawba to have had actual or constructive notice of an unknown and unidentified defective condition that allegedly caused Mrs. Shepard to fall. As such, Mrs. Shepard has failed to forecast any evidence of a *prima facie* case of negligence against Catawba.

Defendant primarily relies on *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992), *abrogated by Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998),[3] in contending plaintiff failed to demonstrate it had constructive knowledge of the allegedly defective condition. In *Roumillat*, the plaintiff slipped and fell in a parking lot of a Bojangles restaurant. *Id.* at 61, 414 S.E.2d at 340-41. Plaintiff contended that there was slippery grease-like substance in the parking lot and this caused her to fall. *Id.* at 61, 414 S.E.2d at 341. The Supreme Court held that the plaintiff failed to forecast any evidence, other than her "bald assertion" that the "defendant knew or should have known of the greasy substance in its parking lot." *Id.* at 65, 414 S.E.2d at 343. The Court noted that the area was well-lit and plaintiff had "exited the restaurant within a few feet of the path she used to enter the restaurant, and her husband himself, less than an hour before, successfully traversed the very area on which plaintiff slipped." *Id.* at 66, 414 S.E.2d at 343-44.

As there was no indication of how long the substance had been there, how it got there, or that any of the defendant's employees had been notified of its presence, the Supreme Court noted that

> *[w]hen the unsafe condition is attributable to third parties or an independent agency*, plaintiff must show that the condition existed for such a length of time that defendant knew or by the exercise of reasonable care should have known of its existence, in time to have removed the danger or to have given proper warning of its presence.

Id. at 64, 414 S.E.2d 343 (citation and quotation marks omitted) (emphasis modified).

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3. *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), notes that the distinction in the level of care needed for invitees versus licensees, as noted in *Roumaillat,* is abolished, but *Roumillat's* discussion of the law regarding actual or constructive notice of a defective condition is still precedential.

The Court contrasted the plaintiff's fall on the substance to the fall of a grocery store customer on an alleged unsafe condition created by a third party in *Warren v. Rosso*:

> In *Warren*, a grocery store patron slipped and fell as a result of human excrement that was deposited on the floor of defendant's store. In support of its motion for summary judgment, defendant submitted affidavits of three employees, each stating that the excrement was deposited immediately before plaintiff stepped in it. Plaintiff submitted her own affidavit contradicting defendant's evidence that the excrement had fallen onto the floor immediately prior to her stepping in it. In her affidavit, plaintiff stated that the excrement was dried and had footprints in it. In her answers to defendant's interrogatories, plaintiff stated that she was at the checkout counter for approximately fifteen minutes and during that time she saw no one enter or leave the store. Moreover, in her affidavit, plaintiff stated that an employee of the store informed her that he knew the excrement was on the floor but that it was not his job to clean it up. On this basis, the Court of Appeals concluded that a dispute existed as to a material fact regarding the length of time the excrement was actually on the floor, making summary judgment for defendant inappropriate.

Id. at 65, 414 S.E.2d at 343.

The Supreme Court also noted *Southern Railway*, where the plaintiff "slipped and fell on some grain lying in a work area in which plaintiff regularly walked and had slipped time after time." *Id.* at 65-66, 414 S.E.2d at 343 (quotation marks omitted). The plaintiff in *Southern Railway* forecast evidence that

> [d]espite receiving complaints about the presence of the grain, defendant never took steps to remedy the situation. Because defendant was on notice of the dangerous condition and plaintiff had no choice but to encounter the condition in completing his job duties, the question of the reasonableness of defendant's failure to take additional precautions was for the jury to decide.

Id. at 66, 414 S.E.2d at 343 (citation omitted).

The primary difference between this case and *Roumillat* is that the unsafe condition in *Roumillat* was *created by a third party*, so

evidence of the time period the condition had existed was crucial to show the defendant's notice or constructive notice of the condition. As to the greasy spot in the Bojangle's parking lot, the Court quoted *Hinson v. Cato's, Inc*:

> Even if a negligent situation could be assumed here, had it existed a week, a day, an hour, or one minute? The record is silent; and since the plaintiff must prove her case, we cannot assume, which is just a guess, that the condition had existed long enough to give the defendant notice, either actual or implied.
>
> The plaintiff has failed to meet the requirements which permit the cause to be submitted to the jury.
>
> 271 N.C. 738, 739, 157 S.E.2d 537, 538.

Id. at 67, 414 S.E.2d at 344.

Roumillat and defendant's argument both address unsafe conditions created by a third party. But in this case, the alleged dangerous condition was not created by a third party; the bleachers were constructed by defendant in 1934 and defendant was responsible for maintenance of the bleachers since their construction. This situation cannot be compared to an ephemeral greasy spot of which the landowner had not been notified, which may have existed only for "a week, a day, an hour, or one minute[.]" *Id.*

Plaintiff must show "that the condition had existed long enough to give the defendant notice, either actual or implied." *Id.* Here, plaintiff did forecast evidence that the dilapidated condition of the bleachers had existed for a long time and defendant should have discovered the condition upon reasonable inspection. Plaintiff's evidence tends to show that defendant failed to maintain or inspect the wooden bleachers constructed over 80 years ago and used regularly for sporting events and that the wooden boards had deteriorated and weakened throughout the entire structure; this is evidence of at least constructive notice of the dangerous condition of the bleachers.

> The ultimate issue which must be decided in evaluating the merits of a premises liability claim, however, is whether the defendant breached the duty to exercise reasonable care in the maintenance of its premises for the protection of lawful visitors.

> Reasonable care requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. This duty includes an obligation to exercise reasonable care with regards to reasonably foreseeable injury by an animal. However, premises liability and failure to warn of hidden dangers are claims based on a true negligence standard which focuses attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

Rolan v. N.C. Dep't of Agric. & Consumer Servs., 233 N.C. App. 371, 382, 756 S.E.2d 788, 795 (2014) (citations, quotation marks, ellipses, and brackets omitted).

Plaintiff's forecast of evidence was not based upon a claim of an individual weakened or broken board which may not have been discovered, even if defendant had regularly inspected and maintained the bleachers, but instead tends to show that the entire structure had been neglected for many years. The wooden boards were rotting and decaying such that even a cursory inspection, according to plaintiff's expert, would have revealed the defective condition. Plaintiff's evidence is sufficient to create a genuine issue of material fact that defendant knew, or should have known in the exercise of reasonable care, of the dangerous conditions created by the allegedly rotting and decaying boards in the bleachers.

2. Proximate Cause

Defendant also argues that plaintiff has failed to show that the defective condition of the bleacher was the proximate cause of her fall. Since plaintiff could not identify the exact place where her foot was caught, defendant contends she cannot show that a defective board caused her fall. Defendant focuses on two cases -- *Gibson v. Ussery*, 196 N.C. App. 140, 143, 675 S.E.2d 666, 668 (2009) and *Hedgepeth v. Rose's Stores*, 40 N.C. App. 11, 14, 251 S.E.2d 894, 896 (1979) -- in contending plaintiff failed to properly forecast evidence that the allegedly defective bleachers were the proximate cause of her injuries.

In *Gibson*, this Court affirmed the trial court's order granting a directed verdict for the defendant, 196 N.C. App.140, 146, 675 S.E.2d 666, 670 (2009), based upon the absence of any evidence that a defective condition of stairs caused plaintiff to fall:

> plaintiff presented evidence in the form of witness testimony that Cynthia fell forward on the staircase, and that she did not appear to trip on anything. Testimony also showed that she was one of several to descend the staircase, but the only one to fall; none of the witnesses noticed any problems with the condition of the staircase as they descended. One witness testified that she went back to inspect the stairs and found the third step from the bottom to wobble to and fro under her foot. *However, there was no testimony about which stair Cynthia fell on and no testimony that anyone observed what caused her to fall.*
>
> We agree with the trial court's conclusion that this evidence, taken in the light most favorable to plaintiff, does not permit a finding of all elements of a negligence claim against defendants. In evaluating the record, we look for evidence that takes the element of proximate cause out of the realm of suspicion. All of the testimony, taken in the light most favorable to plaintiff, provides no more than mere speculation that defendants' alleged negligence was the proximate cause of Cynthia's fall and the injuries that may have resulted from it. Doubtless Cynthia was injured in some manner as a result of her fall, but there is insufficient evidence to support a reasonable inference that the injury was the result of defendants' negligence.

Id., at 144, 675 S.E.2d at 668–69 (emphasis added) (quotation marks omitted).

In *Hedgepeth*, the plaintiff contended that the defendant failed to maintain stairs in a reasonably safe condition based upon a slick, worn metal strip on the stairway and the presence of potted plants on the steps which prevented her from using the stairrail.

> The only evidence introduced by the plaintiff as to the condition of the step on which she fell was that it was worn and that it was very slick. *Plaintiff, however, does not know on which step she fell, or even which foot slipped and caused her to fall. There is no evidence in this record that the condition of the step upon which plaintiff slipped was any different from that of the entire flight of steps.* Plaintiff's evidence tending to show that the steps had a metal strip on them, and that the metal strip was worn and that the steps were very slick

> apparently refers to all the steps. This is not sufficient evidence to support a finding by the jury that the steps had become so worn that their use would be hazardous to the store's patrons. *The unsupported allegations by the plaintiff that the set of steps on which she fell were worn or slick, without evidence of the particular defective condition that caused the fall, is insufficient to overcome a motion for a directed verdict.*

40 N.C. App. 11, 14–15, 251 S.E.2d 894, 896 (emphases added) (quotation marks omitted).

This Court also rejected the plaintiff's argument that the obstruction of the stairrail by plants caused her fall, since she did not actually know what caused her to trip, and she could only speculate that she would have been able to avoid a fall by holding onto the rail.

> Plaintiff has the burden to show the cause of her fall. The evidence introduced by plaintiff leaves the cause of her fall a matter of conjecture. There is no presumption or inference of negligence from the mere fact that an invitee fell to his injury while on the premises, and the doctrine of res ipsa loquitur does not apply to a fall or injury of a patron or invitee on the premises, but the plaintiff has the burden of showing negligence and proximate cause. Plaintiff has failed to meet this burden.

Id. at 16, 251 S.E.2d 894, 897 (citations and quotation marks omitted).

This case is different from *Gibson* and *Hedgepeth* because plaintiff did clearly identify the place she was sitting in the bleachers, "along the first base side three rows down from the press box[,]" that she stood, stepped to the right, felt a board flex, catch her toe, and trap her foot, which resulted in her fall. *See Gibson* 196 N.C. App. at 144, 675 S.E.2d at 668–69; *Hedgepeth*, 40 N.C. App. at 14–16, 251 S.E.2d at 896–97. Plaintiff had marked the spot with an "X" on a photograph to illustrate her statements in her deposition. Further, plaintiff's husband witnessed her stand up in the area and saw where she fell.[4] Plaintiff's expert provided a detailed report as to the negligence of defendant in failing to weather-treat, repair, replace, or otherwise address outdoor

4. Defendant's witnesses contend that plaintiff did not fall at her seat but that she was walking down the steps when she fell. But for purposes of summary judgment, we must take the evidence in the light most favorable to plaintiff. *Nourse*, 127 N.C. App. at 239, 488 S.E.2d at 611. There is a genuine issue of material fact regarding where plaintiff fell.

rotten wooden bleachers with boards that were at least 75 years old, perhaps much older.

Defendant also argues that Mr. Harlowe did not inspect the area where plaintiff fell because she did not identify where she fell: "Even Mrs. Shepard's expert, David Harlowe, testified that he inspected and took photos on the opposite side of the stadium from where Mrs. Shepard was sitting. Again, *this was because Mr. Harlowe did not know where Mrs. Shepard fell* so his inspection was focused on the entire stadium." (Emphasis added.) But we agree with plaintiff that this argument misrepresents Mr. Harlowe's testimony:

> [Defendant] misrepresented Harlowe's deposition testimony by asserting that he inspected the entire stadium because he did not know where Mrs. Shepard fell. Harlowe *knew* where Shepard fell. In fact, when Harlowe visited Catawba he noticed at the outset that Catawba was in the process of reconstructing the bleachers in question: They were actually disassembling -- they had taken down the first three or four rows near the press box I don't know what they did, but those boards were gone. And when asked why he did not visit the grandstand sooner, Harlowe testified that he waiting for Catawba's permission to inspect the premises.

(Citations, quotation marks, ellipses, and brackets omitted.)

While defendant is correct that plaintiff was unable to identify the exact board she stepped on, she did identify the specific area where she was sitting and then fell. Plaintiff's evidence also shows that the boards in the bleachers were over 75 years old, rotting, decaying, and flexed easily. Plaintiff testified that the board flexed easily, trapping her foot, and causing her fall.

Although we have already noted the essential factual differences between *Gibson* and *Hedgepeth*, we find it imperative to note another distinguishing feature of this case -- the potential spoliation of the evidence by defendant. Here, where defendant was on notice of plaintiff's claim and her repeated requests to inspect the bleachers prior to any destruction or repair of the area, the evidence of defendant's removal of the boards in the exact area where plaintiff fell immediately prior to the inspection by Mr. Harlowe creates an "adverse inference" against defendant that evidence from an expert inspection of the area where plaintiff fell would be harmful to defendant:

> "Destruction of potentially relevant evidence obviously occurs along a continuum of fault—ranging from innocence through the degrees of negligence to intentionality." *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988). Although destruction of evidence in bad faith "or in anticipation of trial may strengthen the spoliation inference, such a showing is not essential to permitting the inference." *Rhode Island Hospital*, 674 A.2d at 1234 (citations omitted); *see Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (adverse inference proper where plaintiffs, although not acting in bad faith, permanently destroyed relevant evidence during investigative efforts), and *Henderson v. Hoke*, 21 N.C. 119, 146 (1835) ("[i]t is sufficient if [the evidence] be suppressed, without regard to the intent of that act"); *see also Hamann v. Ridge Tool Co.*, 213 Mich.App. 252, 539 N.W.2d 753, 756–57 (1995) ("[w]hether the evidence was destroyed or lost accidentally or in bad faith is irrelevant, because the opposing party suffered the same prejudice").

McLain v. Taco Bell Corp., 137 N.C. App. 179, 184, 527 S.E.2d 712, 716 (2000).

The timing of defendant's disassembly of the exact area of the bleachers where plaintiff had fallen immediately prior to Mr. Harlowe's inspection could have been an unfortunate and innocent coincidence, but taking the evidence in the light most favorable to plaintiff, *see Nourse*, 127 N.C. App. at 239, 488 S.E.2d at 611, the record not only allows an adverse inference as to the condition of the boards in the area against defendant, but would also allow an inference that defendant's destruction of the evidence was in bad faith.[5] *See generally McLain*, 137 N.C. App. at 184, 527 S.E.2d at 716.

At the summary judgment hearing, defendant's counsel purported to address the spoliation argument as follows:

> Your Honor, typically in these cases what would happen is an engineer would go out. Mr. Chandler [,plaintiff's counsel,] through the deposition testimony, went out to the facility. *There's been some allegation in the brief of spoliation of evidence, and by answering your question*

5. Defendant's counsel before the trial court and on appeal stated to the trial court that his firm was not yet involved in the case between June 2016 and December 2016. Defendant's counsel appeared in the case when the answer was filed in December 2017. We are not suggesting any bad faith on the part of defendant's counsel.

> *I can also respond to spoliation. There is actually no spoliation.* Mr. Chambers [(sic)] was there, took video of the facility.[6] And typically in those circumstances an engineer would go out and would say, well these boards are in or not in tolerance, an accepted tolerance. And there would be weight, a load that would be put on them, and an engineer would be able to calculate the energy that's put on a board and the engineer would be able to say, well these are within or without of tolerance and accepted standards. Those standards are usually the ANSI standards or ASTM standards for bleacher safety or general engineering standards. An engineer would be able to say, based on this load and the amount of energy, these aren't safe stairs. We know video was taken by Mr. Chandler when he entered the facility, when he had access to the facility.

(Emphasis added.)

But in actuality defendant's counsel did *not* explain why the disassembly of the stadium was not spoliation. Instead, defendant's attorney explained the type of inspection typically done in "these cases" and although plaintiff's expert was *prevented* from doing that type of inspection where plaintiff had fallen, he proceeded to argue a video tape was sufficient and comparable to "an engineer . . . able to calculate the energy that's put on a board and . . . able to say, well these are within or without of tolerance and accepted standards." As plaintiff's counsel argued in response:

> Well, I think what our expert would say is that the stadium was full of rotten boards. I mean, in his report he says: It is in my opinion the bleachers should have been condemned many years ago and replaced. And that's what actually happened in this case after we requested to inspect the stadium. We sent three letters to the college, two to the college, one to the college's insurance company, asking to allow our expert to come inspect the stadium. We got no response to that. Now they want to take the position, well you can just go on down there and inspect the stadium any time you want to. Well, that wasn't what they said. They didn't call me up or send me a letter or send

6. It is unclear how an attorney's video of the bleachers could substitute for testing of the strength of the boards. The record before this Court did not explain why defendant never responded to plaintiff's counsel's requests for access to the facility for a formal inspection by the expert witness.

> me an e-mail and say, you can go inspect the stadium any time you want. They basically ignored us until they started tearing the stadium down. Coincidentally, our expert happened to show up unannounced because I eventually told him, look, they are not going to respond to us. You might as well try to go in and get in the stadium, see if you can do your inspection. The day he showed up, they are already dismantling the stadium. They didn't replace one or two boards, they are replacing all the boards, which supports our position that it wasn't just one board or two boards or three boards, the entire stadium had these boards that were rotten, that had shown advanced signs of weather and age and loss of rigidity.

Furthermore, even if defendant's alleged non-responsiveness to the request for inspection coupled with the timing of the disassembly was innocent, the prejudice to plaintiff is the same. *See id.*

Taking the evidence in the light most favorable to plaintiff, she has established the requisite forecast of evidence for a claim of negligence: defendant owed a duty to plaintiff to inspect and maintain the bleachers to ensure they were not in a dangerous state of disrepair; defendant's failure to properly exercise that duty and maintain the bleachers resulted in weakened and unstable boards which caught plaintiff's foot and caused her fall; plaintiff's serious injury was foreseeable in light of the fact that the bleachers were approximately 82 years old and composed of weakened and rotting wood; and due to the age and state of the wood defendant had at the very least, constructive notice of the defect. *See Burnham*, 229 N.C. App. at 339–40, 749 S.E.2d at 79–80. Plaintiff sufficiently identified the place she fell and the reason for her fall. To the extent plaintiff's evidence lacks detail as to the state of the boards in the exact area from which she fell, the jury could draw an adverse inference from defendant's removal of the boards after plaintiff's repeated requests to not change the area before inspection. *See McLain*, 137 N.C. App. at 184, 527 S.E.2d at 716.

III. Conclusion

The only question before this Court is whether plaintiff forecast enough evidence to survive summary judgment. Taking the evidence in the light most favorable to her and drawing all inferences in her favor, the evidence presents a genuine issue of material fact as to exactly where and how plaintiff fell. Based upon plaintiff's evidence, a jury could find that defendant failed to use reasonable care to inspect and maintain the wooden bleachers; that many of the boards were weakened

and unstable; and that plaintiff's foot was caught on a weakened board that flexed when she stood up, tripping her and causing her to fall. A jury could also infer from defendant's disassembly of the bleachers after plaintiff's repeated requests to allow inspection that the results of such an inspection of the area where plaintiff fell would have been harmful to defendant. We reverse the order of the trial court granting summary judgment in favor of defendant and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge INMAN concurs.

Judge BERGER concurs in the result only.

STARLITES TECH CORP., PETITIONER
v.
ROCKINGHAM COUNTY, RESPONDENT

No. COA19-406

Filed 18 February 2020

Zoning—permits—change in ownership—same use—amended ordinance

Where an electronic gaming business was issued a zoning permit and subsequently underwent a change in ownership due to consolidation of the owner's companies, the county board of adjustments made an error of law in concluding that, under its amended ordinance (amended several months after issuance of the permit), the change in ownership constituted a change in use requiring the new company to amend its zoning permit to continue the same use of the property.

Appeal by petitioner from order[1] entered 1 October 2018 by Judge William A. Wood in Rockingham County Superior Court. Heard in the Court of Appeals 30 October 2019.

Nelson Mullins Riley & Scarborough LLP, by Stuart H. Russell and Lorin J. Lapidus, for petitioner-appellant.

1. We note that the judgment mistakenly refers to 17 CVS 1644.

The Brough Law Firm, PLLC, by G. Nicholas Herman and John M. Morris, for respondent-appellee.

ZACHARY, Judge.

Petitioner Starlites Tech Corp. ("Starlites") appeals from an order of the superior court affirming the Rockingham County Board of Adjustment's determination that the operation of Starlites' business violated the special use permit requirements set forth in Rockingham County's amended Unified Development Ordinance. After careful review, we reverse.

Background

Starlites Tech Corp. owner and president Maurice Raynor operated multiple electronic gaming businesses. Raynor served as the president of M, M & K Developments, Inc. ("MM&K"), and was the owner and president of Starlites Technology, Inc.

On 30 September 2011, Danny D. Fulp conveyed the property located at 11652 U.S. 220 Highway, Stoneville, North Carolina, (the "Property"), to MM&K. On 1 May 2014, Rockingham County issued a zoning permit to MM&K, enabling it to "operate a sweepstakes business" in accordance with the County's Unified Development Ordinance (the "Ordinance"). The permit designated MM&K as the owner of the property, and "Starlite Technologies" as the applicant and occupant. The permit's description noted a "change of use to sweepstakes business" and the "addition of [a] 28x45 shelter."

A few months later, on 2 September 2014, the County amended the Ordinance, setting forth permit requirements that "severely restricted the general operation of sweepstakes businesses in the county." Article II of the amended Ordinance defined "Electronic Gaming Operations," in pertinent part, as: "[a]ny for-profit business enterprise where persons utilize electronic machines or devices, including but not limited to, computers and gaming terminals, to conduct games of odds or chance, including sweepstakes[.]"

Article IX Section 9-11(ii) set forth new restrictions for electronic gaming operations and, by extension sweepstakes businesses. The restrictions included, in relevant part, a requirement that electronic gaming operations obtain a special use permit, which in turn, required that the facility be "setback[ ] 1500 feet from any protected facility." Protected facilities included, *inter alia*, single- and multi-family dwellings. The amended Ordinance posed a problem for MM&K and Starlites Technology, Inc. because the Property was "approximately 680 feet from the nearest single family dwelling unit."

On 21 January 2015, articles of incorporation were filed for Starlites in order to turn "the Starlites Technology, Inc. S Corp into a corporation under the advice of [Raynor's] attorney." On 30 January 2015—approximately nine months after the zoning permit was issued—MM&K conveyed the Property to Starlites. Soon thereafter, on 14 July 2015, articles of dissolution were filed for Starlites Technology, Inc. and MM&K. Following MM&K's dissolution, no application was filed to amend the original zoning permit issued to MM&K on 1 May 2014 to indicate that the Property had been conveyed to Starlites.

In November 2016, Officer Ben Curry of the Rockingham County Code Enforcement Division received a complaint about the Property and determined that the business constituted a development without a permit. Officer Curry issued notices of violation to Starlites on 21 November 2016, 9 December 2016, and 3 January 2017.

Starlites appealed the initial notice of violation to the Rockingham County Board of Adjustment ("the Board") on 21 December 2016. Starlites' appeal came on for hearing by the Board on 14 August 2017. Starlites argued that the notices of violation were defective, that Starlites had never ceased operation and was not subject to the special use permit requirement, and that Starlites ran a "Promotional Gaming Establishment" rather than an "Electronic Gaming Operation." Starlites presented Raynor's testimony along with invoices that Raynor paid in conjunction with the continued operation of his businesses.

On 11 September 2017, the Board entered an order denying Starlites' appeal. The Board concluded that Starlites' business operation violated the County's amended Ordinance, that Starlites failed to obtain a special use permit, and that Starlites was not exempt from the requirement to obtain a special use permit.

Starlites appealed by filing a petition for writ of certiorari with the Rockingham County Superior Court on 10 October 2017, seeking review of the order for factual and legal errors. Starlites argued, in part, that the Board's decision was erroneous, and that the order was:

> b. In excess of the statutory authority conferred upon the Board;
>
> . . . .
>
> d. Unsupported by substantial competent evidence in view of the entire record because there was no evidence contradicting Starlites' showing that its business operations on the Property had been continuously operated

> since prior to the 2014 adoption of the disputed amendment to the DSO;
>
> e. Unsupported by substantial competent evidence in view of the entire record because there was no evidence to suggest that Starlites was operating an "electronic gaming operation" as defined by the Rockingham County [Unified Development Ordinance];
>
> f. Affected by other error of law; and
>
> g. Arbitrary or capricious since the Board should not have heard the Appeal due to lack of proper service of a Notice of Violation, because the Board was not impartial, and because there was no legal basis for the Decision.

The case came on for hearing before the superior court on 25 September 2018. On 1 October 2018, the superior court entered an order affirming the Board's order and dismissing Starlites' appeal. The superior court concluded, in pertinent part:

> 2. On *de novo* review, upon dissolution of [MM&K] on July 10, 2015, the business ceased and was no longer a legally permitted nonconforming use because [Starlites] never applied for an amended or new zoning permit; and, even if the business resumed as a nonconforming use at some point after dissolution of [MM&K], there was competent evidence under the whole record test for the [Board] to conclude that the business was discontinued for more than one year from and after July 2015 such that [Starlites] was required after this discontinuance to obtain zoning approval under the requirements of the 2014 [Ordinance] amendment for "electronic gaming operations."

Starlites timely filed written notice of appeal to this Court.

Standard of Review

Our review "is limited to determining whether the superior court applied the correct standard of review, and to determin[ing] whether the superior court correctly applied that standard." *Overton v. Camden Cty.*, 155 N.C. App. 391, 394, 574 S.E.2d 157, 160 (2002). We review a superior court's interpretation of a zoning ordinance de novo, and "apply the same principles of construction used to interpret statutes." *Fort v. Cty. of Cumberland*, 235 N.C. App. 541, 548-49, 761 S.E.2d 744, 749, *disc. review denied*, 367 N.C. 798, 766 S.E.2d 688 (2014).

Discussion

On appeal, Starlites argues, in part, that the superior court applied the wrong standard of review in affirming the Board's decision. Specifically, Starlites maintains that the superior court erroneously concluded, under de novo review, that the Property's "change of ownership caused its use to discontinue, which prohibited Starlites from operating as a permissible prior non-conforming use under Rockingham County's Unified Development Ordinance[,]" and that "change of ownership is an impermissible factor to support a determination that the Stoneville property became a non-conforming use under the 2014 amended [Ordinance]." We agree that a change of ownership does not constitute a change of use.

A county board of adjustment sits in a quasi-judicial capacity. Its decisions must "be based upon competent, material, and substantial evidence in the record." N.C. Gen. Stat. § 160A-388(e2)(1) (2019). Every quasi-judicial decision is "subject to review by the superior court by proceedings in the nature of certiorari pursuant to [N.C. Gen. Stat. §] 160A-393." *Id.* § 160A-388(e2)(2).

In reviewing the decision of a board of adjustment, the superior court sits as an appellate court. Its review is limited to "determinations of whether 1) the board committed any errors in law; 2) the board followed lawful procedure; 3) the petitioner was afforded appropriate due process; 4) the board's decision was supported by competent evidence in the whole record; and 5) . . . the board's decision was arbitrary and capricious." *Overton*, 155 N.C. App. at 393, 574 S.E.2d at 159 (citation omitted). *See also* N.C. Gen. Stat. § 160A-393(k) (addressing the superior court's scope of review on appeal).

The standard of review applied by the superior court depends upon the substantive nature of each issue presented on appeal. *Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjustment*, 365 N.C. 152, 155, 712 S.E.2d 868, 870 (2011) (citation omitted). "When the petitioner questions (1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the whole record test." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citation and internal quotation marks omitted). On the other hand, de novo review is proper when the petitioner contends that the board's decision was based on an error of law. *Id.*

Under de novo review, an appellate "court considers the case anew and may freely substitute its own interpretation of an ordinance for a

[board's] conclusions of law." *Morris Commc'ns Corp.*, 365 N.C. at 156, 712 S.E.2d at 871; *see id.* (noting that this Court has previously determined that "the superior court, sitting as an appellate court, *could* freely substitute its judgment for that of [the board] and apply *de novo* review as *could* the Court of Appeals with respect to the judgment of the superior court" (citations omitted)). Thus, "reviewing courts may make independent assessments of the underlying merits of board of adjustment ordinance interpretations," which, in turn, "emphasizes the obvious corollary that courts consider, but are not bound by, the interpretations of administrative agencies and boards." *Id.* (citations and internal quotation marks omitted). We employ this approach for our de novo analysis below.

After a hearing, the Board entered an order denying Starlites' appeal, concluding that Starlites' business operation violated the Ordinance, that Starlites did not obtain a special use permit, and that Starlites was not exempt from the requirement to obtain a special use permit as a permissible nonconforming use. The Board also made the following relevant findings of fact:

> 14. At no time prior to submitting an appeal did [Raynor] file documentation establishing his business constituted a grandfathered, non-conforming use that has continuously operated since 2014 thereby exempted from the special use requirements of [the Ordinance], Chapter 2, Article IX, Section 9-11(ii).
>
> . . . .
>
> 18. At the hearing, [Starlites] presented invoices from White Sands Technology billed to NC-Starlites Technology Inc. from January 2014 to July 2015 and invoices from [R]edibids billed to NC-[Starlites] from July 2015 to September 2015.
>
> 19. At the hearing, [Starlites] presented Articles of Incorporation from the North Carolina Secretary of State indicating that [Starlites] was not created until January 21, 2015.
>
> 20. At the hearing, [Starlites] presented additional invoices from Baracuda [sic] Enterprises billed to [Raynor] [by] email . . . from January 2016 2015 [sic] to August 2017.
>
> 21. At no time prior to submitting an appeal did [Raynor] file to amend his zoning permit issued to [MM&K] on May 1, 2014.

On appeal to the superior court, Starlites, challenged, *inter alia*, the following of the Board's conclusions:

> 2. [Raynor's] electronic gaming operation has not continuously operated since 2014.
>
> 3. [Raynor's] electronic gaming operation is not an exempt non-conforming use.
>
> . . . .
>
> 6. [Raynor's] electronic gaming operation is in violation of the special use permit requirements as set forth in [the Ordinance], Chapter 2, Article IX, Section 9-11(ii) because he is operating without a special use permit.
>
> 7. Based on the foregoing Findings of fact and Conclusions of Law, the [Board] concludes that the applicant has not met his burden on appeal.

Starlites argued, *inter alia*:

> 15. The Decision erroneously contends that Starlites has not been continuously operating its business on the Property since 2014. However, Starlites produced uncontested evidence in the form of testimony and business receipts showing that its business on the Property had been continuously operating an electronic gaming business prior to 2014 and had not been closed for more than a year.
>
> 16. The Decision erroneously contends that Starlites' business on the Property is not an exempt non-conforming use. But since Starlites has been continuously operating an electronic gaming business on the Property since before 2014, its business on the Property is in fact an exempt non-conforming use under Chapter 2, Article XII of the [Ordinance].
>
> 17. The Decision erroneously contends that Starlites is in violation of the [Ordinance] because it has not obtained a special use permit for its business on the Property. But Starlites is not required to obtain a special use permit because its business is an exempt non-conforming use. Also, Starlites' business on the Property is not an Electronic Gaming Operation as defined by Chapter 1 Article II of the [Ordinance]. Thus, Starlites' business on the Property does not require a special use permit.

On review of the Board's interpretation of the amended Ordinance as it pertains to nonconforming use, we "apply the same principles of construction used to interpret statutes." *Fort*, 235 N.C. App. at 549, 761 S.E.2d at 749. "In interpreting a municipal ordinance the basic rule is to ascertain and effectuate the intent of the legislative body. Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance." *Capricorn Equity Corp. v. Chapel Hill*, 334 N.C. 132, 138, 431 S.E.2d 183, 187-88 (1993) (internal citations and quotation marks omitted). Because "zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof." *Id.* at 139, 431 S.E.2d at 188.

Article II of the amended Ordinance defines "nonconformance" as "[a] lot, structure or land use that is inconsistent with current zoning requirements, but which was entirely lawful when it was originally established." Article XIII Section 13-4(f) addresses the impact on nonconforming uses of structures that were in existence when the amended Ordinance was enacted:

> When any nonconforming use of a structure is discontinued for a period of one year, any future use of the structure shall be limited to those uses permitted in that district under the provisions of this ordinance. Vacancy and/or non-use of the building, regardless of the intent of the owner or tenant, shall constitute discontinuance under this provision.

The amended Ordinance also provides that:

> No Special Use Permit shall be granted by the Planning Board unless each of the following findings is made concerning the proposed special use:
>
> (a) That the use or development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;
>
> (b) That the use or development complies with all required regulations and standards of this ordinance and with all other applicable regulations;
>
> (c) That the use or development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property or that the use or development is a public necessity; and

> (d) That the use or development conforms with the general plans for the land use and development of Rockingham County as embodied in this chapter and in the Rockingham County Development Guide.
>
> There shall be competent, material and substantial evidence in the record to support these conclusions and the Planning Board must find that all of the above exist or the application will be denied.

Approximately four months before the amended Ordinance was enacted, Rockingham County issued a zoning permit allowing MM&K to operate a sweepstakes business on the Property, in compliance with the County's then-existing Ordinance. The permit designated MM&K as the Property's owner, and "Starlite Technologies" as the applicant and occupant. The County's approval of MM&K's permit application indicates that, at the time the permit was issued, the Property met and complied with the requirements for such a permit. The Property's subsequent change of ownership had no impact on the *use* of the Property.

Starlites maintains that section 13-4(f) of the amended Ordinance essentially constitutes a "grandfather clause," allowing a prior permissible nonconforming use to continue so long as such use was not discontinued for a period of one year. We agree. We base our decision, first and foremost, upon the plain language of section 13-4(f) of the amended Ordinance. Moreover, we note that the amended Ordinance contains no provision that a change in ownership will constitute a "new" use or otherwise invalidate a prior permissible nonconforming use.

This Court previously addressed a similar issue in *Graham Court Associates v. Town Council of Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981). In *Graham Court*, we examined "whether the power to control the *uses* of property through zoning extends to control of the manner in which the property is owned." 53 N.C. App. at 544, 281 S.E.2d at 419. Specifically, we considered whether a "change in ownership . . . constitutes a change in use which the town can regulate by its zoning ordinance[,]" and ultimately held that it does not. *Id.* at 547, 281 S.E.2d at 420.

As our Court explained, "zoning is the regulation by a municipality of the *use* of land within that municipality, and of the buildings and structures thereon – not regulation of the *ownership* of the land or structures." *Id.* at 546, 281 S.E.2d at 420 (citation omitted). "The test of nonconforming use is 'use' and not ownership or tenancy." *Id.* at 547, 281 S.E.2d at 420 (citation omitted). Consequently, "[c]hanging the type of ownership of real estate upon which a nonconforming use is located will

not destroy a valid existing nonconforming use." *Id.* at 550, 281 S.E.2d at 422 (citation omitted). "[W]e do not regard a mere change from tenant occupancy to owner occupancy as an extension or alteration of the previous non-conforming use of the dwellings. And there is no question as to the right of [alienability] of property along with its attendant valid non-conforming use." *Id.* at 548, 281 S.E.2d at 421 (citation omitted).

MM&K conveyed the Property to Starlites on 30 January 2015—nine days after Starlites was incorporated on 21 January 2015, and approximately nine months after the zoning permit was issued. A few months later, on 14 July 2015, articles of dissolution were filed for both Starlites Technology, Inc. and MM&K.

At the hearing before the Board, Raynor testified that he dissolved both entities "when the sweepstakes was officially . . . not allowed to operate anymore according to the State." Raynor further testified that the decision to dissolve Starlites Technology, Inc. and MM&K was also based, in part, on "consolidat[ion]" because he determined that he "had too many companies[.]" According to Raynor, "Watts Group was a separate company that had stores of its own as well as Starlites Technology, Inc., has stores of its own. MM&K was just a development company. It only owns the property. That's all—that's all it ever has."

In addition, Raynor testified about the use of certain software at the Property, and proffered invoices to evidence the resulting expenses incurred during the disputed "continuous use" of the Property. When a member of the Board asked Raynor whether Raynor had "change[d] . . . the type of business" conducted, Raynor replied that the business was "still underneath the same promotional—getting promotional items. Still using the desktop computers. Everything was still the same. It's just a different kind of format they made." In sum, Raynor testified that the use of the Property remained the same, and that there had merely been a change in ownership due to the consolidation of his companies.

In his closing argument, Starlites' defense counsel summarized the evidence as follows:

> [Raynor] has been operating his business at this location well before the ordinance at issue was passed. The ordinance that the County maintains he's got to comply with was passed, again, in September 2014. It's an electronic gaming ordinance. Well before September 2014 and on a continuous basis, he was offering his customers promotional games.

> The software changed. When the sweepstakes laws changed, he adopted a skill test, but all throughout, he's been operating a business there and he's been offering his customers promotional games. So he is a prior nonconforming use. He's grandfathered in. This ordinance doesn't apply to him, and that's why he hasn't applied for it[.]

In addition, to demonstrate "continuous use" of the Property, Raynor submitted invoices showing his payment of expenses both before and after September 2014, when the amended Ordinance was enacted.

Accordingly, the Board improperly concluded that under the provisions of the amended Ordinance, a change in ownership constituted a change in use, and that Starlites was required to amend its zoning permit in order to legally continue the same use of the Property.

"Remand is not automatic when an appellate court's obligation to review for errors of law can be accomplished by addressing the dispositive issue(s)." *Morris Commc'ns Corp.*, 365 N.C. at 158, 712 S.E.2d at 872 (citation and internal quotation marks omitted). "Under such circumstances the appellate court can determine how the trial court *should have* decided the case upon application of the appropriate standards of review." *Id.* at 158-59, 712 S.E.2d at 872. Here, we can "reasonably determine from the record[,]" *id.* at 159, 712 S.E.2d at 872-73 (citation omitted), that Starlites' challenge to the Board's interpretation of the amended Ordinance warrants reversal of the Board's ultimate decision.

Because this issue is dispositive, we need not address Starlites' additional arguments.

Conclusion

"In sum, the rule of construction that zoning ordinances are strictly construed in favor of the free use of real property is appropriately applied here." *Id.* at 162, 712 S.E.2d at 874. The Board improperly concluded that Starlites was in violation of the 2014 amended Ordinance. Accordingly, because the Board's interpretation of its amended Unified Development Ordinance constituted an error of law, we reverse.

REVERSED.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
SAMUEL NATHANIEL ANGRAM, III, DEFENDANT

No. COA19-151

Filed 18 February 2020

Robbery—with a dangerous weapon—sufficiency of evidence—aiding and abetting

The State failed to present sufficient evidence to convict defendant of robbery with a dangerous weapon under the theory of aiding and abetting where the only substantive evidence of defendant's involvement was that the mother of his child observed the victim withdrawing $25,000 in cash from her employer bank and spoke to defendant by phone while the victim was still in the bank, and that defendant's brother was convicted of the robbery (which occurred when the victim returned home and was exiting his vehicle).

Appeal by defendant from judgment entered on or about 28 September 2018 by Judge R. Gregory Horne in Superior Court, Henderson County. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Rajeev K. Premakumar, for the State.

Mark Hayes, for defendant-appellant.

STROUD, Judge.

Defendant appeals his conviction for robbery with a dangerous weapon. Because the State failed to present substantial evidence of each element of aiding and abetting the commission of the robbery with a dangerous weapon by defendant's brother, Michael Angram, the trial court should have granted defendant's motion to dismiss. We therefore reverse.

I. Background

The State's evidence tended to show that on 11 May 2017, Mr. Marvin Price went to Mountain Credit Union to close his account which contained approximately $25,000. Mr. Price received about $24,000 in cash and put about $300-400 in his wallet; the rest of the money was in an envelope. At least four employees were working in the credit union when Mr. Price withdrew his money.

When Mr. Price arrived home, he began to get out of his car and was robbed at gunpoint. The robber asked Mr. Price, "where is the 25,000[,]" and Mr. Price claimed he had taken it to another bank although he had not. Ultimately the robber only took Mr. Price's wallet and did not find the envelope. Mr. Price saw no one with the robber and did not see a vehicle the robber used to get to or leave his home. Mr. Michael Angram, defendant's brother, was convicted of robbing Mr. Price with a dangerous weapon.

One credit union employee, Ms. Robinson, had a child with defendant, Michael's brother. The State jointly tried both defendant and Ms. Robinson for charges of conspiracy to commit robbery with a dangerous weapon and robbery with a dangerous weapon. The jury was instructed on aiding and abetting as to the robbery charge, and both were convicted of robbery with a dangerous weapon. Both were acquitted of the charge of conspiracy to commit robbery with a dangerous weapon. Both defendant and Ms. Robinson appealed, but this opinion addresses only defendant's appeal.

II. Motion to Dismiss

Defendant argues that the trial court should have allowed his motion to dismiss due to the insufficiency of the evidence.

> The standard of review on a motion to dismiss is whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.
>
> > Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom.

State v. Clagon, 207 N.C. App. 346, 350, 700 S.E.2d 89, 92 (2010) (citations and quotation marks omitted).

> Our courts have held that the essential elements of the crime of robbery with a dangerous weapon are: (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim.

State v. Van Trusell, 170 N.C. App. 33, 37, 612 S.E.2d 195, 198 (2005) (citation, quotation marks, and italics omitted).

Defendant was charged, but not convicted, with conspiracy to commit robbery with a dangerous weapon based upon an alleged conspiracy with Michael and Ms. Robinson. Defendant was convicted of robbery with a dangerous weapon based upon a theory of aiding and abetting the robbery by Michael. The trial court instructed the jury regarding the theory of aiding and abetting:

> The second count that the State must prove beyond a reasonable doubt as to this charge is that the defendant knowingly advised, instigated, encouraged, procured or aided the other person to commit that crime.
>
> And, third, that the defendant's action or statements caused or contributed to the commission of the crime by that other person.

Defendant argues the State presented no substantive evidence he participated in the robbery or that he "knowingly advised, instigated, encouraged, procured, or aided" Michael in committing the robbery. Defendant notes there are two theories upon which the State alleges defendant aided Michael: "through some kind of communication – by telling him about the money, or if Ms. Robinson told Michael about the money, then by encouraging Michael to rob Mr. Price" or "by driving him to or from Mr. Price's house." Defendant contends the State failed to present any substantive evidence of either theory of aiding and abetting and also failed to present sufficient evidence to support a valid inference of either theory.

Defendant begins his argument by focusing on testimony by Detective Aaron Lisenbee regarding his interview of Michael. The State called Michael as a witness. Michael had previously been convicted of the robbery, but at defendant's trial, he testified he did not remember anything about the robbery and did not know why he was convicted of robbing Mr. Price. Michael did not testify to anything incriminating as to defendant or Ms. Robinson. The State then called Detective Lisenbee to testify about his interview of Michael during his investigation of the robbery. The interview was videotaped but the recording was not in evidence.

The State had Detective Lisenbee testify, over defendant's objections, to the contradictions between Michael's trial testimony – which was minimal as he claimed not to remember anything – and what he had said during the interview. In responding to defendant's objections, the State emphasized it was not offering Detective Lisenbee's testimony

about Michael's statements as substantive evidence: "It is solely being offered to show that Michael Angram is not telling the truth to the jury . . . . We are not trying to get it in as substantive."

All of Detective Lisenbee's testimony regarding the interview with Michael was entered only for impeachment purposes and not as substantive evidence. In summary, the evidence admitted *only for purposes of impeachment* was that defendant told him about the $25,000 bank withdrawal and drove Michael to Mr. Price's home. The trial court gave the jury a limiting instruction noting that the detective's statements could only be considered for purposes of Michael's credibility and not "as evidence of the truth of what was said[;]" in other words, the testimony was not substantive evidence.

In its brief, the State does not seek to use Detective Lisenbee's testimony as part of its summary of evidence against defendant, as is appropriate since the testimony was not substantive evidence and cannot be used to prove the truth of any facts asserted. *See generally State v. Alston*, 131 N.C. App. 514, 517, 508 S.E.2d 315, 317 (1998) (noting that hearsay evidence admitted only as to state of mind was not to be used as substantive evidence).[1] Thus, we will address only the substantive evidence presented by the State for purposes of considering whether defendant's motion to dismiss should have been allowed. Here, the State's substantive evidence regarding defendant's involvement in the robbery of Mr. Price was that defendant was Michael's brother and that while Mr. Price was in the credit union, Ms. Robinson, one of the four employees on duty, spoke to defendant. The evidence also shows that *all* of the employees used their cell phones while Mr. Price was in the credit union, and all were questioned by law enforcement officers.

One employee, Ms. Heather Highland, assisted Mr. Price. One employee, Ms. Melissa Cameron was in the process of purchasing a new vehicle with a loan. Ms. Cameron testified that she expressed concern to Ms. Highland by saying, "What if he were to get robbed?" Another employee, Ms. Charne Tucker, was a childhood friend of Michael, but she denied having Michael's phone number. A third employee, Kristen Walker, did not testify. Another employee, Ms. Robinson, acknowledged

1. A portion of *State v. Alston*, 131 N.C. App. 514, 508 S.E.2d 315, was superseded on other grounds by North Carolina General Statute § 14-415.1 (2019) regarding possession of firearms: "*Alston* is super[s]eded by the current language of N.C. Gen. Stat. § 14–415.1 which contains no time bar for this charge." *State v. Gaither*, 161 N.C. App. 96, 103, 587 S.E.2d 505, 510 (2003).

speaking with defendant, her child's father, on the phone, while Mr. Price was in the credit union. Detective Lisenbee wanted to examine Ms. Robinson's phone and obtained a search warrant for the phone, but according to Detective Lisenbee they did not extract anything of "evidentiary value" from Ms. Robinson's phone.

To be clear, from our reading of the transcript it is not in evidence that Ms. Robinson *initiated* the phone call to defendant though that is the inference the State would like us to make. Ms. Robinson acknowledged she "talked" to defendant but Detective Lisenbee's testimony does not clarify whether Ms. Robinson called defendant or he happened to call her while Mr. Price was in the credit union. When questioned on redirect Detective Lisenbee could not confirm Ms. Robinson's acknowledgement to him she had spoken with defendant during the relevant time,

> Q. Detective Lisenbee, Mr. Edney asked you if you knew -- how you knew whether Christina Robinson talked to Samuel Angram that day.
>
> A. Correct.
>
> Q. How do you know that?
>
> A. She told me.
>
> Q. And what exactly did Christina Robinson tell you?
>
> A. That she talked to . . . [defendant] on the phone while Mr. Price was in the bank.
>
> Q. And he asked you if you were able to confirm that information. Were you?
>
> A. No.
>
> Q. Were you able to confirm it through the phone records?
>
> A. I was not.
>
> Q. Were you able to confirm it through anybody else?
>
> A. No.

When questioned on cross-examination about retrieving data from any of the other employee's phones Detective Lisenbee was asked, "But you never even tried?" to which he responded: "We did not see a need to try."

The State contends that based only upon the relationship between Ms. Robinson, defendant, and Michael, and the fact that Ms. Robinson spoke to defendant while Mr. Price was in the bank,

> [a] reasonable jury could conclude that Christian Robinson, upon learning of Mr. Price's withdrawal of nearly $25,000 in cash, obtained his address from the driver's license photocopy in the employee workstation directly next to her's, left her employee workstation to call the defendant to inform him of this situation, that the defendant then communicated with his brother, with whom he is close, to inform and encourage his brother . . . to rob Mr. Price at gunpoint.

Although circumstantial evidence may be sufficient to prove a crime, pure speculation is not, and the State's argument is based upon speculation. *See generally State v. Weston*, 197 N.C. 25, 29, 147 S.E. 618, 621 (1929).

> [W]hen the essential fact in controversy in the trial of a criminal action can be established only by an inference from other facts, there must be evidence tending to establish these facts. Evidence which leaves the facts from which the inference as to the essential fact must be made a matter of conjecture and speculation, is not sufficient, and should not be submitted to the jury.

Id. Without the information in Detective Lisenbee's testimony which was not admitted for substantive purposes, there is not substantial evidence to support defendant's conviction of aiding and abetting robbery with a dangerous weapon. Detective Lisenbee's testimony, admitted only for the purpose of impeachment, about Michael's communication with defendant and defendant's driving him to Mr. Price's home cannot be used to prove that defendant aided and abetted robbery with a dangerous weapon.

According to the State a "reasonable" juror could infer from the evidence that Ms. Robinson obtained Mr. Price's address from his drivers license, although she was not the employee assisting him; Ms. Robinson then called and informed defendant of Mr. Price's address and withdrawal of funds; defendant then contacted Michael and encouraged him to rob Mr. Price. The State's argument requires not just one but at least three layers of inference built *solely* on knowledge of Mr. Price's transaction and Ms. Robinson's phone call with the father of her child. The trial court should have granted defendant's motion to dismiss due to the

insufficiency of the evidence. Because we must reverse the judgment, we need not address defendant's other issue on appeal.

III. Conclusion

Because the State failed to present substantial evidence that defendant aided or abetted Michael in committing the armed robbery of Mr. Price, the trial court should have granted defendant's motion to dismiss. We therefore reverse.

REVERSED.

Judges ZACHARY and MURPHY concur.

STATE OF NORTH CAROLINA
v.
JAMAR MEXIA DAVIS, DEFENDANT

No. COA19-500

Filed 18 February 2020

1. Motor Vehicles—driving under the influence—jury instructions—limiting instruction—evidence of prior convictions

In a trial for habitual driving while impaired, the trial court did not err by denying defendant's motion for jury instructions limiting consideration of his prior convictions to the sole purpose of his truthfulness because evidence of his prior convictions was elicited as part of his defense on direct examination and his credibility was not impeached.

2. Appeal and Error—preservation of issues—effect of mistrial—objection not renewed in second trial

Where defendant's first trial (for driving while impaired) resulted in a mistrial, his contention that the trial court erred by denying his request for law enforcement officers' personnel files during his first trial was not properly preserved for appellate review because he failed to make a subsequent request or objection during his second trial.

Appeal by Defendant from judgment entered 7 November 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 13 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Terence D. Friedman, for the State-Appellee.

Office of the Appellate Defender, by Assistant Appellate Defender Amanda S. Hitchcock, for the Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment for felony habitual driving while impaired, entered after a jury found Defendant guilty of misdemeanor driving while impaired, and Defendant stipulated to having been convicted of three prior offenses involving impaired driving. Defendant argues that the trial court erred when it refused to give a limiting jury instruction concerning Defendant's prior convictions and asks this Court to review sealed personnel records to determine whether the trial court failed to provide him with information material and favorable to his defense. We discern no error.

I. Background

On 4 October 2015, Defendant Jamar Mexia Davis was arrested for driving while impaired ("DWI"). On 15 December 2015, a grand jury indicted Defendant for misdemeanor driving while impaired, felony habitual driving while impaired, driving while license revoked, and transporting an open container of an alcoholic beverage after consuming alcohol.

On 10 May 2016, prior to a trial on all the charges ("first trial"), Defendant filed a motion to release personnel records, seeking the release and in camera review of the arresting officers' personnel records to determine whether they contained any impeachment evidence. The State did not object to Defendant's motion. That same day, the trial court entered an order compelling the production of the personnel records for in camera review. On 9 June 2016, the trial court entered an order denying release of the personnel records ("Order Denying Release") because, after reviewing the records in camera, the trial court determined the records did not contain material that was "favorable and material" to Defendant. The trial court ordered that the records not be disclosed and ordered them to remain under seal.

On 15 August 2016, Defendant's case came on for trial in superior court. The jury found Defendant guilty of driving while license revoked and transporting an open container of alcohol. The trial court declared

a mistrial on the charges of misdemeanor DWI and felony habitual DWI after concluding the jury was "hopelessly deadlocked."

Defendant appealed the Order Denying Release and his convictions for driving while license revoked and transporting an open container of alcohol to this Court. On 6 March 2018, this Court found no merit in Defendant's appeal of the Order Denying Release and affirmed his convictions. *State v. Davis*, COA17-615, 2017 WL 3222366, at *11 (N.C. Ct. App. Mar. 6, 2018) (unpublished).

On 5 November 2018, Defendant was retried on the charges of misdemeanor DWI and felony habitual DWI ("second trial"). On 6 November 2018, the jury found Defendant guilty of misdemeanor DWI. Defendant stipulated to attaining three prior DWI convictions within the past 10 years. The trial court arrested judgment on the misdemeanor DWI conviction and entered judgment and commitment on the felony habitual driving while impaired, and sentenced Defendant to an active term of 19 to 32 months' imprisonment. From entry of this judgment, Defendant gave notice of appeal in open court.

II. Discussion

Defendant (1) argues that the trial court reversibly erred by refusing his request to give a limiting instruction to the jury that evidence of Defendant's prior convictions be used for purposes of truthfulness only and (2) asks this Court to review the sealed personnel records to determine if the trial court, after its in camera review, failed to provide him with information material and favorable to his defense.

1. Refusal to Give Limiting Instruction

Preservation of Argument for Appellate Review

As a preliminary matter, we first address the State's contention that Defendant failed to preserve this issue for appellate review because he failed "to object on any relevant grounds during [his] own testimony about his prior convictions . . . ." However, the State mischaracterizes Defendant's argument on appeal. Defendant does not argue that the testimonial evidence of his prior convictions was improperly admitted, but instead argues that the trial court erred by refusing his request to give a limiting instruction to the jury regarding his prior convictions.

At the charge conference, Defendant requested the trial court give North Carolina Pattern Jury Instruction 105.40 in its pattern form. The trial court refused to give the instruction in its entirety. Defendant objected and the trial court noted his objection. Defendant's request

and objection were made "before the jury retire[d] to consider its verdict, [and] stat[ed] distinctly that to which objection [was] made and the grounds of the objection . . . ." N.C. R. App. P. 10(a)(1)(2). The issue of whether the trial court erred in refusing Defendant's request for a limiting instruction is thus preserved for this Court's review.

Analysis

[1] Defendant argues that the trial court erred by failing to instruct the jury regarding North Carolina Pattern Jury Instruction 105.40, "Impeachment of the Defendant as a Witness by Proof of Unrelated Crime." This instruction reads:

> Evidence has been received concerning prior criminal convictions of the defendant. You may consider this evidence for one purpose only. If, considering the nature of the crime(s), you believe that this bears on the defendant's truthfulness, then you may consider it, and all other facts and circumstances bearing upon the defendant's truthfulness, in deciding whether you will believe the defendant's testimony at this trial. A prior conviction is not evidence of the defendant's guilt in this case. You may not convict the defendant on the present charge(s) because of something the defendant may have done in the past.

N.C.P.I.—Crim. 105.40 (2018).

"Whether a jury instruction correctly explains the law is a question of law . . . ." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). Questions of law "regarding jury instructions are reviewed *de novo* by this Court." *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

"A limiting instruction is required only when evidence of a prior conviction is elicited on cross-examination of a defendant and the defendant requests the instruction." *State v. Gardner*, 68 N.C. App. 515, 522, 316 S.E.2d 131, 134 (1984), *aff'd*, 315 N.C. 444, 340 S.E.2d 701 (1986) (citations omitted). Where evidence of prior convictions is elicited "as part of defendant's defense . . . , the trial judge [is] not required to give a limiting instruction." *Id.* at 521-22, 316 S.E.2d at 134 ("[D]efendant testified on direct examination that he had been convicted of common law robbery in 1980 . . . . Since evidence of this prior crime was elicited as part of defendant's defense and . . . was . . . for the purpose of clarifying an issue raised by defendant, the trial judge was not required to give a limiting instruction.").

In *State v. Jackson*, 161 N.C. App. 118, 588 S.E.2d 11 (2003), defendant was not entitled to a special instruction limiting consideration of his testimony regarding his prior conviction to his "truthfulness" where defendant "initially offered this testimony on direct examination[.]" *Id.* at 124, 588 S.E.2d at 16.

> The record show[ed] that defendant Jackson took the stand and voluntarily testified upon direct examination concerning his prior crimes and convictions. Defendant Jackson's counsel asked the questions that elicited his responses. Defendant Jackson was not impeached on these prior crimes and convictions. He voluntarily admitted them, presumably to remove the sting before the State impeached him.

Id. at 124, 588 S.E.2d at 15-16.

Here, as in *Gardner* and *Jackson*, Defendant took the stand and testified upon direct examination concerning his prior convictions as follows:

> [Defendant's Attorney]: Who was driving?
>
> . . . .
>
> [Defendant]: Nick was driving the whole time. See, I don't drive because, honestly, I have priors.
>
> . . . .
>
> [Defendant's Attorney]: Why [were you in the driver's seat]?
>
> [Defendant]: Because I thought about driving, but I teach kids now and it's very important that one of the things we talk about is making the right decision. And for me, it's the wrong decision to drive at any point in my life right now, especially after consuming any amount of alcohol.
>
> . . . .
>
> [Defendant's Attorney]: All right. Where -- why -- when the police arrived, you seemed a bit disoriented. What was causing that?
>
> [Defendant]: Well, I had made the decision long before Officer Simon came not to go anywhere, to make arrangements to get picked up. I know better at this point in my

life. So decision had been made not to drive. Period. And so I sat in the car. I wasn't -- it was a rain storm. And I was making arrangements for a friend to come -- I don't have Uber -- called Darnell. He wasn't answering the phone. I was talking on the phone to a previous friend, but she lives in Chicago. But I fell asleep making arrangements to get picked up some kind of way.

. . . .

[Defendant's Attorney]: Well, at the back of the car, the video shows you at some point leaning against the car. Why did you do that?

[Defendant]: Well, I was out there for a while talking to the officers. I understand that when they approached me, what it looks like. And I also understand that in my past experiences with -- with who I am and my background, my experience with law enforcement is different. Maybe -- I don't know how many people can relate, but it's very different, which is why I took the stand to tell you guys I didn't answer too many questions, because they have a tendency to misspeak as they call it. Not anything against the officers. I can't really explain why that is. But I don't hold any ill will towards the officer. And I would hope that he doesn't have any ill will towards me. But I took the stand to let you guys know that the truth is that I made the right decision that night not to go anywhere. And it's through my experiences that I have had with law enforcement that I did not want to talk to the officers about that.

. . . .

[Defendant]: I will let the jury know that I am before you today in the presence of a higher server speaking the honest truth, and I had made the decision not to drive that night. Absolutely. Unequivocally. And that's what you found me in a deep sleep with -- you know, sometimes I might drool depending on how tired I am. I'm a man with -- I'm not perfect. And I want you to know that I do have prior DUI convictions. I have driven without a license before. I have another charge of sneaking into a movie theater, it's called defrauding [an] innkeeper.

. . . .

> [Defendant]: This is relevant because I want to know -- I want you guys to know that I have been very truthful. . . .

Defendant's counsel asked the questions that elicited Defendant's responses. Defendant voluntarily admitted to his prior convictions, using them as a basis to explain why he did not drive on the night in question and why he refused to answer the officers' questions. On appeal, Defendant specifically asserts that he offered this testimony at trial as an "important defense strategy of preempting a damaging cross-examination[.]" Accordingly, Defendant was not entitled to the North Carolina Pattern Jury Instruction 105.40 limiting consideration of his testimony regarding his prior DWI convictions to his "truthfulness[.]" *Gardner*, 68 N.C. App. at 521-22, 316 S.E.2d at 134; *Jackson*, 161 N.C. App. at 124, 588 S.E.2d at 15.

On cross-examination, the State asked Defendant:

> [State]: And you indicated that you do have prior charges of driving while impaired.
>
> [Defendant]: Yes.
>
> [State]: In fact, you've been convicted of driving while impaired –
>
> [Defendant's Attorney]: I ask the question be phrased in its proper manner.
>
> . . . .
>
> [State]: Mr. Davis, you have been convicted in Wake County of impaired driving in 2015, weren't you?
>
> [Defendant]: Yes.
>
> [State]: And you were also convicted in Sampson County of impaired driving in 2010, weren't you?
>
> [Defendant]: Yes.
>
> [State]: And this charge has been pending for about three years, hasn't it?
>
> [Defendant]: Yes.
>
> [State]: How many court appearances do you think that you've made during the pendency of each of these impaired driving cases?
>
> [Defendant]: Couldn't give you an answer.

[State]: More than --

[Defendant]: Been going on nearly all my life.

[State]: So --

[Defendant]: Adult life.

[State]: So would you say that you've been to court for these charges more than ten times?

[Defendant]: Yes.

[State]: Administrative dates, review dates, things like that?

[Defendant]: Yes.

[State]: I'm sure that you have seen other DWI cases play out in court, haven't you?

[Defendant's Attorney]: Object to relevance, Judge.

The Court: Overruled.

[Defendant]: No.

[State]: When you've been to court on those prior occasions, you haven't seen any other cases of driving while impaired?

[Defendant]: No. I'm tired of coming to court.

[State]: On prior occasions when you appeared in court, were there also other defendants who appeared in court who were facing charges of driving while impaired?

[Defendant]: I -- I -- I -- I can't answer that. I don't know. I don't pay attention to other charges. I listen for my name. My name is called, I answer.

[State]: Okay. So, I mean, you've been through this process before.

[Defendant]: Yes.

This exchange confirmed what Defendant had earlier stated on direct examination: "I have priors" and "I do have prior DUI convictions." The State's cross-examination of Defendant pertained to the convictions to which Defendant had previously voluntarily admitted, clarified the dates of the offenses, and was the only time that the State questioned

Defendant about his prior convictions; this limited line of questioning was not impeachment. *See State v. Marslender*, 222 N.C. App. 318, 2012 WL 3192640 (2012) (unpublished) (determining that the questions posed on cross examination, clarifying the nature of the defendant's prior convictions, "was the only time the State questioned [d]efendant about his prior convictions and, . . . we do not construe that line of questioning as impeachment"); *see also State v. Nelson*, 298 N.C. 573, 598, 260 S.E.2d 629, 647 (1979) (evidence which aids in "clarify[ing] an uncertainty which [the defendant] had already admitted" is not impeachment). As the State's clarification of Defendant's prior convictions did not constitute impeachment, Defendant was not entitled to a limiting instruction.

Defendant argues that this Court's decision in *Jackson* required Defendant to make an unfair choice because it forces "defendants to choose between the common strategy of mitigating a damaging cross-examination about prior convictions and preserving their right to ask that the evidence of those convictions be limited to its only permissible purpose." Defendant thus argues, "that decision should be overruled." We are bound by *Jackson*, and Defendant's argument that *Jackson* should be overruled is misplaced before this Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

2. Review of Sealed Records

[2] Defendant next asks this Court "to review the sealed records in this case to determine if the trial court, after its *in camera* review, failed to provide him with information material and favorable to his defense."

Preservation of Argument for Appellate Review

The State argues that Defendant failed to preserve this issue for appellate review because Defendant, in his second trial, failed to move the trial court to review the officers' personnel records. Thus, we must first determine whether this issue is properly before this Court.

A mistrial has the legal effect of "no trial." *State v. Harris*, 198 N.C. App. 371, 376, 679 S.E.2d 464, 468 (2009). Thus, when a defendant's trial results in a hung jury and a new trial is ordered, the new trial is an entirely separate legal affair from the original trial, unaffected by the parties' requests, objections, and motions, and the trial court's rulings made therein during the original trial. *State v. Macon*, 227 N.C. App. 152, 156, 741 S.E.2d 688, 690 (2013); *see State v. Shepherd*, 796 S.E.2d 537,

538 (N.C. Ct. App. 2017) (unpublished) (determining that the defendant failed to preserve an issue for appeal where defendant filed a motion to compel prior to his first trial which ended in mistrial, did not renew the motion after the mistrial, and did not object at trial). Accordingly, a defendant may not rely upon a motion made at an original trial to preserve issues for appeal following his conviction in a subsequent trial.

Defendant filed a motion to release the officers' personnel records prior to the first trial; the first trial ended in a mistrial on the charges of misdemeanor DWI and felony habitual DWI. There is no record evidence in this appeal that Defendant made any request or motion asking the trial court to review the officers' personnel records prior to the second trial. Moreover, Defendant does not claim or argue on appeal that he moved the trial court prior to his second trial to review the records or that he requested a review of the records at his second trial. Thus, the motion to release made prior to his first trial had no effect in the second trial. *Shepherd*, 796 S.E.2d at 538. As Defendant made no timely request or motion of the trial court, he has failed to preserve this issue for our review. N.C. R. App. P. 10(a)(1).

III. Conclusion

As Defendant offered evidence of his prior convictions on direct examination as part of his defense, Defendant's credibility was not impeached and thus the requested instruction was not warranted. Therefore, the trial court did not err when it denied Defendant's request for a jury instruction limiting the testimony to his truthfulness. Moreover, because Defendant made no motion to release prior to his second trial and did not request review at his second trial, he failed to preserve the issue on appeal.

NO ERROR.

Judges TYSON and YOUNG concur.

STATE v. GRIFFIN

[270 N.C. App. 98 (2020)]

STATE OF NORTH CAROLINA
v.
THOMAS EARL GRIFFIN, DEFENDANT

No. COA17-386-2

Filed 18 February 2020

Satellite-Based Monitoring—period of years—felon on post-release supervision—*Grady* analysis

A thirty-year term of satellite-based monitoring (SBM) imposed upon a defendant who had entered an *Alford* plea to first-degree sexual offense with a child constituted an unreasonable warrantless search where defendant had appreciable privacy interests in his person, home, and movements (which were diminished for only five of the thirty years, during his post-release supervision); SBM substantially infringed on those privacy interests even though defendant did receive a risk assessment and a judicial determination of whether and how long to be subject to SBM (and, unlike lifetime SBM, the period-of-years SBM was not subject to later review); and the State failed to produce any evidence at trial showing SBM's efficacy in accomplishing any of the State's legitimate interests.

Judge BRYANT concurring in the result only.

Appeal by Defendant from order entered 1 September 2016 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 19 September 2017, and opinion filed 7 August 2018. Remanded to this Court by order of the North Carolina Supreme Court for further consideration in light of *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). Heard in this Court on remand on 8 January 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

INMAN, Judge.

Following the Supreme Court of North Carolina's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) (*Grady III*), we hold that the trial court's order imposing satellite based monitoring ("SBM") of

a sex offender for thirty years, considering the totality of the circumstances of this case, is unreasonable and violates the Fourth Amendment to the United States Constitution.

In *State v. Griffin*, ___ N.C. App. ___, ___, 818 S.E.2d 336, 342 (2018) (*Griffin I*), this Court held that the State failed to demonstrate the reasonableness of a warrantless search of Defendant Thomas Earl Griffin ("Defendant") through imposition of SBM for a term of thirty years in violation of the Fourth Amendment to the United States Constitution. Our holding was based on this Court's decision in *State v. Grady*, ___ N.C. App. ___, 817 S.E.2d 18 (2018) ("*Grady II*"), holding that lifetime SBM was unconstitutional as applied to a recidivist defendant because the State "failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interests." ___ N.C. App. at ___, 817 S.E.2d at 27.

After *Griffin I* was filed, the Supreme Court of North Carolina modified and affirmed *Grady II*, holding in *Grady III* that lifetime SBM was unconstitutional as applied to Mr. Grady *and* all defendants who were not on probation or post-release supervision but subject to lifetime SBM solely on the basis of recidivism. *Grady III*, 372 N.C. at 591, 831 S.E.2d at 572. *Griffin I* was then remanded to this Court by order of the Supreme Court "for further consideration in light of . . . [*Grady III*]."

After careful review following the decision in *Grady III*, supplemental briefing, and oral argument, we again hold that the imposition of SBM under N.C. Gen. Stat. § 14-208.40(a)(2) per the trial court's order is unconstitutional as applied to Defendant.[1] We again reverse the trial court's order.

I. FACTUAL AND PROCEDURAL HISTORY

The facts of this case are fully described in *Griffin I*. ___ N.C. App. at ___, 818 S.E.2d at 337-39. However, since those facts do not render *Grady III* entirely dispositive of this appeal and the resolution of an as-applied challenge "is strongly influenced by the facts in a particular case[,]" *State v. Packingham*, 368 N.C. 380, 393, 777 S.E.2d 738, 749 (2015), *rev'd and remanded on other grounds*, 582 U.S. ___, 198 L. Ed. 2d 273 (2017), we recite pertinent details.

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1. At oral argument, Defendant made clear his constitutional challenge to SBM was limited to the facts of the instant case and that he was not pressing a facial constitutional challenge to the entire statutory SBM regime. We therefore limit our decision to the as-applied argument advanced by this appeal.

In 2004, Defendant entered an *Alford* plea to one count of first-degree sex offense with a child. *Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 337. At sentencing, Defendant admitted to the digital and penile penetration of his girlfriend's minor daughter over the course of three years. *Id.* at ___, 818 S.E.2d at 338. The trial court sentenced Defendant to imprisonment for 144 to 182 months and recommended the completion of SOAR, a sex offender treatment program. *Id.*

Eleven years after his conviction, in 2015, Defendant was released from prison on a five-year term of post-release supervision. *Id.* Three months later, the State sought SBM of Defendant under N.C. Gen. Stat. § 14-208.40(a)(2), as he had been sentenced for a reportable sex offense as defined by N.C. Gen. Stat. § 14-208.6(4) and therefore could be subject to SBM if ordered by a court. *Id.*

Defendant appeared before the trial court at a "bring-back" hearing in August 2016, where a "Revised STATIC-99 Coding Form" ("Static-99"), prepared by the Division of Adult Correction and Juvenile Justice and designed to estimate the probability of recidivism, was entered into evidence. *Id.* According to the Static-99, Defendant presented a "moderate-low" risk, the second lowest of four possible categories. *Id.*

The State called Defendant's parole officer as a witness, who testified that Defendant failed to complete the SOAR program but had not violated any terms of his post-release supervision. *Id.* The officer also described the physical characteristics and operation of the SBM device. *Id.* The State did not introduce any evidence regarding how it would use the SBM data or whether SBM would be effective in protecting the public from potential recidivism by Defendant. *Id.*

After taking the matter under advisement, the trial court entered a written order imposing SBM on Defendant for thirty years. *Id.* at ___, 818 S.E.2d at 338-39. That order included the following findings of fact and conclusion of law:

> 1. The defendant failed to participate in and[/]or complete the SOAR program.
>
> 2. The defendant took advantage of the victim's young age and vulnerability: the victim was 11 years old [while] the defendant was 29 years old.
>
> 3. The defendant took advantage of a position of trust; the defendant was the live-in boyfriend of the victim's mother. The family had resided together for at least four years and [defendant] had a child with the victim's mother.

4. Sexual abuse occurred over a three year period of time.

The court has weighed the Fourth Amendment right of the defendant to be free from unreasonable searches and seizures with the publics [sic] right to be protected from sex offenders and the court concludes that the publics [sic] right of protection outweighs the "de minimis" intrusion upon the defendant's Fourth Amendment rights.

Id. at___, 818 S.E.2d at 339.

Based on the above record, we held in *Griffin I* that "because the State failed to present any evidence that SBM is effective to protect the public from sex offenders, this Court's decision in *Grady II* compels us to reverse the trial court's order requiring Defendant to enroll in SBM for thirty years." *Id.* at ___, 818 S.E.2d at 342.

II. ANALYSIS

We re-evaluate Defendant's appeal as directed by the Supreme Court, considering *Grady III* and determining whether that decision impacts our prior reversal of the SBM order. Because *Grady III* modifies and affirms *Grady II*, we look to both opinions to discern the scope, effect, and import of *Grady III*. We begin, then, with a review of *Grady II*.

A. *Grady II*

In *Grady II*, this Court determined whether lifetime SBM imposed on an unsupervised recidivist defendant was " 'reasonable—when properly viewed as a search[.]' " *Grady II*, ___ N.C. App. at ___, 817 S.E.2d at 21 (quoting *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 463 (2015)). We ultimately held that Mr. Grady's diminished privacy expectations did not render lifetime SBM reasonable under the totality of the circumstances. *Id.* at ___, 817 S.E.2d at 28.

Our analysis in *Grady II* focused on four things: (1) the defendant's expectation of privacy as a convicted sex offender subject to registration, *id.* at ___, 817 S.E.2d at 23-25; (2) the physical intrusion of the SBM monitor itself, *id.* at ___, 817 S.E.2d at 25; (3) SBM's continuous intrusion into the defendant's locational privacy interest, *id.* at ___, 817 S.E.2d at 25-26; and (4) the State's interest in monitoring the defendant and whether lifetime SBM served that interest, *id.* at ___, 817 S.E.2d at 27-28.[2]

2. We reviewed the issue under a "general Fourth Amendment approach based on diminished expectations of privacy" and declined to examine whether the SBM order constituted a special needs search, holding that the State's failure to raise a special needs argument before the trial court resulted in its waiver on appeal. *Id.* at ___, 817 S.E.2d at 23 (citations and quotation marks omitted).

As to the first circumstance, we held that registration on the sex offender registry meant the "[d]efendant's expectation of privacy [was] . . . appreciably diminished as compared to law-abiding citizens." *Id.* at ___, 817 S.E.2d at 24. We next explained that the impact of the ankle monitor used to conduct SBM was "more inconvenient than intrusive, in light of [the] defendant's diminished expectation of privacy as a convicted sex offender." *Id.* at ___, 817 S.E.2d at 25. We also observed, however, that SBM's "continuous, warrantless search of defendant's location through the use of GPS technology . . . . is 'uniquely intrusive' as compared to other searches upheld by the United States Supreme Court." *Id.* at ___, 817 S.E.2d at 25-26 (quoting *Belleau v. Wall*, 811 F.3d 929, 940 (7th Cir. 2016) (Flaum, J., concurring)). Lastly, we recognized "the State's compelling interest in protecting the public, particularly minors, from dangerous sex offenders[,]" *id.* at ___, 817 S.E.2d at 27, but nonetheless held the SBM search unreasonable because "the State failed to present any evidence of its need to monitor defendant, or the procedures actually used to conduct such monitoring in unsupervised cases." *Id.* at ___, 817 S.E.2d at 28. In announcing that holding, we stressed that it was strictly "limited to the facts of this case." *Id.*

B. *Grady III*

Our decision in *Grady II* was modified and affirmed by our Supreme Court in *Grady III*. In a comprehensive opinion, the Supreme Court reviewed every aspect of this Court's analysis in *Grady II* and identified two points of express disagreement: (1) "the Court of Appeals erroneously limited its holding to the constitutionality of the program as applied only to Mr. Grady, when our analysis of the reasonableness of the search applies equally to anyone in Mr. Grady's circumstances[,]" *Grady III*, 372 N.C. at 510-11, 831 S.E.2d at 546 (citation omitted); and (2) the Supreme Court "[dis]agree[d] with the Court of Appeals that [the SBM ankle monitor's] physical restrictions, which require defendant to be tethered to a wall for what amounts to one month out of every year, are 'more inconvenient than intrusive.' " *Id.* at 535-36, 831 S.E.2d at 562-63 (citations omitted).[3] It then modified the holding in *Grady II* to expand its application "equally to anyone in defendant's circumstances," rendering SBM monitoring under N.C. Gen. Stat. §§ 14-208.40A(c) and

3. Although the Supreme Court did not directly contradict this Court's determination that the State had failed to preserve a "special needs" analysis of the SBM program on appeal, it did address the question of whether a special need was present on the merits and concluded that "the 'special needs' doctrine is not applicable here." *Id.* at 527, 831 S.E.2d at 557 (citations omitted).

14-208.40B(c) unconstitutional as applied to any registered sex offenders who are otherwise not under State supervision but would be subject to SBM solely on the basis of recidivism. *Id.* at 550-51, 831 S.E.2d at 572.

Despite broadening *Grady II*'s impact, *Grady III* examined largely the same factors: (1) the nature of the defendant's legitimate privacy interests in light of his status as a registered sex offender, *id.* at 527-34, 831 S.E.2d at 557-61; (2) the intrusive qualities of SBM into the defendant's privacy interests, *id.* at 534-38, 831 S.E.2d at 561-64; and (3) the State's legitimate interests in conducting SBM monitoring and the effectiveness of SBM in addressing those interests, *id.* at 538-45, 831 S.E.2d at 564-68.

The Supreme Court first concluded that SBM intruded upon the defendant's privacy interests in his physical person, *id.* at 527-28, 831 S.E.2d at 557, his home, *id.* at 528, 831 S.E.2d at 557, and his location and movements, *id.* at 528-29, 831 S.E.2d at 557-58. Though the defendant was a convicted felon and did have to register as a sex offender, the Supreme Court held those facts diminished his privacy interests only in contexts distinct from SBM. *See id.* at 531, 831 S.E.2d at 559 ("None of the conditions imposed by the registry implicate an individual's Fourth Amendment 'right . . . to be secure in [his] person[ ]' or his expectation of privacy 'in the whole of his physical movements.' " (quoting *Carpenter v. United States*, 585 U.S. ___, ___, 201 L. Ed. 2d 507, 523 (2018)). It also drew a contrast between Mr. Grady and defendants subject to probation or post-release supervision:

> Even if defendant has no reasonable expectation of privacy concerning where he lives because he is required to register as a sex offender, he does not thereby forfeit his expectation of privacy in all other aspects of his daily life. This is especially true with respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the "continuum of possible [criminal] punishments" and have no ongoing relationship with the State.

Id. at 531, 831 S.E.2d at 559-60 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874, 97 L. Ed. 2d 709, 718 (1987)). The Supreme Court summarized this portion of its analysis by concluding, "except as reduced for possessing firearms and by providing certain specific information and materials to the sex offender registry, defendant's constitutional privacy rights, including his Fourth Amendment expectations of privacy, have been restored." *Id.* at 534, 831 S.E.2d at 561.

Turning to the intrusive nature of SBM, the Supreme Court noted that recidivists who are required to undergo SBM do not receive the benefit of judicial review of the search's necessity prior to or following its imposition, and "the fact that North Carolina's mandatory SBM program involves no meaningful judicial role is important in the analysis of the constitutionality of the program." *Id.* at 535, 831 S.E.2d at 562.[4] It then explained that SBM constituted a significant invasion of Mr. Grady's physical privacy, as "Mr. Grady . . . must not only wear the half-pound ankle monitor at all times and respond to any of its repeating voice messages, but he also must spend two hours of every day plugged into a wall charging the ankle monitor." *Id.* The Supreme Court held that the State's ability to track Mr. Grady's movements was likewise a substantial intrusion: "mandatory imposition of lifetime SBM on an individual in defendant's class works a deep, if not unique, intrusion upon that individual's protected Fourth Amendment interests." *Id.* at 538, 831 S.E.2d at 564.

In the final step of its analysis, the Supreme Court looked to the State's interests in imposing SBM and " 'consider[ed] the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it.' " *Id.* (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660, 132 L. Ed. 2d 564, 579 (1995)). It identified several compelling interests promoted by the State, namely protecting the public from sex offenders through solving crimes, reducing recidivism, and deterring criminality. *Id.* at 538-39, 543, 831 S.E.2d at 564-65, 567. Despite acknowledging the legitimacy of these interests, the Supreme Court echoed the efficacy-based decision in *Grady II* and wrote that "a problem justifying the need for a warrantless search cannot simply be assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government." *Id.* at 540-41, 831 S.E.2d at 566. It further noted that reliance on "unsupported assumptions . . . [does not] suffice to render an otherwise unlawful search reasonable." *Id.* at 543 n.20, 831 S.E.2d at 567 n.20. Given that the State failed to introduce any evidence that SBM is effective in protecting the public against sex offenders, the Supreme Court refused to "simply assume that the program serves its goals and purposes when determining whether the State's interest outweighs the significant burden that lifetime SBM imposes on the privacy rights of recidivists subjected to

4. The Supreme Court noted that those subject to lifetime SBM do have the opportunity to petition for termination of SBM in front of the Post-Release Supervision and Parole Commission. *Id.* at 534, 831 S.E.2d at 562. It also held that such an opportunity was not equivalent to or a substitute for judicial review of a warrantless search. *Id.* at 534-35, 831 S.E.2d at 562.

it[.]" *Id.* at 544, 831 S.E.2d at 568. And, because "the State . . . simply failed to show how monitoring [a recidivist] individual's movements for the rest of his life would deter future offenses, protect the public, or prove guilt of some later crime[,]" the Supreme Court held that "the State has not met its burden of establishing the reasonableness of the SBM program under the Fourth Amendment balancing test required for warrantless searches." *Id.*

The Supreme Court did not, however, treat the lack of evidence that SBM is effective as a dispositive threshold issue, as opposed to one factor among the totality of the circumstances. *See id.* at 543, 831 S.E.2d at 567 ("The State's inability to produce evidence of the efficacy of the lifetime SBM program in advancing any of its asserted legitimate State interests *weighs heavily against* a conclusion of reasonableness here." (emphasis added)).

Following the above analysis, the Supreme Court reached its ultimate holding: not only was mandatory lifetime SBM under N.C. Gen. Stat. §§ 14-208.40A(c) and 14-208.40B(c) unconstitutional as applied to Mr. Grady, it was also unconstitutional as applied to all unsupervised defendants who received mandatory lifetime SBM solely on the basis of recidivism. *Id.* at 550-51, 831 S.E.2d at 572. In other words, because SBM monitoring of such a defendant on the basis of recidivism alone would never be reasonable under the totality of the circumstances, this Court erred in limiting its holding in *Grady II*. *See id.* at 545, 831 S.E.2d at 568 ("In these circumstances, the SBM program cannot constitutionally be applied to recidivists in Grady's category on a lifetime basis as currently required by the statute."). The Supreme Court was mindful to restrict this quasi-facial element of its decision to the specific facts before it:

> The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen.

Id. at 545, 831 S.E.2d at 568-69.

C. *Grady III*'s Effect on This Appeal

Defendant's circumstances place him outside of the facial aspect of *Grady III*'s holding; he is not an unsupervised recidivist subject to

mandatory lifetime SBM, but is instead a felon on post-release supervision who was convicted of an offense involving the physical, mental, or sexual abuse of a minor. Defendant, then, is subject to SBM under N.C. Gen. Stat. § 14-208.40(a)(2), not subsection (a)(1) as in the *Grady* cases, and he therefore received the benefit of a risk assessment and judicial determination of whether and for how long he would be subject to the SBM search. *See* N.C. Gen. Stat. §§ 14-208.40A(d)-(e) (2019) (providing that defendants subject to SBM under N.C. Gen. Stat. § 14-208.40(a)(2) must receive a risk assessment before the trial court "determines . . . the offender does require the highest possible level of supervision and monitoring" and imposes SBM for "a period of time to be specified by the court"). Plainly, then, *Grady III*'s holding does not directly determine the outcome of this appeal.

Although *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there. As conceded by the State at oral argument, *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances. We thus resolve this appeal by reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns. *See Grady III*, 372 N.C. at 527, 534, 538, 831 S.E.2d at 557, 561, 564. Before doing so, however, we must address whether that analysis is conducted pursuant to the "special needs" doctrine or upon a diminished expectation of privacy as was done in *Grady III*. *See id.* at 524-27, 831 S.E.2d at 555-57.

1. Special Needs v. Diminished Expectations of Privacy

In its initial briefing to this Court, the State argued that SBM serves a special need in this case. However, we held in *Griffin I* that the State's failure to assert a special need before the trial court waived that argument on appellate review. *Griffin I*, ___ N.C. App. at ___ n.5, 818 S.E.2d at 340 n.5. We reaffirm our holding that the State's failure to advance a special need before the trial court waived its application on appeal, and, even assuming *arguendo* that this argument was not waived, we conclude that it is inapplicable to the SBM order appealed here.

Defendant is subject to post-release supervision until June of this year. As recognized in *Grady III*, a supervisory relationship between a defendant and the State may give rise to a special need for warrantless searches. 372 N.C. at 526, 831 S.E.2d at 556 (rejecting the State's special needs argument partly on the basis that Mr. Grady was unsupervised and was "not [in] a situation . . . in which there is any 'ongoing

supervisory relationship' between defendant and the State" (quoting *Griffin v. Wisconsin*, 483 U.S. at 879, 97 L. Ed. 2d at ___)). The thirty years of SBM at issue in this appeal is unrelated to the State's post-release supervision of Defendant.

As acknowledged by counsel at oral argument, all defendants convicted of a reportable conviction or the sexual abuse of a minor who receive post-release supervision must submit to SBM as a condition of their release. *See* N.C. Gen. Stat. § 15A-1368.4(b1)(7) (2019) (establishing SBM monitoring as a required condition of post-release supervision for registered sex offenders and those convicted of sexual abuse of a minor).

Defendant has not contested the imposition of SBM as a condition of post-release supervision but has instead appealed an entirely different search lasting six times the length of his supervisory relationship with the State. In light of the fact that the State's special need to monitor Defendant through SBM can already be met as a term of his release—and given that Defendant has not contested the imposition of SBM in connection with his post-release supervision—we analyze the separate, thirty-year SBM search imposed independent of his supervised release under a diminished expectation of privacy exception to the Fourth Amendment's warrant requirement rather than as a special needs search. *Cf. Grady III*, 372 N.C. at 526-27, 831 S.E.2d at 556-57 ("[T]he primary purpose of SBM is to solve crimes. . . . Because the State has not proffered any concerns other than crime detection, the special needs doctrine is not applicable here." (citations and quotation marks omitted)).

2. Defendant's Privacy Interests

Defendant, as a registered sex-offender subject to post-release supervision, does have a diminished expectation of privacy in some respects. His appearance on the sex offender registry does not mean, however, that his rights to privacy in his person, his home, and his movements are forever forfeit. *Id.* at 534, 831 S.E.2d at 561. And while those rights may be appreciably diminished during his five-year term of post-release supervision, that is not true for the remaining 25 years of SBM imposed here. Treating this search on its own terms, Defendant's "constitutional privacy rights, including his Fourth Amendment expectations of privacy, [will] have been restored" one-sixth of the way into the warrantless search at issue. *Id.* Defendant, then, will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of the thirty-year term.

3. Intrusive Nature of SBM

Grady III made several observations concerning the intrusive nature of SBM, and those same observations generally apply here. For example, the physical qualities of the monitoring device used in this case appear largely similar to those in *Grady III*, and thus meaningfully conflict with Defendant's physical privacy rights. *Id.* at 535-37, 831 S.E.2d at 562-63. And, as recognized in *Grady III*, SBM's ability to track Defendant's location is "uniquely intrusive," *id.* at 537, 831 S.E.2d at 564 (citation and quotation marks omitted), and thus weighs against the imposition of SBM.

Despite the above parallels, the intrusion in this case is different from that in *Grady III* in some respects. Defendant is subject to thirty years of warrantless intrusions, not a lifetime, and, unlike recidivists, was ordered to submit to that term of SBM after a risk assessment and a determination by the trial court that he "require[s] the highest possible level of supervision and monitoring[.]" N.C. Gen. Stat. § 14-208.40A(e). These differences, however, do not sufficiently tilt the scales in favor of SBM in this case. The thirty-year term of SBM imposed here, though less than a lifelong term, nonetheless constitutes a significantly lengthy and burdensome warrantless search. Although Defendant did have the benefit of judicial review in determining whether SBM should be imposed, persons subject to SBM for a term of years do not have the opportunity to later petition the Post-Release Supervision and Parole Commission for relief. "In [this] aspect, the intrusion of SBM on Defendant in this case is greater than the intrusion imposed in *Grady II* [and *Grady III*], because unlike an order for lifetime SBM, which is subject to periodic challenge and review, an order imposing SBM for a period of years is not subject to later review[.]" *Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 341 (citing N.C. Gen. Stat. § 14-208.43). Thus, even when these differences from *Grady III* are taken into account, the intrusive nature of SBM as implemented in this case weighs against the reasonableness of the warrantless search ordered below.

4. The State's Interests

Our case law is clear that the State has advanced legitimate interests in favor of SBM. *See*, *e.g.*, *Grady III*, 372 N.C. at 543, 831 S.E.2d at 568 ("[T]he State's asserted interests here are without question legitimate[.]"). Those interests, as acknowledged in *Grady III* and *Griffin I*, include protecting the public from sex offenders, *Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 341, reducing recidivism, *id.*, solving crimes, *Grady III*, 372 N.C. at 542, 831 S.E.2d at 567, and deterring criminality,

id. at 543, 831 S.E.2d at 567. But, in addition to showing valid objectives, "the State bears the burden of proving the reasonableness of a warrantless search" which, in the context of SBM, includes "the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public." *Id.* at 543-44, 831 S.E.2d at 568 (citation omitted). The State's failure to produce any evidence in this regard "weighs heavily against a conclusion of reasonableness[.]" *Id.* at 543, 831 S.E.2d at 567.

The State conceded at oral argument that it did not introduce any record evidence before the trial court showing SBM is effective in accomplishing any of the State's legitimate interests. *See also Griffin I*, ___ N.C. App. at ___, 818 S.E.2d at 340 (noting the absence of record evidence on efficacy). Although the State proffered testimony that Defendant had betrayed the minor victim's trust and then failed to complete the SOAR program in prison, "[t]he SBM order did not reflect in any finding or conclusion whether the trial court determined that Defendant's betrayal of trust or failure to complete or participate in SOAR increased his likelihood of recidivism." *Id.* at ___, 818 S.E.2d at 342.

The Static-99 produced by the State disclosing a "moderate-low risk" of reoffending is, standing alone, "insufficient to support the imposition of SBM on a sex offender." *Id.* (citing *State v. Kilby*, 198 N.C. App. 363, 370, 679 S.E.2d 430, 434 (2009); *State v. Thomas*, 225 N.C. App. 631, 634, 741 S.E.2d 384, 387 (2013)). And, as explained above, the State's interest in monitoring Defendant via SBM during post-release supervision is already accomplished by a mandatory condition of post-release supervision imposing that very thing. *See* N.C. Gen. Stat. § 15A-1368.4(b1)(7). The State, therefore, failed to carry its burden to produce evidence that the thirty-year term of SBM imposed in this case is effective to serve legitimate interests.

5. Reasonableness of SBM Under the Totality of These Circumstances

As explained above, the circumstances reveal that Defendant has appreciable privacy interests in his person, his home, and his movements—even if those interests are diminished for five of the thirty years that he is subject to SBM. Those privacy interests are, in turn, substantially infringed by the SBM order imposed in this case. Taken together, these factors caution strongly against a conclusion of reasonableness, and they are not outweighed by evidence of any legitimate interest served by monitoring Defendant given the State's failure to meet its burden showing SBM's efficacy in accomplishing the State's professed aims.

In short, the totality of the circumstances discloses that the order for thirty years of SBM in this case constitutes an unreasonable warrantless search in violation of the Fourth Amendment. We therefore hold, consistent with the balancing test employed in *Grady III*, that the imposition of SBM under N.C. Gen. Stat. § 14-208.40(a)(2) as required by the trial court's order is unconstitutional as applied to Defendant and must be reversed. *See State v. Greene*, ___ N.C. App. ___, ___, 806 S.E.2d 343, 345 (2017) (holding that when the State had the opportunity but failed to introduce evidence in showing the reasonableness of SBM, reversal—rather than vacatur and remand—is the appropriate disposition).

III. CONCLUSION

We reaffirm our prior disposition under *Griffin I*, as that result is consistent with the totality of the circumstances test as employed by our Supreme Court in *Grady III*. Because the order imposing thirty years of SBM is an unreasonable warrantless search of Defendant in violation of the Fourth Amendment, we reverse the trial court's order.

REVERSED.

Judge YOUNG concurs.

Judge BRYANT concurs in the result only.

STATE OF NORTH CAROLINA
v.
ROBERT LEE HODGE, DEFENDANT

No. COA19-443

Filed 18 February 2020

1. Indictment and Information—habitual felon status—defective—subject matter jurisdiction—continuance

Where the parties and the trial court discovered—after the jury returned a guilty verdict on the substantive felony—that defendant's indictment for attaining habitual felon status was marked "NOT A TRUE BILL," the trial court retained subject matter jurisdiction to sentence defendant as a habitual felon by continuing judgment on the substantive felony to allow the State to obtain a superseding indictment on habitual felon status.

2. Indictment and Information—habitual felon status—defective—continuance—no abuse of discretion

Where the parties and the trial court discovered—after the jury returned a guilty verdict on the substantive felony—that defendant's indictment for attaining habitual felon status was marked "NOT A TRUE BILL," the trial court did not abuse its discretion by continuing judgment on the substantive felony to allow the State to obtain a superseding indictment on habitual felon status. Defendant had notice the State was pursuing habitual felon status, and any public perception of irregularity was cured by the return of a true bill of indictment.

Judge MURPHY dissenting.

Appeal by Defendant from judgment entered 17 July 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 13 November 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for the Defendant.

BROOK, Judge.

Robert Lee Hodge ("Defendant") appeals from judgment entered upon a jury verdict finding him guilty of attaining the status of habitual felon. Defendant argues that the trial court lacked subject matter jurisdiction to sentence him as a habitual felon because the original habitual felon indictment was marked "not a true bill" by the grand jury foreman. Defendant also argues that the trial court abused its discretion when it granted the State's request for a continuance upon the trial court's discovery that the indictment charging Defendant as a habitual felon was so marked. Because we find that the trial court retained jurisdiction over the proceeding by granting the State's motion for a continuance, and that it did not abuse its discretion in granting that continuance, we find no error.

I. Background

Defendant was charged with three counts of residential breaking and entering, three counts of larceny after breaking and entering, two

counts of obtaining property by false pretenses, and one count of felonious possession of stolen goods. The State also ostensibly indicted Defendant for attaining the status of habitual felon on 7 November 2017, and Defendant waived arraignment on this charge. However, the grand jury returned the indictment marked "NOT A TRUE BILL[.]"

A trial was held on the substantive charges before Judge Henry W. Hight, Jr., from 9 April 2018 to 12 April 2018. At the beginning of trial, counsel for the State listed the charges Defendant faced, including referencing the habitual felon indictment. At the close of the State's evidence, Defendant moved to dismiss the charges of breaking and entering, larceny after breaking and entering, and one count of obtaining property by false pretenses; the trial court granted the motions and dismissed the charges. The jury found Defendant not guilty of felony breaking and entering and felony larceny but found Defendant guilty of one count of obtaining property by false pretenses and of the lesser included offense of non-felonious possession of stolen goods. The charges of which the jury found Defendant guilty resulted from the jury's finding that Defendant knowingly possessed five stolen videogames and sold those videogames to a pawn shop for $12.

After the jury returned its verdict, a bench conference was held off the record to discuss the trial court's discovery that the habitual felon indictment was marked "NOT A TRUE BILL[.]" The State then requested to continue sentencing pursuant to *State v. Oakes*, 113 N.C. App. 332, 438 S.E.2d 477 (1994) "so that the State can go to the grand jury and apply for a new indictment, a superseding indictment." The prosecutor acknowledged that the habitual felon indictment in the case file was marked "NOT A TRUE BILL[.]" In support of its motion, the State argued that Defendant "was on notice from the moment that we discussed the habitual felon indictment that . . . the State was proceeding with this case habitually if he was convicted of the substantive felonies."

The trial court agreed that Defendant had notice of the State's intention to seek sentencing enhancements under the habitual felon statute, and that "until the court discovered that it was not a true bill, [] everyone was proceeding as if there was a valid true bill as to the status of the defendant." The trial court continued judgment and sentencing until 21 May 2018. The State sought a superseding indictment on the charge of habitual felon status, which a grand jury returned 17 April 2018.

Defendant was arraigned on the charge of attaining the status of habitual felon before Judge Vince Rozier on 20 April 2018. A trial was then held on that charge on 21 May 2018 before Judge Hight, Jr. Before

the trial began, Defendant renewed his motion to dismiss for lack of jurisdiction. The State called Assistant Clerk of Superior Court Sonya Clodfelter to testify at Defendant's trial on the status of being a habitual felon.

The jury began deliberations, and outside the presence of the jury, Ms. Clodfelter testified again on voir dire. Ms. Clodfelter testified as to the process that resulted in the original copies indicating different findings by the grand jury:

> [MS. CLODFELTER]: After testifying or finishing testifying this morning, I went back downstairs to do some research to find out if we had a scanned copy of the true bill of indictment that was issued on November 7, 2017.
>
> Our office has been scanning indictments for the last two years, and so after digging through our scanned copies, I found a scanned copy of the original showing it was a true bill of indictment.
>
> I knew there was an issue with this case and so I brought it to Judge Hight's attention this afternoon.
>
> THE COURT: And what happened to the scan?
>
> [MS. CLODFELTER]: The scanned copy, back in 2017, we were receiving two copies, two original copies from the grand jury. The first copy, separated, goes to the attorney or it goes to the magistrate's office if we have to issue a warrant for arrest for the serving of the true bill of indictment.
>
> The second copy goes in the court file since they are both originals. So the original of this copy that was scanned in would have gone to the magistrate's office for service when the order for arrest was served on the defendant.

None of the original copies are file stamped. Ms. Clodfelter testified that when the clerk's office sends one copy to the defendant to provide notice and retains the other for the court records, "we separate the two copies, assuming that they are the same[.]"

One juror experienced a family emergency during an overnight recess from deliberations, and the trial court excused her and declared a mistrial. A second trial on the charge of attaining the status of habitual felon was held before Judge Rebecca W. Holt from 16 July 2018 to 17 July 2018. At the beginning of this trial, Defendant again moved to dismiss the indictment for lack of jurisdiction. The trial court denied

the motion, finding that the State had jurisdiction as a result of the superseding indictment returned 17 April 2018.

At the close of all evidence, Defendant renewed the motion to dismiss for lack of subject matter jurisdiction based on the irregularities in the indictments charging Defendant with the status of being a habitual felon. The trial court denied the motion, finding that the State was proceeding on the superseding indictment, returned as a true bill. The jury found Defendant guilty of attaining the status of habitual felon. The trial court entered judgment on the jury verdicts and sentenced Defendant on both the underlying charges and the charge of attaining the status of habitual felon. The trial court sentenced Defendant to a minimum of 115 and a maximum of 150 months in prison.

Defendant entered notice of appeal orally, and appellate counsel was appointed.

II. Standard of Review

Questions of subject matter jurisdiction are questions of law, which we review de novo. *State v. Armstrong*, 248 N.C. App. 65, 67, 786 S.E.2d 830, 832 (2016).

North Carolina General Statutes § 15A-1334(a) provides that "[e]ither the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing." N.C. Gen. Stat. § 15A-1334(a) (2019). Therefore, we review a decision to allow a continuance for an abuse of discretion. *Oakes*, 113 N.C. App. at 336, 438 S.E.2d at 479. "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

III. Analysis

Defendant argues that because the original habitual felon indictment was marked "NOT A TRUE BILL" by the grand jury foreman, it was not an indictment, and the trial court did not have jurisdiction to sentence Defendant as a habitual felon. As such, Defendant further argues that the trial court was required to enter judgment upon the jury verdicts for the underlying substantive felony and to deny the State's motion for a continuance. Defendant argues that the trial court abused its discretion in granting the State's motion for a continuance to allow the State to procure a valid indictment on the charge of habitual felon because the decision to continue sentencing was "an error of law that undermines public faith in the criminal justice system."

A. Jurisdiction to Sentence Defendant

[1] Criminal defendants possess "the right to be charged by a lucid prosecutive statement which factually particularizes the essential elements of the specified offense." *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E.2d 719, 730 (1981). The Habitual Felons Act contemplates that defendants will be so charged through "the finding of a true bill by the grand jury." N.C. Gen. Stat. § 14-7.3 (2019); *see also State v. Langley*, 371 N.C. 389, 394, 817 S.E.2d 191, 195 (noting "a valid indictment is an essential of jurisdiction" in this context and reviewing statutorily required contents of valid habitual felon indictment) (internal marks and citation omitted).[1]

Moreover, a valid habitual felon indictment does not in and of itself grant a trial court jurisdiction to hear the proceeding. In order for the superior court to have jurisdiction to enter judgment on a charge of attaining the status of habitual felon, the indictment alleging the defendant's status as a habitual felon must be "part of, and ancillary to, the prosecution of defendant for the underlying felony, for which no judgment" has yet been entered. *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 482. A proceeding to establish a defendant's status as a habitual felon may not be "independent from the prosecution of some substantive felony[.]" *State v. Allen*, 292 N.C. 431, 434, 233 S.E.2d 585, 587 (1977). Consequently, if an indictment is returned after judgment has been entered on all substantive felony proceedings upon which a habitual felon charge is based, the indictment must be dismissed. *Id.* at 436, 233 S.E.2d at 589; *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 482.

The trial court had jurisdiction under these facts. While the State could not establish jurisdiction over the habitual felon charge without evidence beyond a charging document marked "NOT A TRUE BILL[,]" the State obtained a valid indictment before judgment was entered on the substantive felony. Because judgment had not been entered, the habitual felon indictment was still "part of, and ancillary to," an underlying felony and, as a consequence, the trial court retained jurisdiction. *Oakes*, 113 N.C. App. at 340, 438 S.E.2d at 482.

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1. The State argues that "Defendant is not constitutionally entitled to an indictment for habitual felon status, and nothing in the Habitual Felons Act requires a grand jury to attest to a true bill" here. We disagree. As noted above, the Habitual Felons Act and governing case law do not permit the State to proceed pursuant solely to an indictment marked "NOT A TRUE BILL." Further, our Constitution states clearly that "no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment[,]" N.C. Const. Art 1, § 22; no such valid predicate to the habitual felon prosecution at issue existed before the grand jury returned a true bill on 17 April 2018.

B. Trial Court's Order Continuing Judgment

[2] Given that the trial court retained jurisdiction over the habitual felon indictment here only by continuing judgment on the underlying felony, we turn now to whether the trial court properly continued judgment.

"A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Id.* at 337, 438 S.E.2d at 480 (citation omitted). In assessing the continuance at issue here we bear in mind that "[o]ne basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist*." *Allen*, 292 N.C. at 436, 233 S.E.2d at 588 (emphasis in original); *see also Oakes*, 113 N.C. App. at 339, 438 S.E.2d at 481 ("As *Allen* makes clear, the critical issue is whether defendant had notice of the allegation of habitual felon status at the time of his plea to the underlying substantive felony charge.").

Defendant first argues that the trial court's decision to grant a continuance under these circumstances was "exceedingly prejudicial" because it resulted in an exponential increase in his sentence. The argument is straightforward: the continuance prejudiced Defendant because the habitual felon charge increased his sentence from 20 to 30 months to between nine-and-a-half and twelve-and-a-half years. Relatedly, Defendant highlights the undeniable outrageousness of incarcerating him for, at a minimum, the better part of a decade for knowingly possessing five stolen video games.

Our Court, however, has not made punishment the determinative factor in the proscribed procedural prejudice inquiry. In *Oakes*, a continuance granted at the same moment in the proceeding to remedy the same general malady, a defect in indicting the Defendant on habitual felon grounds, did not establish prejudice. 113 N.C. App. at 339-40, 438 S.E.2d at 481. The continuance in *Oakes* also resulted in an exponential increase in the defendant's sentence. *Id.* at 334, 438 S.E.2d at 478.

And, as there, Defendant had notice that the State was pursuing a habitual charge here. Defendant waived arraignment on the charge of being a habitual felon before trial on the substantive charges. Each participant in the proceedings against Defendant was operating under the impression that the grand jury had returned a valid habitual felon indictment and that the State intended to prosecute Defendant as a recidivist. Neither Defendant, nor defense counsel, nor counsel for the State, nor the trial court realized the indictment in the court file was marked "NOT

A TRUE BILL" until the trial court discovered as much after the jury returned its verdicts.

As such, despite the highly irregular nature of the proceedings and the grossly disproportionate sentence that resulted, Defendant did not suffer prejudicial procedural conduct. *Id.*

Defendant next argues that the trial court's decision to continue the sentencing proceeding to allow the State to seek a superseding indictment manifested an abuse of discretion because the proceedings offended the public sense of fair play and "undermine[d] public faith in the criminal justice system." Defendant contends that our Court should not be seen to condone the State's mistake here by permitting the State to correct its error at the eleventh hour. Defendant undoubtedly raises important concerns; however, we cannot hold that the trial court's grant of the continuance was manifestly unsupported by reason. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. Indeed, the trial court expressed concern regarding continuing the proceedings, but its comments do not suggest an absence of reason:

> THE COURT: I am sure that there is an innocent reason why we have two different documents. I am concerned about the integrity of the court file, so I will have to call somebody to do an investigation on it to determine why we have got different things. It might be fine. It may not. But I don't think that would defer our proceeding at this point. They can do that. I don't believe they depend upon each other.

We are not insensitive to the notion that granting the State time to fix its error at a moment when the only evidence in the court file suggested the grand jury did not find probable cause to indict Defendant could, under different circumstances, offend the public sense of fair play. However, any public perception of irregularity was cured here by the return of a true bill by the grand jury on 17 April 2018.

Consequently, we cannot say that the trial court's grant of a continuance so offended the public sense of fair play that it constituted an abuse of discretion. *See Oakes*, 113 N.C. App. at 336-37, 438 S.E.2d at 479-80.

IV. Conclusion

The trial court retained jurisdiction at the moment it discovered the State's habitual felon indictment error. The State thus could still and, in fact, did seek to rectify its mistake by requesting a continuance and

procuring a valid indictment. We need not agree with the trial court's finding of good cause to nevertheless hold it did not abuse its discretion. *See State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (reviewing for abuse of discretion "we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record."). Therefore, we must find no error.

NO ERROR.

Judge STROUD concurs.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

Is a defective indictment the same as a nonexistent indictment? If I buy a car and get a car without an engine, that is a defective car. If I ask for a car and get a covered wagon, that is *not* a defective car. I can fix an engineless car; I cannot transform a covered wagon into a car. What we have here is the covered wagon of indictments.

I cannot agree with the Majority's view that, when determining a trial court's ability to retain jurisdiction over a habitual felon indictment, sufficient notice alongside a *defective* indictment is the same as sufficient notice alongside a *nonexistent* indictment. *Compare State v. Oakes*, 113 N.C. App. 332, 334, 438 S.E.2d 477, 478 (1994) (considering an habitual felon indictment that "failed to allege the underlying felony with particularity"), *with State v. Allen*, 292 N.C. 431, 432, 233 S.E.2d 585, 586 (1977) (considering "an independent proceeding purportedly pursuant to the North Carolina Habitual Felons Act" where "defendant was indicted, tried and convicted of being an habitual felon" in the absence of a cognizable offense). Especially when the statute tells us "the proceedings shall be as if the issue of habitual felon were a principal charge[,]" N.C.G.S. § 14-7.5 (2019), and "does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon." *Allen*, 292 N.C. at 434, 233 S.E.2d at 587. Hence, I cannot agree with the Majority that the facts of this case fail to show an "abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *Oakes*, 113 N.C. App. at 337, 438 S.E.2d at 480 (internal quotation marks and citation omitted).

The facts of Defendant's case are qualitatively different from *Oakes* and qualitatively similar to *Allen*. *Oakes*'s reasoning relied on the reasoning and holding of *Allen*, and both cases relied on the existence of a defective true bill of indictment or a valid, but after-the-fact, true bill of indictment.

In *Allen*, there was no habitual felon indictment until after the defendant was sentenced for an underlying felony. Our Supreme Court held the State could not "bring [an] independent proceeding to declare [the defendant] an habitual felon when the indictment itself revealed that before it was returned all the proceedings by which he had been found guilty of the underlying substantive felonies had been concluded." *Allen*, 292 N.C. at 432, 233 S.E.2d at 586. Our Supreme Court emphasized that "[o]ne basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist*." *Id.* at 436, 233 S.E.2d at 588. It never said that was the only purpose.

In *Oakes*, we extended the notice-purpose rationale of *Allen*. We considered an indictment that was defective for failing to allege an underlying felony with particularity. *Oakes*, 113 N.C. App. at 334, 438 S.E.2d at 478. We stated that "[t]he sentencing phase of a criminal prosecution constitutes a significant component of the prosecutorial process." *Id.* at 339, 438 S.E.2d at 481. We held, relying on *Allen*, that "for the purpose of our habitual felon laws, until judgment was entered upon defendant's conviction of [his underlying felony], there remained a pending, uncompleted felony prosecution to which a new habitual felon indictment could attach." *Id.* Later in the opinion, we also declared "the defect in the initial habitual felon indictment" did not cause the trial court to lose jurisdiction for two reasons: (1) the defect was "technical"; and (2) that defect "was not such as to deprive defendant, when entering his plea to the substantive charge, of notice and understanding that the State was seeking to prosecute [defendant] on that charge as a recidivist." *Id.* at 339-40, 438 S.E.2d at 481. Part of our reasoning was that "[a]t the time defendant entered his plea to the underlying substantive felony and proceeded to trial, there was pending against him an habitual felon indictment presumed valid by virtue of its 'return by the grand jury as a true bill.' " *Id.* at 339, 438 S.E.2d at 481 (quoting *State v. Mitchell*, 260 N.C. 235, 238, 132 S.E.2d 481, 482 (1963)). Unlike *Allen*, our holding in *Oakes* depended on the existence of a true bill of indictment presumed valid.

In habitual felon status proceedings, the first step of having a valid indictment is at least as important as the last step of sentencing. Although a significant step in prosecuting a case is sentencing, so too

is having a true bill of habitual felon status indictment to attach to an underlying felony.

The facts here are more akin to the independent proceeding in *Allen* than the ancillary proceeding in *Oakes*. At sentencing, Defendant's attorney aptly argued why *Oakes* should not apply to this case:

> Your Honor, I would object to the State's motion to continue[. U]nderstanding that their argument based on *State v. Oakes* is that they can, when an indictment is found to be defective, still seek an effective indictment, and I think that's well established in this case. *However*, *that's not what we have here. We don't have a defective indictment. We don't have a true bill.* . . .
>
> As far as we know, as far as anyone other than the people in [the grand jury room] know, they issued – they came up with not a true bill and it's signed by the foreperson for that grand jury. That is their will. That is that body's will. . . .
>
> What we know is that we have an indictment that is issued as not a true bill that is signed by a foreperson in the file. That's it. . . .
>
> There is nothing at this point -- there is no accusatory instrument that Your Honor can continue judgment on in order to at this point sentence down the road on a new -- on a new instrument. . . .
>
> A continuance at this point is to allow the State to seek a different answer from another jury, *not to fix a defect*, and so I don't believe *State v. Oakes* applies.

Indeed, the indictment in this case was not marred by a "technical" defect as in *Oakes* —it did not exist. The State could not request a continuance to get a true bill of indictment when no indictment existed because this is functionally the same after-the-fact independent proceeding as in *Allen*. The trial judge should have commenced sentencing the moment the State presented him with a covered wagon.

Moreover, having a true bill at the time a defendant pleads guilty or not guilty to the underlying felony is more important as a matter of due process than notice. The Majority's holding invites a dereliction of duty. Now, all the State must do is give notice in some unprescribed manner. I anticipate a future argument wherein the State relies only on

an oral communication with counsel and having delivered defendant's prior history, and then, when the defendant is about to be sentenced upon conviction for a felony, ask for a continuance to seek an indictment for habitual felon status. I cannot support even a preliminary step in that direction. Such a procedure is totally out of line with *Allen*, the Habitual Felon Act, and notions of procedural due process. The result here is beyond the boundaries of due process. What happened here was an "abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, [and] conduct which offends the public sense of fair play." *Oakes*, 113 N.C. App. at 337, 438 S.E.2d at 480 (internal quotation marks and citation omitted).

Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
CLAYTON JAMES KOWALSKI

No. COA19-709

Filed 18 February 2020

1. Appeal and Error—preservation of issues—challenge to limits placed on cross-examination—testimony elicited at voir dire

In an appeal from a conviction for assault on a female where defendant argued that the trial court erred by prohibiting him from cross-examining the victim about her mental health history, defendant preserved his argument for appellate review by eliciting the contested testimony during voir dire and obtaining a ruling from the trial judge. Thus, defendant did not waive appellate review by deciding not to elicit the testimony in the jury's presence.

2. Evidence—cross-examination—impeachment—assault victim's mental health history—relevance—prejudice

At a trial for assault on a female arising from a fight between defendant and his ex-girlfriend, the trial court did not err by prohibiting defendant from cross-examining his ex-girlfriend about her mental health history because he failed to show the proposed testimony was relevant for purposes of impeaching his ex-girlfriend's credibility. Further, the trial court did not abuse its discretion in

finding the proposed testimony was more prejudicial than probative under Evidence Rule 403.

3. Assault—on a female—jury instruction—variance from criminal summons—invited error—plain error analysis

At a trial for assault on a female, the trial court did not commit plain error by instructing the jury that the State needed to prove defendant assaulted his ex-girlfriend by "grabbing, pushing, dragging, kicking, slapping, and/or punching" where the criminal summons charged defendant with "striking her neck and in her ear." Defendant not only failed to object to the variance between the court's instruction and the summons, but he also recommended that the court add the words "slapping" and "punching" to the instruction; thus, any error was invited error.

Appeal by defendant from judgment entered 14 February 2019 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 January 2020.

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

William D. Spence for defendant-appellant.

TYSON, Judge.

Clayton James Kowalski ("Defendant") appeals from judgment entered on the jury's verdict finding him guilty of misdemeanor assault on a female. We find no error.

I. Background

Defendant and Katelyn Policke dated on-and-off for five years, from approximately 2012 until 2017. They lived together in an apartment for a year and a half until October 2017, when Policke moved out and into a house without Defendant. Defendant and Policke had drinks at his parents' house on 23 December 2017. Defendant and Policke left around 11 p.m. Defendant drove Policke to her house and then drove himself home.

Policke called Defendant shortly after he returned home to discuss their relationship. Policke believed their relationship was not progressing and asserted it "was going backwards." The conversation escalated and Defendant hung up the phone. Policke repeatedly tried to call Defendant back, but he refused to speak with her.

Policke drove to Defendant's house and rang the doorbell. Policke and Defendant presented differing versions of what happened at his house during the trial.

A. Policke's Version

Policke testified Defendant answered the door while holding a loaded shotgun. Defendant allowed Policke to come inside and they spoke. At one point, Policke went upstairs to gather her possessions and leave. Policke was sitting on Defendant's bed when he grabbed her head and tried to pull her off the bed. She fell and injured her neck. Defendant dragged her down the hallway and pushed her down the stairs. Defendant stood over Policke on the stairs, kicking and hitting her in the face.

Policke screamed, hoping someone would eventually hear her. Defendant allegedly told her, "the louder you scream, the more [I'm] going to hit [you]." Defendant took Policke's purse and keys from her and threw them out the front door into a flower bed. Defendant threatened to call the police. Policke eventually got up and walked out the front door. She found her purse and keys and drove herself home.

Policke's mother, Kathy, testified at trial. She said Policke called her between 12:30 and 1 a.m. as she drove from Defendant's house. Policke was "in a panic" and told her mother "she had been assaulted." Kathy drove to meet her at her home as Policke told her what happened. Kathy testified Policke gave a detailed account, which was consistent with her own testimony at trial.

Kathy called the police shortly before arriving at Policke's home. Police and emergency medics responded to Policke's home. Policke went to the hospital. Policke had bruises and scratches on her cheeks and neck and complained her eardrum had burst and she could not hear.

B. Defendant's Version

Defendant testified he heard banging on his door as well as the doorbell ringing. Defendant denied having a shotgun when he opened the door. Defendant described Policke as "upset but not violent at that moment."

Defendant went upstairs and Policke followed. They sat on his bed and continued discussing the status of their relationship. Defendant testified he told Policke, "until there's no problems and you don't have violent – you know, end up getting violent, I can't give a ring to someone that acts like that." Policke continued to question Defendant about their

relationship until "she felt like [Defendant] was ignoring her," at which point she slapped Defendant in his face.

Defendant told Policke she had to leave. Policke punched Defendant in the arm. Defendant pushed her away onto his bed and went downstairs. Policke followed Defendant down the stairs, but she stumbled and fell. Defendant opened the front door and told Policke to leave his home. She was yelling loudly at him and did not leave. Defendant closed the front door and called the police while Policke resumed slapping and punching him. When Policke told Defendant she would leave, he hung up the phone call. She did not leave.

Defendant went into the kitchen and Policke followed. Policke swung at Defendant and fell into his stove. Defendant denied pushing her into his stove. Policke tried to punch Defendant again after following him to the living room. Defendant threatened to call the police again. He took her purse and threw it out the front door. Policke left to look for it and Defendant closed and locked the door. Defendant denied slapping, punching, or kicking Policke.

C. Adjudication

Defendant was charged with assault on a female on 24 December 2017, and Policke obtained an *ex parte* domestic violence protective order ("DVPO") that same day. After Policke received a blank text message from Defendant on 26 December 2017, he was charged with violating the DVPO on 3 January 2018. The State joined both charges for trial.

The jury found Defendant guilty of misdemeanor assault on a female on 14 February 2019. The jury found Defendant not guilty of violating the DVPO. The trial court sentenced Defendant to a suspended sentence of 75 days' imprisonment and placed Defendant on supervised probation for 18 months. Defendant filed his written notice of appeal on 27 February 2019.

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 abused its discretion by prohibiting Defendant from cross-examining Policke about her prior mental health history. Defendant also argues the trial court committed plain error in its instruction to the jury.

IV. Cross-Examination

Policke and Kathy each testified for the State, along with an officer from the Huntersville Police Department. During cross-examination of Policke, Defendant's counsel began a line of questioning by asking Policke if she gets aggressive "when things don't go your way[.]" Defendant's counsel then asked about a previous incident in which Policke had allegedly attacked her mother. The State objected, and the trial court excused the jury. The court heard arguments from both parties on the issue and conducted a *voir dire* of Defendant's line of questioning to "see where this leads."

Defendant's counsel demonstrated the proposed cross-examination of Policke in *voir dire*. Defendant's counsel asked some questions about prior incidents of Policke's physical aggression, anger, and her mental health and treatment. The State objected to the relevance of the questions, which the trial court overruled for the purpose of taking the *voir dire*. The trial court heard arguments on the admissibility of the proposed testimony at the conclusion of Defendant's *voir dire* cross-examination.

The trial court ruled some of Defendant's proposed line of questioning admissible, but determined the questions concerning Defendant's mental health and treatment were not relevant and inadmissible. Additionally, the trial court ruled "to the extent [the questions had] some attenuated relevance, [they are] more prejudicial than [they are] probative." Defendant did not attempt to elicit any of the proposed testimony about Policke's mental health when cross-examination resumed in front of the jury.

A. Preservation

[1] The State argues Defendant failed to preserve this issue for appellate review by failing to elicit the contested testimony in the presence of the jury. The State cites *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), to support its argument. The State's reliance on *Coffey* is misplaced.

In *Coffey*, the State called a police officer to testify and the trial court conducted a *voir dire* of his proposed testimony. *Id.* at 286-87, 389 S.E.2d at 59. The court ruled most of the officer's proposed testimony was inadmissible hearsay. *Id.* at 287, 389 S.E.2d at 59.

During the *voir dire*, the defendant's counsel asked if he could question the officer about another possible culprit for the crime charged. *Id.* "The trial court indicated that the defendant's counsel could do so, but that the trial court would sustain an objection to such questions at

that time." *Id.* When the jurors returned, the defendant's counsel had no questions for the officer on cross-examination. *Id.* The defendant's counsel did not attempt to elicit and preserve the proposed testimony from the officer, even during the *voir dire*. *Id.*

One purpose of conducting a *voir dire* examination of contested evidence, when a trial court determines its admissibility, is to preserve an offer of proof of the evidence for appellate review. *See id.* at 289-90, 389 S.E.2d at 61 (where "the defendant never actually attempted to introduce [the contested] evidence . . . . the defendant may not now be heard to complain on appeal that such evidence was not before the jury *or that the trial court did not allow him to cause the record to show what any such evidence might have been.*") (emphasis supplied); *see also State v. Chapman*, 294 N.C. 407, 415, 241 S.E.2d 667, 672 (1978) ("A judge should be loath to deny an attorney his right to have the record show the answer a witness would have made when an objection to the question is sustained. In refusing such a request the judge incurs the risk . . . that the Appellate Division may not concur in his judgment that the answer would have been immaterial or was already sufficiently disclosed by the record.").

Unlike the defendant's counsel in *Coffey*, Defendant's counsel elicited Policke's contested testimony in *voir dire*, secured a ruling from the trial judge, and preserved the issue in the record for review on appeal.

B. Standards of Review

"[A]lthough cross-examination is a matter of right, the scope of cross-examination is subject to appropriate control in the sound discretion of the court." S*tate v. Larrimore*, 340 N.C. 119, 150, 456 S.E.2d 789, 805 (1995) (citations omitted); *see also* N.C. Gen. Stat. § 8C-1, Rule 611(a) (2019). "In general, we review a trial court's limitation on cross-examination for abuse of discretion." *State v. Bowman*, 372 N.C. 439, 444, 831 S.E.2d 316, 319 (2019).

"Even though a trial court's rulings on relevancy [under Rule 401] technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Muhammad*, 186 N.C. App. 355, 360, 651 S.E.2d 569, 573 (2007) (citation and alterations omitted). "We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008).

C. Analysis

[2] Defendant argues the trial court abused its discretion in limiting his trial counsel's cross-examination of Policke by ruling portions of his intended questioning not relevant and more prejudicial than probative.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "Relevant evidence, as a general matter, is considered to be admissible. . . . Any evidence calculated to throw light upon the crime charged should be admitted by the trial court." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988) (citations and internal quotation marks omitted). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" under Rule 403. N.C. Gen. Stat. § 8C-1, Rule 403 (2019).

Defendant argues the proposed cross-examination of Policke was relevant evidence for the purpose of impeaching her credibility. *See State v. Williams*, 330 N.C. 711, 723, 412 S.E.2d 359, 367 (1992) ("Where, as here, the witness in question is a key witness for the State, this jurisdiction has long allowed cross-examination regarding the witness' past mental problems or defects."). "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C. Gen. Stat. § 8C-1, Rule 611(b) (2019). However, evidence that has no bearing on truthfulness or untruthfulness is not proper impeachment evidence. *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514 (1998); N.C. Gen. Stat. § 8C-1, Rule 608(b) (2019).

The excluded testimony at issue concerned prior instances of Policke's mental health and treatment. One instance involved treatment Policke had sought for childhood trauma. The trial court noted Defendant's counsel did not ask Policke about nor attempt to introduce evidence of a mental health diagnosis or mental state in the proposed cross-examination.

Defendant has not shown the excluded testimony was relevant to Policke's truthfulness or untruthfulness to challenge her credibility before the jury. S*ee Call*, 349 N.C. at 411, 508 S.E.2d at 514. Defendant has not shown the trial court committed prejudicial error in ruling the proposed cross-examination was not relevant under Rule 401. To the extent the excluded evidence may have had some relevance, the trial court's ruling that the proposed testimony was more prejudicial than

probative under Rule 403 was not an abuse of discretion. Defendant's argument is overruled.

V. Jury Instructions

A. Standard of Review

Defendant failed to proffer instructions or to object to the jury instructions given by the trial court.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4). To "specifically and distinctly" show plain error to challenge instructions given to the jury, Defendant "must show that a fundamental error occurred at his trial and that the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012) (citations and internal quotation marks omitted).

B. Analysis

[3] Defendant argues the trial court committed plain error in charging the jury that the State needed to prove Defendant had intentionally assaulted Policke by "grabbing, pushing, dragging, kicking, slapping, and/or punching" when the criminal summons charged Defendant with "striking her neck and in her ear."

Defendant correctly argues: "It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) (citations omitted). "[T]he failure of the allegations [in a warrant or indictment] to conform to the equivalent material aspects of the jury charge represents a fatal variance, and renders the indictment insufficient to support that resulting conviction." *Id.* at 631, 350 S.E.2d at 357.

However, "[a] criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991). "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2019). "[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), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 141 (2002).

The trial court followed the pattern jury instruction for misdemeanor assault on a female, which requires the court to describe the alleged assault. *See* N.C.P.I.–Crim. 208.70 (2019). During the charge conference, the trial court proposed describing Defendant's alleged assaultive conduct in its jury instructions as "grabbing, pushing, dragging and/or kicking." Defendant's counsel replied: "I think there was slapping and punching in there as well. I think that is what they are alleging. So drag, punched, slapped, kicked."

The trial court incorporated Defendant's counsel's addition of "slapping and punching" to its original proposed instruction, resulting in the final description in the jury instruction as Defendant: "grabbing, pushing, dragging, kicking, slapping, and/or punching" Policke.

Defendant's counsel failed to object to the variance he now alleges to have been plain error. Defendant's counsel did not request the trial court include the specific language of "striking her neck and in her ear" from the criminal summons. Rather, Defendant's counsel contributed to the variance by adding more descriptive words, which were consistent with the evidence presented at trial by the State and not found in the criminal summons.

The variance, which Defendant now alleges is plain error, resulted in part from his own conduct in the proposed instructions. Defendant cannot show prejudice. *See* N.C. Gen. Stat. § 15A-1443(c). Defendant's asserted error, if any, was invited and he "will not be heard to complain" on appeal. *See McPhail*, 329 N.C. at 643, 406 S.E.2d at 596. Defendant's argument is overruled.

VI. Conclusion

Defendant preserved the excluded testimony and the issue of the trial court's limitation of his cross-examination of Policke for appellate review. Defendant has not shown relevancy or that the trial court abused its discretion by limiting his cross-examination of Policke to exclude certain testimony about her mental health and treatment to challenge her credibility.

Defendant's counsel did not object to the jury instruction as a fatal variance, which he now alleges was plain error to warrant a new trial. The unpreserved error, if any, was invited error, as Defendant's counsel contributed to the variance. Defendant received a fair trial, free from

prejudicial errors he preserved and argued. We find no reversible errors to award a new trial. *It is so ordered.*

NO ERROR.

Judges DIETZ and INMAN concur.

STATE OF NORTH CAROLINA
v.
RICKY SCOTT MILLS, DEFENDANT

No. COA19-597

Filed 18 February 2020

1. Probation and Parole—probation revocation—willfully absconding—failure to report to probation officer—failure to provide valid address and phone number

The trial court did not abuse its discretion in revoking defendant's probation after finding that defendant willfully absconded from supervision, where competent evidence showed defendant failed to report to his probation officer for at least twenty-one days after being released from custody, reported an invalid home address (belonging to a stranger), and failed to report a valid phone number for contact purposes (his sister's phone number was inadequate because she rarely saw him and was not aware that he had been released from custody).

2. Probation and Parole—probation revocation—willfully absconding—additional findings—regarding violations of other conditions—completion not due yet

Where the trial court revoked defendant's probation for willfully absconding from supervision, the court did not err by also finding defendant violated other conditions of his probation even though the time period for completing them had not yet expired, because defendant presented no evidence showing he had taken steps to begin complying with those conditions and, at any rate, the absconding violation was the only one for which the trial court could and did revoke his probation.

Appeal by defendant from judgment entered 7 February 2019 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary S. Crawley, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

BERGER, Judge.

Ricky Scott Mills ("Defendant") appeals from the judgment revoking probation entered February 7, 2019. Defendant contends the trial court erred in finding that Defendant violated the terms of probation and willfully absconded. We disagree.

Factual and Procedural Background

On December 5, 2018, Defendant pleaded guilty to assault with a deadly weapon on a government official and was placed on supervised probation. That same day, Defendant met with Buncombe County probation intake coordinator, Officer Robin Canipe ("Officer Canipe"), in the local jail to complete his intake paperwork. Defendant informed Officer Canipe that he would reside at his sister's house in Arden, North Carolina and provided his sister's phone number as his contact point. Officer Canipe gave Defendant "Reporting Instructions" which required Defendant to meet with his probation officer within three days of his release from custody. Defendant signed and acknowledged the requirements and indicated that he understood that he could be arrested if he failed to comply. Defendant was also provided with, and initialed, the "Regular Conditions of Probation."

On Friday, December 21, 2018, Defendant was released from custody and was required to report to Officer Michael Britton ("Officer Britton") by December 24, 2018. The Buncombe County Probation Office was closed the following Monday, Tuesday, and Wednesday in observance of the Christmas holiday. Soon after, Officer Britton attempted to locate Defendant through the address and phone number which Defendant provided during his intake interview.

Officer Britton called the phone number Defendant provided. Defendant's sister answered and claimed that she "rarely has contact with him and hasn't had contact with him in some time and didn't even

know he was out of custody." In early January, Officer Britton went to the address given by Defendant as his sister's residence, but the owner had "never heard of" Defendant.

On January 11, 2019, Officer Britton filed a violation report that alleged Defendant had violated the following conditions of probation: (1) "The Defendant has avoided supervision or is making their whereabouts unknown and has absconded;" (2) "Defendant has failed to provide proof to supervising officer of attending one community support meeting a week;" (3) "Defendant has failed to provide proof to supervising officer of completing any of 100 community service hours ordered;" (4) "Defendant has failed to report to supervising officer in any way since being released from custody on 12/21/2018," "Defendant has failed to report a valid address," and "Defendant has failed to report a phone number to be contacted on;" (5) "Defendant has failed to provide proof to supervising officer of enrolling in a G.E.D. program;" (6) "Defendant has an [active] warrant for non support;" (7) "[Defendant] has failed to provide supervising officer proof of obtaining a substance abuse assessment;" and (8) "Defendant has failed to provide proof of obtaining a job and working at[]least 20 hours a week."

On February 7, 2019, this matter came on for hearing. At the time, Defendant was in custody on an active warrant for nonsupport. The trial court determined that Defendant willfully violated the terms of his probation and revoked Defendant's probation. Defendant appeals, arguing that the trial court erred in finding (1) Defendant violated the conditions of his probation and that the State failed to present competent evidence to support the violations, and (2) that Defendant willfully absconded from supervision. We disagree.

Standard of Review

"In a probation revocation, the standard is that the evidence be such as to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant has willfully violated a valid condition" upon which probation can be revoked. *State v. Harris*, 361 N.C. 400, 404, 646 S.E.2d 526, 529 (2007) (*purgandum*).

> A hearing to revoke a defendant's probationary sentence only requires that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.

State v. Young, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (*purgandum*). "We review a trial court's decision to revoke a defendant's probation for an abuse of discretion. Abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Newsome*, ___ N.C. App. ___, ___, 828 S.E.2d 495, 498 (2019) (*purgandum*).

Analysis

[1] "Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *State v. Murchison*, 367 N.C. 461, 463, 758 S.E.2d 356, 358 (2014) (citations and quotation marks omitted). Pursuant to N.C. Gen. Stat. § 15A-1344, the trial court "may only revoke probation for a violation of a condition of probation" including committing a "criminal offense in any jurisdiction" or absconding "by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." N.C. Gen. Stat. §§ 15A-1344(a); 15A-1343(b)(1), (b)(3a) (2017). "It is a defendant's responsibility to keep his probation officer apprised of his whereabouts." *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498.

Here, the violation report alleges that Defendant has willfully violated:

> 1. Regular Condition of Probation: General Statute 15A-1343 (b) (3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT HAS AVOIDED SUPERVISION OR IS MAKING THEIR WHEREABOUTS UNKNOWN AND HAS ABSCONDED.
>
> 4. "Report as dire[c]ted by the Court, Commission or the supervising officer to the officer at reasonable times and places . . ." in that
>
> -DEFENDANT HAS FAILED TO REPORT TO SUPERVISING OFFICER IN ANY WAY SINCE BEING RELEASED FROM CUSTODY ON 12/21/2018.
>
> -DEFENDANT FAILED TO REPORT A VALID ADDRESS
>
> -DEFENDANT FAILED TO REPORT A PHONE NUMBER TO BE CONTACTED ON

Prior to Defendant's release, Defendant was instructed to meet with Officer Britton within three days of his release from custody. "This was

more than a regular office visit. It was a special requirement imposed upon Defendant . . . , and it was his responsibility to keep his probation officer apprised of his whereabouts" upon release. *Id.* at ___, 828 S.E.2d at 499 (citation and quotation marks omitted). Defendant was released on December 21, 2018 and failed to report to Officer Britton for at least 21 days. Although the probation office was closed around the time of his release, Officer Britton testified he still would have been notified if Defendant had attempted to contact the office. Moreover, the evidence tended to show that Defendant had failed to contact the probation office by January 11, 2019 when the probation violation report was filed.

In addition, Officer Britton further testified that he tried to contact Defendant using the phone number and address that Defendant provided in the intake form. When Officer Britton called the phone number, he was connected with Defendant's sister, who lives in South Carolina. She informed Officer Britton that she "rarely has contact with [Defendant] and hasn't had contact with him in some time and didn't even know he was out of custody." Officer Britton then went to the address provided by Defendant on the intake form. The homeowner was not Defendant's sister, Defendant was not there, and the homeowner did not know Defendant.

"[O]nce the State present[s] competent evidence establishing [a] defendant's failure to comply with the terms of his probation, the burden [is] on [the] defendant to demonstrate through competent evidence his inability to comply with those terms." *State v. Trent*, 254 N.C. App. 809, 819, 803 S.E.2d 224, 231 (2017), *writ denied*, *review denied*, 370 N.C. 576, 809 S.E.2d 599 (2018). Defendant did not present any evidence at the probation violation hearing.

The evidence demonstrated that Defendant failed to provide accurate contact information, made his whereabouts unknown, failed to make himself available for supervision, actively avoided supervision, and knowingly failed to make contact with Officer Britton after release. Thus, the trial court did not abuse its discretion when it found that Defendant absconded and thereafter revoked Defendant's probation.

[2] Defendant further argues the trial court erred in revoking probation because the time period for the alleged violations had not expired. Specifically, Defendant alleges that the trial court erred in finding that he violated the following conditions of probation even though the time period had not yet expired: enrolling in a G.E.D. program, proof of paying child support, and proof of enrollment in a substance abuse program.

While Defendant was not required to complete any of these requirements as of the filing of the violation report, Defendant failed to provide any evidence that he was making progress, or any effort, towards enrolling in or satisfying these court-ordered requirements. Defendant admitted each of the violations in the violation report, and Defendant failed to present any evidence which demonstrated his failure to abide by valid terms and conditions of his probation was not willful. In addition, Defendant failed to produce any evidence that he had taken steps to begin complying with the terms and conditions of his probation. Therefore, the trial court did not err when it found that Defendant willfully violated each of the conditions as alleged in the violation report.

Further, the trial court specifically revoked Defendant's probation "for the willful violation of the condition that he not . . . abscond from supervision" pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a). The absconding violation is the only violation for which the trial court could and did revoke Defendant's probation. Defendant's argument that the trial court may have revoked his probation for his other violations is without merit. Accordingly, the trial court did not err because it properly revoked Defendant's probation "for the willful violation of the conditions that [he] not commit any criminal offense . . . or abscond from supervision."

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges ZACHARY and YOUNG concur.

STATE OF NORTH CAROLINA
v.
SHANIKA NICOLE MITCHELL, DEFENDANT

No. COA18-1163

Filed 18 February 2020

1. Evidence—Rule 602—third party testimony—defendant's knowledge of shooting—plain error analysis

In a murder prosecution, although testimony from a witness regarding whether defendant knew her brother planned to shoot the victim should not have been admitted due to a lack of foundation, the erroneous admission did not amount to plain error given the substantial other evidence, though circumstantial, of defendant's participation in the events that led to the shooting and which supported the State's theory that defendant conspired to murder the victim.

2. Evidence—Rule 701—inferential testimony—lack of foundation—plain error analysis

In a murder prosecution, although the admission of testimony from two witnesses—regarding whether defendant concealed evidence on her phone via use of an application to prevent the preservation of text messages—was erroneous due to the lack of a proper foundation that the opinions were rationally based on the witnesses' perception, the admissions did not amount to plain error where there was sufficient other evidence from which the jury could draw the same conclusion, along with other evidence of defendant's guilt.

3. Evidence—Rule 404(a)—victim's nonviolent character—not used for rebuttal—plain error analysis

In a murder prosecution, testimony regarding the victim's nonviolent character was erroneously admitted because it was not offered to rebut any evidence from defendant that the victim was the initial aggressor in the incident, or that defendant's brother shot the victim in self-defense. However, the admission did not amount to plain error given other evidence of defendant's guilt.

4. Conspiracy—multiple potential victims—single agreement—only one count permitted

In a murder prosecution, where the State presented evidence of only one agreement between conspirators (including defendant) to ambush two brothers at a particular time and location, defendant

could be convicted of only one charge of conspiracy to commit murder. Therefore, a second conspiracy conviction was vacated and the matter remanded for resentencing.

Judge BRYANT concurring in the result.

Appeal by Defendant from judgments entered 13 April 2018 by Judge Tanya T. Wallace in Bladen County Superior Court. Heard in the Court of Appeals 3 September 2019.

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

David Weiss for the Defendant.

BROOK, Judge.

Shanika Nicole Mitchell ("Defendant") appeals from judgments entered upon jury verdicts finding her guilty of first-degree murder under the first-degree felony murder rule, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder. Defendant alleges that the trial court committed plain error in admitting certain inferential testimony and character evidence, and that the evidence supported only one charge of conspiracy. We disagree that the trial court committed plain error. However, we vacate the second conspiracy conviction and remand for resentencing because the State's evidence supported only one agreement among co-conspirators.

I. Background

On 4 January 2016, Defendant was indicted on charges of first-degree murder, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder stemming from a shooting that occurred on 8 November 2015.[1]

In the instant case, the State presented evidence at trial that the November 2015 shooting stemmed from a 2013 dispute that involved

1. The facts of this case are set out more fully in the appeal to this Court by Defendant's brother from his convictions for first-degree murder, attempted first-degree murder, and conspiracy to commit first-degree murder, which arose from the same incident. *See State v. Mitchell*, ___ N.C. App. ___, 822 S.E.2d 327, 2019 WL 190153, at *1 (2019) (unpublished).

Defendant's brother, Montise Mitchell ("Mitchell"). In 2013, Mitchell was working at a Smithfield packing plant with Robert Council ("Robert"). Mitchell saw Robert talking to Mitchell's girlfriend. Mitchell waited for Robert in the parking lot one evening after work and started a fistfight. A few months later, Robert and his cousin Antwan Council ("Antwan") retaliated, starting a fistfight with Mitchell. After the 2013 incidents, the Council family had no contact with Mitchell until 2015.

On the afternoon of 8 November 2015, Mitchell dropped off Defendant and his girlfriend, D'Nazya Downing ("Downing"), at Defendant and Mitchell's home. Downing contacted Antwan to purchase marijuana. She and Defendant went to the home shared by Antwan and his brother Darrell Council ("Darrell"). While Darrell called someone to bring the marijuana, Defendant and Downing waited. Once the marijuana was delivered, Defendant and Downing left.

Then, between 5:00 and 5:30 p.m., Downing contacted Antwan about meeting to smoke the marijuana, and the brothers picked up Defendant and Downing. Accompanied by a friend of the Council brothers, Isiah Long ("Long"), the group returned to the brothers' house. They sat in the car as Defendant and Downing began texting Mitchell their whereabouts. Mitchell communicated with Defendant and Downing through a texting app. Defendant and Downing also texted each other while in the car. Soon thereafter, Mitchell texted Downing that he was going to shoot the brothers. Defendant, Downing, and Mitchell then began to text each other as to when the ambush would take place and to coordinate the location.

The text messages went back and forth between Defendant and Downing, with Downing informing Defendant of at least some portions of Mitchell's plan. Downing testified to the following exchange at trial. At 5:45 p.m., Downing texted:

> Downing: "Think [Mitchell] said gonna do it when they get ready to drop us off."
>
> Defendant: "Oh okay. Do it where??"
>
> Downing: "Idk [I don't know] you see any guns in here?"
>
> Defendant: "No."
>
> Defendant: "When [are] they drop[ping] us off? Where?"
>
> Downing: "At the house and [Mitchell] probably gonna be down the road somewhere, but I'm bout [sic] to see."

> Defendant: "We need to go yo [sic] way so they can sit in the cut somewhere."

At 6:53 p.m., Downing texted Defendant:

> "He told us don't leave yet and don't leave til [sic] about 7:40."
>
> Defendant: "I thought he said hurry up?"
>
> Downing: "He did[,] he said he ain't [sic] have all night, and I said [I] think [we] bout [sic] [to] be there in [a] few, and he said don't leave til [sic] like, 7:40."

Defendant, Downing, and the brothers sat in the car and smoked marijuana for another 40 minutes. At 7:29 p.m., Downing texted Defendant: "I think [Mitchell] [is] ready!!" Downing again texted Defendant: "[Mitchell] said just get dropped off [at your] house and when they leave from the house he gonna [sic] call us."

The brothers then drove Defendant and Downing to Defendant's house at Defendant and Downing's request. Once there, Defendant and Downing went inside. The brothers drove away. Within five minutes, Downing heard multiple gunshots. Darrell was shot and killed. Mitchell was later identified as a shooter.

Mitchell called Downing and told her and Defendant to come out of the house. Together, they drove to a Food Lion parking lot in Cameron, North Carolina, an hour away. Upon their arrival, family members picked up Defendant and Mitchell. Mitchell then deleted the texting app he had been using and destroyed his phone. Mitchell also asked Downing to destroy her phone, but Downing refused.

Detective Thomas Morgan Johnson of the Bladen County Sheriff's Office investigated the death of Darrell and issued warrants for the arrests of Defendant, Downing, and Mitchell. A month later, Defendant and Mitchell were discovered in a neighboring county and arrested for the murder of Darrell.

On 13 April 2018, Defendant was tried and convicted by a jury in Bladen County Superior Court of first-degree murder, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder.

Defendant was sentenced to life imprisonment with the possibility of parole for the first-degree murder conviction and sentenced to 125

to 162 months in prison for the attempted first-degree murder and conspiracy convictions. The trial court arrested judgment on the conviction for discharging a weapon into an occupied vehicle. Defendant appeals.

II. Analysis

Defendant contends that the trial court committed plain error by admitting (1) speculative testimony of Downing, (2) improper inferential testimony of Downing and Detective Johnson, and (3) improper character evidence of the victim's good character. After addressing the applicable standard of review, we consider each of these contentions in turn.

A. Standard of Review

Alleged evidentiary error to which a defendant does not object at trial may be reviewed only for plain error. *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (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 affects the fairness, integrity or public reputation of judicial proceedings[.]

Id. at 518, 723 S.E.2d at 334 (internal marks and citations omitted).

B. Testimony of Defendant's Knowledge of the Planned Shooting

[1] We first consider whether the admission of Downing's testimony that Defendant knew her brother planned to shoot the Council brothers was error. As we explain below, the admission of this testimony was error because the record reflects that it was outside Downing's personal knowledge. However, we hold that the erroneous admission of this testimony was not plain error because it did not have "a probable impact on the jury's finding that the defendant was guilty." *Id.*

North Carolina Rule of Evidence 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2019). Personal knowledge includes what a witness saw, *see generally State v. Tuck*, 173 N.C. App. 61, 69-70, 618 S.E.2d 265,

271-72 (2005) (witness had personal knowledge of robber by looking through his mask and personally observing him); what a witness heard, *see generally State v. Wright*, 151 N.C. App. 493, 496, 566 S.E.2d 151, 153-54 (2002) (witness had personal knowledge that victim was shot because witness heard the gunshot from an adjoining room); what a witness smelled, *see generally State v. Norman*, 213 N.C. App. 114, 119-20, 711 S.E.2d 849, 855 (2011) (testimony deemed proper where witness testified that defendant seemed impaired where, among other observations, witness testified to smelling the odor of alcohol on Defendant); what a witness feels, knows, or believes regarding his or her own mind, *see generally State v. Cole*, 147 N.C. App. 637, 645, 556 S.E.2d 666, 671 (2001) (witness had personal knowledge of how certain she was of her own testimony); and what a witness learns from other reliable sources, *see generally State v. Watson*, 179 N.C. App. 228, 245, 634 S.E.2d 231, 242 (2006) (witness investigator had personal knowledge that defendant did not have a brother by conducting research).

However, a lay witness generally may not testify as to the contents of another person's mind without providing a foundation to support that testimony. For example, testimony that a witness's wife was familiar with certain corporate financial records violated Rule 602 because the witness did not provide a foundation supporting the assertion. *Lee v. Lee*, 93 N.C. App. 584, 587, 378 S.E.2d 554, 556 (1989). Additionally, testimony that a defendant acted with a particular purpose, without establishing that the witness has personal knowledge of the defendant's purpose, violates Rule 602. *See State v. Harshaw*, 138 N.C. App. 657, 662, 532 S.E.2d 224, 227 (2000) (holding admission of testimony in violation of Rule 602 was not prejudicial, however, because other evidence at trial supported the State's theory of premeditation and deliberation).[2]

Defendant contends that two instances of Downing's testimony constituted inadmissible evidence under Rule 602. First, Downing testified that when she texted Defendant that Mitchell was "gonna do it when they get ready to drop us off[,]" she did not explain to Defendant what

2. Relatedly, under North Carolina Rule of Evidence 701 lay witnesses may not testify to their inferences unless based on their rational perceptions. N.C. Gen. Stat. § 8C-1, Rule 701 (2019). For example, testimony by a witness that her husband sold drugs out of a back bedroom and that the defendant went into the back bedroom with her husband has been held to constitute an inadequate factual foundation to support the witness's further testimony that the defendant bought drugs from her husband in the back bedroom where the witness did not observe the sale. *State v. Wilkerson*, 363 N.C. 382, 414-15, 683 S.E.2d 174, 194-95 (2009) (holding that admission of speculative testimony not prejudicial in light of other evidence against defendant).

"it" was because she "was aware just like I was . . . of the situation," referring to Mitchell's intent to shoot the Council brothers. Similarly, Defendant challenges the admission of Downing's affirmative response to the State's question "that both [Downing] and [Defendant] knew that [Mitchell] was going to shoot at Darrell and Antwan?"

Downing did not testify about the basis for her knowledge that Defendant was aware that Mitchell had planned a shooting. For example, she did not testify regarding any messages she saw between Mitchell and Defendant suggesting that Mitchell told Defendant the plan, nor did she testify regarding anything Defendant said that indicated that she was aware of the planned shooting. Without such foundation, Downing's testimony that Defendant "was aware just like [Downing] was" aware of the planned shooting was speculative and inadmissible under Rule 602.

Defendant asserts that, without this testimony, "the jury had little basis to conclude [Defendant] was aware the confrontation would be anything more than a fist fight between feuding young men"; we must consider whether the improper admission amounts to plain error. The evidence showed that Defendant was aware of and involved in the plan to ambush the Council brothers. Defendant concedes as much, contending that the evidence did not support a finding that Defendant was aware that the ambush *involved firearms*. Although Downing provided the only direct testimony that Defendant was aware Mitchell was planning a shooting—and not merely a fistfight—the State provided additional circumstantial evidence that Defendant assisted in planning and carrying out the ambush; that she knew her brother planned to shoot the Councils; and that she therefore "counseled or knowingly aided" the underlying felony, shooting into an occupied vehicle. As we explain below, the circumstantial evidence is sufficient to rebut Defendant's plain error argument.

First, the State presented evidence that Defendant was communicating with both Downing and Mitchell and that she had endeavored to hide these communications from the Council brothers and Long. The jury heard testimony that Defendant was using her phone to communicate with both Downing and Mitchell throughout the afternoon she spent with the Council brothers, and that she was holding her cellphone "real close to her body" and "hid[ing]" it in such a way that Antwan and Long could not see what she was communicating or with whom. While Downing was in the car with the Council brothers, she asked Defendant via text whether she saw any guns. Downing also texted Defendant, "Think [Mitchell] said gonna do it when they get ready to drop us off." Defendant did not ask Downing what "it" meant in reply; instead,

Defendant responded, "Oh okay. Do it where?[,]" whereupon Downing replied, "At the house and [Mitchell] probably gonna be down the road somewhere[.]" Defendant told Downing, "We need to go yo way so they can sit in the cut somewhere." Downing testified that she understood "in the cut" to mean that Mitchell would be hiding out to ambush the Council brothers when they passed in their car.

Second, the State presented additional evidence to support its theory that Defendant participated in the conspiracy both immediately before and immediately after her brother shot at the Council brothers. When the brothers dropped Defendant off at her house, Antwan testified that he knew something bad was going on when he told Defendant, "see you later" and she replied, "You ain't got to worry about that." Less than five minutes later, Mitchell shot at the Council brothers and killed Darrell. Shortly after Mitchell shot and killed Darrell, he met Downing and Defendant outside the house he shared with Defendant, and they drove to Cameron, North Carolina.

Finally, the State presented evidence supporting the jury's findings that not only was Defendant aware of and involved in a conspiracy to ambush the Council brothers, but also Defendant knew her brother planned to use a gun in the ambush. When Detective Johnson interviewed Defendant for the second time, on 10 November 2015, Defendant told him that, while Downing knew that the Council brothers would be shot, Defendant only knew that "something" was going to happen when she got to the Councils' house. Further, the jury heard testimony that Defendant knew that the Council brothers were going to drop her and Downing off by car, and that her brother would be hiding down the road. This evidence supports the narrative presented by the State that the jury chose to credit — that the planned ambush was more than merely the latest episode of fisticuffs between Mitchell and the Council brothers.

From this evidence, a jury could reasonably determine that Defendant "counseled or knowingly aided" the underlying felony, shooting into an occupied vehicle, by assisting in luring the Council brothers to the stakeout spot. We cannot say that Defendant has established that the jury probably would have reached a different result without considering Downing's speculative testimony. While Downing's testimony was speculative and its admission was error, we hold that its admission did not constitute plain error.

C. Testimony Regarding Cellphone Technology

[2] Defendant alleges that the trial court committed plain error when it permitted Downing and Detective Johnson "to testify, without

foundation, that [Defendant] concealed evidence using a smartphone texting app." As explained below, we agree that the admission of this testimony was error, but we hold that it did not rise to the level of plain error.

Rule 701 of the North Carolina Rules of Evidence provides that

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2019). When questioning calls for testimony based on opinion or inference, a foundation must first be laid that the testimony is rationally based on the lay witness's perception. *Matheson v. City of Asheville*, 102 N.C. App. 156, 174, 402 S.E.2d 140, 150 (1991) ("As there was no foundation showing that the opinion called for was rationally based on the witness's perception, the opinion was inadmissible."); *see also State v. Givens*, 95 N.C. App. 72, 79, 381 S.E.2d 869, 873 (1989) (holding admission of officer's testimony that "scales were common drug paraphernalia" violated Rule 701 because there was no showing in the record that the officer had "a basis of personal knowledge for his opinion.") (internal marks omitted).

Downing testified that she had seen Defendant use an application on her smartphone to text with her brother, Mitchell. The following exchange took place between the prosecutor and Downing at trial:

> [PROSECUTOR]: And, to your knowledge, if you're trying to hide communications, could you go through an app and it wouldn't show up on your cell phone records?
>
> [DOWNING]: Yes, sir.
>
> [PROSECUTOR]: So if [Defendant] was texting or if [Mitchell] was also texting [Defendant] and he did it on an app, then it wouldn't appear on these records? If they were trying to hide that conversation, it would appear on an app that you could get rid of?
>
> [DOWNING]: Yes, sir.
>
> [PROSECUTOR]: But your cell phone records, you can't get rid of those? Those are saved?

> [DOWNING]: Yes, sir.

Because of the leading nature of these questions, the State laid no foundation regarding how Downing was familiar with the data retention questions at issue. These affirmative responses require inferential leaps about what cellphone records contain, how the use of apps impacts cell phone records, and the effect deleting any particular app would have on the data that app contained. While there are myriad ways to rationally connect a witness's perceptions to his or her inferences, the State made no efforts to do so with Downing, instead simply asking leading questions. Without the required foundation, Downing's testimony about the cellphone technology and the records it generated was inadmissible.

Detective Johnson testified that he received certain cellphone data from Defendant's cellphone company, U.S. Cellular. He testified that he did not see any records of communications between Defendant and Mitchell on the date of the shooting. The following exchange then took place between the prosecutor and Detective Johnson:

> [PROSECUTOR]: And, to your knowledge, if you know, that network, that company only preserves texts that are sent on their network; is that right?
>
> [DET. JOHNSON]: That is correct.
>
> [PROSECUTOR]: So if a message is sent using an app or some third party, would U.S. Cellular have access to that?
>
> [DET. JOHNSON]: No, they would not.

As illustrated above, the foundation for Detective Johnson's testimony about U.S. Cellular's preservation policies and U.S. Cellular's ability to access messages sent using an app was inadequate. For example, the State did not establish that Detective Johnson had ever seen the cellphone records from this particular telecommunications company before conducting this investigation; that Detective Johnson knew how U.S. Cellular preserves its cellphone records; or that Detective Johnson had any knowledge about U.S. Cellular's ability to access data sent through an app or third party. The leading nature of these questions again prevented the State from laying the necessary foundation and, as such, Detective Johnson's above testimony was inadmissible.

Having concluded that the admission of the aforementioned portions of Downing's and Detective Johnson's testimony regarding Defendant's cellphone records were error, we turn to whether they amounted to plain error. The jury heard testimony from Downing that she knew Defendant

was communicating with Mitchell on her phone because Downing saw messages on Defendant's screen appear with Mitchell's name. The jury also heard testimony that Downing had observed Defendant communicate with Mitchell via a smartphone app and not through the normal text messaging function. The jury then heard Detective Johnson testify that Defendant's phone records revealed no communications between Defendant and Mitchell during the relevant time frame. Even excluding the inadmissible evidence offered by Downing and Detective Johnson, the jury was left to square the fact that they had heard testimony indicating Defendant was communicating with her brother via cellphone; that her brother had destroyed his cellphone; and that there were no records reflecting their communication. The jury could have resolved this tension in a manner disadvantageous to Defendant. Given the reasonable inferences arising from admissible testimony, along with the other evidence of guilt discussed more fully above, we cannot say that the jury probably would have reached a different result absent the inadmissible testimony.

D. Evidence of Victim's Good Character

[3] Defendant contends that "[t]he trial court committed plain error by admitting irrelevant testimony about the good character of the victim." We agree that the testimony was admitted in error, but we hold that it did not amount to plain error.

Rule 404(a) of the North Carolina Rules of Evidence provides that evidence of a person's character is generally not admissible to prove "that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2019). The Rule provides, however, that "[e]vidence of a pertinent trait of character of the victim of the crime" is admissible if "offered by an accused, or by the prosecution to rebut the same[.]" *Id.* § 8C-1, Rule 404(a)(2). The prosecution also may offer "evidence of a character trait of peacefulness of the victim in a homicide case to rebut evidence that the victim was the first aggressor[.]" *Id.*; *see also State v. Faison*, 330 N.C. 347, 354-55, 411 S.E.2d 143, 147 (1991).

Here, Defendant did not offer any evidence that Darrell was the first aggressor, that Mitchell acted in self-defense, or that Mitchell was in any way justified in shooting and killing Darrell. Regardless, the State introduced evidence through the testimony of Long that Darrell was kind, protective, and the kind of person who would "give you the clothes off his back." Long testified further that Darrell was part of a motorcycle club called "Bikes Up/Guns Down," which he testified was

> a movement, man. We'd rather see you on a dirt bike or a four-wheeler riding than have a pistol in your hand or somebody in the corner selling drugs, man. It was a movement to try to uplift the community to keep young black men and just young people in general out of the way, you know, out of *this* situation.

(Emphasis in original). He testified further that Darrell was "[n]onviolent."

This testimony was inadmissible under Rule 404(a)(2) because it was not offered to rebut any testimony offered by Defendant that Darrell was the first aggressor in the altercation between Mitchell and the Council brothers. We therefore conclude that the admission of this testimony was error.

However, the admission of evidence of the victim's nonviolent character did not rise to the level of plain error. Given the evidence consistent with Defendant's guilt discussed above, we cannot say that the jury probably would not have convicted Defendant had it not heard that Darrell was nonviolent.

E. Conspiracy

[4] Finally, Defendant argues, and the State concedes, that the trial court erred in allowing the jury to convict her of two counts of conspiracy. We agree.

"According to North Carolina law, a criminal conspiracy is an agreement by two or more persons to perform either an unlawful act or a lawful act in an unlawful manner." *State v. Wilson*, 106 N.C. App. 342, 345, 416 S.E.2d 603, 605 (1992). "To determine whether single or multiple conspiracies are involved, the essential question is the nature of the agreement or agreements, but factors such as time intervals, participants, objectives, and number of meetings all must be considered." *Id.* (internal marks and citation omitted). "When the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy." *State v. Medlin*, 86 N.C. App. 114, 121, 357 S.E.2d 174, 178 (1987) (emphasis in original).

Here, the evidence presented at trial established the existence of one agreement between Defendant, Downing, and Mitchell. Their agreement involved determining a location and a specific time for the ambush to occur. While the shooting involved two potential victims, the State did not present sufficient evidence of two separate agreements to support

the second conspiracy conviction. *See Mitchell*, ___ N.C. App. at ___, 822 S.E.2d at 327, 2019 WL 190153, at *3 ("Here, the evidence at trial only was sufficient to show a single agreement . . . that Mitchell conspired with D'Nazya Downing, Shanika Mitchell, and the second shooter to ambush and shoot Darrell and Antwan Council in their car.").

Therefore, we must vacate the second conspiracy conviction and remand for resentencing.

III. Conclusion

Even considering the above evidentiary errors cumulatively, we cannot say that they had a probable impact on the jury's findings. *See State v. Hembree*, 368 N.C. 2, 20, 770 S.E.2d 77, 89 (2015) (considering the cumulative prejudicial effect of errors at trial). While we hold that the admission of speculative testimony that Defendant knew of the planned shooting, the insufficiently supported inferences drawn by Downing and Detective Johnson, and the improper character evidence of the victim's peacefulness were error, we cannot conclude that the jury probably would have reached a different result absent this inadmissible testimony. Accordingly, we find no error in part, vacate in part, and remand for resentencing only.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE concurs.

Judge BRYANT concurs in the result.

STATE v. RICHARDSON

[270 N.C. App. 149 (2020)]

STATE OF NORTH CAROLINA
v.
ROBIN RENE RICHARDSON, DEFENDANT

No. COA19-627

Filed 18 February 2020

1. Appeal and Error—preservation of issues—jury instructions—language omitted by trial court—lack of objection

In a trial for voluntary manslaughter, defendant failed to preserve for appellate review an argument that the trial court erroneously omitted certain language from a requested jury instruction—since the trial court did not completely fail to give the instruction, defendant was required to object to the instruction as given. However, since defendant distinctly argued that the instruction amounted to plain error, appellate review of defendant's challenge to the instruction could be reviewed for plain error.

2. Homicide—voluntary manslaughter—jury instructions—omission from pattern instruction—plain error analysis

The trial court's omission of language from the pattern jury instruction on voluntary manslaughter—regarding the use of excessive force—in its final mandate to the jury did not amount to plain error where the trial court correctly included similar language in other parts of the jury charge. Taken as a whole, the instructions accurately stated that the State carried the burden of proving every element of voluntary manslaughter beyond a reasonable doubt.

Appeal by Defendant from judgment entered 24 January 2019 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak and Assistant Solicitor General Nicholas S. Brod, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty of voluntary manslaughter. Defendant argues that the trial court reversibly erred by omitting certain verbiage from the final mandate of its charge of voluntary manslaughter. Although the trial court erred, the trial court's instructions, read as a whole, adequately presented the law of voluntary manslaughter fairly and clearly to the jury. We thus discern no reversible error.

I. Procedural History

Defendant Robin Rene Richardson was indicted on 1 February 2016 for the first-degree murder of Timothy Lee Fry. The case came on for trial on 14 January 2019. On 24 January 2019, a jury returned a verdict of guilty of voluntary manslaughter. Defendant was sentenced to 73-100 months' imprisonment. Defendant gave notice of appeal in open court.

II. Factual Background

At trial, the evidence tended to show the following: Defendant and her boyfriend, Timothy Lee Fry, met in August of 2012 and moved into a house together a few months later. At first their relationship was good, but it started to deteriorate after about a year. Fry was peculiarly fastidious about the organization and cleanliness of their home and "it got to where [Fry] really had a need to have everything just perfect in the household." Defendant testified that Fry verbally and physically abused her. Fry did not approve of Defendant's smoking habit and told her she was getting too fat. Fry would choke her, pull her hair, and push her face.

Fry was a gun enthusiast who kept loaded guns around the house. He would take them out, load and unload them, and point the laser sight at different things. He pointed the laser sight at Defendant's forehead and chest, which scared her. The abuse also included repeated instances where Fry would coerce Defendant into engaging in sexual activity with him and other, older men. Defendant suffered from depression and, at one point, attempted suicide.

On 11 December 2015, Defendant returned home from work to find Fry in their basement. Three guns were also in the basement—two handguns and a 12-gauge shotgun. Fry asked Defendant to go with him to South Carolina to have sex with an older man. Defendant refused. She testified that Fry held a handgun to her chest, acted like he was pulling the trigger, and told her he would kill her if she did not go with him.

Defendant left the basement and went upstairs. When she returned to the basement, Fry was standing behind a couch, folding laundry. Defendant testified:

> He told me I am going to South Carolina, and he was making the reservations and he was calling me names. Then he told me that he was going to kill me if I didn't go. He reached over and grabbed where the gun was and he started towards me[.]

Defendant testified that she grabbed a shotgun that was up against the bathroom wall and "and started firing. The closer he came, the more I would shoot because he wouldn't stop, he just kept coming towards me." Defendant fired five rounds, hitting Fry four times. Two shots entered Fry's chest. Another two entered through Fry's left arm and armpit, traveling through his left lung and fracturing five ribs. Each shot required Defendant to reload or "rack" the shotgun. After each shot, she had to pull back on the shotgun's slide to load a new shell into the chamber, push the slide forward, and then pull the trigger.

The State's forensic pathologist testified that any one of the shots would have been enough to incapacitate and kill Fry. Three bullet holes from the shotgun's slugs were found in the carpet underneath Fry's body, suggesting that he was on the ground when Richardson shot him. Each of the four bullet wounds had a downward trajectory.

After she shot Fry, Defendant called 911 and told the operator that she had shot her boyfriend. Fry was pronounced dead shortly after paramedics arrived on the scene.

After a four-day trial, the trial court held a jury charge conference. During the conference, Defendant asked the trial court to instruct the jury with North Carolina Pattern Jury Instruction 206.10, which provides model instructions for first-degree murder, its lesser included offenses, and self-defense. The trial court agreed. The trial court also agreed to Defendant's request to omit from the pattern instruction any instructions about the aggressor doctrine. The State pointed out that there was no evidence to support an involuntary manslaughter instruction.

The trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, self-defense, voluntary intoxication, and diminished mental capacity. In giving the final mandate on voluntary manslaughter, the trial court omitted certain verbiage. After excusing the jury to commence its deliberations, the trial court asked, "[Does the] State have any additions or corrections or modifications to

the jury instructions?" The State answered, "No, sir." The trial court then asked, "Defendant?" Defendant responded, "No, Your Honor." The trial court thus announced, "Okay, very well. We will be at ease in this case."

III. Discussion

Defendant's sole argument on appeal is that the trial court reversibly erred by omitting certain verbiage from the final mandate on voluntary manslaughter when the trial court charged the jury.

A. Preservation and Standard of Review

[1] We first determine to what extent Defendant preserved this issue for our review.

Defendant argues that this issue is preserved for review, even though she did not object to the erroneous instruction before the trial court, because she requested at the charge conference that the trial court instruct the jury using N.C.P.I.—Crim. 206.10 and the trial court agreed to do so, but the trial court failed to accurately give the instruction.

Where a defendant has properly preserved her challenge to jury instructions, an appellate court reviews the 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). On appeal, a defendant is required not only to show that a challenged jury instruction was erroneous, but also that such error prejudiced the defendant. N.C. Gen. Stat. § 15A-1442(4)(d) (2019). "A defendant is prejudiced . . . 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." N.C. Gen. Stat. § 15A-1443(a) (2019).

The State argues this issue is only reviewable for plain error because Defendant did not object to the voluntary manslaughter instruction before the trial court.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation

> of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original)).

Pursuant to our Rules of Appellate Procedure:

> A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C. R. App. P. 10(a)(2).

However, our Supreme Court has recently stated, specifically on the issue of a self-defense instruction, as follows:

> Though the trial court here agreed to instruct the jury on self-defense under N.C.P.I.—Crim. 206.10, it omitted the "no duty to retreat" language of N.C.P.I.—Crim. 206.10 without notice to the parties and did not give any part of N.C.P.I.—Crim. 308.10, the "stand-your-ground" instruction. . . . The State nonetheless contends that defendant did not object to the instruction as given, thereby failing to preserve the error below and rendering his appeal subject to plain error review only.
>
> *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.*
>
> > [A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

> *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). Because the trial court here agreed to instruct the jury in accordance with N.C.P.I.—Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review under [N.C. Gen. Stat.] § 15A-1443(a).

State v. Lee, 370 N.C. 671, 675-76, 811 S.E.2d 563, 567 (2018) (emphasis and brackets added).

In *Ross*, upon which the *Lee* Court relied, "defendant requested, and the trial judge indicated he would give, a jury instruction concerning defendant's decision not to testify in his own defense at trial. Yet, . . . the trial judge neglected to give the requested and promised jury instruction." *Ross*, 322 N.C. at 264, 367 S.E.2d at 891. This Court "note[d] at the outset that the trial judge's failure to give the requested and promised instruction [was] properly before [the Court] on appeal despite defendant's failure to object prior to the commencement of the jury's deliberation[,]" despite defendant's "fail[ure] to embrace a final, explicit opportunity provided by the trial judge for remaining comments on the jury instructions[,]" and notwithstanding the fact that "Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that no party may assign as error any portion of the jury charge or omission therefrom unless he enters an objection before the jury retires to consider its verdict." *Id.* at 264-65, 367 S.E.2d at 891.

In concluding that defendant's issue was properly preserved for review, the Court relied upon the then-recent case of *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), in which it "held that a request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions." *Ross*, 322 N.C. at 265, 367 S.E.2d at 891.

In *Pakulski*, "[d]uring the instruction conference, defense counsel asked the court to give the pattern instruction on prior inconsistent statements (N.C.P.I.—Crim. 105.20)." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 327. "The judge then stated, 'If I overlook that, call it to my attention. I don't think I will.' " *Id.* "The court never gave the requested instruction" and "the omission was not called to the court's attention prior to jury deliberations." *Id.* The Court concluded that the issue was preserved for review under N.C. Gen. Stat. § 15A-1443 because "defense counsel

complied with the spirit of Appellate Rule 10(b)(2)" by "request[ing] an instruction on impeaching a witness with a prior inconsistent statement." *Id.* at 575, 356 S.E.2d at 327.

In *Lee*, *Ross*, and *Pakulski*, the error our Supreme Court determined to be preserved under Appellate Rule 10 solely by defendant's request for a specific jury instruction was the trial court's complete failure to give the requested jury instruction. Accordingly, when a trial court agrees to give a requested instruction, an "erroneous deviation from that instruction" occurs when the trial court fails to give the requested instruction. *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. Thus, under *Lee*, it is the trial court's failure to give the agreed-upon instruction that is "preserved for appellate review without further request or objection." *Id.*; *see State v. Gordon*, 104 N.C. App. 455, 458, 410 S.E.2d 4, 7 (1991) (Defendant's challenge to the manner in which the trial court instructed the jury on self-defense was not preserved by her request for the self-defense instruction, and the trial court's indication that it would give the pattern instruction, because a defendant's request for a pattern instruction preserves a challenge only to "the failure of the trial judge to give [that] instruction at all.").

Here, Defendant requested that the trial court instruct the jury pursuant to N.C.P.I.—Crim. 206.10, which includes the relevant provision on voluntary manslaughter. The trial court agreed to instruct the jury accordingly. The trial court instructed the jury pursuant to N.C.P.I.—Crim. 206.10, including instructing on voluntary manslaughter. However, the trial court omitted certain verbiage from the instruction when giving the final mandate to the jury on voluntary manslaughter. As the trial court did not completely fail to give the agreed-upon instruction, Defendant's argument that the trial court erroneously delivered the mandate was not "preserved for appellate review without further request or objection." *Lee*, 370 N.C. at 676, 811 S.E.2d at 567. As Defendant did not object when the instruction was given, and "failed to embrace a final, explicit opportunity provided by the trial judge for remaining comments on the jury instructions," *Ross*, 322 N.C. at 264, 367 S.E.2d at 891, Defendant has failed to preserve this issue for review under N.C. Gen. Stat. § 15A-1443.

However, Defendant, in an alternative argument, "specifically and distinctly" contended the trial court's erroneous jury instruction amounted to plain error. Thus, we may analyze the issue for plain error. N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). We nevertheless

note that, under both the review described in N.C. Gen. Stat. § 15A-1443 and plain error review, Defendant has failed to show reversible error.

B. Analysis

[2] "When analyzing jury instructions, we must read the trial court's charge as a whole." *State v. Fowler*, 353 N.C. 599, 624, 548 S.E.2d 684, 701 (2001). "We construe the jury charge contextually and will not hold a portion of the charge prejudicial if the charge as a whole is correct." *Id.* "If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal." *State v. McWilliams*, 277 N.C. 680, 685, 178 S.E.2d 476, 479 (1971) (citation omitted).

The trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, self-defense, voluntary intoxication, and diminished mental capacity. Near the beginning of the charge, the trial court instructed, "The State must prove to you that the defendant is guilty beyond a reasonable doubt." After instructing the jury on the definition of each theory of guilt and of self-defense, the trial court then specifically instructed, "The defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense and did not use excessive force under the circumstances." Later in the charge, the trial court instructed the jury as follows:

> If the State 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 State proves that the defendant used excessive force.

After instructing the jury on the elements of first-degree murder and second-degree murder, the trial court instructed the jury on the elements of voluntary manslaughter, as follows:

> For you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt: first, that the defendant killed the victim by an intentional and unlawful act; second, that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred. And third, that the defendant did not act in self-defense, or though acting in self-defense used excessive force. Voluntary manslaughter is also committed if the defendant kills in self-defense but uses excessive force.

> The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense; however, if the State proves beyond a reasonable doubt that defendant, though otherwise acting in self-defense, used excessive force, the defendant would be guilty of voluntary manslaughter.

This instruction accurately followed N.C.P.I.—Crim. 206.10, for voluntary manslaughter. However, in its final mandate for voluntary manslaughter, the trial court instructed the jury as follows:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the alleged victim with a deadly weapon and thereby proximately caused the alleged victim's death, it would be your duty to find the defendant guilty of voluntary manslaughter, even if the State has failed to prove that the defendant did not act in self-defense.

As the State concedes, this instruction was erroneous. Pursuant to N.C.P.I.—Crim. 206.10, the instruction should have been given as follows:

> 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 voluntary manslaughter even if the State has failed to prove that the defendant did not act in self-defense.

N.C.P.I.—Crim. 206.10 (2018) (emphasis added).

Shortly after the erroneous instruction, the trial court instructed the jury as follows:

> And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense or that the defendant used excessive force, then the defendant's action would be justified by self-defense, and therefore, it would be your duty to return a verdict of not guilty.

Although the trial court erroneously omitted the verbiage "*and that the defendant . . . used excessive force*" from the voluntary manslaughter

final mandate, the trial court correctly instructed the jury on three separate occasions during the charge on the State's burden to prove Defendant's use of excessive force for the jury to find Defendant guilty of voluntary manslaughter. Moreover, on two other occasions during the charge, including once after the erroneous voluntary manslaughter final mandate was given, the trial court correctly instructed the jury that it should return a verdict of not guilty if defendant acted in self-defense and did not use excessive force. We thus conclude that the trial court's instructions, read as a whole, adequately presented the law of voluntary manslaughter fairly and clearly to the jury, and the isolated mistake, standing alone, affords no ground for reversal. *McWilliams*, 277 N.C. at 685, 178 S.E.2d at 479.

The trial court's error is similar to the one made in *State v. Baker*, 338 N.C. 526, 564, 451 S.E.2d 574, 597 (1994). In *Baker*, the trial court properly instructed the jury on the State's burden of proof for the charges of murder, common law robbery, and first-degree kidnapping. *Id.* at 564-65, 451 S.E.2d at 597. However, after instructing the jury properly on the kidnapping charge, the trial court concluded as follows: "However, 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 *guilty*." *Id.* at 564, 451 S.E.2d at 597 (emphasis added).

Our Supreme Court concluded this error was not prejudicial, explaining that

> [t]his Court has repeatedly held that a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction. In the instant case, the trial court repeatedly instructed the jury that the State had the burden of proving defendant was guilty beyond a reasonable doubt. The court also instructed that "[a]fter weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." In addition, in its instructions on murder and common-law robbery, the court stated that if the jurors did not find each element had been shown, it would be their duty to return a verdict of not guilty. Reading the charge in its entirety, we are convinced the jurors could not have been misled by the omission complained of.

Id. at 565, 451 S.E.2d at 597 (internal citation omitted).

As in *Baker*, the trial court here repeatedly instructed the jury that the State had the burden of proving Defendant was guilty beyond a reasonable doubt, including when it instructed in detail on voluntary manslaughter, and emphasized that, if the jury did not find each element of the charge had been proven beyond a reasonable doubt, it must find Defendant not guilty. Thus, as in *Baker*, when "[r]eading the charge in its entirety, we are convinced the jurors could not have been misled by the omission complained of." *Id.*

The facts of the present case are distinguishable from those in *State v. Hunt*, 192 N.C. App. 268, 664 S.E.2d 662 (2008).[1] In *Hunt*, the trial court properly instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. *Id.* at 270, 664 S.E.2d at 664. However, the instruction on voluntary manslaughter included the following misstatement:

> Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that he acted with malice. If the *defendant* fails to meet this burden, the defendant can be guilty of no more than voluntary manslaughter.

Id. at 271, 664 S.E.2d at 664 (emphasis added). Although the trial court first properly instructed the jury that the burden of proof was on the State, it incorrectly instructed the jury in the next sentence that the burden was on the defendant. *Id.*

"Shortly after deliberation began, the jury returned to the court and requested 'a list of requirements for [second] [d]egree [m]urder and [two] [m]anslaughters.' " *Id.* (alterations in original).

> The trial judge asked the court reporter to type up the original oral instructions as to those charges and give each juror a copy of the instructions. The instructions given to the jury included the misstatement on the instruction of voluntary manslaughter. The jury ultimately convicted defendant of second[-]degree murder.

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1. Defendant relies on *State v. Hamilton*, No. COA14-1005, 2015 N.C. App. LEXIS 181 at *1 (N.C. Ct. App. 2015) (unpublished), in support of her argument that the erroneous instruction was reversible error. "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs . . . in the trial and appellate divisions is disfavored[.]" N.C. R. App. P. 30(e)(3). As *Hunt* has similar facts and a similar analysis to *Hamilton*, we distinguish the case before us from *Hunt*.

Id. On appeal, this Court was "unable to conclude that the instructional error did not have a probable impact on the jury's finding of guilt[,]" explaining,

> [t]his is not a case with a singular misstatement where the trial court repeatedly instructed the jury that the State had the burden of proving that defendant was guilty beyond a reasonable doubt. Nor is this a case where the trial court made a misstatement of law which was preceded by several correct instructions. Instead, the trial court made a misstatement as to the burden of proof for the voluntary manslaughter charge and then provided that same misstatement to the jury in writing, along with the correct second[-]degree murder and involuntary manslaughter charges.

Id. (internal quotation marks and citations omitted).

Unlike the instructions in *Hunt*, the instructions at issue in this case included a "singular misstatement," *id.*, after the trial court repeatedly instructed the jury that the burden of proof was on the State to prove every element of the charge beyond a reasonable doubt. Moreover, the record before this Court does not indicate that the trial court provided the misstatement to the jury in writing. Although the trial court indicated that it would give the jurors a copy of the instructions for their deliberations, it is apparent from the transcript, and Defendant does not argue otherwise,[2] that the trial court intended to give jurors a copy of the written instructions as agreed upon by the parties, not a copy of the transcribed oral instructions given in the jury charge. *Hunt* is distinguishable, and we are bound by *Baker*.

IV. Conclusion

The trial court's instructions, read as a whole, adequately presented the law of voluntary manslaughter fairly and clearly to the jury. We thus discern no plain error.

NO PLAIN ERROR.

Judges ARROWOOD and HAMPSON concur.

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2. The record does not contain a copy of the jury instructions provided to the jurors. "The record on appeal in criminal actions shall contain . . . copies of all other papers filed . . . in the trial courts which are necessary for an understanding of all issues presented on appeal[. . . .]" N.C. R. App. P. 9(a)(3)(i). "It is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644-45 (1983).

THOMAS C. WETHERINGTON, PETITIONER
v.
NC DEPARTMENT OF PUBLIC SAFETY, NC HIGHWAY PATROL, RESPONDENT

No. COA18-1018

Filed 18 February 2020

Police Officers—dismissal of highway trooper—untruthfulness—consideration of necessary factors

In upholding the dismissal of a highway trooper for making untruthful statements about the loss of a hat, the Administrative Law Judge (ALJ) failed to appropriately address all of the factors deemed by the Supreme Court in *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583 (2015), as a necessary part of determining whether to impose discipline on a career state employee for unacceptable personal conduct. Although the ALJ did address some of the factors, his conclusory reasoning echoed the per se rule previously rejected by the Supreme Court, and overlooked the mitigating nature of some of the factors. The matter was reversed and remanded to the Office of Administrative Hearings to order appropriate discipline, short of dismissal, to reinstate the trooper to his position, and to grant relief pursuant to N.C.G.S. § 126-34.02.

Appeal by petitioner from order entered 17 May 2018 by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 7 August 2019.

The McGuinness Law Firm, by J. Michael McGuinness; Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tammera S. Hill, for respondent-appellee.

Milliken Law, by Megan A. Milliken, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

Crabbe, Brown & James, LLP, by Larry H. James and Christopher R. Green, for National Fraternal Order of Police; Essex Richards, P.A., by Norris A. Adams, II, for North Carolina Fraternal Order of Police, amici curiae.

Edelstein & Payne, by M. Travis Payne, for the Professional Fire Fighters and Paramedics of North Carolina, amicus curiae.

Tin, Fulton, Walker & Owen, PLLC, by John W. Gresham, for the National Association of Police Organizations, amicus curiae.

STROUD, Judge.

It is unlikely so many lawyers have ever before written so many pages because of a lost hat. True, hats have caused serious problems in prior cases. Once a street car passenger was blinded in one eye by a hat thrown by a man quarreling with others.[1] Lost and misplaced hats have been important bits of evidence in quite a few murder and other felony cases.[2] People have suffered serious injuries trying to catch a hat.[3] As in those cases, the real issue here is far more serious than an errant hat, but that is where it started. Up to this point, this case includes over 1,000 pages of evidence, testimony, briefs, and rulings from courts, from the agency level to the Supreme Court and back to this Court for a second time. But we agree with Respondent, this matter is not just about a hat. It is about the tension between the statutorily protected rights of a law enforcement officer and proper discipline to protect the integrity and reliability of the North Carolina State Highway Patrol.

This case began in 2009 when Petitioner Wetherington, then a trooper with the North Carolina State Highway Patrol, misplaced his hat during a traffic stop; he then lied about how he lost his hat, which was later recovered, mostly intact. Respondent terminated Petitioner's employment as a trooper based upon its "per se" rule that any untruthfulness by a state trooper is unacceptable personal conduct and just cause for dismissal. *See* N.C. Gen. Stat. § 126-35 (2017). In the first round of appellate review, the North Carolina Supreme Court concluded, "Colonel Glover's use of a rule requiring dismissal for all violations of the Patrol's truthfulness policy was an error of law," and remanded for Respondent to make a decision on the proper legal basis "as to whether petitioner should be

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1. *Giblett v. Garrison*, 232 N.Y. 618, 134 N.E. 595 (1922).

2. *Sulie v. Duckworth*, 743 F. Supp. 592, 598 (N.D. Ind. 1988), *aff'd*, 908 F.2d 975 (7th Cir. 1990); *Johnson v. State*, 289 Ga. 106, 709 S.E.2d 768 (2011); *Bower v. State*, 5 Mo. 364 (1838); *People v. Baker*, 27 A.D. 597, 50 N.Y.S. 771, (N.Y. App. Div. 1898); *Thomas v. State*, 171 Tex. Crim. 54, 344 S.W.2d 453 (1961);*Wilson v. State*, 63 Tex. Crim. 81, 138 S.W. 409 (1911); *Nelson v. State*, 52 Wis. 534, 9 N.W. 388 (1881).

3. *Rosenberg v. Durfree*, 87 Cal. 545, 26 P. 793 (1891); *Gulf, C. & S.F. Ry. Co. v. Newson*, 45 Tex. Civ. App. 562, 102 S.W. 450 (1907).

dismissed based upon the facts and circumstances and without the application of a per se rule." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 593, 780 S.E.2d 543, 548 (2015) (hereinafter *Wetherington I*), *aff'd as modified*, 231 N.C. App. 503, 752 S.E.2d 511 (2013). In 2015 on remand, based upon the same evidence and facts, Respondent again determined Petitioner engaged in unacceptable personal conduct and there was just cause for his dismissal. Because Respondent failed to consider the factors as directed by the Supreme Court on remand, we again reverse and conclude as a matter of law, on *de novo* review, that Petitioner's unacceptable personal conduct was not just cause for dismissal. In accord with North Carolina General Statute § 126-34.02(a), we remand to the Office of Administrative Hearings for entry of a new order imposing some disciplinary action short of dismissal and reinstating Petitioner to the position from which he was removed.

I. Background

The full factual and procedural history of this case leading up to remand can be found in *Wetherington I*, 368 N.C. 583, 780 S.E.2d 543. By the time of remand from the Supreme Court, Colonel Randy Glover, who had originally terminated Petitioner's employment, had retired. In March 2013, Colonel William Grey became the Commander of the North Carolina State Highway Patrol responsible for considering the appropriate discipline for Petitioner's violation of the truthfulness policy on 28 March 2009. Col. Grey did not provide notice or a pre-dismissal conference to Petitioner, and he reviewed the existing record. On 20 May 2016, Col. Grey sent a termination letter to Petitioner. The letter states:

> Pursuant to the decision of the North Carolina Supreme Court filed on 18 December 2015, this case has been remanded back to the North Carolina Highway Patrol for me to determine, based upon the facts and circumstances of this case, whether you should be dismissed from the Highway Patrol, as previously determined by Colonel Glover, or whether you should be reinstated.
>
> This letter serves as notification of my decision to uphold your dismissal. My decision is based on my review of the Report of Investigation and attached documents, my viewing of the video recording of your interview with Internal Affairs and the evidence presented by you during your pre-dismissal conference.
>
> This case has been remanded for me to review based on a determination that Colonel Glover's earlier decision to

dismiss you from the Highway Patrol was premised on a "misapprehension of the law, namely that he had no discretion over the range of discipline he could administer." Accordingly, I review this case with an open mind and with the full understanding that the range of discipline to be administered, if any, is within my discretion and based on the unique facts and circumstances of your case.

Your dismissal was based on evidence that you provided contradictory statements about an incident in which you lost your campaign hat during a traffic stop, thereby violating the Highway Patrol's truthfulness policy. That policy, at all relevant times, stated, in pertinent part: "Members shall be truthful and complete in all written and oral communications, reports, and testimony. No member shall willfully report any inaccurate, false, improper, or misleading information."

. . . .

Consistent with the mandate of the North Carolina Supreme Court, I have reviewed the record with the understanding that I have discretion in determining what, if any, level of punishment is most appropriate based on the facts and circumstances of this case. I have considered the entire range of disciplinary actions available under state law. In that regard, I have taken into consideration the fact that you had been employed by the Highway Patrol as a Cadet and as a State Trooper from June 2007 until the time of your dismissal on August 4, 2009 that you did not have any disciplinary actions prior to the time of your dismissal and that your overall performance rating and work history since being sworn as a Trooper in November 2007 was "Good."

I am also mindful that, pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), prosecutors have constitutional obligation to disclose evidence favorable to the defendant. "Favorable evidence" includes evidence that is exculpatory as well as information that could be used to impeach the testimony of a prosecution witness. *Giglio v. U.S.*, 405 U.S. 150 (1972). Consistent with this Constitutional obligation, law enforcement agencies have a duty to disclose information to prosecutors, including a summary of Internal Affairs findings

and other applicable conduct that bears on the credibility of any witness who may testify. In federal court, the United States Attorney, in each of the three North Carolina districts, routinely requires the Highway Patrol to disclose, in writing, potential *Giglio* issues for each and every case in which a Trooper may testify. Several District Attorneys have adopted similar policies based on an understanding that the credibility of the judicial system rests on the foundation that public servants possess integrity that is beyond reproach and can be trusted to testify truthfully in every case. Despite these Constitutional concerns, I understand that not every violation of the Highway Patrol's truthfulness policy warrants dismissal.

Based upon the facts and circumstances of this case, as described above, I have no confidence that you can be trusted to be truthful to your supervisors or even to testify truthfully in court or at administrative hearings. Given that you were willing to fabricate and maintain a lie about such an insignificant fact as losing a campaign cover[4] as part of an attempt to cover up the fact that you did not wear it during an enforcement contact, I have no confidence that you would not alter material facts in court in an attempt to avoid evidence from being suppressed or for the purpose of obtaining a conviction. Even if my confidence in your ability to testify truthfully had not been lost, your ability to perform the essential job functions of a Trooper is reparably limited due to the Highway Patrol's duty to disclose details of the internal investigation to prosecutors, as discussed above. If you were to return to duty with the Highway Patrol I could not, in good conscience, assign you to any position where you may potentially have to issue a citation, make an arrest or testify in a court of law or administrative proceeding. There are no Trooper positions available within the Highway Patrol that do not include these essential job functions, accordingly, any assignment would compromise the integrity of the Highway Patrol and the ability of the State to put on credible evidence to prosecute its cases.

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4. Campaign cover is another term for the official hat worn by State Highway Patrol troopers.

> For the above-stated reasons, I do not find any level of discipline, short of dismissal, to be appropriate in your case. Your violation of the Highway Patrol's truthfulness policy, while over a trivial matter, does not negate the fact that your false story was created by you with premeditation and deliberation to lie to your supervisor and you continued to lie to your supervisor for a period of weeks and only decided to tell the truth after being confronted with compelling evidence that your story was untruthful. Additionally, there was no coercion, no trickery and no other mitigating circumstance present to mitigate or even explain your misconduct. Instead, the evidence shows that your fabricated an elaborate story merely because you were afraid you would possibly be reprimanded for leaving your patrol vehicle without your cover. As indicated above, I simply have no confidence that, if allowed to return to the Highway Patrol, you can be trusted to testify truthfully and having considered all mitigating factors and lesser levels of discipline, I have concluded that the appropriate level of discipline in this case is Dismissal from the North Carolina Highway Patrol.
>
> The obligations outlined above under *Brady* and *Giglio*, as well as the high standards expected of each member of the Highway Patrol, preclude me, in my capacity as Patrol Commander, from ever allowing you to testify in court as a representative of the Highway Patrol. Therefore it is my decision to uphold your dismissal.

Petitioner received a final agency decision from Frank Perry, Secretary of the North Carolina Department of Public Safety, by a letter dated 31 August 2016. The letter stated the North Carolina Department of Public Safety Employee Advisory Committee convened and upheld his dismissal for the same reasons as stated in Col. Grey's letter. Having exhausted his administrative remedies for a second time, Petitioner filed a second contested case petition with the Office of Administrative Hearings ("OAH") to challenge his termination. Petitioner filed motions for judgment as a matter of law, for judgment on the pleadings, and for summary judgment. These were all denied by Administrative Law Judge Donald W. Overby. A contested case hearing was held on 29-30 January 2018 before ALJ Overby.

At the 2018 hearing, all of the exhibits and testimony from the 2009 hearing were admitted. The only new witnesses were Melvin Tucker, an

expert witness for Petitioner, and Col. Grey, who testified regarding his decision-making process after remand from the Supreme Court.[5] Col. Grey testified that he did not draft or prepare Petitioner's termination letter. Col. Grey also testified that he did not review the Supreme Court's decision or this Court's prior decision before making his determination regarding Petitioner's termination:

> Q. Okay. Now, at that point -- well, I would presume that you would have been provided the supreme court decision that, sort of, dumped this back in your lap?
>
> A. I never saw the supreme court decision.
>
> Q. Oh.
>
> A. I didn't review it.
>
> Q. Okay. All right.· Did anyone provide you the court of appeals decision in the case right before it reached the supreme court?
>
> A. And I don't know -- I do -- I saw the OAH information, but I don't know that -- you know, I don't recall reviewing the court of appeals stuff.

Col. Grey was asked about this again on cross examination:

> Q. Colonel, you did share with us earlier that you did not read the supreme court decision; but didn't you become aware through some source that the entire court of appeals and the superior court found there was no just cause for Trooper Wetherington's termination?
>
> MS. HILL: Objection.
>
> BY MR. MCGUINNESS:
>
> Q. Did you become aware of that?
>
> THE COURT: Overruled.
>
> THE WITNESS: I did. At some point I understood that, I think, correct me if I'm wrong, Mr. McGuinness, that OAH was in favor of the organization, superior court and court the appeals was in favor of Mr. Wetherington, and the supreme court remanded it back to the agency. Am I right?

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5. At the time of the hearing, Col. Grey had been retired from the Highway Patrol for approximately one year.

BY MR. MCGUINNESS:

Q. I believe you are. And I guess it just makes me curious as to why in light of the history of the case and the concerns that you've articulated that -- that you didn't get into the supreme court decision and see what particular factors that they thought was most important, not myself or Miss Hill, but the supreme court. In your, obviously, your course of actions, but you chose not to get into that, apparently?

A. That's correct.

In an order entered 17 May 2018, ALJ Overby conducted *de novo* review of whether just cause existed for Petitioner's termination and affirmed the decision to terminate Petitioner concluding in part:

> 38. Whether just cause existed for disciplinary action against a career status State employee is a question of law, to be reviewed de novo. In conducting that review, this Court owes no deference to DPS's just cause decision or its reasoning therefore and is free to substitute its judgment for that of the agency on whether just cause exists for the disciplinary action taken against the employee.
>
> 39. Respondent met its burden of proof and established by substantial evidence that it had just cause to dismiss Petitioner from employment with the State Highway Patrol for unacceptable personal conduct.
>
> 40. The Respondent has not exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; and has not failed to act as required by law or rule.

(Citations omitted.) Petitioner timely appealed to this Court.

II. Preliminary Procedural Issues

We first note that during the long pendency of this case, the procedure for this appeal has changed.

A. Jurisdiction

The appeal process under North Carolina General Statute Chapter 126, Article 8 for Petitioner's case changed as of 21 August 2013, when amendments to North Carolina General Statute Chapter § 126-34.02 became effective.

> Once a final agency decision is issued, a potential, current, or former State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02 (2015). As relevant to the present case, N.C. Gen. Stat. § 126-34.02(a) provides:
>
> > (a) [A] former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. . . . In deciding cases under this section, the [ALJ] may grant the following relief:
> >
> > > (1) Reinstate any employee to the position from which the employee has been removed.
> > >
> > > (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
> > >
> > > (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.
>
> One of the issues, which may be heard as a contested case under this statute, is whether just cause existed for dismissal, demotion, or suspension. As here, "[a] career State employee may allege that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause." N.C. Gen. Stat. § 126-34.02(b)(3). In such cases, "the burden of showing that a career State employee was discharged, demoted, or suspended for just cause rests with the employer." N.C. Gen. Stat. § 126-34.02(d). In a contested case, an "aggrieved party" is entitled to judicial review of a final decision of an administrative law judge [ALJ] by appeal directly to this Court. N.C. Gen. Stat. § 126-34.02(a); N.C. Gen. Stat. § 7A-29(a).

Harris v. N.C. Dep't of Pub. Safety, 252 N.C. App. 94, 98, 798 S.E.2d 127, 131-32, *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017) (alterations in original).

The amendments in 2013 eliminated one step in appellate review, so there was no Superior Court review of the OAH decision after remand by the Supreme Court, as there was in *Wetherington I*. Neither party has raised any challenges to the procedure on remand. Petitioner timely

appealed the ruling from the OAH to this Court pursuant to North Carolina General Statute § 126-34.02(a) and North Carolina General Statute § 7A-29(a). *See Peterson v. Caswell Developmental Ctr.*, ___ N.C. App. ___, ___, 814 S.E.2d 590, 593 (2018) ("An appeal lies with this Court of a final decision of the Office of Administrative Hearings pursuant to N.C. Gen. Stat. § 7A-29 (2017).").

B. Standard of Review

> Section 150B-51 of our State's Administrative Procedure Act (APA) establishes the scope and standard of review that we apply to the final decision of an administrative agency. The APA authorizes this Court to affirm or remand an ALJ's final decision, but such a decision may be reversed or modified only
>
> > if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
> >
> > (1) In violation of constitutional provisions;
> >
> > (2) In excess of the statutory authority or jurisdiction of the agency or [ALJ];
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> >
> > (6) Arbitrary, capricious, or an abuse of discretion.
>
> The particular standard applied to issues on appeal depends upon the nature of the error asserted. "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."
>
> To that end, we review *de novo* errors asserted under subsections 150B-51(b)(1)-(4). Under the *de novo* standard of review, the reviewing court "considers the matter anew and freely substitutes its own judgment[.]"
>
> When the error asserted falls within subsections 150B-51(b)(5) and (6), this Court must apply the "whole record standard of review." Under the whole record test,

> [the reviewing court] may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo. Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision.

" 'Substantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion."

"In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, there is but one fact-finding hearing of record when witness demeanor may be directly observed." It is also well established that

> [i]n an administrative proceeding, it is the prerogative and duty of [the ALJ], once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the [ALJ] to determine, and [the ALJ] may accept or reject in whole or part the testimony of any witness.

Our review, therefore, must be undertaken "with a high degree of deference" as to " '[t]he credibility of witnesses and the probative value of particular testimony[.]' " As our Supreme Court has explained, "the ALJ who conducts a contested case hearing possesses those institutional advantages that make it appropriate for a reviewing court to defer to his or her findings of fact."

Brewington v. N.C. Dep't of Pub. Safety, 254 N.C. App. 1, 12-13, 802 S.E.2d 115, 124-25 (2017) (alterations in original) (citations omitted), *review denied*, 371 N.C. 343, 813 S.E.2d 857 (2018).

The primary issue on appeal is whether the OAH erred in upholding Col. Grey's determination of "just cause" to terminate Petitioner's employment.

> Career state employees are entitled to statutory protections, including the protection from being discharged, suspended, or demoted without "just cause." This Court established a three-part analysis to determine whether just cause existed for an employee's adverse employment action for unacceptable personal conduct:
>
> > The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."
>
> Here, only the third prong of the analysis is at issue, as the ALJ concluded, and Petitioner did not appeal, the first two findings that Petitioner had engaged in the alleged unacceptable personal conduct and that conduct fell within one of the provided categories.

Peterson, ___ N.C. App.at ___, 814 S.E.2d at 593 (citation omitted) (quoting *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 383, 726 S.E.2d 920, 925 (2012)).

Here, as in *Peterson*, only the "third inquiry" is challenged on appeal, and we review the conclusion of "just cause" *de novo*. "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's." *Wetherington I*, 368 N.C. at 590, 780 S.E.2d at 546 (citation and brackets omitted).

C. Law of the Case

This case's long history adds another layer of complication. Our review of the order on appeal is guided both by the standard of review and by the prior rulings in this case under the law of the case doctrine.

> According to the doctrine of the law of the case, 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, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) (citing *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974)).

The law of the case doctrine applies only to the issues decided in the previous proceeding.

> In North Carolina courts, the law of the case applies only to issues that were decided in the former proceeding, whether explicitly or by necessary implication, but not to questions which might have been decided but were not. "[T]he doctrine of the law of the case contemplates only such points as are actually presented and necessarily involved in determining the case."

Goldston v. State, 199 N.C. App. 618, 624, 683 S.E.2d 237, 242 (2009) (alteration in original) (quoting *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956)), *aff'd by an equally divided court*, 364 N.C. 416, 700 S.E.2d 223 (2010).

In his Petition for a Contested Case Hearing filed after Col. Grey issued his determination on remand, Petitioner argued, "The law of the case controls[,]" citing to *Wetherington I*. In *Wetherington I*, the Supreme Court notably did not reverse or vacate either the Superior Court's order or this Court's opinion, which was affirmed as modified. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548-49. In addition, the Superior Court's order and this Court's opinion reversed ALJ Gray's order which was on appeal in *Wetherington I*. The Supreme Court instead held:

> Nevertheless, the superior court determined that petitioner's conduct did not constitute just cause for dismissal, and the Court of Appeals affirmed that determination. Because we conclude that Colonel Glover's use of a rule requiring dismissal for all violations of the Patrol's truthfulness policy was an error of law, we find it prudent to remand this matter for a decision by the employing agency as to whether petitioner should be dismissed based upon the facts and circumstances and without the application of a per se rule. As a result, we do not decide whether petitioner's conduct constitutes just cause for dismissal.

> Accordingly, the decision of the Court of Appeals is modified and affirmed, and the case is remanded to the Court of Appeals with instructions to that court to remand to the Superior Court, Wake County for subsequent remand to the SPC and further remand to the employing agency for additional proceedings not inconsistent with this opinion.

Id. at 593, 780 S.E.2d at 548 (citation omitted). Therefore, the Supreme Court modified this Court's opinion in *Wetherington I* only regarding this Court's holding, which was, "The superior court did not err in concluding that Petitioner's conduct did not constitute just cause for dismissal." 231 N.C. App. at 513, 752 S.E.2d at 517.

As ALJ Overby noted, the basic facts as to the traffic stop in 2009, the loss of the hat, and Petitioner's statements about it were determined in *Wetherington I*. The remand by the Supreme Court did not limit Respondent's options on remand but gave Respondent the *opportunity* to develop additional evidence as to those events in 2009, to amend its charges against Petitioner, and to present additional substantive evidence at another contested case hearing. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548-49. Since the Supreme Court was considering a legal issue, the holding and open-ended remand gave Respondent at least two options. One option was for Respondent to pursue amended charges or consider additional evidence on remand, if it determined the facts required further development. *See N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 674-75, 599 S.E.2d 888, 904 (2004) ("Ordinarily, when an agency fails to make a material finding of fact or resolve a material conflict in the evidence, the case must be remanded to the agency for a proper finding."). Another option, which Respondent elected, was to proceed upon the same evidence and facts as established in *Wetherington I* regarding the events in 2009 and to make a new determination of "whether petitioner's conduct constitutes just cause for dismissal" based upon the specific factors as directed by the Supreme Court. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 548.

D. Adjudicated Facts

At the second contested case hearing, no new substantive evidence regarding the facts surrounding the loss of the hat was presented. The transcripts and exhibits from the first hearing were all admitted into evidence. In the order, ALJ Overby noted that both the Court of Appeal and Supreme Court in *Wetherington I* had quoted "fifteen specific findings of fact" from the prior order which were not "successfully challenged on appeal" in *Wetherington I* and "thus are conclusively established on

appeal."[6] "[T]he established and settled facts of the underlying events for which Petitioner was terminated" quoted by the Supreme Court in *Wetherington I* are:

> 5. On March 29, 2009, Petitioner, while on duty, observed a pickup truck pulling a boat and made a traffic stop of that truck on U.S. 70 at approximately 10:00 pm. During that traffic stop, Petitioner discovered two loaded handguns in the truck and smelled the odor of alcohol coming from the interior of the truck. The two male occupants of the truck were cooperative and not belligerent. Petitioner took possession of the handguns. At the conclusion of that traffic stop, Petitioner proceeded to a stopped car that had pulled off to the side of the road a short distance in front of the truck and boat trailer.
>
> 6. Petitioner testified that he first noticed his hat missing during his approach to the car parked in front of the truck. Petitioner heard a crunch noise in the roadway and saw a burgundy eighteen-wheeler drive by.
>
> 7. Petitioner testified that after the conclusion [of] his investigation of the stopped car, he looked for his hat. Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns were somewhat flattened.
>
> . . . .
>
> 9. After searching for, but not locating his hat, Petitioner contacted Sergeant Oglesby, his immediate supervisor, and told him that his hat blew off of his head and that he could not find it.
>
> . . . .
>
> 11. Trooper Rink met Petitioner on the side of the road of U.S. 70. Trooper Rink asked Petitioner when

6. These findings were in ALJ Beecher Gray's order based upon the 2009 hearing. It is true that these findings are the "established and settled facts," although the Superior Court and this Court *reversed* ALJ Gray's order in *Wetherington I* based upon *de novo* review of the "just cause" conclusion. Petitioner challenges some of these "adjudicated facts" on appeal as unsupported by substantial evidence. There are good arguments both ways on whether this Court would be able to review those facts on appeal or if they are part of the law of the case. But based upon our analysis of the case, we need not address this portion of Petitioner's argument.

he last saw his hat. Petitioner said he did not know. . . . Petitioner said that he was going down the road . . . and was putting something in his seat when he realized he did not have his hat. Petitioner then indicated that he turned around and went back to the scene of the traffic stops and that is when he found the acorns from his hat. Petitioner was very upset and Trooper Rink told Petitioner that everybody loses stuff and that if Petitioner did not know what happened to his hat, then he should just tell his Sergeants that he didn't know what happened to it. Petitioner replied that it was a little late for that because he already had told his Sergeant that a truck came by and blew it off of his head.

. . . .

13. The testimony of Trooper Rink provides substantial evidence that Petitioner did not know what happened to his hat, was untruthful to Sergeant Oglesby when he said it blew off of his head, and that Petitioner's untruthfulness was willful.

. . . .

15. The next day, March 30, 2009, Sergeant Oglesby and several other members of the Patrol looked for Petitioner's hat.

16. Sergeant Oglesby had a detailed conversation with Petitioner on the side of the road regarding how the hat was lost. During the conversation, Petitioner remained consistent with his first statement to Sergeant Oglesby from the night of March 29, 2009 as he explained to Sergeant Oglesby that a gust of wind blew his hat off of his head. Petitioner continued stating that the wind was blowing from the southeast to the northwest. Petitioner said he turned back towards the direction of the roadway and saw a burgundy eighteen[-]wheeler coming down the road so he could not run out in the roadway and retrieve his hat. Petitioner then heard a crunch and did not see his hat anymore.

. . . .

18. Petitioner was not truthful to Sergeant Oglesby on March 30, 2009, when he explained how he lost his hat.

. . . .

20. Petitioner testified that, approximately three to four days after the loss of the hat, he suddenly realized that the hat did not blow off of his head, but that he had placed the hat on the light bar of his Patrol vehicle and it blew off of the light bar. Petitioner never informed any supervisors of this sudden realization.

21. Approximately three weeks after the hat was lost, Petitioner received a telephone call from Melinda Stephens, during which Petitioner was informed that her nephew, the driver of the truck and boat trailer on March 29, 2009, had Petitioner's hat.

22. Petitioner informed Sergeant Oglesby that his hat had been found.

23. Petitioner's hat subsequently was returned to Sergeant Oglesby. When returned, the hat was in good condition and did not appear to have been run over.[7]

24. Due to the inconsistencies in Petitioner's statements and the condition of the hat, First Sergeant Rock and Sergeant Oglesby called Petitioner to come in for a meeting. During the meeting, First Sergeant Rock asked Petitioner to clarify that the hat blew off of his head and that the hat was struck by a car. Petitioner said yes. First Sergeant Rock then pulled Petitioner's hat out of the cabinet and told Petitioner that his story was not feasible because the hat did not appear to have been run over. At that point, Petitioner broke down in tears and said he wasn't sure what happened to his hat. He didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off. Petitioner stated that he told Sergeant Oglesby that the hat blew off his head because he received some bad counsel from someone regarding what he should say about how the hat was lost.

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7. As noted in Finding 7, "Petitioner found the gold acorns from his hat in the right hand lane near his patrol vehicle. The acorns were somewhat flattened." *Wetherington I*, 368 N.C. at 586, 780 S.E.2d at 544. When the hat was recovered, the acorns were missing from the hat, but it was not crushed. Thus, the hat had not been run over by an eighteen-wheeler—at least not to the point the hat was destroyed. There was some debate at the hearing over whether a hat without acorns is in "good condition." For purposes of this opinion, we assume so.

> 25. During his meeting with First Sergeant Rock and Sgt. Oglesby, Petitioner was untruthful when he told First Sergeant Rock that the hat blew off of his head because by Petitioner's own testimony, three days after losing his hat he realized that he placed it on his light bar. However, three weeks after the incident, in the meeting with First Sergeant Rock and Sergeant Oglesby he continued to claim that the hat blew off of his head. It wasn't until First Sergeant Rock took the hat out and questioned Petitioner more that Petitioner admitted that the hat did not blow off of his head, but blew off of the light bar. Therefore, even if Petitioner was confused on March 29, 2009, as he claims, he still was being untruthful to his Sergeants by continuing to tell them that the hat blew off of his head . . . .
>
> . . . .
>
> 33. Petitioner's untruthful statements to First Sergeant Rock and Sergeant Oglesby were willful and were made to protect himself against possible further reprimand because of leaving the patrol vehicle without his cover.

Wetherington I, 368 N.C. at 585-88, 780 S.E.2d at 544-46 (alterations in original).

III. New Findings of Fact on Remand

ALJ Overby made additional findings of fact regarding Col. Grey's consideration on remand. Many of these findings did not exist before remand and were not addressed in *Wetherington I*, although some are essentially reiterations of the "adjudicated facts" regarding events in 2009 and some are actually conclusions of law. We will refer to these new findings as the "remand findings" to distinguish them from the "adjudicated facts." Petitioner challenges some of the remand findings as unsupported by substantial evidence.[8]

> 8. Col. Grey's termination letter is very specific about what he reviewed in making his decision. He considered the Report of Investigation and attached documents, the video recording of Petitioner's interview with Internal Affairs, and the evidence presented by Petitioner during his pre-dismissal conference.

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8. Petitioner challenges Findings 15, 17, 18, 28, 29, 30, 32, 34, 35, 36, 47, 48, 60, 62, 64, 65, and 66. We address the arguments as to specific findings as appropriate below.

9. In the letter, Col. Grey recognizes that he has discretion to administer any level of punishment. He acknowledges mitigating factors, including Petitioner's work history.

10. There are four enumerated facts that the Colonel recites as the basis of his decision to terminate. Those facts, as set forth in the letter, are consistent with the Facts as found by ALJ Gray. Within the four enumerated facts, Col. Grey states his conclusions regarding the facts as he recites the proven facts as the basis for his decision.

11. Col. Grey states that Petitioner violated the Patrol's truthfulness policy by making contradictory statements (plural) about how he lost his campaign cover.

. . . .

14. Col. Grey did not write the termination letter, and he does not know who wrote the letter. It was given to him to sign.

15. It is not of consequence that Col. Grey did not write the dismissal letter. By signing the letter, he is taking full responsibility and ownership for its contents. Likewise, Col. Grey did not need to be fully aware of Col. Glover's testimony because Col. Grey was reviewing the file and drawing his own conclusions from the full record in the hearing.

16. Trooper Wetherington's employment was terminated based on the allegations of untruthfulness. Petitioner's untruthful statements were about where his hat was physically located when it was blown away from his care and control.

17. Wetherington initially stated his hat blew off his head and became lost during a traffic stop, and that is what he reported to his supervisor, Sergeant Oglesby, knowing that statement not to be true.

18. From the Adjudicated Facts of this case, Petitioner Wetherington sought counsel from someone who suggested what he should say about the lost hat, after which he called Sgt. Oglesby. He then talked with

Trooper Rink who counseled him to tell the truth, but Petitioner told Trooper Rink that it was too late because he had already told Sgt. Oglesby a story that was not true. Petitioner continued to maintain his untrue statements until confronted with the return of his campaign cover, i.e., hat.

19. According to Petitioner Wetherington, he had a sudden realization three to four days later of the hat's actual location when he lost it but never informed any of his superiors of that revelation.

20. It has been practically a universally held opinion, including Col. Grey, that the underlying premise of a lost campaign cover in and of itself was not a significant violation. The issue pertains to Petitioner's untruthfulness.

. . . .

23. The remand hearing before the undersigned primarily focused on Col. Grey's decision, including his application of the just cause factors required by North Carolina's just cause law. Two witnesses testified at the remand hearing on January 29 and 30, 2018, Col. William Grey for the Respondent and retired Chief Melvin Tucker for Petitioner.

. . . .

25. At the time of the hearing, Col. Grey was still familiar with the policies of the SHP. The policy on truthfulness, he remembered, was fairly simple: "You're just required to be truthful in all your communications whether they're oral or written at all times."

26. As the commander of the SHP, Col. Grey felt that truthfulness was paramount, not just for the SHP, but for all law enforcement:

> [Y]ou gotta have trust that a person is credible, has moral courage to step up and do the right thing and is going to be honest and forthright in all their communications…. You take people's freedoms, you're gonna charge them with stuff and in a worst case scenario, you can-you can take their life, if the situation calls for it,

> so you got [to] be sure that person is always aboveboard and forthright.

27. During his tenure as Colonel, Col. Grey disciplined members of SHP. He gave the full range of discipline from written warnings to days off to dismissals. In making his decision to discipline a member, it was Col. Grey's practice to review the entire case, including the internal affairs investigation and the member's work history, and he would make a decision based on the totality of the circumstances surrounding the case.

28. Col. Grey received this case after the Supreme Court ruled to remand the matter for decision. Col. Grey never read the Supreme Court decision in this contested case; however, it was explained to him. As he understood the Supreme Court ruling, he was to review the case as if for the first time and make his decision from the evidence presented.

29. Col. Grey did not have to read the Supreme Court decision to understand the full import of all of its holdings. The provisions of the decision were explained to him in sufficient detail for him to properly consider the provisions of the Supreme Court decision in conducting the review and making his decision in this contested case.

30. Over the course of a few days, Col. Grey reviewed the recordings, transcripts, internal investigation report, and pre-disciplinary information, as well as Petitioner's work history and disciplinary history. Col. Grey treated this case like any other case coming to him for the first time.

31. Col. Grey did not know Petitioner and had never worked with him at SHP. Col. Grey did not speak with Petitioner during his review of Petitioner's case. This was not unusual since he did not usually speak with members prior to issuing discipline. He would only review the information presented to him after the pre-disciplinary conference just as he did with Petitioner's case.

32. Col. Grey determined Petitioner's dismissal was appropriate based on Petitioner's violation of the truthfulness policy. It was not a "spontaneous lie." Rather,

Petitioner "had time to think about it, he thought about it, and then he called his sergeant and told him a lie, knowing that it was untrue, and then he changed his story from his first statement to a second statement." It was not until he was confronted with the truth that Petitioner finally admitted: "Okay, I'm not telling the truth."

33. Col. Grey considered evidence of mitigation, as well as all other forms of discipline available to him, but decided that dismissal was the most appropriate discipline given Petitioner's conduct. Col. Grey made his decision without regard for what the Secretary of the Department of Public Safety or anyone else wanted. He was not pressured to dismiss Petitioner.

34. Col. Grey did not feel that the matter was "just about a hat." Instead, the Colonel was bothered that Petitioner was willing to go to such lengths to lie about an event when there was not "a whole lot on the line there." Had Petitioner been truthful and confessed that he simply did not know what happened to his hat, the Colonel likely would not have known about it, because it would not rise to the level of his review. Petitioner would most likely have been given a written warning or a counseling.

35. Col. Grey felt that the fact that Petitioner had just concluded a "high-intensity" yet routine traffic stop does not negate the fact that Petitioner intentionally lied to his sergeant about how he lost his hat. Col. Grey also felt that the fact that Petitioner was a relatively new trooper does not negate the fact that he intentionally lied to his sergeant and continued to maintain the lie. While it might be expected that less experienced troopers will make more technical mistakes, the same cannot be said for moral mistakes, according to Col. Grey.

36. The fact that Petitioner was willing to lie about such a relatively small thing as losing his hat caused Col. Grey to lose confidence in the integrity of Petitioner. This is consistent with the findings in the Recommended Decision by Judge Gray, which speaks of the widely held position with the Highway Patrol and not just Colonel Glover's position of a *per se* violation. For Col. Grey to reach that conclusion is not a new allegation, but a finding

based upon the facts and circumstances existing in the 2009 case as found by Judge Gray.

. . . .

52. The transcript of the first OAH hearing shows that Trooper Wetherington was 23 years old at the time of the first hearing. He graduated from New Bern High School in 2005. Wetherington was a volunteer firefighter and an American Red Cross Instructor. Wetherington graduated from the Highway Patrol Academy in 2007.

53. According to that transcript, Wetherington was not previously disciplined by SHP. Wetherington was rated as one of the highest producers while in the field training program. His work and conduct history revealed exemplary service and conduct. In his 2008-2009 evaluation, Trooper Wetherington was rated as good or very good in every rating category. Judge Gray found that Wetherington's overall performance rating in 2008 was "3," which was average. Colonel Grey was aware of Wetherington's work history.

54. *The Employee Advisory Committee* report found that Wetherington was a very "devoted, dedicated" Trooper, and unanimously recommended reinstatement. Colonel Grey was aware of the Committee report.

55. The record of this contested case reflects that several laypersons and some of Wetherington's supervisors testified before Judge Gray in the first hearing at OAH. They testified to Wetherington's excellent work performance, character, and conduct. This Tribunal did not hear their testimony and therefore is unable to assess the credibility of their individual testimonies by taking into account the appropriate factors generally used for determining credibility. Their testimony is considered and given the appropriate weight.

56. Likewise, seven letters were written on Petitioner's behalf. Two of the authors also appeared and testified before Judge Gray. The letters have been considered.

57. The circumstances of the traffic stop wherein the hat was lost was also considered by Col. Grey and the

undersigned. It is noted that there were two occupants in the truck he stopped, that there was an odor of alcohol, and that there were two guns in the truck. The guns were removed, and the occupants were cooperative and were released without incident.

. . .

58. Disparate treatment is a factor which may be considered in assessing discipline.

59. The issue of disparate treatment was raised in the OAH hearing before Judge Gray in 2009. Judge Gray made specific Findings of Fact concerning disparate treatment.

60. In 2009, Judge Gray, in Finding No. 43, found that substantial evidence existed that "since at least 2002 all members of the Patrol with substantiated violations of truthfulness have been dismissed."

61. Judge Gray concluded then that it was not incumbent on the Highway Patrol to look back through history to find a lowest common denominator for assessing punishment from the historical point forward. There is no evidence of cases of disparate treatment more recent in time before this Tribunal for determining the most recent punishment by the Patrol for violation of the truthfulness policy; however, this Tribunal is not going to reach back into history in order to compare Petitioner's case with similar cases from several years ago, without any recent cases for comparison, and especially cases decided by Col. Grey.

62. This current case was decided by Col. Grey in 2016. It is not fair or reasonable to hold the Highway Patrol to a standard set by disposition of its worse cases from many years before. Col. Grey decided the case based upon his thorough review of the totality of facts and circumstances of this case, including how he had disposed of cases during his tenure as Colonel. Col. Grey acknowledged that he reviewed only cases decided during his tenure.

. . .

63. Petitioner Wetherington contends that Col. Grey's reliance on the Brady and Giglio cases is tantamount to

inserting a new allegation of sorts that should not have been brought into consideration in this current review on remand.

64. The undersigned excluded evidence on the Brady and Giglio cases, at least in part, out of an abundance of caution, to avoid evidence that would indeed constitute a totally new allegation not within the purview of the original charge sheet. On further review, Col. Grey's reliance on Brady and Giglio was not ill-founded. Brady was decided by the Supreme Court of the United States in 1963, and Giglio was decided by the Supreme Court of the United States in 1973, well before even the first hearing in OAR on this matter.

65. Assuming *arguendo* that Col. Grey should not have referenced specifically to those cases, Col. Glover had considered the impact of findings of untruthfulness with Highway Patrol Troopers as reflected in his testimony. Further, in upholding Col. Glover's decision to terminate Petitioner, Secretary Reuben Young referenced the effect of a Trooper having his honesty, integrity and truthfulness questioned, especially from the witness stand. Thus, Col. Grey's reliance on the impact of loss of credibility for untruthfulness would have been in keeping with the initial determinations in this case, including Col. Glover's testimony in the first hearing before OAR.

66. Col. Grey's reliance on the Brady/Giglio factors was directly related to Petitioner's actions which were the cause of his termination, and referenced in Col. Glover's very abbreviated dismissal letter and the original Charge Sheet.

(Citations and parentheticals omitted) (alterations in finding 26 in original.)

IV. Just Cause

Petitioner first argues on appeal that DPS did not follow the instructions from the North Carolina Supreme Court regarding factors to consider on remand. Respondent contends that "[d]espite the numerous argument headings in Petitioner's brief, there is solely one issue before this Court: the existence of just cause to affirm Petitioner's dismissal." We review whether just cause existed to terminate Petitioner *de novo*. *See Peterson*, ___ N.C. App. at ___, 814 S.E.2d at 593.

As this Court noted in *Warren v. North Carolina Department of Crime Control*:

> We conclude that the best way to accommodate the Supreme Court's flexibility and fairness requirements for just cause is to balance the equities after the unacceptable personal conduct analysis. This avoids contorting the language of the Administrative Code defining unacceptable personal conduct. The proper analytical approach is to first determine whether the employee engaged in the conduct the employer alleges. The second inquiry is whether the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code. Unacceptable personal conduct does not necessarily establish just cause for all types of discipline. If the employee's act qualifies as a type of unacceptable conduct, the tribunal proceeds to the third inquiry: whether that misconduct amounted to just cause for the disciplinary action taken. Just cause must be determined based "upon an examination of the facts and circumstances of each individual case."

221 N.C. App. 376, 382-83, 726 S.E.2d 920, 925 (2012) (footnote omitted) (quoting *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900).

In *Wetherington I*, the Supreme Court noted Col. Glover's testimony that

> because petitioner's conduct "was obviously a violation of the truthfulness policy," dismissal was required, and he repeatedly asserted that he "had no choice" to impose any lesser punishment. After petitioner's counsel asked Colonel Glover whether, "when there is a substantiated or adjudicated finding of untruthfulness . . . [a trooper] would necessarily need to be terminated," Colonel Glover reiterated that if "that's the violation, again . . . I have no choice because that's the way I view it." Petitioner's counsel then asked, "[D]oes that mean if you find a substantiated or adjudicated violation of the truthfulness policy . . . that you don't feel like that gives you any discretion as Colonel to do anything less than termination?" Colonel Glover agreed with that statement.

368 N.C. at 592, 780 S.E.2d at 548 (alterations in original). The Supreme Court then noted that the "truthfulness policy" applies to a wide range

of communications, whether related to the trooper's duties or not, but as Col. Glover described his application of that policy, any untruthful or inaccurate statement, in any context, required termination:

> As written, the truthfulness policy applies to "all written and oral communications," and it applies to a wide range of untruthful, inaccurate, "improper," or "misleading" statements. Nothing in the text of the policy limits its application to statements related to the trooper's duties, the Patrol's official business, or any other significant subject matter. Notwithstanding the potentially expansive scope of this policy, Colonel Glover confirmed that he could not impose a punishment other than dismissal for any violation, apparently regardless of factors such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

Id.

The Supreme Court rejected the "per se" rule of dismissal for any violation of the truthfulness policy. *Id.* at 593, 780 S.E.2d at 548. Although Respondent had discretion in choosing an appropriate punishment for violation of the policy, that discretion was to be guided by consideration of certain factors outlined by the Supreme Court. Specifically, on remand, DPS was required to consider

> the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.

Id. at 592, 780 S.E.2d at 548. The Supreme Court also noted that Respondent should consider a "range of disciplinary actions" and not just termination:

> While dismissal may be a reasonable course of action for dishonest conduct, *the better practice*, *in keeping with*

> *the mandates of both Chapter 126 and our precedents, would be to allow for a range of disciplinary actions in response to an individual act of untruthfulness, rather than the categorical approach employed by management in this case.*

Id. at 593, 780 S.E.2d at 548 (emphasis added).

On remand, the Supreme Court did not limit DPS to relying on the existing record. *Id.* The ALJ found that "[t]he Supreme Court's directive is specifically sending this matter back to the agency to make a determination based on the facts and circumstances of this case. The directive does not indicate that an entirely new investigation should be undertaken." We agree the Supreme Court did not direct "an entirely new investigation" but it also did not preclude Respondent from conducting further investigation or from developing additional evidence as needed to address the factors as directed by the Supreme Court.[9] In any event, Respondent elected to rely only on the existing record, so all the evidence and facts as to the events in 2009 are exactly the same as considered by this Court and the Supreme Court in *Wetherington I*. Only the findings on remand as to Col. Grey's decision are new, and many of these findings are actually reiterations of the 2009 "adjudicated facts" or conclusions of law, which we will review as such.

Petitioner argues, and ALJ Overby found, that Col. Grey did not read either the opinions issued by the Court of Appeals or Supreme Court in *Wetherington I*:

> 28. Col. Grey received this case after the Supreme Court ruled to remand the matter for decision. Col. Grey never read the Supreme Court decision in this contested case; however, it was explained to him. As he understood the Supreme Court ruling, he was to review the case as if for the first time and make his decision from the evidence presented.

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9. Since the Supreme Court was reviewing "just cause" *de novo*, it could have performed that review based upon the existing record in *Wetherington I* without remand, but because Respondent had erroneously applied a "per se" rule of dismissal, the Supreme Court gave Respondent the opportunity on remand to develop the record as to the additional factors it had directed Respondent to consider and to exercise its discretion accordingly. We also agree with the ALJ that if Respondent had considered new evidence, "then such new allegations would have necessitated procedural due process, including, among other things, written notice and an opportunity to be heard in a pre-dismissal conference." But Respondent elected to rely on the existing record, so another pre-dismissal conference was not required.

> 29. Col. Grey did not have to read the Supreme Court decision to understand the full import of all of its holdings. The provisions of the decision were explained to him in sufficient detail for him to properly consider the provisions of the Supreme Court decision in conducting the review and making his decision in this contested case.

(Parenthetical omitted.)

Based upon Col. Grey's letter, his testimony, and the above findings, it is apparent that Col. Grey "review[ed] the case as if for the first time and ma[de] his decision from the evidence presented." It is not apparent that he considered the factors as directed by the Supreme Court, as we discuss in more detail below. We acknowledge that it is possible for an opinion to be "explained to" someone, but we cannot discern from Col. Grey's letter and testimony he "understood the full import of all of its holdings," since he did not address the factors as directed by the Supreme Court.

The ALJ interpreted the Supreme Court's opinion as requiring consideration of as few as one of the listed factors, based upon the word "or" in one sentence. Those factors, sometimes referred to as the "*Wetherington* factors," as articulated by the Supreme Court are "the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, *or* discipline imposed in other cases involving similar violations." *Id.* at 592, 780 S.E.2d at 548 (emphasis added).

> 26. It is important to note that the Supreme Court uses the word "or." The usual and customary use of "or" indicates an alternative and oftentimes, as here, alternatives in a listing. If there is a choice between two items, then "or" would mean an alternative choice for either item. While the Supreme Court notes that it is appropriate and necessary to consider those factors, the use of "or" negates any mandatory findings or conclusions based on all of those factors.
>
> 27. Assuming *arguendo* that there is a requirement to give consideration to all of those factors, Col. Grey did, in fact, consider each of the Wetherington factors in reaching his decision to terminate Petitioner.

This interpretation of the "*Wetherington* factors" is not supported the text of *Wetherington I* or by later cases applying it. Although the factors as quoted in ALJ Overby's order are accurate, they are taken out of the context of the sentence in the case. Reading the Supreme Court's

instruction in context, the "or" in this sentence must be read as "and" when applied to the factors which should be considered. The Supreme Court stated:

> *Notwithstanding the potentially expansive scope of this policy, Colonel Glover confirmed that he could not impose a punishment other than dismissal for any violation, apparently regardless of factors* such as the severity of the violation, the subject matter involved, the resulting harm, the trooper's work history, or discipline imposed in other cases involving similar violations. *We emphasize that consideration of these factors is an appropriate and necessary component of a decision to impose discipline upon a career State employee for unacceptable personal conduct.*

Id. (emphases added). The Supreme Court explained that Col. Glover could not "impose a punishment other than dismissal for any violation" without regard for these factors. *Id.* The Court then directed that "*consideration of these factors is an appropriate and necessary component of a decision* to impose discipline upon a career State employee for unacceptable personal conduct." *Id.* (emphasis added). Other cases from this Court have interpreted *Wetherington I* as requiring consideration of any factors for which evidence is presented. *See Brewington*, 254 N.C. App. at 25, 802 S.E.2d at 131 ("Although the primary holding in *Wetherington* was that public agency decision-makers must use discretion in determining what disciplinary action to impose in situations involving alleged unacceptable personal conduct, the Court did identify factors that are 'appropriate and necessary component[s]' of that discretionary exercise." (alterations in original)); *accord Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 784 S.E.2d 509 (2016). Thus, Respondent was directed to consider all of these factors, at least to the extent there was any evidence to support them. Respondent could not rely on one factor while ignoring the others.

ALJ Overby determined that "Col. Grey did, in fact, consider each of the Wetherington factors in reaching his decision to terminate Petitioner." But upon examination of his letter, we can find consideration of only two factors. We will address each factor as directed by the Supreme Court. Since we are to review "just cause" for dismissal de novo, we will review the factors based upon the "adjudicated fact" and the "remand facts."[10]

10. By relying on the existing findings, we are essentially viewing the facts in the light most favorable to Respondent. Petitioner has challenged some of the findings on appeal, but we need not consider those challenges based upon our holding.

A. The Severity of the Violation

Although Col. Grey's letter uses more words than Col. Glover's did to describe Petitioner's untruthfulness regarding losing his hat, the basic facts have not changed and were established in 2009, as quoted above. But Petitioner's untruthful statement regarding losing his hat was not a severe violation of the truthfulness policy. It did not occur in court and it did not affect any investigation, prosecution, or the function of the Highway Patrol. It was about a matter—exactly how Petitioner lost his hat—all parties concede was not very important.

Col. Grey considered the very insignificance of the subject matter an indication of the severity of the violation, indicating Petitioner could not be trusted in any context. His letter to Petitioner stated, "Based upon the facts and circumstances of this case, as described above, I have no confidence that you can be trusted to be truthful to your supervisors or even to testify truthfully in court or at administrative hearings." ALJ Overby agreed that "Petitioner's lie was neither insignificant nor immaterial. Because the Petitioner chose to continue to lie about an insignificant event, his credibility is called into question all the more." This reading of the truthfulness policy sounds exactly like Col. Glover's "per se" rule—rejected by the Supreme Court—that any untruthful statement, even if the subject matter does not involve an investigation or official business, and no matter how insignificant the subject, requires dismissal, and no discipline short of dismissal will suffice. In fact, based on ALJ Overby's logic, the more "insignificant" the subject matter of the lie, the more Petitioner's credibility is called into question. Thus, a lie about a significant matter, such as untruthful testimony about a criminal investigation in court, would be a severe violation requiring dismissal because untruthfulness in that context obviously undermines the very mission of the Highway Patrol, while a lie about an *insignificant matter* must also result in dismissal because a trooper who would lie about something so insignificant cannot be trusted in any context, according to Col. Grey. This interpretation of the truthfulness policy is functionally indistinguishable from the "per se" dismissal rule applied by Col. Glover in *Wetherington I* and rejected by the Supreme Court.

Respondent made a similar argument seeking to embellish the severity of Petitioner's untruthfulness in *Wetherington I*, and this Court noted:

> Respondent contends in its brief that Petitioner "made up an elaborate lie full of fabricated details" regarding the "specific direction of the wind, the specific color of the truck and the noise he heard when the truck ran

> over his hat." However, neither the ALJ nor the SPC made findings indicating that the wind, truck's color, or "crunch noise" were untruthful. Rather, the lie or "untruth" lay only in the hat's location when Petitioner misplaced it. The ALJ found that Petitioner "didn't know if it was on the trunk lid of the truck, the boat, or behind the light bar, and blew off." *The findings do not support Respondent's characterization of Petitioner's statements as an "elaborate lie full of fabricated details[.]"*

Wetherington I, 231 N.C. App. at 511, 752 S.E.2d at 516 (alteration in original) (emphasis added).

On remand, there are no new facts and no new evidence which would allow us to come to any new conclusion regarding the severity of Petitioner's lie than this Court did in *Wetherington I*. Col. Grey relied only on the existing record. This Court has previously determined "the lie or 'untruth' lay only in the hat's location when Petitioner misplaced it," *id.*, and the Supreme Court did not modify this portion of this Court's opinion but instead affirmed it. *See Wetherington I*, 368 N.C. at 593, 780 S.E.2d at 509.

B. The Subject Matter Involved

Col. Grey's letter notes the subject matter involved, the loss of the hat, but gives no consideration to this particular factor other than the fact that Petitioner lied about the location of the hat. He characterizes the subject matter of the untruthfulness appropriately as "over a trivial matter." Again, this particular violation of the truthfulness policy had no potential effect on any investigation or prosecution. Nor would the subject matter—or even Petitioner's untruthfulness about it—bring the Highway Patrol into disrepute, as some violations may. For example, in *Poarch v. North Carolina Department of Crime Control & Public Safety*, this Court affirmed a trooper's termination for just cause based on unacceptable personal conduct where the trooper was engaged in an extra-marital affair and "admitted to specific instances of sexual relations with Ms. Kirby, including sex in a Patrol car, sex behind a Patrol car, and sex in a Patrol office." 223 N.C. App. 125, 131, 741 S.E.2d 315, 319 (2012). This Court noted the trooper's misconduct, even committed when he was off duty, may harm the Patrol's reputation:

> After reviewing the record, we find the distinction between on duty and off duty based on the Patrol's radio codes to be of little significance in this case where petitioner was in uniform and the use of patrol facilities is

> so intertwined with the acts of misconduct. Furthermore, we find respondent's argument persuasive that if any member of the public would have witnessed petitioner's misconduct, where petitioner was in uniform and using patrol facilities, they would assume that petitioner was on duty to the detriment of the Patrol's reputation.

Id.

ALJ Overby appropriately noted the importance of truthfulness by law enforcement officers:

> 36. The world in which we live has become more tolerant and accepting of untruthfulness and outright lies. While it may be acceptable in some comers, it is not acceptable for everyone. With some occupations, there is a higher expectation for honesty and integrity, e.g., the judiciary and law enforcement officers. Those with power and authority have a greater responsibility.
>
> 37. The citizens of North Carolina and the public at large, including anyone visiting our state, deserve and expect honesty from the State Highway Patrol and law enforcement officers in general. It does not require any imagination at all to understand how devastating it would be if the Patrol tolerated and fostered a reputation for lack of honesty among its personnel. Yet it remains of paramount consideration that each case rises and falls on the particular facts and circumstances of this particular case. Not every case of untruthfulness merits termination.

We agree, and our Supreme Court was also well aware in *Wetherington I* that Petitioner had lied and of the importance of truthfulness by law enforcement officers. It was established in *Wetherington I* that (1) "the employee engaged in the conduct the employer alleges," and (2) "the employee's conduct falls within one of the categories of unacceptable personal conduct provided by the Administrative Code." *Warren*, 221 N.C. App. at 383, 726 S.E.2d at 925. The only issue left on remand in this case was whether Petitioner's lie, which is unacceptable personal conduct, "amounted to just cause for the disciplinary action taken. Just cause must be determined based 'upon an examination of the facts and circumstances of each individual case.' " *Id.* (quoting *Carroll*, 358 N.C. at 669, 599 S.E.2d at 900).

The facts as to the unacceptable personal conduct—the lie about the hat—are the same now as in *Wetherington I*. The Supreme Court could

have rejected prior cases requiring consideration of various factors and a balancing of equities and adopted the "per se" rule for truthfulness for Troopers with the Highway Patrol as applied by Col. Glover, but it did not. Neither this Court nor the Supreme Court endorses untruthfulness of any sort by a law enforcement officer, but that is not the question presented here. The Supreme Court did not suggest that the Highway Patrol should "tolerate[] and foster[] a reputation for lack of honesty among its personnel" but only that some instances of untruthfulness may call for some discipline short of dismissal. The question is whether this lie, in this context, justifies dismissal, *without consideration of any lesser discipline*, upon consideration of all of the applicable factors. Neither Col. Glover nor Col. Grey actually conducted this full analysis. Col. Grey applied essentially the same "per se" rule as to truthfulness as did Col. Glover; he just used different words to describe it.

C. The Resulting Harm

The third factor is "the resulting harm" from the violation. Col. Grey spends most of his letter discussing the *potential* harm to the agency from any untruthfulness by an officer, including a discussion of the requirements of *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104 (1972). We agree, as noted above, that law enforcement officers must uphold the highest standards of truthfulness, particularly in the course of their official duties, and we appreciate the legal requirements for law enforcement agencies to disclose exculpatory evidence to defendants. Yet our Supreme Court was also well-aware of the requirements of *Brady* and *Giglio* when it decided *Wetherington I*. In support of its position, which the Supreme Court accurately characterized as a "per se" rule of dismissal for any violation of the truthfulness policy, Respondent made the same argument to the Supreme Court in *Wetherington I*.[11] But even

11. Respondent argued in its brief to this Court in *Wetherington I*, "From this point forward, in every criminal case in which Petitioner is associated, the judicial finding of untruthfulness here and the facts supporting that conclusion must be disclosed to the defendant. The United States Supreme Court in *Brady v. Maryland*, held that the prosecution must turn over all evidence which may favor the defendant." Before the Supreme Court, Respondent argued, "The Court of Appeals next dismissed concerns that in the future every district attorney would have to produce the record of Wetherington's falsehoods in response to any defendants' demands for exculpatory evidence in accordance with their rights under *Brady v. Maryland*. The Court of Appeals did not find that the Patrol's concerns were not legitimate. In fact, there are reported cases in which courts have order[ed] the prosecution to produce officer personnel files in response to *Brady*. However, the Court of Appeals found that Petitioner's history of untruthfulness would not bar him from testifying in court and SPC had not presented any argument that it was likely that defense counsel would use the information to impeach Wetherington or that the impeachment would cause a jury to disregard his testimony." (Citations omitted.)

considering the requirements of *Brady* and *Giglio*, our Supreme Court still rejected a "per se" rule of termination for untruthfulness. Although Col. Grey states he was not applying a per se rule, it is difficult to discern what sort of untruthfulness, in any context, by a trooper would not lead to termination, without even any consideration of lesser discipline. Respondent's counsel at oral argument agreed that a statement of this sort regarding a missing hat does not compare to perjury while testifying in court or dishonesty in the investigation of a crime—the actual issues addressed by *Brady* and *Giglio*. It is easy to understand the resulting harm to the agency from a trooper's intentional lie about substantive facts in sworn testimony or in the course of his official duties. But Respondent has never been able to articulate how this particular lie was so harmful. Respondent failed to develop or present any additional facts on remand which could lead to a different determination.

D. The Trooper's Work History

According to the letter, Col. Grey did give cursory consideration to Petitioner's work history. He stated:

> I have taken into consideration the fact that you had been employed by the Highway Patrol as a Cadet and as a State Trooper from June 2007 until the time of your dismissal on August 4, 2009 that you did not have any disciplinary actions prior to the time of your dismissal and that your overall performance rating and work history since being sworn as a Trooper in November 2007 was "Good."

The ALJ made these findings regarding Petitioner's work history:

> 53. According to that transcript, Wetherington was not previously disciplined by SHP. Wetherington was rated as one of the highest producers while in the field training program. His work and conduct history revealed exemplary service and conduct. In his 2008-2009 evaluation, Trooper Wetherington was rated as good or very good in every rating category. Judge Gray found that Wetherington's overall performance rating in 2008 was "3," which was average. Colonel Grey was aware of Wetherington's work history.
>
> 54. The *Employee Advisory Committee* report found that Wetherington was a very "devoted, dedicated" Trooper, and unanimously recommended reinstatement. Colonel Grey was aware of the Committee report.

> 55. The record of this contested case reflects that several laypersons and some of Wetherington's supervisors testified before Judge Gray in the first hearing at OAH. They testified to Wetherington's excellent work performance, character, and conduct. This Tribunal did not hear their testimony and therefore is unable to assess the credibility of their individual testimonies by taking into account the appropriate factors generally used for determining credibility. Their testimony is considered and given the appropriate weight.

(Parentheticals omitted.)

ALJ Overby goes into more detail than did Col. Grey, but nothing in Petitioner's work history would support termination. He had no prior disciplinary actions and a "good" performance rating and work history. This factor could only favor some disciplinary action short of termination. *See Whitehurst v. E. Carolina Univ.*, 257 N.C. App. 938, 947-48, 811 S.E.2d 626, 634 (2018) ("Whitehurst's discipline-free work history is also relevant to this just cause analysis. . . . . Whitehurst was subject to regular performance reviews by ECU and generally received above average ratings. Jimmy Cannon, an ECU police sergeant who worked with Whitehurst for roughly twelve years, testified that 'He's been an outstanding peer to work with especially when it comes to his knowledge of police procedures and police work in general. He's one of the best . . . that I've worked with[.]' Whitehurst had worked for ECU for twelve years, with no disciplinary action. This factor also mitigates against a finding that just cause existed to dismiss Whitehurst from employment based on his conduct the night of 17 March 2016." (second and third alterations in original)).

E. Discipline Imposed in Other Cases Involving Similar Violations

Col. Grey's letter did not mention any consideration of discipline imposed in other cases for similar violations. In his testimony, he stated he considered only violations occurring during his tenure as Commander, which began in March 2013. ALJ's Overby's order includes several findings regarding disparate treatment:

> 58. Disparate treatment is a factor which may be considered in assessing discipline.
>
> 59. The issue of disparate treatment was raised in the OAH hearing before Judge Gray in 2009. Judge Gray made specific Findings of Fact concerning disparate treatment.

> 60. In 2009, Judge Gray, in Finding No. 43, found that substantial evidence existed that "since at least 2002 all members of the Patrol with substantiated violations of truthfulness have been dismissed."
>
> 61. Judge Gray concluded then that it was not incumbent on the Highway Patrol to look back through history to find a lowest common denominator for assessing punishment from the historical point forward. There is no evidence of cases of disparate treatment more recent in time before this Tribunal for determining the most recent punishment by the Patrol for violation of the truthfulness policy; however, this Tribunal is not going to reach back into history in order to compare Petitioner's case with similar cases from several years ago, without any recent cases for comparison, and especially cases decided by Col. Grey.
>
> 62. This current case was decided by Col. Grey in 2016. It is not fair or reasonable to hold the Highway Patrol to a standard set by disposition of its worse cases from many years before. Col. Grey decided the case based upon his thorough review of the totality of facts and circumstances of this case, including how he had disposed of cases during his tenure as Colonel. Col. Grey acknowledged that he reviewed only cases decided during his tenure.

(Parenthetical omitted.)

We first note that the finding as to discipline since 2002 is not relevant to Col. Grey's decision, as he testified, and the ALJ found, he did not consider any disciplinary actions prior to his tenure which began in 2013. In addition, the findings from the 2009 hearing seem to reflect a per se rule of dismissal for any untruthfulness. ALJ Gray found that "since at least 2002 *all members* of the Patrol with substantiated violations of truthfulness have been dismissed." This finding is consistent with application of the "per se" dismissal rule Col. Glover applied, and our Supreme Court *rejected* in *Wetherington I*. On remand, Col. Grey did not consider this history but acknowledged that he reviewed only cases decided during his tenure, which began in 2013, four years after Petitioner's termination. He did not describe the "untruthfulness" in any of those instances or the discipline imposed. Our record reveals no instances of disciplinary actions for untruthfulness which arose *during*

Col. Grey's tenure before his decision regarding Petitioner in 2016. Col. Grey did not identify any other violations during his tenure he may have compared to Petitioner's situation, and certainly did not identify any *similar* violations of the truthfulness policy.

Based upon the same evidence and facts, this Court analyzed this issue in *Wetherington I*. Regarding discipline imposed in other cases, the unanimous panel of this Court held:

> As the superior court observed in its order, the dissenting member of the SPC concluded that "the dismissal of Petitioner did not fit the violation and was not necessary to uphold the integrity of the truthfulness policy. In short, the punishment did not fit the offense." In view of the commensurate discipline approach described in *Warren* and applied in *Carroll*, we agree. Petitioner's conduct in this case did not rise to the level described in *Kea* and *Davis*. Rather, Petitioner's conduct and the existence of extenuating circumstances surrounding the conduct make this case comparable to Carroll, in which our Supreme Court concluded that the Commission lacked just cause to discipline the petitioner.

Wetherington I, 231 N.C. App. at 513, 752 S.E.2d at 517 (citation omitted).

This Court recently affirmed reversal of the Highway Patrol's dismissal of a trooper for unacceptable personal conduct. *Warren v. N.C. Dep't of Crime Control*, ___ N.C. App. ___, 833 S.E.2d 633 (2019). The trooper drove "his Patrol-issued vehicle" to a party at a private residence after consuming alcohol and with an open bottle of vodka in the trunk of his vehicle. *Id*. at ___, 833 S.E.2d at 635. This Court noted this dismissal was based upon disparate treatment.

> Respondent contends that petitioner's conduct was especially egregious so as to warrant termination. However, our review of the disciplinary actions respondent has taken for unbecoming conduct typically resulted in either: a temporary suspension without pay, a reduction in pay, or a demotion of title. In fact, where the conduct was equally or more egregious than that of petitioner (i.e., threats to kill another person, sexual harassment, assault), the employee was generally subjected to disciplinary measures other than termination.
>
> While petitioner certainly engaged in unacceptable personal conduct, termination is inconsistent with

> respondent's treatment of similar conduct and, other factors mitigate just cause for the punishment. Petitioner had an excellent work history and tenure of service, and there was no evidence that petitioner's actions resulted in harm. Thus, taking into consideration all of the factors and circumstances in this case as suggested by *Wetherington*, we conclude the superior court properly determined there is no just cause for petitioner's termination based on his conduct.

Id. at ___, 833 S.E.2d at 638.

Again, Respondent had the opportunity on remand to address disciplinary actions of other employees who violated the truthfulness policy, since Col. Glover did not consider this factor in applying the "per se" rule in Petitioner's initial termination. Col. Grey had the opportunity to note factors in other disciplinary cases which support dismissal for Petitioner's violation, but he did not. *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548. We agree that Col. Grey need not "look back through history to find a lowest common denominator for assessing punishment" but he must consider if there is some relevant denominator in the Highway Patrol's prior history for comparison. Although there is no particular time period set for this factor, we find no legal basis for relying only upon disciplinary actions during a particular commander's tenure. If this were the rule, during the first week, or month, or any time period of a new colonel's tenure until a disciplinary action based upon a particular violation has occurred, there would be no history at all, and the disparate treatment factor would have no meaning. For a new commander, disparate treatment would by definition be impossible, if he can ignore all relevant prior history for the agency in imposing discipline.

Thus, Col. Grey failed to consider most of the factors our Supreme Court directed were "necessary" in this case. The only factor he clearly addressed was Petitioner's work history, which would favor discipline short of dismissal. The Supreme Court stated: "We emphasize that consideration of these factors is an appropriate *and necessary component of a decision to impose discipline* upon a career State employee for unacceptable personal conduct." *Wetherington I*, 368 N.C. at 592, 780 S.E.2d at 548 (emphasis added). Instead, he considered only his personal assessment of the importance of Petitioner's untruthful statements, and although his letter was longer, his consideration was substantively no different from Col Glover's. As this Court noted in *Wetherington I*: "The findings do not support Respondent's characterization of Petitioner's statements

as an 'elaborate lie full of fabricated details[.]' " *Wetherington I*, 231 N.C. App. at 511, 752 S.E.2d at 516 (alteration in original).

V. Disposition

Our Courts rarely grant parties in cases two bites at the apple, but Respondent here has already had the opportunity for two bites. There is no basis for further remand other than for the appropriate remedy. Upon our *de novo* review of the existence of just cause, we reverse ALJ Overby's conclusion that "Respondent met its burden of proof and established by substantial evidence that it had just cause to dismiss Petitioner from employment with the State Highway Patrol for unacceptable personal conduct." However, Respondent has established that some disciplinary action short of dismissal should be imposed. We also reverse the ALJ's conclusion that "Respondent has not exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; and has not failed to act as required by law or rule." We hold that Respondent failed to use proper procedure on remand and failed to act as required by law or rule in that it should have considered the factors as directed by the Supreme Court. We therefore remand for the ALJ to enter an order granting Petitioner relief under North Carolina General Statute § 126-34.02. Specifically, the ALJ shall order an appropriate level of discipline, in accord with the law regarding disparate treatment, followed by reinstatement and "other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority." N.C. Gen. Stat. § 126-34.02(a) (2017).

> Under subsection (a)(3) of the statute, the ALJ has 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. Under the ALJ's de novo review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief."
>
> Because the ALJ hears the evidence, determines the weight and credibility of the evidence, makes findings of fact, and "balanc[es] the equities," the ALJ has the authority under *de novo* review to impose an alternative discipline. Upon the ALJ's determination that the agency met the first two prongs of the *Warren* standard, but just cause does not exist for the particular disciplinary alternative imposed by the agency, the ALJ may impose an alternative sanction within the range of allowed dispositions.

Harris, 252 N.C. App. at 109, 798 S.E.2d at 138 (alterations in original) (citation omitted).

VI. Conclusion

Upon *de novo* review of the existence of just cause, the ALJ's order affirming Petitioner's dismissal is reversed and we remand to the ALJ for further proceedings consistent with our directive above.

Reversed and Remanded.

Judges BRYANT and DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 FEBRUARY 2020)

CHERRY CMTY. ORG. v. SELLARS No. 19-695	Mecklenburg (17CVS16155)	Affirmed
McGRATH RENTCORP v. TCI TRIANGLE, INC. No. 19-655	Wake (17CVS4340)	Affirmed in Part, Dismissed in Part
McMASTER v. McMASTER No. 19-234	Guilford (17CVD1384)	Affirmed
REZVANI v. CARNES No. 19-491	Orange (15CVS808)	Dismissed
STATE v. BOYD No. 19-543	Mecklenburg (17CRS221217)	No Error
STATE v. CLARK No. 19-456	Wake (16CRS222977)	Affirmed
STATE v. DAVIS No. 19-663	Gaston (15CRS64037) (18CRS2028)	No Error in Part, Remanded in Part
STATE v. ENGLE No. 19-488	Cumberland (14CRS62033-34)	No Error
STATE v. EVERWINE No. 19-629	Moore (16CRS52928) (17CRS83)	No Error
STATE v. JOHNSON No. 19-489	Forsyth (16CRS52126) (16CRS52265) (17CRS182)	No Error
STATE v. JUAREZ No. 19-545	Rowan (17CRS50447) (17CRS50450)	Affirmed
STATE v. LAIL No. 19-468	Catawba (13CRS4784-87) (13CRS52508)	No Error
STATE v. McDANIEL No. 17-856-2	McDowell (14CRS50509) (14CRS50512)	No Error

STATE v. NEWSUAN No. 19-564	Cumberland (18CRS52674)	No plain error.
STATE v. NYEPLU No. 18-1251	Mecklenburg (16CRS225460)	No Error in Part; Dismissed in Part.
STATE v. ROBINSON No. 19-405	Henderson (17CRS52480)	Reversed
STATE v. WHEELING No. 18-1055	Mecklenburg (16CRS5813)	No Error; No Prejudicial Error.
WALLACE v. GETER No. 19-696	Rowan (18CVD1014)	Vacated and Remanded
WHISNANT v. ABERNATHY LAURELS No. 19-774	N.C. Industrial Commission (16-011190)	Affirmed

JAMES CUMMINGS AND WIFE, CONNIE CUMMINGS, PLAINTIFFS
v.
ROBERT PATTON CARROLL; DHR SALES CORP. D/B/A RE/MAX COMMUNITY BROKERS; DAVID H. ROOS; MARGARET N. SINGER; BERKELEY INVESTORS, LLC; KIM BERKELEY T. DURHAM; GEORGE C. BELL; THORNLEY HOLDINGS, LLC; BROOKE ELIZABETH RUDD-GAGLIE F/K/A BROOKE ELIZABETH RUDD; MARGARET RUDD & ASSOCIATES, INC. AND JAMES C. GOODMAN, DEFENDANTS

No. COA19-283

Filed 3 March 2020

1. Negligence—purchase of rental property—water damage—concealed—seller's real estate agent

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court erred in granting a motion to dismiss plaintiffs' negligence claim against the sellers' real estate agents where there was a genuine issue of material fact about the meaning of statements made by a contractor and known to the agents that he "may have found" a water leak and that he "hope[d]" that he fixed it. Further, the economic loss rule was not applicable so as to bar plaintiffs' negligence claim because the sellers' contract with plaintiffs did not impose any contractual duties on defendant-agents with regard to disclosure of defects.

2. Negligence—purchase of rental property—water damage—concealed—buyer's real estate agent

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court properly granted a motion to dismiss plaintiffs' negligence claim against their real estate agency and agents because the claim was barred by the economic loss rule where the scope of the agents' duties owed to plaintiffs were specifically bargained for and laid out in the buyer agency agreement signed by plaintiffs and the agency, and where the agents' purported negligence in discovering and disclosing the defects was clearly related to the essence of the agency contract and the harm allegedly suffered by plaintiffs hinged on plaintiffs not receiving the benefit of the agreement.

3. Negligence—negligent misrepresentation—purchase of rental property—disclosure statement

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally

concealed, the trial court did not err by granting a motion to dismiss plaintiffs' claim for negligent misrepresentation against their own real estate agents based on the application of the economic loss rule (which prohibited a cause of action in tort for violation of contractual duties the agents owed to plaintiffs pursuant to their agency contract), or by granting dismissal of the same claim against the sellers' agents (who did not sign the disclosure statement which plaintiffs alleged they relied on to their detriment). However, the trial court improperly dismissed the same claim against the sellers because there was a genuine issue of material fact regarding whether their representation in the disclosure statement that they had no actual knowledge of any problems with the house—based on their assertion that the painter they hired had completely fixed the significant water issues—was reasonable.

4. Fiduciary Relationship—breach of fiduciary duty—buyer's real estate agent—disclosure of material facts—reasonable diligence

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court erred in granting a motion to dismiss plaintiffs' claim for breach of fiduciary duty against their real estate agents where there was a genuine issue of material fact regarding the reasonableness of the agents' efforts to discover the significant defects existing in the house or in the agents' hiring of an inspector who failed to perform a moisture test.

5. Appeal and Error—abandonment of issues—unfair and deceptive trade practices—no argument or reply brief

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim for unfair and deceptive trade practices against the sellers and the sellers' agents was deemed abandoned where plaintiffs failed to raise any argument in their brief or to file a reply brief responding to defendants' contention that the cause of action was abandoned.

6. Contracts—real estate purchase—breach of sales contract—false representation in disclosure statement

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court properly granted a motion to dismiss plaintiffs' claim for breach of contract against the sellers (a corporate entity and an individual owner of that entity) because

any representations in the real estate disclosure statement, false or otherwise, were not made a part of the sales contract's terms. In addition, the individual seller did not sign the sales contract in his individual capacity.

7. Appeal and Error—abandoned issue—breach of implied covenant of good faith and fair dealing—no argument or reply brief

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim for breach of implied covenant of good faith and fair dealing against the sellers was deemed abandoned where plaintiffs failed to raise any argument in their brief or to file a reply brief in response to defendants' argument that the claim was abandoned.

8. Fraud—fraud in the inducement—real estate purchase—disclosures—genuine issue of material fact

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, the trial court improperly granted a motion to dismiss plaintiffs' claim for fraud in the inducement against the sellers and the sellers' real estate agents. The claims were not barred by the economic loss rule and genuine issues of material fact existed regarding: (1) whether the sellers were reasonable in representing in the disclosure statement that they had no knowledge of any defects based on a painter's tentative assertion that he repaired a leak, (2) whether the sellers' alleged misrepresentations in the disclosure statement induced plaintiffs or their inspector to forego further inquiry into the house's condition which might have led to discovery of the defects' extent, and (3) whether the sellers' and sellers' agents' knowledge of significant previous water intrusion issues in the house constituted material information not easily discoverable through reasonable diligence which required disclosure.

9. Appeal and Error—abandoned issue—personal liability—no argument

In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim against one of the individual sellers for personal liability was deemed abandoned where plaintiffs failed to raise any argument in their brief on this claim.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Plaintiffs from order entered 31 July 2018 by Judge Alma L. Hinton in Brunswick County Superior Court. Heard in the Court of Appeals 17 October 2019.

Chleborowicz Law Firm, PLLC, by Christopher A. Chleborowicz and Elijah A.T. Huston, for Plaintiffs-Appellants.

Ward and Smith, P.A., by Ryal W. Tayloe and Alex C. Dale, for Defendants-Appellees Berkeley Investors, LLC, and George C. Bell.

Crossley McIntosh Collier Hanley & Edes, PLLC, by Clay Allen Collier, for Defendants-Appellees Robert Patton Carroll and DHR Sales Corp. d/b/a Re/Max Community Brokers.

Wallace, Morris, Barwick, Landis & Stroud, P.A., by Stuart L. Stroud and Kimberly Connor Benton, for Defendants-Appellees Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman.

COLLINS, Judge.

Plaintiffs James and Connie Cummings appeal from the trial court's 31 July 2018 order granting summary judgment to Defendants Berkeley Investors, LLC, George C. Bell, Robert Patton Carroll, DHR Sales Corp. d/b/a Re/Max Community Brokers, Brooke Elizabeth Rudd-Gaglie f/k/a Brooke Elizabeth Rudd, Margaret Rudd & Associates, Inc., and James C. Goodman (collectively, "Defendants"[1]). Plaintiffs contend that material issues of fact exist that preclude summary judgment. We affirm in part and reverse and remand in part.

I. Background

In August 2014, Plaintiffs purchased a house located on Oak Island (the "House") from Berkeley Investors, LLC ("Berkeley"). Plaintiffs were represented in the transaction by Margaret Rudd & Associates, Inc., (the "Rudd Agency"), and the Rudd Agency's agents Brooke Rudd-Gaglie and James Goodman. Berkeley was represented in the transaction by DHR

1. Although they were initially named as defendants, David H. Roos, Margaret N. Singer, Kim Berkeley T. Durham, and Thornley Holdings, LLC were voluntarily dismissed by Plaintiffs prior to entry of the trial court's order from which Plaintiffs have appealed.

Sales Corp. d/b/a Re/Max Community Brokers ("Re/Max") and Robert Carroll, Re/Max's agent in charge of listing the House. At all times relevant to this litigation, George Bell owned a fifty-percent interest in Berkeley, and Thornley Holdings, LLC, an entity owned by Kim Durham, owned the other fifty-percent interest.

The House was constructed in 2003. Berkeley purchased the House in 2005, intending to use it as a rental property. Over the course of its ownership of the House, Berkeley employed Oak Island Accommodations, Inc., ("OIA") to manage the House's rental, cleaning, and maintenance. OIA records demonstrate that over the course of Berkeley's ownership of the House, there were various reports about problems at the House requiring maintenance including, *inter alia*, damage to the roof, windows which would not close, various internal leaks, mold and other "foreign substances" growing within, and pests.

Berkeley first hired Carroll to list the House for sale in January 2013. On 14 January 2013 (Durham's signature) and 20 January 2013 (Bell's signature), Berkeley executed a State of North Carolina Residential Property and Owners' Association Disclosure Statement (the "Disclosure Statement"), which owners of certain residential real estate are required to provide to prospective purchasers in connection with a contemplated sale pursuant to N.C. Gen. Stat. § 47E. In the Disclosure Statement, Berkeley (through Durham and Bell) marked "No" in response to the following questions:

> Regarding the [House] . . . to your knowledge is there any problem (malfunction or defect) with any of the following:
>
> . . . .
>
> (1) FOUNDATION, SLAB, FIREPLACES/CHIMNEYS, FLOORS, WINDOWS (INCLUDING STORM WINDOWS AND SCREENS), DOORS, CEILINGS, INTERIOR AND EXTERIOR WALLS, ATTACHED GARAGE, PATIO, DESK OR OTHER STRUCTURAL COMPONENTS including any modifications to them? . . .
>
> (2) ROOF (leakage or other problem)? . . .
>
> (3) WATER SEEPAGE, LEAKAGE, DAMPNESS OR STANDING WATER in the basement, crawl space or slab? . . . .
>
> (4) PRESENT INFESTATION, OR DAMAGE FROM PAST INFESTATION OF WOOD DESTROYING INSECTS OR ORGANISMS which has not been repaired?"

The "Instructions to Property Owners" section of the Disclosure Statement sets forth that marking "No" on the form is a representation that the signatory has "no actual knowledge of any problem" regarding the relevant characteristic or condition at the time of signing. The instructions also charged Berkeley that if "something happens to the property to make your Disclosure Statement incorrect or inaccurate (for example, the roof begins to leak), you must promptly give the purchaser a corrected Disclosure Statement or correct the problem."

Evidence in the record shows that Bell and Durham discussed various issues with the House during Berkeley's ownership including, *inter alia*, mold, various water leaks, and ceiling leaks. Carroll was also party to certain of these communications, including a 14 October 2013 email regarding issues with the House between Carroll, Bell, and Durham, among others, in which Bell said they needed to "trace the source of the water leakage evident on the ceiling" and "[f]ix the separated/rotted wood in the guest room level from the water leakage. (it leaked while we were there last week and it looks as though the water may be coming in through the half moon window on the upper floor[,)]" and that he had "[f]ound a small plumbing leak in the kitchen" which he had "fixed with tape."

On 20 January 2014, Bell sent Durham an email noting that they needed to: (1) paint the exterior walls and the trim around the doors, as "the wooden trim around the doors is in real danger of beginning to rot"; (2) paint the "living area on the lower level" because "[t]here has been a lot of water intrusion that has come into that ceiling from wind driven rain from above and has stained it badly about 15 feet into the room ceiling. It's right in the center of the room and seems to originate on the upper level and flow down through the interior column between the doors"; and (3) "[f]ind and repair the source of this leak that is causing the damage. We'll need to get a few boards replaced on the columns as well; they are buckled from the water intrusion." OIA records from 13 February 2014 entitled "Work for Owner" indicate that OIA was seeking estimates to repair these issues, and indicated on 25 March 2014: "Owner is having this work completed by another vendor."

Carroll hired a painter named Randy Cribb to paint the house at some point in March 2014. In addition to painting a wall, the upper and lower decks, and the living room, the work Cribb bid included repairing "cracks" and "cracked caulk" in the living room ceiling. The record contains a screenshot of text messages exchanged between Carroll and Cribb at an unspecified date prior to 24 March 2014 in which Cribb said "I may have found that leak . . . I hope that was it. Everything else there

is tight[.]" In his deposition, Cribb testified that he did not look behind any walls to check for sources of water intrusion.

The Rudd Agency began representing Plaintiffs in their efforts to purchase the House on 26 June 2014, when Rudd-Gaglie (on the agency's behalf) and Plaintiffs executed an Exclusive Buyer Agency Agreement. That agreement set forth, *inter alia*, that: (1) the Rudd Agency had the duty of "disclosing to [Plaintiffs] all material facts related to the property or concerning the transaction of which [the Rudd Agency] has actual knowledge"; (2) Plaintiffs "[are] advised to seek other professional advice in matters of . . . surveying, wood-destroying insect infestation, structural soundness, engineering, and other matters pertaining to any proposed transaction"; and (3) while the Rudd Agency "may provide [Plaintiffs] the names of providers who claim to perform such services, [Plaintiffs] understand[] that [the Rudd Agency] cannot guarantee the quality of service or level of expertise of any such provider." The Exclusive Buyer Agency Agreement also provided that Plaintiffs agreed to "indemnify and hold [] harmless" the Rudd Agency (and its agents Rudd-Gaglie and Goodman) for any liability it might incur arising "either as a result of [Plaintiffs'] selection and use of any such provider or [Plaintiffs'] election not to have one or more of such services performed."

Berkeley accepted Plaintiffs' offer to purchase the House for $1.25 million on 12 (Plaintiffs' and Bell's signatures) and 13 July 2014 (Durham's signature). The Offer to Purchase and Contract (the "Contract") contemplated a 30-day due diligence period allowing Plaintiffs and their agents "to conduct all desired tests, surveys, appraisals, investigations, examinations and inspections of the Property as [Plaintiffs] deem[] appropriate," without limitation, and expressly contemplated that Plaintiffs were allowed to conduct "[i]nspections to determine . . . the presence of . . . evidence of excessive moisture adversely affecting any improvements on the Property" or "evidence of wood-destroying insects or damage therefrom[.]" The Contract also: (1) included an acknowledgment by Plaintiffs that they had received the Disclosure Statement (which, as mentioned above, Berkeley had executed in January 2013); (2) included an acknowledgement by Plaintiffs that "THE PROPERTY IS BEING SOLD IN ITS CURRENT CONDITION"; and (3) set forth that Berkeley was not providing Plaintiffs any warranty to Plaintiffs in connection with the sale.

Plaintiffs hired Jeff Williams, a licensed home inspector, to conduct an inspection of the House on 19 July 2014, which Carroll, Rudd-Gaglie, and Goodman also attended. In the inspection report he provided to

Rudd-Gaglie (to be provided to Plaintiffs), Williams set forth the scope of his inspection, including that he "shall[,]" *inter alia*: (1) "[r]eport signs of abnormal or harmful water penetration into the building or signs of abnormal or harmful condensation on building components"; and (2) "[p]robe structural components where deterioration is suspected[.]" But the Williams report also set forth that: (1) "[t]he inspection did not involve . . . inspecting behind furniture, area rugs or areas obstructed from view"; (2) Williams was "not required to: [e]nter any area or perform any procedure that may damage the property or its components" or "[d]isturb insulation, move personal items, panels, furniture, equipment, plant life, soil, snow, ice, or debris that obstructs access or visibility"; (3) Williams was not required to "report on . . . [t]he presence or absence of pests such as wood damaging organisms, rodents, or insects"; and (4) "[w]hile the inspector makes every effort to find all areas of concern, some areas can go unnoticed[.] Our inspection makes an attempt to find a leak but sometimes cannot. . . . It is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report."

The Williams report noted a variety of issues with the House requiring repairs, including, *inter alia*: (1) minor damage to the roof; (2) areas on the exterior of the House needing "to be sealed to keep water and insect [sic] from entering the home"; (3) doors that failed to close or otherwise seal properly; (4) windows that exhibited rust stains and would not open; and (5) minor leaks causing mold to grow. Williams did not report that the House exhibited significant water-intrusion issues. At his deposition, Williams testified that he did not see any evidence of moisture intrusion during his inspection of the House, and therefore did not conduct any moisture testing, which would have involved intruding behind the walls. Williams also testified that he was not made aware of any history of water intrusion, which would have caused him to either conduct moisture testing or turn down the job. James Cummings ("Cummings") testified at his deposition that following Williams' inspection, he asked Carroll: "Is this a good, watertight, sound house?" and that Carroll responded "Jim, if I had the money, I'd buy it."

Rudd-Gaglie sent Plaintiffs the Williams report via email on 21 July 2014. In her email, Rudd-Gaglie said that Williams had told her the issues included "mostly small items" and that "the bigger items were the doors and windows[,]" and said that she and Plaintiffs should review the report in-depth and then "discuss how [Plaintiffs] would like to proceed with repairs."

On 11 August 2014 (Bell's signature) and 12 August 2014 (Durham's signature), Berkeley and Plaintiffs amended the Contract to require Berkeley to pay $4,500 of Plaintiffs' "expenses associated with the purchase of the Property[.]" Cummings testified at his deposition that the amendment was intended to compensate Plaintiffs for the cost of repairing the issues identified by Williams during his inspection, primarily replacing certain door locks and window cranks. The transaction closed on 15 August 2014.

Cummings testified that Plaintiffs and their family went to the House for Thanksgiving in 2014. Just before the holiday, there was a storm, and water began entering the House from the first-floor ceiling. Cummings and his son-in-law cut away a section of the wall with a knife, and noticed a nest of termites and mold. Cummings then called Rudd-Gaglie and apprised her of the problem. Rudd-Gaglie suggested Cummings call Craig Moore, a licensed general contractor, to come to inspect the House, and Cummings did so.

At his deposition, Moore testified that upon his first visit to the House soon thereafter, the ocean-side wall showed signs of flooding and "massive rot," which he testified was a "structural issue" that would have "take[n] quite a while" to develop. Moore also testified that he witnessed an active termite infestation causing damage to the House, and that in his experience such damage "doesn't happen in a couple of days."

Moore testified that the damage he witnessed showed that, in his opinion, the House had not been properly maintained, although "work had been done to make the house look better[,]" i.e., that the "previous damage to the house, wherever it was, was carefully painted and hidden so that the only way to discover that there was an ongoing water intrusion problem would have been to do extensive intrusion testing into the walls[.]" Moore also disagreed that "there [would] have been any reason for you if you went and looked at this house to cut a hole in the wall before you bought it to do intrusive testing[,]" although Moore testified that he would have identified the water-intrusion issues had he inspected the House for Plaintiffs, and told Plaintiffs that "this is why you should have a general contractor do your inspection instead of a home inspector because [general contractors] know what the repairs look like."

Moore testified that he did not believe that someone performing aesthetic work could have done their job without suspecting that they were covering up a major problem, but expressed his opinion that "[t]here would be no way to tell the extent of the condition without exposing the framing of the house," i.e., conducting moisture testing by intruding into the walls.

Later, once the interior sheetrock walls were removed, Moore observed extensive moisture intrusion and rot, and that there had been newspaper shoved into holes in the walls and then caulked over. Moore ultimately contracted with Plaintiffs to repair much of the damage he found.

Plaintiffs initially filed suit in this case on 2 September 2015. The trial court subsequently granted Plaintiffs' motion to amend the complaint, which was filed on 12 September 2016. Plaintiffs' amended complaint brought the following causes of action against Defendants:[2] (1) negligence, against Re/Max, Carroll, the Rudd Agency, Rudd-Gaglie, and Goodman; (2) negligent misrepresentation, against all Defendants; (3) breach of fiduciary duty, against the Rudd Agency, Rudd-Gaglie, and Goodman; (4) unfair and deceptive trade practices within the meaning of N.C. Gen. Stat. § 75-1.1, against Berkeley, Bell, Re/Max, and Carroll; (5) breach of contract, against Berkeley and Bell; (6) breach of the implied covenant of good faith and fair dealing, against Berkeley and Bell; (7) fraud and fraud in the inducement, against Berkeley, Bell, Re/Max, and Carroll; (8) fraud by concealment, against Berkeley, Bell, Re/Max, and Carroll; and (9) personal liability against Bell. In their amended complaint, Plaintiffs alleged that Defendants facilitated their purchase of the House in a defective condition—namely, that the House was damaged by undisclosed water-intrusion issues and was infested with termites—in derogation of various duties, and sought damages.

Defendants answered the amended complaint, asserted various affirmative defenses, and moved to dismiss on 18 October 2016, 14 November 2016, and 30 November 2016. Discovery ensued, after which Defendants moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, on 24 May 2018 and 31 May 2018.

Defendants' motions for summary judgment came on for hearing on 11 June 2018.[3] On 12 July 2018, the trial court emailed counsel for the parties indicating that she intended to grant Defendants' motions for

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2. Plaintiff's amended complaint also brought causes of action against the voluntarily dismissed defendants, *see supra* note 1, which are not relevant for purposes of this appeal.

3. During the hearing, Berkeley and Bell's counsel objected to Plaintiffs' reliance upon a document reflecting OIA maintenance records for the House from 2005 to 2010 on the basis that the document had not been authenticated in any deposition, and the trial court overruled the objection. The purportedly unauthenticated records—which Berkeley and Bell urge in their brief on appeal that we not consider in reviewing the trial court's order—are not material to our conclusions regarding whether summary judgment was appropriately granted on Plaintiffs' various causes of action, and we therefore need not analyze the trial court's ruling on Berkeley and Bell's objection to those records.

summary judgment on all of Plaintiffs' causes of action, and requested that counsel prepare proposed orders reflecting that ruling, as well as various findings of fact she said the proposed orders "should include[.]" The parties responded with various proposed orders over the next week, and suggested to the trial court that findings of fact were not necessary.

On 31 July 2018, the trial court entered an order granting Defendants' motions for summary judgment on all of Plaintiffs' causes of action, without any findings of fact. The trial court dismissed Plaintiffs' causes of action with prejudice and taxed Plaintiffs with costs.

Plaintiffs timely noticed appeal from the 31 July 2018 order.[4]

II. Discussion

Plaintiffs argue that the trial court erred by granting Defendants summary judgment because genuine issues of material fact exist that require trial. After stating the standard of review, we address each of Plaintiffs' causes of action in turn.

a. Standard of Review

This Court has said:

> Summary judgment is a somewhat drastic remedy, that must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue. The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.
>
> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is

4. In their notice of appeal, Plaintiffs also purported to appeal from the trial court's ruling sustaining Berkeley and Bell's objection to the introduction of certain evidence at the hearing on Defendants' motions for summary judgment. However, Plaintiffs make no arguments regarding that ruling in their brief on appeal, and as such, that aspect of Plaintiffs' appeal has been 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.").

> entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> A defendant may show entitlement to summary judgment by
>
> (1) proving that an essential element of the plaintiff's case is non-existent, or
>
> (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or
>
> (3) showing that the plaintiff cannot surmount an affirmative defense.
>
> Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 211-12, 580 S.E.2d 732, 735 (2003) (internal quotation marks, brackets, and citations omitted).

"Our standard of review of an appeal from summary judgment is de novo. The evidence produced by the parties is viewed in the light most favorable to the non-moving party. If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied." *Nationstar Mortg. LLC v. Curry*, 822 S.E.2d 122, 125-26 (N.C. Ct. App. 2018) (internal quotation marks, brackets, and citations omitted).

b. Negligence

"[U]nder established common law negligence principles, a plaintiff must offer evidence of four essential elements in order to prevail: duty, breach of duty, proximate cause, and damages." *Estate of Mullis v. Monroe Oil Co.*, 349 N.C. 196, 201, 505 S.E.2d 131, 135 (1998).

Plaintiffs brought their negligence cause of action against Re/Max and Carroll (collectively, "Berkeley's agents") and the Rudd Agency, Rudd-Gaglie, and Goodman (collectively, "Plaintiffs' agents"), and we address these two groups separately.

1. Berkeley's agents

[1] Plaintiffs alleged that Berkeley's agents owed them duties to, *inter alia*: (1) "take all reasonable steps to ascertain all known and readily available material facts about the condition" of the House, including by making inquiries of Berkeley, OIA, and their representatives regarding the House, and to disclose all known and ascertainable material facts regarding the House to Plaintiffs; (2) ensure that the water-intrusion issues at the House were effectively repaired by a proper professional; and (3) ensure that Berkeley's Disclosure Statement was materially accurate and fully disclosed any material defects to the House before providing the same to Plaintiffs. Plaintiffs alleged that Berkeley's agents breached those duties by: (1) failing to discover any ascertainable material defects to the House and disclose those defects to them; (2) hiring Cribb, a painter, to repair the water-intrusion issues; (3) allowing Berkeley to provide Plaintiffs with the Disclosure Statement in which Berkeley represented that it had no actual knowledge of defects to the House; and (4) failing to disclose the known history of water-intrusion issues at the House and any other known material facts about the House to them. Berkeley's agents' alleged negligence was a proximate cause of Plaintiffs closing on the House, the theory continues, which caused Plaintiffs injury when they repaired the defects to the House once they were discovered, and resulted in other damages.

We have described the duties a seller's agent owes to the buyer in a real-estate transaction as follows:

> It is well-settled that a broker who makes fraudulent misrepresentations or who conceals a material fact when there is a duty to speak to a prospective purchaser in connection with the sale of the principal's property is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller. Further, *a broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information. This duty applies, however, to material facts known to the broker and to representations made by the broker.*

Clouse v. Gordon, 115 N.C. App. 500, 508, 445 S.E.2d 428, 432-33 (1994) (emphasis added) (internal quotation marks, brackets, and citations omitted).

First, Plaintiffs' theory that Berkeley's agents were negligent because they failed to discover defects and disclose "ascertainable" material facts is misguided, because a seller's agent only has a duty to disclose material facts that are known to him. *Id*. Second, Berkeley's agents could not have become liable in negligence to Plaintiffs by failing to ensure that proper repair work at the House took place, because Berkeley's agents owed Plaintiffs no duty to ensure that the House was in any particular condition at the time of closing. And third, Berkeley's agents were not negligent by merely passing along Berkeley's Disclosure Statement to Plaintiffs, where the Disclosure Statement (1) was not signed by Berkeley's agents, (2) expressly set forth that "the representations are made by the owner and not the owner's agent(s) or subagent(s)[,]" and (3) only set forth representations regarding Berkeley's (and its representatives') actual knowledge. Plaintiffs have not directed our attention to any authority setting forth that a seller's agent has a duty to challenge or correct the statements made by its principal to a prospective buyer under such circumstances, and we are aware of no such authority.

However, the facts that Berkeley's agents owed Plaintiffs no duties to discover defects at the House, repair the House, or correct the Disclosure Statement does not mean that Berkeley's agents owed no duty to Plaintiffs to speak regarding the water-intrusion issues at the House, the circumstances surrounding Cribb's purported repair work to those issues, or the substance of Berkeley's Disclosure Statement, of which the record demonstrates Berkeley's agents had knowledge. As mentioned above, "a broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Clouse*, 115 N.C. App. at 508, 445 S.E.2d at 432-33. Berkeley's agents do not dispute that they did not tell Plaintiffs about the previous water-intrusion issues or the circumstances surrounding Cribb's purported repairs, and so the question is whether those facts were material such that Berkeley's agents were required to disclose them, and were negligent by failing to do so.

The materiality of the past water-intrusion issues and Cribb's purported repairs to them depends upon whether Cribb's work was sufficient to justify a reasonable belief that the issues had been successfully

repaired,[5] and thus that the facts of the issues and the repairs—which would be material in the absence of successful repairs—were rendered no longer material such that the failure to disclose them to Plaintiffs was not negligence (or fraud, *see infra* Section II(h)). Because none of the Defendants have directed our attention to any authority tending to support the proposition that where a painter states that he "may have found" a leak at a residence and "hope[s]" that he repaired it, the facts of the previous water-intrusion issues at the residence and the efforts that were undertaken to repair them are rendered immaterial as a matter of law, we conclude that the question of the materiality of those facts must be answered by a jury following trial. *See Latta v. Rainey*, 202 N.C. App. 587, 599, 689 S.E.2d 898, 909 (2010) ("A misrepresentation or omission is 'material' if, had it been known to the party, it would have influenced the party's judgment or decision to act. Materiality is generally a question of fact for the jury." (citations omitted)).

Berkeley's agents argue, however, that the economic-loss rule bars Plaintiffs' negligence cause of action against them. This Court has explained the economic-loss rule as follows:

> [A] tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation. Where parties were privy to a contract, a viable tort action must be grounded on a

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5. *See* 2008-2009 Update Course, "Material Facts" 28 (N.C. Real Estate Comm'n, 2009), https://www.ncrec.gov/Pdfs/bicar/MaterialFacts.pdf ("Where the broker is reasonably certain that the repair was successful and cured the problem, then it may not need to be disclosed, such as a leaky faucet which has been fixed, or the purchase of a new water heater to replace the old one, etc."); *see also Friebel v. Paradise Shores of Bay Cty., LLC*, 2012 U.S. Dist. LEXIS 36384, at *9 (N.D. Fla. Mar. 19, 2012) ("Here, the only issue is whether the structural problems and the subsequent repairs were material facts which should have been disclosed. . . . Plaintiffs have not met their burden because the evidence in the record demonstrates that Defendant was reasonable in relying on the assurances of the engineer of record, the architect, their retained certified general contractor, the engineers at ECM, and the city issued certificate of occupancy. . . . Defendants were reasonable to believe that the repairs were adequate and that no disclosures had to be made."); *cf. Clouse*, 115 N.C. App. at 509, 445 S.E.2d at 433 (defendant "would have no reason to question [surveyor]'s affirmative representation and make her own independent investigation when [surveyor]'s expertise was specifically in the area of conducting surveys and when he was paid to specifically conduct such survey").

> violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties.

Boone Ford, Inc. v. IME Scheduler, Inc., 822 S.E.2d 95, 99 (N.C. Ct. App. 2018) (internal quotation marks and citations omitted).

However, Berkeley's agents did not have direct contractual privity with Plaintiffs. And as described below in Section II(f), we conclude that Berkeley's Contract with Plaintiffs did not impose a contractual duty upon Berkeley (or others) to (1) discover defects to the House and disclose them to Plaintiffs, (2) repair any known defects to the House for Plaintiffs, or (3) provide a Disclosure Statement free from misrepresentations to Plaintiffs, meaning that such alleged acts and omissions by Berkeley's agents could not breach the Contract. It follows, therefore, that the economic-loss rule is not applicable to Plaintiffs' negligence cause of action brought against Berkeley's agents: i.e., because neither Berkeley, Bell, nor Berkeley's agents are adequately alleged to have acted or failed to act in a way implicating any *contractual* duties Berkeley owed to Plaintiffs under the Contract—namely, to sell the House to Plaintiffs "IN ITS CURRENT CONDITION"—the economic-loss rule cannot bar Plaintiffs' causes of action alleged *in tort* against Berkeley, Bell, or Berkeley's agents.

For these reasons, we conclude that the trial court erred by granting Berkeley's agents summary judgment on the negligence cause of action Plaintiffs brought against them.

2. Plaintiffs' agents

[2] Plaintiffs alleged that Plaintiffs' agents had duties to: (1) discover material defects to the House, including the water-intrusion issues, and to disclose those defects to them; and (2) make proper recommendations regarding home inspectors. Plaintiffs alleged that Plaintiffs' agents breached those duties by (1) failing to discover and disclose the water-intrusion issues and (2) negligently recommending Williams, who did not perform moisture testing.

However, the scope of Plaintiffs' agents' duties which Plaintiffs alleged were breached were bargained for and set forth within the Exclusive Buyer Agency Agreement that the Rudd Agency executed with Plaintiffs, and Plaintiffs have not argued that the Exclusive Buyer Agency Agreement, or any term therein, was invalid. *See Andrews v. Fitzgerald*, 823 F. Supp. 356, 378 (M.D.N.C. 1993) (upholding

exculpatory clause in contract for the sale of securities: "Under North Carolina law, parties to a contract may agree to limit liability for ordinary negligence. Exculpatory provisions are not favored by the law and are strictly construed against parties relying on them. Exculpatory clauses will be held void if the agreement is (1) violative of a statute, (2) contrary to a substantial public interest, or (3) gained through inequality of bargaining power." (citations omitted)). Because Plaintiffs agreed to limit the scope of Plaintiffs' agents' duties within a valid contract, Plaintiffs' negligence cause of action against Plaintiffs' agents is barred by the economic-loss rule.[6] *See Lord v. Customized Consulting Specialty, Inc.*, 182 N.C. App. 635, 639, 643 S.E.2d 28, 30 (2007) (in the products-liability context, noting that the economic-loss rule "encourages contracting parties to allocate risks for economic loss themselves, because the promisee has the best opportunity to bargain for coverage of that risk or of faulty workmanship by the promisor").

The Exclusive Buyer Agency Agreement specifically (1) described the Rudd Agency's duties regarding the disclosure of material facts about the House, (2) advised Plaintiffs to seek professional advice regarding inspections of the House, and (3) set forth that Plaintiffs understood that the Rudd Agency was not responsible for the quality of services provided by any professionals it recommended to Plaintiffs. Accordingly, because Plaintiffs are in privity of contract with the Rudd Agency regarding the bases for the negligence cause of action Plaintiffs brought against the Rudd Agency, that cause of action is barred by the economic-loss rule.

Moreover, although Rudd-Gaglie and Goodman were not parties to the Exclusive Buyer Agency Agreement and therefore lacked privity of contract with Plaintiffs, we have held that the economic-loss rule bars negligence actions brought against a defendant acting on behalf of another with whom the plaintiff was in contractual privity where the defendant's acts and the harm suffered by the plaintiff were related to the essence of the contract. *See Beaufort Builders, Inc. v. White Plains Church Ministries, Inc.*, 246 N.C. App. 27, 37-38. 783 S.E.2d 35, 42 (2016) (rejecting the plaintiff's argument that the president/co-owner could not avail himself of the economic-loss rule because he lacked contractual

6. The fact that Plaintiffs did not bring a breach-of-contract claim against Plaintiffs' agents in the amended complaint does control the application of the economic-loss rule here, as a holding to that effect would create an avenue by which litigants could effectively avoid the effect of bargained-for contractual terms where unfavorable by simply not bringing a claim for breach of contract and suing their counterparty in tort instead.

privity with the plaintiff, who had contracted with the construction company, rather than the president/co-owner in his individual capacity).

So here, where Rudd-Gaglie and Goodman's purported negligence in discovering and disclosing the purported defects to the House to Plaintiffs was clearly related to the essence of the Rudd Agency's contract with Plaintiffs to represent them in their efforts to purchase the House, and the harm Plaintiffs allegedly suffered was that they did not get the benefit of their bargain with the Rudd Agency, Plaintiffs may not avoid the application of the economic-loss rule to its claims against Rudd-Gaglie and Goodman in their individual capacities.

We accordingly conclude that the trial court did not err by granting Plaintiffs' agents summary judgment on the negligence cause of action Plaintiffs brought against them.

c. Negligent misrepresentation

[3] This Court has said:

> The tort of negligent misrepresentation occurs when a party [1] justifiably relies [2] to his detriment [3] on information prepared without reasonable care [4] by one who owed the relying party a duty of care. If the plaintiff could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.

Songwooyarn Trading Co. v. Sox Eleven, Inc., 213 N.C. App. 49, 54, 714 S.E.2d 162, 166 (2011) (internal quotation marks and citations omitted).

Plaintiffs brought their cause of action for negligent misrepresentation against all Defendants, alleging that Defendants breached their duties to discover and disclose material defects to the House to Plaintiffs, and that Plaintiffs justifiably relied to their detriment upon Defendants' representations that did not include disclosure of the defects.

As a threshold matter, this Court has said that the economic-loss rule can bar negligent-misrepresentation causes of action. *E.g.*, *Boone Ford*, 822 S.E.2d at 99. Accordingly, and for the same reasons described above in Section II(b) regarding Plaintiffs' negligence cause of action, the economic-loss rule bars Plaintiffs' negligent-misrepresentation claims concerning the discovery and disclosure of defects to the House brought against Plaintiffs' agents, but does not apply to Plaintiffs' negligent-misrepresentation claims brought against Berkeley, Bell, or Berkeley's agents.

The purportedly false representations attributed to Berkeley, Bell, or Berkeley's agents alleged by Plaintiffs in the negligent-misrepresentation count of the amended complaint are: (1) a statement "that the house was well built[,]" attributed elsewhere in the amended complaint to Carroll; and (2) the representation "NO" in the response to Question 1 on the Disclosure Statement, i.e., whether "to your knowledge is there any problem (malfunction or defect) with . . . [the] FOUNDATION, SLAB, FIREPLACES/CHIMNEYS, FLOORS, WINDOWS (INCLUDING STORM WINDOWS AND SCREENS), DOORS, CEILINGS, INTERIOR AND EXTERIOR WALLS, ATTACHED GARAGE, PATIO, DESK OR OTHER STRUCTURAL COMPONENTS including any modification to them?"

Carroll's statement that the House was well built could not have been justifiably relied upon on by Plaintiffs in deciding whether to purchase the House, as the amended complaint establishes that Plaintiffs knew that Carroll was a real-estate agent, and does not allege that Plaintiffs thought that Carroll had helped build the House or otherwise possessed peculiar knowledge regarding the House's construction. *See Libby Hill Seafood Rests., Inc. v. Owens*, 62 N.C. App. 695, 698, 303 S.E.2d 565, 568 (1983) (vague statements of those lacking "peculiar knowledge" of the facts are not actionable misrepresentations).

Regarding the Disclosure Statement, any false representation made therein cannot be attributed to Berkeley's agents, who did not sign the Disclosure Statement, which expressly set forth that "the representations are made by the owner and not the owner's agent(s) or subagent(s)[.]" Misrepresentations within the Disclosure Statement can, however, be attributed to Berkeley and Bell, who signed the document. *See Wilson v. McLeod Oil Co.*, 327 N.C. 491, 518, 398 S.E.2d 586, 600 (1990) ("Corporate officers are liable for their torts, although committed when acting officially." (quotation marks and citation omitted)).

In its response to the Disclosure Statement's Question 1, Berkeley (through Bell and Durham) represented that as of January 2013 it was without actual knowledge of any defects to, *inter alia*, the House's windows, doors, ceilings, walls, or roof, and elsewhere within the Disclosure Statement expressly represented that it was not aware of any current issues with water leakage. In the event the Disclosure Statement became "incorrect or inaccurate[,]" the Disclosure Statement required Berkeley to furnish potential buyers with another, updated statement or to "correct the problem." The record reflects that Bell and Durham discussed significant water intrusion into the House flowing from the upper level and causing damage to the second-floor ceiling on 20 January 2014, and that Berkeley subsequently hired Cribb to paint the House; Cribb told

Carroll that he might have fixed a leak in the House. The record does not reflect that anyone else was hired to repair the water-intrusion issues identified in Bell and Durham's January 2014 correspondence, and does not reflect that an updated Disclosure Statement was ever completed and furnished to Plaintiffs.

The record thus tends to show that Berkeley and Bell: (1) were aware of significant water-intrusion issues; (2) did not hire anyone besides Cribb, a painter, to repair those issues; and (3) thereafter represented to Plaintiffs that they were not aware of any water-intrusion issues at the House before closing on the sale thereof. Although Berkeley and Bell argue that Cribb "fully repaired" the water-intrusion issues, we conclude that the record, viewed in the light most favorable to Plaintiffs, raises a genuine issue of material fact regarding whether hiring a painter to repair the water-intrusion issues was unreasonable such that Berkeley and Bell negligently misrepresented, in their response to Disclosure Statement Question 1, that they did not have actual knowledge of any problems with the House.

Berkeley and Bell counter that the fact that Plaintiffs were able to inspect and discover the water-intrusion issues themselves means that Plaintiffs did not justifiably rely upon the Disclosure Statement as a matter of law. As mentioned above, "[i]f the plaintiff could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Songwooyarn Trading*, 213 N.C. App. at 54, 714 S.E.2d at 166.

The amended complaint alleges that Cribb was hired to conceal the water-intrusion issues, which is effectively an allegation that Plaintiffs could not have learned of the water-intrusion issues through the exercise of reasonable diligence. The record shows that Plaintiffs hired Williams to inspect the House, who testified at his deposition that he did not conduct moisture testing and did not discover the water-intrusion issues. But the record also reflects Moore's testimony disagreeing that "there [would] have been any reason for you if you went and looked at this house to cut a hole in the wall before you bought it to do intrusive testing" and agreeing that "previous damage to the house, wherever it was, was carefully painted and hidden so that the only way to discover that there was an ongoing water intrusion problem would have been to do extensive intrusion testing into the walls[.]"

This evidence, taken in the light most favorable to Plaintiffs demonstrates a genuine issue of material fact as to whether Williams'

inspection amounted to the exercise of "reasonable diligence[,]" particularly because Defendants' alleged efforts to conceal the water-intrusion issues might have caused Plaintiffs to forego moisture testing and more reasonably rely upon the Disclosure Statement where Plaintiffs otherwise might not have. *See Songwooyarn Trading*, 213 N.C. App. at 55, 714 S.E.2d at 166 (rejecting justifiable reliance argument in negligent misrepresentation context: "A plaintiff is not barred from recovery because he had a lesser opportunity to investigate representations made by someone with superior knowledge."); *Willen v. Hewson*, 174 N.C. App. 714, 719-20, 622 S.E.2d 187, 191 (2005) (rejecting reasonable reliance argument in fraud context where "defendant deliberately concealed" material facts).

The question of whether a party's reliance was justifiable for purposes of a negligent-misrepresentation claim is "one for the jury, unless the facts are so clear as to permit only one conclusion." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P.*, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999). Because a jury could reach more than one conclusion on this issue, summary judgment for Berkeley and Bell was not appropriate on Plaintiffs' negligent-misrepresentation cause of action.

In summary, we conclude that the trial court (1) did not err by granting Plaintiffs' agents and Berkeley's agents summary judgment but (2) erred by granting Berkeley and Bell summary judgment on the negligent-misrepresentation cause of action brought against them.

d. Breach of Fiduciary Duty

[4] This Court has said:

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business entrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so. The care and skill required is that generally possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure to the principal of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal. The principal has the right to rely on his agent's statements, and is not required to make his own investigation.

Brown v. Roth, 133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999) (internal quotation marks, brackets, and citations omitted).

Plaintiffs brought their cause of action for breach of fiduciary duty against Plaintiffs' agents,[7] alleging that Plaintiffs' agents breached their fiduciary duties "by failing to take all necessary steps to ascertain the history and status of the [House] and by referring a home inspector whom [sic] [Plaintiffs' agents] knew did not undertake the usual and customary testing and investigations which would have or could have independently disclosed and discovered the substantial water intrusion issues and damages" to the House.

Plaintiffs' agents argue that their duties regarding discovery and disclosure of any defects to the House were defined by their contract with Plaintiffs.[8] While we agree as discussed in Section II(b)(2) above that the Exclusive Buyer Agency Agreement contemplates those duties, a real-estate agent's fiduciary duty is not prescribed by contract, but is instead imposed by operation of law. *See Lockerman v. S. River Elec. Membership. Corp.*, 250 N.C. App. 631, 635-36, 794 S.E.2d 346, 351 (2016) (noting that *de jure* fiduciary duties, which "arise by operation of law" between "legal relations[,]" include those between "principal and agent" (citation omitted)). Plaintiffs' agents have not directed our attention to any authority setting forth that a party who undertakes to act as a fiduciary may limit the scope of that duty by contract, and we are aware of no such authority. Accordingly, the scope of the Exclusive Buyer Agency Agreement is not dispositive as to the scope of Plaintiffs' agents' duties that were owed to Plaintiffs.

While the Exclusive Buyer Agency Agreement sets forth that Plaintiffs' agents must only "disclos[e] to [Plaintiffs] all material facts related to the property or concerning the transaction of which [they] ha[ve] *actual knowledge*" (emphasis added), Plaintiffs' agents' fiduciary duty is not as limited: as noted above, a real-estate agent is required to "make a full and truthful disclosure to the principal of all facts known to him, *or discoverable with reasonable diligence* and likely to affect the principal." *Brown*, 133 N.C. App. at 54-55, 514 S.E.2d at 296 (1999) (emphasis added) (internal quotation marks, brackets, and citations omitted). Further, "[t]he principal has the right to rely on his agent's statements, and *is not required to make his own investigation*." *Id.* (emphasis added).

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7. Plaintiffs' agents concede in their brief on appeal that the Exclusive Buyer's Agency Agreement "create[ed] a contractual and fiduciary relationship between" Plaintiffs and Plaintiffs' agents.

8. Plaintiffs' agents do not argue in their brief on appeal that the economic-loss rule bars Plaintiffs' fiduciary-breach claims, so we do not reach that question.

Plaintiffs do not allege in the amended complaint that Plaintiffs' agents had actual knowledge of the water-intrusion issues or other defects to the House. Accordingly, the question is whether Plaintiffs' agents have established that the record reflects no genuine issue of material fact regarding Plaintiffs' agents' exercise of reasonable diligence in attempting to investigate and discover defects to the House and disclose the results of their investigation to Plaintiffs. Plaintiffs focus upon two acts that allegedly breached the fiduciary duty owed to them: (1) Plaintiffs' agents' failure to request and obtain OIA maintenance records for the House, which allegedly demonstrate a history of moisture intrusion and other defects to the House; and (2) Plaintiffs' agents' hiring of Jeff Williams to inspect the House, because Williams did not perform a moisture test, which Plaintiffs allege was "usual and customary."

Regarding the first allegation, Plaintiffs' agents argue that: (1) there is no "North Carolina Real Estate Commission ruling or advisory opinion that establishes a duty to request maintenance records for the sale of a house"; (2) Plaintiffs did not request that Plaintiffs' agents ask for the OIA maintenance records; and (3) Berkeley's agents were in possession of those records and that, if they showed material defects to the House, Berkeley's agents were obligated to produce them to Plaintiffs. But Plaintiffs' agents direct our attention to no authority setting forth that a real-estate agent's duty to investigate and disclose is limited, as a matter of law, by the North Carolina Real Estate Commission, the requests made by the agent's client, or the fact that another who may owe the client a duty of disclosure is in possession of the information at issue.

Regarding the second allegation, Plaintiffs' agents argue that the Exclusive Buyer Agency Agreement "indemnifies [them] from any liability related to the selection of the home inspector which was the [sic] explicitly the [Plaintiffs'] duty" and that "[t]here is absolutely no evidence that Jeff Williams failed to do anything during the inspection that should have been done or that he was otherwise failed [sic] to adequately conduct a home inspection." But as explained above: (1) we are aware of no authority setting forth that the scope of a real-estate agent's fiduciary duty may be delineated or limited by contract;[9] and (2) Moore testified at his deposition that he would have identified the water-intrusion problem had he inspected the House. Further, whether a moisture test is "usual and customary" for a home inspection is not clear to us from any

9. Plaintiffs' agents have directed our attention to no authority setting forth that a contractual indemnification provision can extinguish a cause of action, and we are aware of no such authority.

authorities cited by the parties, and we are therefore unable to conclude that Williams' failure to conduct such a test was unobjectionable.

As mentioned above, Plaintiffs had the right to rely upon Plaintiffs' agents' investigation and were not required to conduct their own. *Brown*, 133 N.C. App. at 54-55, 514 S.E.2d at 296. Because of that fact, and based upon the authorities cited by the parties and the record as viewed in the light most favorable to Plaintiffs, we are unable to say whether, as a matter of law, Plaintiffs' agents performed in keeping with the standard of care "generally possessed and exercised by persons engaged in the same business[,]" *Brown*, 133 N.C. App. at 54, 514 S.E.2d at 296, when they failed to request the OIA maintenance records and hired Williams to inspect the House.

Accordingly, we conclude that there exist genuine issues of material fact as to whether Plaintiffs' agents breached their fiduciary duties to Plaintiffs, and that the trial court erred by granting Plaintiffs' agents summary judgment on Plaintiffs' fiduciary-breach cause of action.

e. Unfair and/or Deceptive Trade Practices

[5] Although they mention the term, Plaintiffs make no argument in their brief concerning unfair and/or deceptive trade practices. Moreover, they did not file a reply brief to respond to Defendants' arguments that this cause of action was abandoned. *See* N.C. R. App. P. 28(h). We accordingly deem that aspect of Plaintiffs' appeal abandoned. N.C. R. App. P. 28(b)(6); *see Comstock v. Comstock*, 244 N.C. App. 20, 25 n.2, 780 S.E.2d 183, 186 n.2 (2015) (holding "cursory reference" insufficient to satisfy Appellate Rule 28(b)(6) where party "offers no actual substantive argument with regard to [an] issue"); *First Charter Bank v. Am. Children's Home*, 203 N.C. App. 574, 580, 692 S.E.2d 457, 463 (2010) ("It is not the role of the appellate courts to create an appeal for an appellant, nor is it the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein." (internal quotation marks, ellipsis, and citations omitted)).

f. Breach of Contract

[6] "The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 216, 768 S.E.2d 582, 590 (2015) (quotation marks and citation omitted).

Plaintiffs brought their breach-of-contract cause of action against Berkeley and Bell, alleging breach of the Contract because Bell and

Durham represented (on Berkeley's behalf) in the attached Disclosure Statement that they had no actual knowledge of any defects to the House, when they allegedly knew or should have known of water-intrusion issues rendering certain of those representations false.

As a threshold matter, Bell is correct that because he did not contract in his individual capacity with Plaintiffs, he cannot be held individually liable for any breach of the Contract. *See Keels v. Turner*, 45 N.C. App. 213, 218, 262 S.E.2d 845, 847 (1980) ("[W]here individual responsibility is demanded, the nearly universal practice in the commercial world is that the corporate officer signs twice, once as an officer and again as an individual." (quotation marks and citation omitted)).

Regarding the remaining claim against Berkeley, our Supreme Court has said that " '[i]t is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and separable -- that is, the representations are usually not regarded as merged in the contract.' " *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965) (quoting 23 Am. Jur., *Fraud and Deceit*, § 23, pp. 775-76). Plaintiffs have cited no authority where any of our courts have held that a false representation in an N.C. Gen. Stat. § 47E disclosure statement furnished to a prospective buyer of a residence was sufficient to support a cause of action against the seller for breach of the sales contract, and we are aware of no such authority. Further: (1) the Disclosure Statement expressly sets forth that Plaintiffs understand that Berkeley's representations do not comprise warranties regarding the facts represented, and that the representations were not intended to be substitutes for Plaintiffs' own investigation; and (2) the Contract expressly provides that Berkeley was selling the House "IN ITS CURRENT CONDITION" and that Berkeley would not provide Plaintiffs with any warranties regarding the House as part of the sale. Neither Plaintiffs' amended complaint nor their brief on appeal direct our attention to any particular provision in the Contract setting forth that the representations made within the Disclosure Statement are terms of the Contract, and after a careful review of the Contract, we discern no provision reasonably read as creating such terms.

We therefore conclude that while a false representation within the Disclosure Statement may give Plaintiffs a basis for their cause of action alleging fraud—a tort which, if proven, allows for rescission of the contract and/or damages, *see Kee v. Dillingham*, 229 N.C. 262, 265-66, 49 S.E.2d 510, 512 (1948)—such a false representation cannot support Plaintiffs' cause of action alleging breach of the Contract, and that

the trial court did not err by granting Berkeley and Bell summary judgment thereupon.[10]

g. Breach of the Implied Covenant of Good Faith and Fair Dealing

[7] As with their cause of action alleging unfair and/or deceptive trade practices, Plaintiffs make no argument regarding the implied covenant of good faith and fair dealing in their initial brief, and did not file a reply brief. We therefore deem that aspect of Plaintiffs' appeal abandoned as well. N.C. R. App. P. 28(b)(6); *Comstock*, 244 N.C. App. at 25 n.2, 780 S.E.2d at 186 n.2.

h. Fraud

[8] Plaintiffs purported to bring separate causes of action for "Fraud and Fraud in the Inducement" and "Fraud by Concealment[.]" Because: (1) the purportedly distinct causes of action each allege false representations or omissions in inducing Plaintiffs to purchase the House; and (2) the respective elements of fraud, fraud in the inducement, and fraudulent concealment overlap on these facts, *compare Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 31, 588 S.E.2d 20, 29 (2003) (elements of fraud), *with Harton v. Harton*, 81 N.C. App. 295, 298-99, 344 S.E.2d 117, 119-20 (1986) (elements of fraud in the inducement), *with Friedland v. Gales*, 131 N.C. App. 802, 807, 509 S.E.2d 793, 797 (1998) (elements of fraudulent concealment), we analyze Plaintiffs' causes of action alleging fraud as separate theories of a single cause of action alleging fraud in the inducement.

This Court has said:

> The essential elements of fraud in the inducement are:
>
> (i) that defendant made a false representation or concealed a material fact he had a duty to disclose[;]
>
> (ii) that the false representation related to a past or existing fact;

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10. Because Plaintiffs (1) have abandoned their appeal regarding the trial court's ruling on their cause of action alleging breach of the implied covenant of good faith and fair dealing, *see infra* Section II(g), and (2) make no arguments regarding the breach of any other implied terms within the Contract, we have no occasion to consider (a) the impact the breach of any implied contractual terms might have upon the trial court's ruling on Plaintiffs' breach-of-contract cause of action or (b) the impact such a breach might have upon the application of the economic-loss rule to Plaintiffs' tort claims. *First Charter Bank*, 203 N.C. App. at 580, 692 S.E.2d at 463.

(iii) that defendant made the representation knowing it was false or made it recklessly without knowledge of its truth;

(iv) that defendant made the representation intending to deceive plaintiff;

(v) that plaintiff reasonably relied on the representation and acted upon it; and

(vi) plaintiff suffered injury

Harton, 81 N.C. App. at 298-99, 344 S.E.2d at 119-20.

Plaintiffs brought their fraud cause of action against Berkeley, Bell, and Berkeley's agents, alleging that those four Defendants "made false representations and/or concealments of a material fact regarding the existence of long-standing, chronic and substantial water intrusion and damages as well as the history of not properly repairing the same." Plaintiffs alleged that all four Defendants were, by virtue of Plaintiffs' offer to purchase the House, under a duty to disclose all material facts regarding the House to them, and that: (1) Carroll defrauded Plaintiffs by saying that he would buy the House if he could; (2) Berkeley and Bell defrauded Plaintiffs by filling out the Disclosure Statement representing that they had no knowledge of water-intrusion issues at the House; and (3) all four Defendants defrauded Plaintiffs by failing to disclose the history of water-intrusion issues and the fact that the issues had not been properly repaired. Rather than properly repair the water-intrusion issues, Plaintiffs alleged that these four Defendants took active steps to conceal the issues and thereby deceived them, which both made Plaintiffs' reliance upon the alleged false representations reasonable and excused Plaintiffs' own failure to discover the issues. Plaintiffs acted upon the four Defendants' alleged fraud by closing on the House at full price, and suffered injury by, *inter alia*, repairing the House once the defects to the House became evident.

1. Carroll's statement

Carroll's statement that he would buy the House if he could is vague "puffing" that is not material and could not be reasonably relied upon by Plaintiffs in deciding whether to purchase the House, and accordingly is inadequate as an allegation of fraud. *See Rowan Cty. Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 659 (1992) ("mere puffing, guesses, or assertions of opinions" are not actionable as fraud).

2. Representations within the Disclosure Statement

As discussed above in Section II(b)(1), the record tends to show that Berkeley and Bell (1) were aware of water-intrusion issues at the House, (2) hired only a painter to address those issues, and (3) thereafter represented to Plaintiffs that they were not aware of any water-intrusion issues at the House.

Berkeley and Bell argue that: (1) the economic-loss rule bars Plaintiffs' fraud claims; (2) the record does not contain any evidence that any representation in the Disclosure Statement was made with knowledge of the representation's falsity; and (3) Plaintiffs cannot establish that they reasonably relied upon any of the alleged false representations.

The economic-loss rule does not apply to Plaintiffs' fraud causes of action, because the alleged false representations within the Disclosure Statement (like the alleged omissions discussed *supra* Section II(f)) could not have breached the terms of the Contract. Moreover, this Court has expressly set forth that the economic-loss rule does not bar fraud claims, even where the alleged fraud also breaches a contractual term between the parties. *See Bradley Woodcraft, Inc. v. Bodden*, 251 N.C. App. 27, 34, 795 S.E.2d 253, 259 (2016) ("while claims for negligence are barred by the economic loss rule where a valid contract exists between the litigants, claims for fraud are not so barred and, indeed, the law is, in fact, to the contrary: a plaintiff may assert both claims." (internal quotation marks, brackets, and citation omitted)).

Regarding Berkeley and Bell's second argument that the record does not contain any evidence that any representation in the Disclosure Statement was made with knowledge of the representation's falsity, we do not agree. The evidence in the record, viewed in the light most favorable to Plaintiffs, reflects a genuine issue of material fact regarding whether Berkeley and Bell were aware of unrepaired water-intrusion issues at the House at the time Berkeley furnished the Disclosure Statement to Plaintiffs representing that Berkeley (through Bell and Durham) was unaware of such issues. Because Defendants have not directed our attention to authority setting forth otherwise, the question of whether a painter's purported repair of a leak eliminated Bell and Durham's knowledge regarding the water-intrusion issues is appropriate for a jury to decide as a matter of fact, not a judge as a matter of law. *Cf. Clouse*, 115 N.C. App. at 509, 445 S.E.2d at 433 (defendant "would have no reason to question [surveyor]'s affirmative representation and make her own independent investigation when [surveyor]'s expertise was specifically in the area of conducting surveys and when he was paid

to specifically conduct such survey"). Indeed, even if Bell were to testify that he had no such knowledge, the jury would still be free to not credit that testimony and find otherwise in light of the other evidence in the record. *See Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979) ("It is the function of the jury alone to weigh the evidence, determine the credibility of the witnesses and the probative force to be given their testimony, and determine what the evidence proves or fails to prove.").

Finally, we also reject Berkeley and Bell's argument that the fact that Plaintiffs were able to inspect and discover the water-intrusion issues themselves means that Plaintiffs did not reasonably rely upon the Disclosure Statement as a matter of law, for the same reasons we reject Berkeley and Bell's argument regarding justifiable reliance above in Section II(c).

We have said that "[i]n an arm's-length transaction, when a purchaser of property has the opportunity to exercise reasonable diligence and fails to do so, the element of reasonable reliance is lacking and the purchaser has no action for fraud." *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2004) (internal quotation marks and citations omitted). But even if the plaintiff fails to make its own investigation, the plaintiff's fraud claim will not fail where "(1) it was denied the opportunity to investigate the property, (2) it could not discover the truth about the property's condition by exercise of reasonable diligence, or (3) it was induced to forego additional investigation by the defendant's misrepresentations." *Id.* (internal quotation marks and citation omitted).

As discussed in more detail above in Section II(c), the record reflects that: (1) Plaintiffs hired Williams to inspect the House; Williams testified that he did not conduct moisture testing or discover the water-intrusion issues; and (2) Moore testified that he saw no reason to conduct moisture testing based upon a visual inspection of the House, and that he believed previous damage to the house had been carefully hidden so that the damage was only discoverable if such testing was undertaken. This evidence, taken in the light most favorable to Plaintiffs, demonstrates that genuine issues of material fact exist regarding whether (1) Williams' inspection amounted to the exercise of "reasonable diligence" and (2) whether Defendants induced Plaintiffs to forego moisture testing and rely upon their allegedly-false representations within the Disclosure Statement. *See Willen*, 174 N.C. App. at 719-20, 622 S.E.2d at 191 (rejecting reliance argument where "defendant deliberately concealed" material facts); *Libby Hill*, 62 N.C. App. at 698, 303 S.E.2d at 568 ("An action

in fraud for misrepresentations regarding realty will lie . . . where the purchaser has been fraudulently induced to forego inquiries which he otherwise would have made. . . . Thus, where material facts are available to the vendor alone, he or she *must* disclose them." (citations omitted)).

In the fraud context, "[t]he reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007). Because, for the aforementioned reasons, the record reasonably supports more than one conclusion, we conclude that genuine issues of material fact exist regarding whether Berkeley and Bell defrauded Plaintiffs by providing them with the Disclosure Statement, and that the trial court erred by granting Berkeley and Bell summary judgment on Plaintiffs' fraud cause of action.

3. Non-disclosure of water intrusion and repairs

Finally, Plaintiffs argue that Berkeley, Bell, and Berkeley's agents defrauded them by failing to disclose the history of water-intrusion issues and the fact that the issues had not been properly repaired.

This Court has said:

> A duty to disclose material facts arises where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser. In other words, in order to establish fraud based upon a seller's failure to disclose material defects, a buyer must, in part, show that the material defects were not discoverable in the exercise of the buyer's diligent attention or observation.

Everts v. Parkinson, 147 N.C. App. 315, 325, 555 S.E.2d 667, 674 (2001) (internal quotation marks, emphasis, and citations omitted). Moreover, a seller's real-estate agent has a duty to disclose known material facts to a prospective buyer, or else he may be personally liable for fraud. *Johnson v. Beverly-Hanks & Assocs., Inc.*, 328 N.C. 202, 210, 400 S.E.2d 38, 43 (1991) (reversing summary judgment for defendant broker on fraud claim because of conflicting testimony regarding whether defendant concealed material fact from buyer); *Clouse*, 115 N.C. App. at 508, 445 S.E.2d at 432-33. ("A broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information. This duty applies, however, to material facts known to the broker and to representations made by the broker." (internal quotation marks, brackets, and citation omitted)).

Because the four Defendants dispute neither (1) that they were aware of the previous water-intrusion issues at the House and the circumstances surrounding Cribb's purported repair work nor (2) that they did not disclose those facts to Plaintiffs, the question is whether the four Defendants had a duty to disclose those facts. That question itself requires consideration of whether those facts were (1) material and (2) "not discoverable in the exercise of the [Plaintiffs'] diligent attention or observation." *Everts*, 147 N.C. App. at 325, 555 S.E.2d at 674.

As set forth above in Sections II(b)(1) and II(c), these are questions for a jury to decide. First, because Defendants have not directed our attention to any authority setting forth that because a painter said he might have fixed a leak at a residence, the fact of previously-material water-intrusion issues at the residence and the circumstances surrounding the painter's work are rendered immaterial as a matter of law, we conclude that such a question presents a genuine issue of material fact. Second, we are also unable to say as a matter of law that the water-intrusion issues were discoverable in the exercise of Plaintiffs' diligent attention. Although Plaintiffs may have been able to but did not obtain the full OIA maintenance records or conduct moisture testing at the House, whether taking such steps is necessary for a buyer to be diligent for reasonable reliance purposes is less than clear from the authorities cited by the parties. Therefore, the questions of whether the four Defendants (1) owed Plaintiffs a duty to disclose the facts of the previous water-intrusion issues and what they undertook to repair those issues and (2) defrauded Plaintiffs by omission by failing to disclose those facts[11] depend upon the resolution of genuine issues of material fact, and we accordingly conclude that Plaintiffs must be given the opportunity to persuade a jury that the answers to those questions require that they be given relief on their alleged injuries.

In sum, we conclude that the trial court erred by granting the four Defendants summary judgment on Plaintiffs' fraud cause of action.

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11. It is worth noting the interplay between Plaintiffs' fraud theories. The fact that Berkeley and Bell made affirmative representations about the House in the Disclosure Statement may mean that their failure to disclose the water-intrusion issues and Cribb's purported repairs—which they might not have been required to disclose in the absence of such affirmative representations—amounted to fraud by omission. *See Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 501 (1974) ("even though a vendor may have no duty to speak under the circumstances, nevertheless if he does assume to speak he must make a full and fair disclosure as to the matters he discusses.").

i. Personal Liability

[9] Finally, Plaintiffs make no argument regarding their cause of action brought against Bell for personal liability, and we also deem that aspect of Plaintiffs' appeal abandoned. N.C. R. App. P. 28(b)(6).

III. Conclusion

For the aforementioned reasons, we affirm the grant of summary judgment as to Plaintiffs' causes of action alleging: (1) negligence, against Plaintiffs' agents; (2) negligent misrepresentation, against Plaintiffs' agents and Berkeley's agents; (3) unfair and/or deceptive trade practices, against Berkeley, Bell, and Berkeley's agents; (4) breach of contract, against Bell; (5) breach of the implied covenant of good faith and fair dealing, against Berkeley and Bell; and (6) personal liability, against Bell.

For the aforementioned reasons, we reverse the grant of summary judgment as to Plaintiffs' causes of action alleging: (1) negligence, against Berkeley's agents; (2) negligent misrepresentation, against Berkeley and Bell; (3) breach of fiduciary duty, against Plaintiffs' agents; (4) fraud and fraud in the inducement, against Berkeley, Bell, and Berkeley's agents; and (5) fraud by concealment, against Berkeley, Bell, and Berkeley's agents, all of which we remand for further proceedings consistent with this opinion.

AFFIRMED IN PART. REVERSED AND REMANDED IN PART.

Judge HAMPSON concurs.

Judge ARROWOOD concurs in part and dissents in part per separate opinion.

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

I concur fully with that portion of the opinion in so far as it affirms the grant of summary judgment to the defendants on any claims. I also concur with that portion of the opinion which reverses summary judgment with respect to negligent misrepresentation, and the fraud claims in whatever form pled against defendants Berkeley and Bell.

However, for the reasons set forth below, I dissent from that portion of the majority's opinion that reverses summary judgment with respect to any claim against either plaintiffs' or Berkeley's real estate agents.

The majority reversed the grant of summary judgment with respect to: (1) breach of fiduciary duty against plaintiffs' agents; (2) negligence against Berkeley's agents; (3) fraud and fraud in the inducement, against Berkeley, Bell, and Berkeley's agents; and (4) fraud by concealment, against Berkeley, Bell, and Berkeley's agents. I address the claims against plaintiffs' agents first, and then defendant-Berkeley's agents.

1. Breach of Fiduciary Duty

I first address plaintiffs' claim against their real estate agents for breach of fiduciary duty. As the majority noted, in *Brown v. Roth*, we described a real estate agent's fiduciary duty as follows:

> A real estate agent has the fiduciary duty to exercise reasonable care, skill, and diligence in the transaction of business [e]ntrusted to him, and he will be responsible to his principal for any loss resulting from his negligence in failing to do so. The care and skill required is that generally possessed and exercised by persons engaged in the same business. This duty requires the agent to make a full and truthful disclosure [to the principal] of all facts known to him, or discoverable with reasonable diligence and likely to affect the principal.

133 N.C. App. 52, 54-55, 514 S.E.2d 294, 296 (1999) (quotation marks and citations omitted). Plaintiffs contend that their real estate agents failed to exercise reasonable care because they did not provide plaintiffs with information that plaintiffs assert would have been discoverable with reasonable diligence. Specifically, plaintiffs allege that their agents, the Rudd agency, Rudd-Gaglie, and Goodman, violated their fiduciary duties when they (1) failed to discover and disclose water intrusion issues in the House and (2) negligently recommended Williams, who did not perform moisture testing. The majority asserts that whether the real estate agents acted with reasonable diligence is a question for the jury. However, the facts of this case reveal that while the plaintiffs' real estate agents did not take every possible action they could to discover every single piece of information about the House, they certainly took reasonable actions to do so.

This is not a case where a buyer's agent failed to disclose material information or failed to take actions usually taken by competent real estate agents. On the contrary, plaintiffs' agents obtained all information and documents requested by plaintiffs, procured a qualified home inspector to inspect the home prior to purchase, connected plaintiffs with various repairmen, and obtained a termite inspection. Although

the home inspector, Williams, ultimately decided not to conduct a moisture test based upon his professional opinion that it was not necessary to perform one, this decision cannot be attributed to plaintiffs' agents. Plaintiffs have not presented any evidence Williams was incompetent or otherwise not qualified to perform the inspection. Thus, plaintiffs' agents' fiduciary duty to plaintiffs was satisfied upon their suggestion to plaintiffs of a home inspector and general contractor who was well-qualified to perform the inspection. Plaintiffs' agents, who are not licensed and experienced home inspectors or general contractors, exercised reasonable diligence to discover any defects in the House by suggesting a qualified home inspector, and they reasonably relied on Williams' assessment of the home. *See Clouse v. Gordon*, 115 N.C. App. 500, 509, 445 S.E.2d 428, 433 (1994) (holding it was reasonable for real estate agent to rely on expert opinion of independent surveyor of property).

The one action plaintiffs' agents failed to take was one that plaintiffs have failed to show was either customary or necessary – requesting the OIA maintenance records. While the maintenance records would have revealed past issues with the House that had presumably been dealt with, it was reasonable for plaintiffs' agents to arrange for a home inspection because the home inspection was expected to reveal present issues with the House that needed to be fixed. Thus, the home inspection should have, and in fact did, reveal the same type of information that the maintenance reports contained. Though the home inspection did not reveal the significant water intrusion issues, this was only because Williams did not believe a moisture test was necessary.

In addition, as plaintiffs' own expert, Moore, testified, there would have been no reason for a home inspector to conduct intrusive moisture testing because the water damage was not readily apparent. Neither the plaintiffs nor the majority is able to provide any support for the proposition that a real estate agent who took reasonable actions to discover material information about the House at issue breached their fiduciary duty by not taking every action possible to obtain information about the House. Moreover, plaintiffs' agents also complied with the Rules of Real Estate Commission throughout their dealings with plaintiffs and met all of the duties set forth in the Exclusive Buyer's Agency Agreement with plaintiffs. I therefore respectfully disagree with the majority that the trial court erred in granting summary judgment for plaintiffs' agents on this issue.

2. Negligence and Fraud by Berkeley's Agents

Plaintiffs additionally contend defendants Carroll and RE/MAX, Berkeley's real estate agents, were negligent. To establish negligence,

plaintiffs must show that defendants (1) owed them a duty, (2) breached that duty, (3) plaintiffs suffered injury, and (4) the breach of duty was the proximate cause of the injury to plaintiffs. *Id.* at 508, 445 S.E.2d at 432 (quoting *Simpson v. Cotton*, 98 N.C. App. 209, 211, 390 S.E.2d 345, 346 (1990)). As the majority explained, "[a] broker has a duty not to conceal from the purchasers any material facts and to make full and open disclosure of all such information." *Johnson v. Beverly-Hanks & Assoc.*, 328 N.C. 202, 210, 400 S.E.2d 38, 43 (1991) (citing *Spence v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 665, 347 S.E.2d 864 (1986)). "This duty [only] applies, however, to material facts known to the broker and to representations made by the broker." *Clouse*, 115 N.C. App. at 508, 445 S.E.2d at 432-33. In addition, the purchaser also has a duty to protect their own interests, as "it is the policy of the courts not to encourage negligence and inattention to one's own interest." *Id.* at 509, 445 S.E.2d at 433.

In the present case, Carroll had a duty to disclose all material facts known to him. After Carroll listed the property, he was made aware that the House had a water leakage problem which left a stain on the living room ceiling and caused some rotting in one of the guest bedrooms. Carroll hired Cribb to perform work on the House which included painting various areas of the House and repairing cracks. After completing the requested work on the House, Cribb represented to Carroll that he thought he found the leak causing the water intrusion problems and repaired it as well. The majority believes there is a question as to whether the water intrusion issue was successfully repaired such that it was no longer a material fact that Carroll needed to disclose. However, the evidence shows Carroll was told that the leak was repaired and he did not see any signs of water intrusion thereafter. Plaintiffs' own professional inspection of the House, which occurred three days after it had rained in the area, also did not reveal any significant water intrusion issues.

As we noted in *Clouse*, a real estate agent would have no reason to question the expert opinion of a professional surveyor, or in this case, inspector. *Id.* Thus, even if Carroll had initially not been completely certain the water leak had been repaired, it would have been reasonable for him to rely on the inspection report as an accurate assessment of the present condition of the House. Furthermore, plaintiffs also had a duty to preserve their own interests. *Id.* Though the inspection report did not reveal any significant water intrusion, it did, however, alert plaintiff to the presence of minor leaks and areas on the exterior of the House that needed to be sealed in order to keep out water and insects. Plaintiffs were thus made aware of leaks and potential water intrusion problems

in the House prior to their purchase, further rendering Carroll's knowledge of the prior leak immaterial. The report also advised plaintiffs to conduct additional inspection with respect to the recommended repairs, yet they neglected to do so. This Court has recognized that contributory negligence is a complete bar to a plaintiff's negligence claim. *Swain v. Preston Falls East, L.L.C.*, 156 N.C. App. 357, 361-62, 576 S.E.2d 699, 702-703 (2003). Berkeley's real estate agents should not be held responsible for plaintiffs' own negligence.

I am thus unable to conclude Berkeley's agents were negligent as a matter of law and would affirm the trial court's grant of summary judgment on the matter. I also note that the majority does not cite to any authority supporting the proposition that a real estate agent's duty should extend so far. In my view, the proper party to sue for negligence here would be the home inspector, who neglected to conduct a moisture test despite discovering minor leaks in the House.

Furthermore, I am also unable to concur with the majority's opinion that Berkeley's agents committed fraud in the inducement and by concealment by not informing plaintiffs of prior water intrusion issues. "A broker who makes fraudulent misrepresentations or *who conceals a material fact* when there is a duty to speak . . . is personally liable to the purchaser notwithstanding that the broker was acting in the capacity of agent for the seller." *Johnson*, 328 N.C. at 210, 400 S.E.2d at 43 (emphasis in original) (citation omitted). For the same reasons I would hold Carroll and RE/MAX were not negligent, I also find they did not commit fraud.

Carroll did not conceal a material fact that he had a duty to disclose, and also made no false representations. Carroll did not inform plaintiffs of prior water intrusion issues in the House because he reasonably believed the source of the water leak had been repaired. Thus, his nondisclosure did not amount to concealing a material fact in order to induce plaintiffs to purchase the House. Rather, there is evidence in the record showing that Carroll did not mention the water leak because he simply believed it was no longer an issue, and was thus immaterial. As such, Carroll was under no duty to disclose that information.

This Court addressed a similar issue in *MacFadden v. Louf*, 182 N.C. App. 745, 643 S.E.2d 432 (2007). There, we rejected the home-purchaser's fraud claim based on a lack of reasonable reliance, holding that "[p]laintiff failed to establish that her reliance was justifiable because she conducted a home inspection before closing and that inspection report put her on notice of potential problems with the home." *Id.* at

748, 643 S.E.2d at 434. We reasoned that the inspection report pointed out potentially serious problems and advised the plaintiff to conduct an additional inspection. *Id.* at 749, 643 S.E.2d at 435. Similarly, in the present case, the inspection report noted a variety of issues with the House requiring repairs, including: (1) minor damage to the roof; (2) areas on the exterior of the House needing "to be sealed to keep water and insect [sic] from entering the home"; (3) doors that failed to close or otherwise seal properly; (4) windows that exhibited rust stains and would not open; and (5) minor leaks causing mold to grow. The report also provided that "[i]t is recommended that qualified contractors be used in your further inspection or repair issues as it relates to the comments in this inspection report."

As the majority correctly noted, this Court has said that "[i]n an arm's-length transaction, when a purchaser of property has the opportunity to exercise reasonable diligence and fails to do so, the element of reasonable reliance is lacking and the purchaser has no action for fraud." *RD&J Props. v. Lauralea-Dilton Enters., LLC*, 165 N.C. App. 737, 746, 600 S.E.2d 492, 499 (2001) (citing *Calloway v. Wyatt*, 246 N.C. 129, 134, 97 S.E.2d 881, 885-86 (1957)). Because plaintiffs were made aware of water leakage issues and were advised to have the House undergo further inspection but neglected to do so, I would hold they did not exercise reasonable diligence and cannot now claim they were fraudulently induced by Berkeley's agents. Accordingly, I would affirm the trial court's grant of summary judgment on the matter, and respectfully dissent.

ESTATE OF MELVIN JOSEPH LONG, BY AND THROUGH MARLA HUDSON LONG, ADMINISTRATRIX, PLAINTIFF-APPELLANT

v.

JAMES D. FOWLER, INDIVIDUALLY, DAVID A. MATTHEWS, INDIVIDUALLY, DENNIS F. KINSLER, INDIVIDUALLY, ROBERT J. BURNS, INDIVIDUALLY, MICHAEL T. VANCOUR, INDIVIDUALLY, AND MICHAEL S. SCARBOROUGH, INDIVIDUALLY, DEFENDANTS-APPELLEES

No. COA19-785

Filed 3 March 2020

1. Jurisdiction—motion to dismiss—sovereign immunity—individual versus official capacity

In a wrongful death action filed against individual employees of a state university (defendants), the trial court erred by granting defendants' motion to dismiss for lack of personal and subject matter jurisdiction under the theory of sovereign immunity because the case captions, relief sought, and allegations contained in the complaint all indicated that defendants were sued in their individual capacities rather than their official capacities.

2. Negligence—gross negligence—proximate cause—sufficiency of pleading

In a wrongful death suit alleging gross negligence brought by decedent's wife against individual employees (defendants) of a state university where decedent worked as a pipefitter, the trial court erred in granting defendants' motion to dismiss for failure to state a claim because plaintiff's complaint sufficiently alleged that defendants' conduct in improperly shutting down a chiller unit showed an intentional disregard or indifference to decedent's safety and that they knew, or should have known, their conduct would be reasonably likely to cause injury or death.

Judge TYSON dissenting.

Appeal by Plaintiff from order entered 3 May 2019 by Judge Josephine K. Davis in Person County Superior Court. Heard in the Court of Appeals 5 February 2020.

Hardison & Cochran, PLLC, by John Paul Godwin, and Sanford Thompson, PLLC, by Sanford Thompson, IV, for Plaintiff.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Patrick M. Meacham, and Catherine R. L. Lawson, for Defendants.

BROOK, Judge.

Marla Hudson Long ("Plaintiff"), as Administratrix of the Estate of Melvin Joseph Long ("Mr. Long"), appeals from the trial court's order dismissing her claims against James D. Fowler, David A. Matthews, Dennis F. Kinsler, Robert J. Burns, Michael T. Vancour, and Michael S. Scarborough (collectively "Defendants") for the wrongful death of her husband, Mr. Long. For the following reasons, we reverse the order of the trial court.

I. Factual and Procedural Background

On 20 January 2017, Mr. Long, a pipefitter with Quate Industrial Services, was tasked with reconnecting the water pipes of a portable chiller machine at North Carolina State University's ("NCSU") Centennial Campus that had been turned off for winter break. When Mr. Long began to loosen a 13.1-pound metal flange on a water pipe, pressurized gas, which had built up within the machine, forcefully projected the flange into his head. Mr. Long suffered severe head trauma and died five days later at the hospital.

Plaintiff commenced an action in the Industrial Commission on 15 March 2018 for wrongful death on behalf of the estate of her husband, Mr. Long, against NCSU, Randy Woodson, Allen Boyette, and "John Doe," the then-"unidentified employee/agent of [NCSU]'s machine shop and/or Maintenance and Operations Division."[1] Plaintiff alleged that John Doe had improperly shut down the chiller unit, which caused high pressure gas to leak into the water pipes so that when Mr. Long loosened the metal flange, compressed gas was exposed to air and caused the flange to explode.

Plaintiff subsequently filed a wrongful death action in Person County Superior Court on 13 November 2018 against Defendants, employees in the maintenance and HVAC department at NCSU, seeking compensatory and punitive damages.[2] Plaintiff alleged Defendants negligently shut down the chiller unit on 21 December 2016, which led to the explosion that killed Mr. Long. The complaint's case caption read as follows:

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1. At the time of the filing of the Industrial Commission complaint, Randy Woodson was NCSU's Chancellor and Allen Boyette was the director of NCSU's Building Maintenance and Operations Division.

2. Plaintiff's counsel stated during the hearing on the motions to dismiss at issue that they learned the identity of Defendants through discovery in the Industrial Commission proceedings.

JAMES D. FOWLER, Individually,
DAVID A. MATTHEWS, Individually,
DENNIS F. KINSLER, Individually,
ROBERT J. BURNS, Individually,
MICHAEL T. VANCOUR, Individually,
and MICHAEL S. SCARBOROUGH, Individually,
Defendants.

The complaint sought relief from each of the abovenamed Defendants, jointly and severally, as follows:

1. Compensatory damages from defendant Fowler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

2. Punitive damages from defendant Fowler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

3. Compensatory damages from defendant Matthews in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

4. Punitive damages from defendant Matthews in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

5. Compensatory damages from defendant Kinsler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

6. Punitive damages from defendant Kinsler in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

7. Compensatory damages from defendant Burns in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

8. Punitive damages from defendant Burns in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

9. Compensatory damages from defendant Vancour in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

10. Punitive damages from defendant Vancour in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

> 11. Compensatory damages from defendant Scarborough in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).
>
> 12. Punitive damages from defendant Scarborough in an amount in excess of TWENTY-FIVE THOUSAND DOLLARS ($25,000).

Proceedings in the Industrial Commission were stayed pending final adjudication of the superior court matter.

On 19 February 2019, Defendants filed motions to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. The trial court heard arguments on Defendants' motions to dismiss on 8 April 2019. Defense counsel argued that Defendants were sued in their official capacity, which meant they were entitled to share in their government-employer's sovereign immunity, and the Industrial Commission maintained exclusive jurisdiction over the action. Defense counsel also argued that the complaint failed as a matter of law to properly allege negligence, gross negligence, and state a claim for punitive damages. The trial court granted Defendants' motions to dismiss on 3 May 2019.

Plaintiff timely appealed.

II. Analysis

On appeal, Plaintiff contends the trial court erred in granting Defendants' motions to dismiss pursuant to Rules 12(b)(1) and 12(b)(2) because Defendants were sued in their individual, not official, capacities, and, as such, sovereign immunity does not apply to the case at bar.

Plaintiff next argues the trial court erred in allowing Defendants' motion to dismiss under Rule 12(b)(6) because the complaint gave sufficient notice of a legally cognizable claim of negligence and gross negligence as well as, based on allegations of willful and wanton conduct by Defendants, punitive damages.

For the following reasons, we agree with Plaintiff.

A. Rule 12(b)(1) and Rule 12(b)(2) Motions to Dismiss

[1] First, we consider whether the trial court properly dismissed Plaintiff's claim pursuant to Rules 12(b)(1) and 12(b)(2) for lack of subject matter and personal jurisdiction, which requires determining

whether Defendants were sued in their official capacity and are thus protected from suit under the doctrine of sovereign immunity.[3]

i. Standard of Review

The standard of review of a motion to dismiss for lack of subject matter jurisdiction is de novo. *Brown v. N.C. Dept. of Public Safety*, 256 N.C. App. 425, 427, 808 S.E.2d 322, 324 (2017). When a trial court grants a motion to dismiss for lack of personal jurisdiction, the standard of review is "whether the record contains evidence that would support the Court's determination that the exercise of jurisdiction over defendants would be inappropriate." *Stacy*, 191 N.C. App. at 134, 664 S.E.2d at 567 (citation omitted).

ii. Merits

At common law, the doctrine of sovereign immunity protected the state from any liability for negligent or tortious conduct on the part of the state or its agents. *See Moody v. State Prison*, 128 N.C. 9, 12, 38 S.E. 131, 132 (1901), *superseded by statut*e, N.C. Gen. Stat. § 143-291 (2019), *as recognized in Hocheiser v. North Carolina Dep't of Transp.*, 82 N.C. App. 712, 715, 348 S.E.2d 140, 141 (1986).

The North Carolina Tort Claims Act partially waived state immunity and allows tort claims against state agencies to be maintained in the exclusive jurisdiction of the North Carolina Industrial Commission. N.C. Gen. Stat. § 143-291 (2019). The Tort Claims Act provides in pertinent part:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education,

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3. "A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina." *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012). "[F]ederal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) . . . or a Rule 12(b)(2) motion." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-28, 293 S.E.2d 182, 184 (1982). However, the "distinction becomes crucial in North Carolina" in cases like that of *Teachy v. Coble Dairies, Inc.* when the denial of a Rule 12(b)(2) motion allows for immediate appeal while the denial of a Rule 12(b)(1) motion does not. *Id.* at 328, 293 S.E.2d at 184. The distinction is not crucial to our determination of the instant case as this case is before us as an appeal from a final judgment in superior court under N.C. Gen. Stat. § 7A-27(b)(1) (2019), *see Stacy v. Merrill*, 191 N.C. App. 131, 134, 664 S.E.2d 565, 567 (2008) (reviewing whether sovereign immunity prevented plaintiffs from bringing suit against defendants when suit was dismissed pursuant to both Rules 12(b)(1) and 12(b)(2)), and Plaintiff prevails regardless of the governing standard of review.

> the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id. § 143-291(a). "[A] statutory waiver of sovereign immunity must be strictly construed." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885 (1997). "Therefore, the Tort Claims Act applies only to actions against state departments, institutions, and agencies and does not apply to claims against officers, employees, involuntary servants, and agents of the State." *Id.* at 107, 489 S.E.2d at 885-86.

As a corollary, "[a] plaintiff may maintain both a suit against a state agency in the Industrial Commission under the Tort Claims Act and a suit against the negligent agent or employee in the General Court of Justice for common-law negligence." *Id.* at 108, 489 S.E.2d at 886 (citation omitted); *see also Chastain v. Arndt*, 253 N.C. App. 8, 15, 800 S.E.2d 68, 75 (2017) (explaining plaintiff could bring suit against the state agency in the Industrial Commission and suit against the negligent employee in his individual capacity alleging gross negligence and willful and wanton conduct). The "threshold issue to be determined" in a common law action is whether the negligence suit is brought against the employee in an official or individual capacity. *Mullis v. Sechrest*, 347 N.C. 548, 551, 495 S.E.2d 721, 723 (1998). When an actor is sued in his or her official capacity, the suit is effectively one against his or her employer, and the defendant is immune to the same extent as the government entity itself unless there has been a waiver of immunity. *Wright v. Town of Zebulon*, 202 N.C. App. 540, 543, 688 S.E.2d 786, 789 (2010) (citation omitted). In an individual capacity suit, on the other hand, a plaintiff seeks recovery from the defendant directly and sovereign immunity does not protect the negligent employee. *See Chastain*, 253 N.C. App. at 15, 800 S.E.2d at 74.[4]

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4. As our Court explained in affirming the trial court's denial of a motion to dismiss in *Chastain*, allowing an individual capacity negligence suit and Tort Claims Act suit to both proceed out of a common factual origin does not permit a plaintiff to receive a double recovery in excess of the damages sustained. 253 N.C. App. at 15, 800 S.E.2d at 74.

Differentiating between an official and individual capacity suit turns on "the nature of the relief sought, *not the nature of the act or omission alleged*." *Meyer*, 347 N.C. at 110, 489 S.E.2d at 887 (citations omitted) (emphasis added).

> It is a simple matter for attorneys to clarify the capacity in which a defendant is being sued. Pleadings should indicate in the caption the capacity in which a plaintiff intends to hold a defendant liable. For example, including the words "in his official capacity" or "in his individual capacity" after a defendant's name obviously clarifies the defendant's status. In addition, the allegations as to the extent of liability claimed should provide further evidence of capacity. Finally, in the prayer for relief, plaintiffs should indicate whether they seek to recover damages from the defendant individually or as an agent of the governmental entity.

Mullis, 347 N.C. at 554, 495 S.E.2d at 724-25. Beyond the four corners of the complaint, if money damages are sought "it is appropriate to consider the course of the proceedings . . . to determine the capacity in which defendant is being sued." *Id.* at 553, 495 S.E.2d at 724.

Mullis v. Sechrest, involving an injury to student Blaine Mullis in Harry Sechrest's shop class at a high school in the Charlotte-Mecklenburg school system, demonstrates how this inquiry operates in practice. *Id.* at 549-50, 495 S.E.2d at 721-22. First, our Supreme Court noted "plaintiffs failed to specify whether they were suing defendant Sechrest in his individual or official capacity" in the caption or elsewhere in the complaint. *Id.* at 553, 495 S.E.2d at 724. Along the same lines, though the complaint specifically named the teacher when it alleged he had failed to give reasonable or adequate instructions, our Supreme Court "note[d] it was necessary to allege defendant [teacher's] negligence in the complaint" in order to establish liability for the school board. *Id.* The plaintiffs furthermore had set forth only one claim for relief, which was that "the Defendant Charlotte[-]Mecklenburg School System provided, permitted and directed the operation of a Rockwell tilting arbor saw, model # 34-399 in its industrial arts class." *Id.*; *see also White v. Cochran*, 216 N.C. App. 125, 131, 716 S.E.2d 420, 425 (2011) (using the phrase "joint and several" indicates relief is sought in the defendants' individual capacities). Finally, in reviewing the course of proceedings, the Court noted that the plaintiffs had amended their complaint to reference the defendants' liability insurance. *Mullis*, 347 N.C. App. at 553, 495 S.E.2d at 724. Generally, the purchase of liability insurance waives

immunity for cities and counties, *see Meyer*, 347 N.C. at 108, 489 S.E.2d at 886, which is relevant in an official capacity action but not an individual capacity suit, *see id.* at 111, 489 S.E.2d at 888. "Taken as a whole, the amended complaint, along with the course of proceedings in the present case, indicate[d] an intent by plaintiffs to sue defendant Sechrest in his official capacity." *Mullis*, 347 N.C. at 554, 495 S.E.2d at 725.

Defendants argue that the superior court action is impermissibly duplicative of the claim pending in the Industrial Commission. They note that the allegations in the Industrial Commission and superior court complaints are "identical, and the monetary damages sought by Appellant in the two cases are based on the same alleged actions by Appellees." They further argue that, in spite of the fact that Plaintiff "did not include an agency theory in th[e superior court] case[,]" this is, at bottom, the theory upon which the suit proceeds.

Though Defendants are correct that the two cases arise out of the same event, Plaintiff may commence both actions for two related reasons. First, as noted above and despite the common factual origin, Plaintiff is permitted to bring both an action against NCSU in the Industrial Commission and against Defendants in the superior court so long as she has properly alleged an individual capacity suit. *See Meyer*, 347 N.C. at 108, 489 S.E.2d at 886. Second,

> [w]hether the allegations relate to actions outside the scope of defendant's official duties is not relevant in determining whether the defendant is being sued in his or her official or individual capacity. To hold otherwise would contradict North Carolina Supreme Court cases that have held or stated that public employees may be held individually liable for mere negligence in the performance of their duties.

Id. at 111, 489 S.E.2d at 888 (citations omitted); *see also Boyd v. Robeson County*, 169 N.C. App. 460, 477-78, 621 S.E.2d 1, 12 (concluding plaintiff intended an individual capacity suit against detention officers notwithstanding "the substantive allegations related solely to actions undertaken by the deputy as part of his official duties.").

Focusing our inquiry as the case law dictates, the complaint and the course of proceedings reveal Plaintiff intended to bring an individual capacity suit. The case caption clearly states that Defendants are being sued in their individual capacities and does not name the state, a state entity, or NCSU. *See Mullis*, 347 N.C. at 552, 495 S.E.2d at 724 ("[P]leadings should . . . clearly state[] the capacity in which [defendants

are] being sued."). Likewise, in the prayer for relief, Plaintiff explicitly notes relief is sought "individually" as well as "jointly and severally." *See Schmidt v. Breeden*, 134 N.C. App. 248, 257, 517 S.E.2d 171, 177 (1999) (concluding the language of joint and several in "plaintiff's request for relief indeed implies that damages [we]re [being] sought from the . . . pocket" of defendants in their individual capacities).

As to the allegations in the superior court complaint, Plaintiff pled six causes of action against the six individual Defendants, naming them individually liable. For example, Plaintiff alleged that

> 149. Between December 21, 2016 and January 20, 2017 at all times pertinent to this action, *defendant Fowler*, individually, and or jointly with the other defendants, was negligent by one or more of the following acts or omissions:
>
> a. *He* improperly drained water from the carrier chiller;
>
> b. *He* did not fill the Carrier chiller with glycol, ethylene glycol or some other anti-freeze after draining water from it;
>
> c. *He* left the Carrier chiller outside when he knew or should have known there was still water in the chiller tubes[.]

(Emphasis added.) And so on for the five other defendants, demonstrating an intent to bring suit against Defendants individually and not against NCSU. In contrast, Plaintiff alleged in the Industrial Commission amended complaint,

> 39. That the *Defendant North Carolina State University* was responsible for seeing that the chiller was inspected, maintained, and operating according to manufacturer specifications and industry standards.
>
> . . .
>
> 46. That the *Defendant North Carolina State University* and its agents and employees knew, or through the exercise of reasonable care should have known, that attempting to drain and purge a chiller unit with damaged and deteriorating tubes that were leaking would cause coolant and/or other substances to remain in the system.

(Emphasis added.)

Furthermore, the allegations in the superior court action specifically contemplate the public official and public employee distinction, which is pertinent in an individual capacity suit but not in a suit against the state entity. In an individual capacity claim, the defendant's status as a public official or public employee can protect him or her from liability for injuries he or she has caused. *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888 ("Public officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties; public employees can.") (citations omitted). The distinction is immaterial in an official capacity suit. *Epps v. Duke Univ.*, 122 N.C. App. 198, 203, 468 S.E.2d 846, 850 (1996) ("A suit against a public official in his official capacity is basically a suit against the public entity (*i.e.*, the state) he represents. Therefore, an official capacity suit operates against the public entity itself, as the public entity is ultimately financially responsible for the compensable conduct of its officers.").

Turning finally to the course of proceedings, Plaintiff first brought suit in the Industrial Commission, following the proper pleading format for an action against a state entity by filing an affidavit that contained: (1) the name of the claimant, the Estate of Mr. Long; (2) the name of the institution and the name of the state employee upon whose alleged negligence the claim was based, NCSU and "John Doe," the "as-yet unidentified negligent employee"; (3) the time and place where the injury occurred, NCSU's campus on 20 January 2017; (4) a brief statement of the facts and circumstances surrounding the injury giving rise to the claim; and (5) the damages sought to be recovered. *See* N.C. Gen. Stat. § 143-297 (2019) (setting forth these requirements in order to invoke the jurisdiction of the Industrial Commission in a claim against a state agency). After learning of Defendants' identity during discovery in the Industrial Commission proceedings, Plaintiff then filed a complaint against the allegedly negligent employees in superior court. As explained above, this filing followed the pleading requirements for an individual capacity suit against an alleged negligent state employee as explained in *Mullis*. 347 N.C. at 554, 495 S.E.2d at 724-25. This progression follows our case law's guidance for seeking recovery from both State and named individual defendants.

We therefore conclude that Plaintiff seeks recovery against Defendants in their individual capacities. Consequently, we reject Defendants' characterization of this action as an official capacity suit from which they are immune. The trial court thus erred in granting Defendants' motion to dismiss for lack of subject matter and personal jurisdiction.

B. Rule 12(b)(6) Motion to Dismiss

[2] Next, we consider whether the trial court properly dismissed Plaintiff's claim under Rule 12(b)(6) for failure to state a claim upon which relief could be granted.

i. Standard of Review

This Court reviews a trial court's ruling on a Rule 12(b)(6) motion de novo. *Grich v. Mantelco, LLC*, 228 N.C. App. 587, 589, 746 S.E.2d 316, 318 (2013).

ii. Merits

A motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). When analyzing a Rule 12(b)(6) motion, this Court is to take all factual allegations as true but should not presume legal conclusions. *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000). "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *Snyder v. Freeman*, 300 N.C. 204, 209, 266 S.E.2d 593, 597 (1980) (internal marks and citations omitted). "[A] complaint should not be dismissed for insufficiency 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*, 277 N.C. at 103, 176 S.E.2d at 166 (citation omitted). We also note that a motion to dismiss under Rule 12(b)(6) "is disfavored by the courts and the pleadings will be liberally construed in the light most favorable to the nonmovant." *Mabrey v. Smith*, 144 N.C. App. 119, 124, 548 S.E.2d 183, 187 (2001).

Defendants argue that Plaintiff's complaint is deficient for two reasons. First, Plaintiff failed to properly allege proximate cause; that is, that Mr. Long's injury was a reasonably foreseeable consequence of Defendants' alleged conduct. And second, that Plaintiff failed to include well-pled factual allegations that Defendants' conduct was either grossly negligent or willful and wanton.

1. Proximate Cause

"A wrongful death negligence claim must be based on actionable negligence under the general rules of tort liability." *Id.* at 122, 548 S.E.2d at 186 (citation omitted). The elements of negligence are: (1) legal duty; (2) breach of that duty; (3) actual and proximate causation; and (4) injury. *Id.* (citation omitted).

> The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. Questions of proximate cause and foreseeability are questions of fact to be decided by the jury. Thus, since proximate cause is a factual question, not a legal one, it is typically not appropriate to discuss in a motion to dismiss.

Acosta v. Byrum, 180 N.C. App. 562, 568-69, 638 S.E.2d 246, 251 (2006) (internal marks and citations omitted). When a "complaint adequately recites the element of causation, an issue of fact for the jury to decide, plaintiff has made a sufficient pleading of causation under Rule 12(b)(6)." *See Demarco v. Charlotte-Mecklenburg Hosp. Authority*, ___ N.C. App. ___, ___, 836 S.E.2d 322, 328 (2019).

Defendants argue that the allegations in Plaintiff's complaint as to proximate cause are "conclusory." Defendants specifically label the complaint's assertions that Defendants "knew or should have known, pressure could build up inside the chiller" and yet failed to warn Mr. Long "that there was high pressure gas behind the metal flanges . . . [as] unwarranted deductions of fact and unreasonable inferences."

Here, the complaint alleges that each Defendant worked as a facilities maintenance technician in the maintenance and operations department at NCSU. It then alleges that the chiller and operating manual warned that it was not possible to drain all the water from the chiller, and, in order to "prevent freeze-up damage," the unit had to be filled with anti-freeze. The complaint asserts that each Defendant failed to follow these shutdown procedures, water froze in the pipes, the pipes burst, and pressure built within the machine. It then alleges that a 13.1-pound metal flange capped in place by the individual Defendants "was blown off by pressurized refrigerant gas inside the water pipe." Finally, it alleges that each Defendant "knew[] or should have known" his negligence "would be reasonably likely to result in injury or death," and Mr. Long's death was "a direct and proximate result of one or more acts or omissions of [each] defendant." Plaintiff's allegation of foreseeability is not an unreasonable inference but clearly is supported by the allegations within the complaint. Moreover, the complaint "adequately recites the element of causation." *Demarco*, ___ N.C. App. at ___, 836 S.E.2d at 328.

We conclude Plaintiff's allegations as to proximate cause were sufficient to withstand a motion to dismiss under Rule 12(b)(6).

2. Gross Negligence

"Gross negligence has been defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Toomer v. Garrett*, 155 N.C. App. 462, 482, 574 S.E.2d 76, 92 (2002) (citations and internal marks omitted). "Aside from allegations of wanton conduct, a claim for gross negligence requires that plaintiff plead facts on each of the elements of negligence, including duty, causation, proximate cause, and damages." *Id.* (citations omitted).

Defendants argue that Plaintiff's allegations fail to meet the standard for gross negligence. Defendants claim no factual basis supports the assertion that Defendants knew or should have known that pressurized gas would build within the chiller's water pipes, much less that such conduct rises to the level of gross negligence.

As noted above, Plaintiff alleged here that Defendants did not exercise reasonable care to prevent the 13.1-pound metal flange from becoming exposed to pressure from the inside of the chiller, ignored winterization and shutdown procedures, knew or should have known pressurized gas would build within the machine, and failed to warn Mr. Long or his employer of this improper shutdown. The complaint further expressly alleges that in their acts, omissions, and failures, each Defendant "demonstrated a conscious or intentional disregard or indifference to the rights and safety of others, including [Mr.] Long, which [D]efendant[s] knew, or should have known, would be reasonably likely to result in injury or death and as such constituted willful or wanton conduct." Such allegations are sufficient to withstand a Rule 12(b)(6) motion. *See Suarez v. American Ramp. Co. (ARC)*, ___ N.C. App. ___, ___, 831 S.E.2d 885, 893 (2019). We thus conclude Plaintiff's complaint adequately states a claim for gross negligence, and the trial court erred in granting Defendants' motion to dismiss.

III. Conclusion

For the reasons stated above, we reverse the trial court's dismissal of Plaintiff's claims.

REVERSED AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

I. Sovereign Immunity

The question before the trial court and before this Court on Plaintiff's appeal is limited and boils down to a simple and single issue: whether any of the purported negligent acts or omissions of these five individuals, acting together or individually, occurred outside of or were unrelated to their public employment by North Carolina State University ("NCSU"). If not, the trial court's dismissal must be affirmed. The matter pending before the Industrial Commission is the exclusive and sole procedure for the recovery for the wrongful death of Melvin Joseph Long arising from injuries he allegedly suffered while working at NCSU.

"A motion to dismiss based on sovereign immunity is a jurisdictional issue." *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 62, 730 S.E.2d 254, 257 (2012). When ruling upon Defendants' motion to dismiss, the "threshold issue to be determined" is whether a negligence suit is brought against the employees for alleged acts which occurred in official or individual capacities. *Mullis v. Sechrest*, 347 N.C. 548, 551, 495 S.E.2d 721, 723 (1998).

When a defendant, who is a public employee, is sued for actions arising during his official capacity, the suit is effectively one against his public employer. Defendants are immune to the same extent as the government-employer entity itself, unless there has been a waiver of immunity. *See Wright v. Town of Zebulon*, 202 N.C. App. 540, 543, 688 S.E.2d 786, 789 (2010) (citation omitted). "[A] statutory waiver of sovereign immunity must be strictly construed." *Meyer v. Walls*, 347 N.C. 97, 107, 489 S.E.2d 880, 885 (1997).

II. Motions to Dismiss

On 19 February 2019, these five individual Defendants filed motions to dismiss asserting: lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. Defendants argue they were being sued for negligent acts occurring while at work and in their official capacity and all are entitled to their government-employer's sovereign immunity. Defendants argue the Industrial Commission maintains exclusive jurisdiction over Plaintiff's claims.

Plaintiff's complaint failed as a matter of law to properly allege negligence, gross negligence, or state a claim for punitive damages against Defendants individually by asserting actions for conduct arising

during and solely out of their public employment. The trial court granted Defendants' motions to dismiss on 29 April 2019.

Plaintiff acknowledged at oral argument this action was filed after she had asserted and filed a wrongful death action under the State Tort Claims Act in the Industrial Commission involving the identical acts she asserts here. Plaintiff's allegations before the Industrial Commission and in her superior court complaint are "identical, and the monetary damages sought by [Plaintiff] in the two cases are based on the same alleged actions by [Defendants]."

Plaintiff also "did not include an agency theory in th[e superior court] case[,]" the only theory upon which that suit proceeds. Nothing alleges any Defendant committed *any acts* that occurred outside of their employment with the State. Plaintiff also admitted at oral arguments that, after invoking a state tort claim against NCSU before the Industrial Commission and engaging in discovery, she moved to stay the proceeding pending before the Industrial Commission, rather than resolving her claims in that chosen forum.

No allegation shows any of the individuals named in the complaint ever knew of or had met the deceased, had any knowledge of his presence, or owed any individual duties to an unknown plaintiff. There is simply no allegation of the Defendants' asserted negligence that is independent of and apart from their public employment by NCSU, which places exclusive jurisdiction within and before the Industrial Commission. *Wright*, 202 N.C. App. at 543, 688 S.E.2d at 789.

Defendants argue the trial court properly dismissed Plaintiff's complaint as deficient for two reasons: (1) Plaintiff failed to properly allege proximate cause; that is, Mr. Long's injury was a reasonably foreseeable consequence of Defendants' alleged conduct; and, (2) Plaintiff failed to include well-pled factual allegations that Defendants' conduct was either grossly negligent or willful and wanton.

III. Foreseeability and Proximate Cause

Palsgraf v. Long Island Railroad Co., 162 N.E. 99, 99 (N.Y. 1928), is the leading case in American tort law addressing the issue of a defendant's liability to an unforeseeable plaintiff. Judge (later Justice) Cardozo explained proximate cause and reasonable foreseeability of distant and remote acts and impact on an unknown plaintiff as follows: "the conduct of the defendants . . . if a wrong in its relation to the[ir employer], was not a wrong in its relation to the plaintiff, standing far away. Relative[] to her it was not negligence at all." *Id.* at 102. Judge

Cardozo quoted *Pollock on Torts* and cited several cases for the proposition that "proof of negligence in the air, so to speak, will not do." *Id.* Only if there is a duty to the injured plaintiff, the breach of which causes injury, can there be liability. *See id.*

Negligence which does no one harm is not a tort. It is not enough, Judge Cardozo found, to prove negligence by the Defendants and damage to the Plaintiff's husband. There must be a breach of a duty these Defendants owed to Plaintiff's husband. Judge Cardozo traced the history of the law of negligence. He noted and concluded that negligence evolved as an offshoot from the law of trespass, and Plaintiff cannot sue for trespass committed against a third party. *Id.*

Our Supreme Court has agreed with this analysis: "The breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury, which is sought to be referred to the negligence, unless the connection of cause and effect is established." *Smith v. Whitley*, 223 N.C. 534, 535, 27 S.E.2d 442, 443 (1943) (citation omitted).

IV. Willful and Wanton Conduct

Addressing Defendants' second contention, Plaintiff failed to include well-pled factual allegations that Defendants' conduct was either grossly negligent or willful and wanton. Nothing in the complaint alleges grossly negligent, or willful and wanton conduct to support a cause of action. Gross negligence and willful and wanton conduct describe the same conduct. *Benton v. Hillcrest Foods, Inc.*, 136 N.C. App. 42, 50, 524 S.E.2d 53, 59 (1999). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Green v. Kearney*, 217 N.C. App. 65, 72, 719 S.E.2d 137, 142 (2011) (citation omitted). Gross negligence is "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Greene v. City of Greenville*, 225 N.C. App. 24, 26, 736 S.E.2d 833, 835 (2013) (citations omitted).

Our Court has found a substantial difference between alleged acts of negligence and gross negligence. "Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence." *Green*, 217 N.C. App. at 71, 719 S.E.2d at 142 (citations and quotations omitted). Wanton conduct is done "in conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* (citations and quotations omitted). Here, Plaintiff's complaint asserts no factual basis or to warrant inferring that Defendants knew or should have known about the risk of pressurized gas build-up in the chiller's water pipes or acted

with "intentional disregard of and indifference to the rights and safety of others." *Id.*

V. Conclusion

As noted, Plaintiff admitted that her claims before the Industrial Commission are identical to those in her dismissed complaint without the allegation of Defendants' employment and agency with the State and NCSU. Under the State's sovereign immunity, the only basis for liability and recovery for Defendants' alleged negligent acts while public employees, is a claim under the State Tort Claims Act before the Industrial Commission. The General Assembly's "statutory waiver of sovereign immunity must be strictly construed." *Meyer*, 347 N.C. at 107, 489 S.E.2d at 885.

Plaintiff's allegations against Defendants as public employees judicially estops Plaintiff's identical assertions to impose individual liability upon Defendants for identical conduct that occurred as public employees. She cannot have it both ways. The trial court correctly ruled Plaintiff's complaint did not invoke the subject matter jurisdiction of the courts, nor against these Defendants personally or individually, and that her complaint had failed to state a claim in the superior court.

Plaintiff has chosen the Industrial Commission as her forum for the resolution of her claim for her husband's wrongful death for the asserted negligence of public employees of the State under a waiver of the State's sovereign immunity. *See Walls*, 347 N.C. at 107, 489 S.E.2d at 885. The trial court's dismissal of Plaintiff's complaint was proper, lawful, and is properly affirmed. I respectfully dissent.

GREEN v. BLACK

[270 N.C. App. 258 (2020)]

SUSAN GREEN, PLAINTIFF
v.
LISA BLACK, DEFENDANT

No. COA19-661

Filed 3 March 2020

1. Contracts—promissory note—language of contract—plain and unambiguous—meeting of the minds

In a dispute in which plaintiff alleged defendant defaulted on a promissory note, the challenged portion of the note was not ambiguous because it reflected a meeting of the minds to enter into a second promissory note in the event of default, but that portion was void because it lacked necessary specificity regarding the terms of the additional promissory note.

2. Contracts—promissory note—validity—severability of void provision

In a claim for breach of contract, a provision of the contract that was void for uncertainty and unenforceable was severable because it was not an essential provision of the contract since it reflected what the parties would do in the event of default and none of the essential elements of the contract depended on the provision.

3. Loans—promissory note—breach of contract—summary judgment—genuine issue of material facts

In a claim for breach of contract in which plaintiff alleged defendant defaulted on a promissory note, the trial court did not err by granting plaintiff's motion for summary judgment because there were no genuine issues of material fact pertaining to whether defendant defaulted on the note or the amount owed to plaintiff based on defendant's admissions in her answer (that she agreed to the note, she received money from plaintiff, and she failed to pay plaintiff in accordance with the note) and on plaintiff's complaint and supporting affidavits detailing the specific amount owed.

Appeal by Defendant from order entered 26 November 2018 by Judge C.W. McKeller in Henderson County District Court. Heard in the Court of Appeals 7 January 2020.

Cosgrove Law Office, by Timithy R. Cosgrove, for Plaintiff-Appellee.

Stam Law Firm, by R. Daniel Gibson, for Defendant-Appellant.

COLLINS, Judge.

Defendant Lisa Black appeals from the trial court's 26 November 2018 order granting Plaintiff Susan Green's motion for summary judgment made pursuant to North Carolina Rule of Civil Procedure 56. Defendant contends that there exist genuine issues of material fact regarding (1) the construction of the promissory note that is central to the parties' dispute and (2) whether the parties breached that note, and that the trial court erred by granting Plaintiff summary judgment. We affirm.

I. Background

On 21 April 2015, Plaintiff loaned Defendant $50,000 in exchange for a promissory note (the "Note"). Under the terms of the Note, which Defendant drafted, Defendant promised to pay Plaintiff the $50,000 principal plus "interest payable on the unpaid principal at the rate of 2% per annum (or a total of $1000 USD), calculated yearly and not in advance." The Note also set forth as follows:

> 2. This Note will be paid on December 1, 2015. If any additional amount is required to fulfill the obligation of $51,000 USD total to [Plaintiff], an additional Note will be created for the remaining amount due. All diligence will be made to meet this payment obligation on the first date it is due.

As of 1 December 2015, Defendant had paid only $32,000 of the $51,000 the parties agree Defendant owed Plaintiff under the Note. Thereafter, Defendant paid an additional $6,150 towards the outstanding debt she owed to Plaintiff under the Note, which Plaintiff accepted. Defendant also attempted to make other partial payments on the debt which Plaintiff refused to accept.

On 26 June 2018, Plaintiff filed a verified complaint in which she (1) alleged that Defendant had defaulted on the Note and (2) sought the remaining $12,850 she alleged she was owed under the Note. Defendant answered the complaint on 27 July 2018. In her answer, Defendant admitted that she had not fully paid her debt obligation under the Note, but argued that she "has never refused to pay back this loan, is not in default of this loan, and is waiting for a reasonable payment schedule to be written and agreed to between [Plaintiff] and [Defendant] for this loan." Defendant further stated that she "has in good faith made payments to the Plaintiff on the first of each month, voluntarily beginning on [sic] January 2016, until the Plaintiff would meet to create a new Note

and mutually agreed upon payment schedule." Regarding the "payment schedule" she sought, Defendant pled that:

> Item Number 2 of the Note states that the Note be paid on December 1, 2015, and if any additional amount is still owed of the $51,000USD, after that date, of the personal loan to [Plaintiff], that an additional new Note will be created between [Plaintiff] and [Defendant] with a mutually agreed upon payment schedule for the remaining amount due. Both [Plaintiff] and [Defendant] on th[e Note] were fully aware of this fact and it was communicated at length upon the signed acceptance of the [Note] by both parties.

Defendant moved to dismiss[1] Plaintiff's complaint on 21 August 2018, and filed a memorandum of law in support arguing, *inter alia*, that the complaint should be dismissed because "Defendant is willing to repay the loan, but is waiting for a meeting with the Plaintiff to be able to create a new repayment Note with mutually agreed upon repayment terms and schedule."[2]

Plaintiff moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, on 24 October 2018. On that same date, Plaintiff also filed an affidavit of her own in support of her motion for summary judgment, in which she stated that the Note "contains ambiguous language upon which the Defendant is relying as a defense to the Plaintiff's complaint." On 15 November 2018, Plaintiff's counsel filed an affidavit in support of Plaintiff's motion for summary judgment noting that there were checks written by Defendant to Plaintiff in 2016 which "Plaintiff refused to cash upon advice of Counsel" and for which "Defendant has mistakenly credited herself" in her filings to the trial court. Both Plaintiff and Plaintiff's counsel attested that the sum due under the Note was $12,850, as sought by the complaint. Defendant did not respond to Plaintiff's motion for summary judgment with an opposing motion or any affidavit or other proffer of evidence of her own.[3]

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1. The *pro se* motion to dismiss does not specify the procedural rule under which the motion was brought.

2. The record does not reflect whether the trial court ruled upon Defendant's motion to dismiss.

3. Defendant's *pro se* filings reflected within the record on appeal are not verified. Accordingly, Defendant's filings contain mere allegations, which are not evidence, and do not create triable issues of fact in the face of contradictory evidence. *Cf. Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) ("A verified complaint may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein.").

On 26 November 2018, the trial court entered an order granting Plaintiff's motion for summary judgment, and Defendant timely appealed.

II. Discussion

This Court has said:

> The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.
>
> Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.
>
> . . . .
>
> Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 211-12, 580 S.E.2d 732, 735 (2003) (internal quotation marks, brackets, and citations omitted).

> Our standard of review of an appeal from summary judgment is de novo. The evidence produced by the parties is viewed in the light most favorable to the non-moving party. If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied.

Nationstar Mortg. LLC v. Curry, 822 S.E.2d 122, 125-26 (N.C. Ct. App. 2018) (internal quotation marks, brackets, and citations omitted).

[1] Defendant contends that the trial court erred by granting Plaintiff's motion for summary judgment "because (1) the Note's terms are ambiguous or, if they are unambiguous, [Defendant] was not in default and (2) the Note contains an unenforceable agreement to agree or, if it is enforceable, [Plaintiff] breached the Note." Both the purported ambiguity and the agreement to agree upon which Defendant's arguments on appeal focus are found within Section 2 of the Note. Accordingly, based upon the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[,]" N.C. Gen. Stat. § 1A-1, Rule 56 (2018), we must determine whether Section 2 (1) reflects an ambiguity or (2) if it does not, was breached by Plaintiff, such that Plaintiff is not entitled to judgment as a matter of law on her breach of contract claim.

As noted above, Section 2 reads as follows:

> 2. This Note will be paid on December 1, 2015. If any additional amount is required to fulfill the obligation of $51,000 USD total to [Plaintiff], an additional Note will be created for the remaining amount due. All diligence will be made to meet this payment obligation on the first date it is due.

Defendant argues that Section 2 is ambiguous because it is

> susceptible to at least two interpretations. First, [Defendant] will pay on 1 December 2015 and, if she does not, she is in default. Second, [Defendant] should make a diligent effort to pay by 1 December 2015 but this is only the "first date" the loan is due. If [Defendant] does not pay by 1 December 2015, the parties will create an "additional Note" for the amount remaining due.

In effect, then, Defendant argues that it was impossible for her to default on the Note, because the second sentence of Section 2 (the "Second Sentence") contemplated that "an additional Note will be created for the remaining amount due" if Defendant did not pay in full on the "first date." As mentioned above, in her answer, Defendant pled that she "has never refused to pay back this loan, is not in default of this loan, and is waiting for a reasonable payment schedule to be written and agreed to between [Plaintiff] and [Defendant] for this loan." Plaintiff does not contest Defendant's construction of the Second Sentence, but argues that because it "would leave [Plaintiff] at the mercy of [Defendant] and could result in [Plaintiff] not ever getting paid," the Second Sentence is "wholly repugnant to the original intent of the parties" and "serves

to undo the very basis of the bargain[,]" and "should be set aside or rejected."

Like the parties, we read the Second Sentence as the parties' agreement that in the event Defendant did not fully pay off her debt under the Note by 1 December 2015, the parties would then negotiate an additional promissory note for the outstanding debt. The Second Sentence therefore reflects a mutual conditional offer to execute an additional promissory note—importantly, on unspecified terms, and therefore subject to future agreement by the parties—in the event of Defendant's default. Because the record demonstrates that there was a meeting of the minds regarding the Second Sentence, the Note is not ambiguous.[4]

However, the question remains whether the Second Sentence is enforceable. If enforceable, Plaintiff's failure to execute an additional promissory note with Defendant upon Defendant's default would itself be a breach of the Note's terms, such that Defendant's breach arguably might be excused.

"An offer to enter into a contract in the future must, to be binding, specify all of the essential and material terms and leave nothing to be agreed upon as a result of future negotiations." *Young v. Sweet*, 266 N.C. 623, 625, 146 S.E.2d 669, 671 (1966).

The Second Sentence contains no specifics regarding the terms of the additional promissory note, and Defendant repeatedly argues that that new note's terms, including its "payment schedule[,]" and any rate of interest accruing upon the unpaid debt, would have to be "mutually agreed upon" by the parties before the new note could be executed. Because it does not contain specifics, and instead leaves *everything* "to be agreed upon as a result of future negotiations[,]" we conclude that the Second Sentence is void for uncertainty and unenforceable.[5] *See Young*, 266 N.C. at 625, 146 S.E.2d at 671 (in real-estate context, "[a] covenant to let the premises to the lessee at the expiration of the term

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4. Plaintiff's statement in her affidavit that the Note contains unspecified "ambiguous language" does not control our analysis. *See International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989) ("A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law." (citation omitted)).

5. Were we to hold the Second Sentence to be enforceable, Defendant would have court-enforced leverage to refuse to pay back the unpaid debt except for on wildly-unjust terms: e.g., Defendant could hold firm that she would only agree to a new note that allowed her to pay one cent every fifty years, without any interest, in which case inflation would render the unpaid debt wholly valueless.

without mentioning any price for which they are to be let, or to renew the lease upon such terms as may be agreed on, in neither case amounts to a covenant for renewal, but is altogether void for uncertainty.").

[2] The next question is whether the void Second Sentence may be set aside and the remainder of the Note enforced, or whether the entire Note is unenforceable by virtue of the unenforceable provision. Our Supreme Court has said:

> When a contract contains provisions which are severable from an illegal provision and are in no way dependent upon the enforcement of the illegal provision for their validity, such provisions may be enforced. It is well established that the fact that a stipulation is unenforceable because of illegality does not affect the validity and enforceability of other stipulations in the agreement, provided they are severable from the invalid portion and capable of being construed divisibly.

Rose v. Vulcan Materials Co., 282 N.C. 643, 658, 194 S.E.2d 521, 531-32 (1973) (internal quotation marks and citations omitted). This Court has said that the question of whether an unenforceable contractual provision is severable depends upon whether the provision is "the main purpose or essential feature of the agreement[,]" or whether other such provisions are "dependent on" the unenforceable provision. *Robinson, Bradshaw, & Hinson, P.A. v. Smith*, 129 N.C. App. 305, 314, 498 S.E.2d 841, 848 (1998) (upholding summary judgment on contingency-fee contract: "Despite the invalidity of this section of the contract, the remainder of the contingency fee contract is still enforceable because it is also severable from, and not dependent in its enforcement upon, the void portion. The severable portion is not the main purpose or essential feature of the agreement." (citation omitted)); *Am. Nat'l Elec. Corp. v. Poythress Commercial Contractors, Inc.*, 167 N.C. App. 97, 101, 604 S.E.2d 315, 317 (2004) (upholding summary judgment for defendant: "We therefore conclude that the 'pay when paid' clause of the contract is indeed unenforceable, but that it is severable from the rest of the contract and does not defeat the other portions of the contract, such as the notice of delay provision, which are in no way dependent on the illegal provision.").

The main purpose of a promissory note is to memorialize an agreement to exchange money for a promise to pay the money back with interest on a date certain. The amount of the principal loaned, the amount of interest that accrues thereupon, and the date when the borrower is

required to pay back the principal with accrued interest to the lender are all examples of essential provisions of a promissory note that cannot be severed from the note. The Second Sentence, which only contemplated what the parties would do in the event of default, and upon which none of the Note's essential provisions described above depend,[6] is not such an essential provision. We accordingly conclude that it is severable from the Note and should be set aside, and that the remainder of the Note may be enforced.

[3] The final question is therefore whether Plaintiff has established via the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits[,]" N.C. Gen. Stat. § 1A-1, Rule 56, that there are no genuine issues of material fact regarding whether (1) Defendant defaulted on the Note (construing the Second Sentence as stricken therefrom) and (2) Plaintiff is owed $12,850 as a result, such that Plaintiff is entitled to judgment as a matter of law for that amount.

Regarding the default, Defendant admitted in her answer that she (1) agreed to the Note, (2) received $50,000 from Plaintiff, and (3) had not paid Plaintiff the entirety of the principal and interest due under the Note as of 1 December 2015. As mentioned above, Defendant argues in her brief on appeal that the Note could be interpreted to mean that 1 December 2015 was the "first date" the loan is due, which—rather than creating a date upon which Defendant's failure to pay would create a default—merely triggered the Second Sentence's obligation to create an "additional Note" for the amount outstanding. However, Defendant has directed our attention to no authority setting forth that a loan can become due on multiple dates such that the legal import of nonpayment by the borrower upon the "first date" the loan is due is somehow qualified by a latter due date, and we are aware of no such authority. In the absence of authority to the contrary, we reject Defendant's theory that the Note contemplated multiple due dates as an unreasonable construction that

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6. An argument that the Second Sentence effectively renders the due-date provision meaningless—and that the due-date provision therefore is "dependent on" the Second Sentence—would fail, because the parties agree that the Note's due date was 1 December 2015. The determination of the Note's due date therefore is "dependent on" nothing else. *See infra* (rejecting Defendant's argument that the Note had multiple due dates).

Further, if construed to render the due-date provision meaningless, the Second Sentence is irreconcilable with the first sentence of Section 2—i.e., the due-date provision—and is repugnant to the general purpose of the Note, which further supports our conclusion that the Second Sentence must be set aside as unenforceable. *See Davis v. Frazier*, 150 N.C. 447, 451, 64 S.E. 200, 201 (1909) ("It is an undoubted principle that a subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract will be set aside." (internal quotation marks and citation omitted)).

would render an absurd result. *See Fairbanks, Morse & Co. v. Twin City Supply Co.*, 170 N.C. 315, 321, 86 S.E. 1051, 1054 (1915) ("All instruments should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results[.]"). The admissions within Defendant's answer accordingly amount to an admission that Defendant defaulted on the Note.

Regarding the amount owed, Defendant admitted in her answer to owing $12,250 to Plaintiff under the Note as of 27 July 2018. Later, in her 21 August 2018 memorandum in support of her motion to dismiss, Defendant stated that the amount she owed was $11,050. As mentioned above, both Plaintiff and her counsel stated in their affidavits that Defendant owed Plaintiff $12,850, as sought in the complaint.

The affidavit submitted by Plaintiff's counsel in support of Plaintiff's motion for summary judgment (1) explains that the difference in the amounts of outstanding debt claimed by the parties is the result of checks written by Defendant to Plaintiff in 2016 which "Plaintiff refused to cash upon advice of Counsel" and for which "Defendant has mistakenly credited herself" and (2) attaches a 5 July 2016 letter written by Defendant contemplating that she had written checks to Plaintiff which were "Not Cashed" as of that date. Defendant did not respond to Plaintiff's motion for summary judgment with any opposing motion or any affidavits or other evidence of her own,[7] and nowhere has (1) argued that Plaintiff's counsel's characterization of any particular check as uncashed is inaccurate or (2) disputed that she wrote the letter in the record indicating that various attempts by Defendant to pay Plaintiff had been refused. Accordingly, because Defendant has not directed our attention to any authority standing for the proposition that Plaintiff was required to cash Defendant's checks or otherwise accept anything offered by Defendant in partial payment for the outstanding debt owed by Defendant under the Note, we conclude that it was proper for the trial court to conclude as a matter of law that Defendant owed Plaintiff $12,850 under the Note as the complaint and Plaintiff's affidavits claimed.

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7. As mentioned above, *see supra* note 3, Defendant's *pro se* filings are not verified, and therefore cannot create triable issues of fact in the face of Plaintiff's affidavits. N.C. Gen. Stat. § 1A-1, Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

III. Conclusion

Because we conclude that Plaintiff has demonstrated that no genuine issue of material fact exists and that Plaintiff is entitled to judgment as a matter of law on her breach of contract claim, we affirm the trial court's 26 November 2018 order granting Plaintiff summary judgment thereupon.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

REBECCA HOLDSTOCK AND LOUIS HOLDSTOCK, PLAINTIFFS
v.
DUKE UNIVERSITY HEALTH SYSTEM, INC., D/B/A DUKE UNIVERSITY MEDICAL CENTER, DUKE UNIVERSITY HOSPITAL AND/OR DUKE HEALTH, DEFENDANTS

No. COA18-1312

Filed 3 March 2020

Medical Malpractice—Rule 9(j)—facial constitutional challenge—mandatory statutory requirements—determination by three-judge panel

In a medical malpractice case, the trial court's order striking the affidavit of plaintiffs' designated expert and granting summary judgment in favor of defendant-hospital pursuant to Civil Procedure Rule 9(j) was vacated because the trial court failed to comply with mandatory statutory requirements in addressing plaintiffs' facial constitutional challenge to Rule 9(j). The matter was remanded to the trial court for determination of whether plaintiffs properly raised a facial challenge to Rule 9(j) in their complaint (thereby invoking N.C.G.S. § 1-267.1(a1) and Civil Procedure Rule 42(b)(4)) and to resolve any issues not contingent upon the facial challenge to Rule 9(j) before deciding whether it is necessary to transfer the facial challenge to a three-judge panel of the Superior Court of Wake County.

Judge BERGER concurring in result only.

Appeal by Plaintiffs from order entered 25 July 2018 by Judge Orlando Hudson in Superior Court, Durham County. Heard in the Court of Appeals 6 August 2019.

Bailey & Glasser, LLP, by Benjamin J. Hogan, pro hac vice, and George B. Currin, for Plaintiffs-Appellants.

Yates, McLamb & Wyher, L.L.P., by Dan J. McLamb and Lori Abel Meyerhoffer, and Robinson Bradshaw, by Mark W. Merritt and Brian L. Church, for Defendants-Appellees.

McGEE, Chief Judge.

Rebecca Holdstock ("Ms. Holdstock") and Louis Holdstock (collectively, "Plaintiffs") appeal from an order striking the affidavit of Plaintiffs' designated expert and granting summary judgment in favor of Duke University Health System, Inc., d/b/a Duke University Medical Center, Duke University Hospital and/or Duke Health ("Defendant Duke").

I. Factual and Procedural History

Ms. Holdstock contacted Duke Health in early 2013 complaining of dizziness and "syncopal episodes." Dr. Scott A. Strine, a neurologist, ordered an MRI of Ms. Holdstock's brain, which was performed on 1 March 2013 (the "2013 MRI"). Dr. Hasan A. Hobbs, a radiologist and neuroradiology fellow, and Dr. Jenny K. Hoang, a neuroradiologist, interpreted the 2013 MRI as an "unremarkable brain MR." At a follow-up appointment on 21 March 2013, Dr. Strine reviewed the results of the 2013 MRI and found the images of Ms. Holdstock's brain "completely unremarkable."

Ms. Holdstock returned to Duke Health on 21 September 2015 complaining of "headaches, vision changes, nausea, photophobia, worsening tinnitus and questionable hearing loss." Audiological testing confirmed Ms. Holdstock was suffering from decreased hearing in her left ear, and a second MRI was ordered. At the follow-up appointment on 23 September 2015, Dr. David Kaylie, an otolaryngologist, diagnosed Ms. Holdstock with an acoustic neuroma in her left ear. Ms. Holdstock testified in her deposition that when Dr. Kaylie reviewed the 2013 MRI, he stated "[t]his is awkward. They missed something two-and-a half years ago on your MRI. You have an acoustic neuroma. This explains everything that you've been through."

Subsequently, physicians at the Mayo Clinic removed the acoustic neuroma in Ms. Holdstock's left ear. Post-operative audiological testing revealed Ms. Holdstock "had suffered a complete hearing loss in her left ear."

Plaintiffs' counsel e-mailed Dr. Marc L. Bennett ("Dr. Bennett") on 14 November 2016 and requested he "review the records and advise us

if you believe there was any negligence in failing to diagnose the acoustic neuroma in the first instance and, secondly, what harm was occasioned by the delay in diagnosis[.]" Plaintiffs' counsel sent Plaintiffs an e-mail on 7 December 2016, stating "I spoke with the ENT reviewer Dr. Marc Bennett from Vanderbilt. Without getting into great detail, he says the neuroma is very clear on the original MRI and should never have been missed."

Plaintiffs filed a complaint on 16 December 2016 against Dr. Strine, Dr. Hobbs, Dr. Hoang ("Defendant Doctors") and Defendant Duke (collectively, "Defendants"), alleging professional negligence of Defendant Doctors, negligence of Defendant Duke, and imputed negligence of Defendant Doctors to Defendant Duke. Plaintiffs filed an amended complaint on 19 December 2016, which included the certification language required by Rule 9(j) for medical malpractice actions:

> Plaintiff asserts that the medical care, treatment and all medical records pertaining to the alleged negligence that are available to plaintiff after a reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care.

In addition to Plaintiffs' allegations of negligence, Plaintiffs also alleged that "the pre-filing requirements of Rule 9(j) of the NC Rules of Civil Procedure [are] unconstitutional."

Defendants filed an answer on 21 March 2017, asserting Defendants' actions complied with the standard of care and denying any negligence. Plaintiffs filed answers to Defendants' Rule 9(j) interrogatories on 4 June 2018. Plaintiffs identified Dr. Bennett as the "person[] who . . . [Plaintiffs] reasonably expect to qualify as an expert witness . . . and who is willing to testify that the medical care of Scott Strine, D.O., Hasan Hobbs, M.D. and Jenny Hoang, M.D. did not comply with the applicable standard of care."

Dr. Bennett was deposed on 3 January 2018. Defendants' counsel asked Dr. Bennett, "you were never willing to testify that Dr. Strine, Dr. Hoang, or Dr. Hobbs violated the standard of care; is that correct?" Dr. Bennett answered, "[c]orrect." Dr. Bennett was asked, "you were never willing – you have never been willing to testify that the medical care of Scott Strine, Hasan Hobbs, or Jenny Hoang did not comply with the applicable standard of care; is that correct?" Dr. Bennett responded, "[y]es, that's correct." Plaintiffs' counsel intervened and stated on the record:

> I don't understand these questions. We didn't designate him as a standard of care expert. He's not in the same specialty as . . . these doctors. We wouldn't have asked him to render a standard of care . . . You asked him if he was a specialist in these specialties. He said no. You've asked him before whether he's offered standard of care opinions or would he be willing to, and he said no because they are different specialists. . . . I can represent [Dr. Bennett] wasn't asked to look at the standard of care for Dr. Strine, Dr. Hoang, or Dr. Hobbs. I wouldn't ask him to do it because he's in a different specialty and he never expressed standard of care opinions to me. [] I'm not going to ask him about standard of care at the time of trial.

Defendant Duke filed a motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) or, in the alternative, a motion for summary judgment pursuant to Rule 56 on 1 June 2018. Defendant Duke alleged that Plaintiffs failed to comply with the requirements of Rule 9(j) because Dr. Bennett "was not reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence," did not form the opinion that "any health care provider breached the applicable standard of care," and was unwilling "to testify that the medical care did not comply with the applicable standard of care under Rule 9(j)."

Plaintiffs filed an affidavit from their counsel and an affidavit from Dr. Bennett "to clarify" Dr. Bennett's deposition testimony on 15 June 2018. In his affidavit, Dr. Bennett explained:

> I advised counsel for Ms. Holdstock that I was willing to testify the MRI images taken in 2013 clearly show an acoustic neuroma that should not have been missed and that the ultimate delay in diagnosis of the acoustic neuroma led to a loss of chance for her to preserve hearing because of the growth of the tumor caused by the delay in diagnosis.

Plaintiffs' counsel explained in his affidavit:

> That based on Dr. Bennett's education, training and experience, coupled with his review of the medical records and MRI images, I believed that I had met the requirements of Rule 9(j) in getting a qualified expert to review the matter and who held the opinion that a deviation from the standard of care occurred prior to filing the lawsuit and in response to the Defendant's Rule 9(j) interrogatories.

Plaintiffs filed a response to Defendant Duke's motion to dismiss or, in the alternative, motion for summary judgment on 2 July 2018. Defendant Duke filed a motion to strike Dr. Bennett's affidavit on 5 July 2018 stating it was "in direct conflict with Dr. Bennett's prior deposition testimony." Following a hearing on 10 July 2018, the trial court orally ruled "[P]laintiff's [sic] have failed to comply with Rule 9(j); the motion to strike Dr. Bennett's affidavit is allowed. The motion for summary judgment is allowed for the reasons argued by the defense."

The trial court then entered an order striking Dr. Bennett's affidavit and granting summary judgment pursuant to Rule 9(j) and Rule 56 on 25 July 2018, concluding that Rule 9(j) was constitutional, Dr. Bennett's affidavit was a "sham affidavit" that should be stricken, Plaintiffs failed to comply with the requirements of Rule 9(j), and "[t]he facially valid Rule 9(j) certification of the Plaintiffs' amended complaint [was] not supported by the facts." Plaintiffs appeal.

II. Analysis

Plaintiffs make two substantive arguments on appeal. First, Plaintiffs contend the trial court erred by striking Dr. Bennett's affidavit and granting Defendant Duke's motion for summary judgment because the record demonstrates that Plaintiffs satisfied the requirements of Rule 9(j) at the time the complaint was filed. Second, Plaintiffs argue Rule 9(j) violates the open courts guarantee preserved in the North Carolina Constitution and the equal protection clauses of the North Carolina and United States Constitutions. We do not consider the merits of Plaintiffs' arguments because, assuming *arguendo* Plaintiffs properly "raised" a constitutional facial challenge to Rule 9(j), N.C.G.S. § 1-267.1(a1) (2017) and N.C.G.S. § 1-81.1 (2017) required that Plaintiffs' facial challenge be heard and decided by a three-judge panel in the Superior Court of Wake County. Because this did not occur, Plaintiffs' purported facial challenge has yet to be resolved and the 25 July 2018 order from which Plaintiffs purport to appeal is interlocutory. We therefore vacate and remand.

A.

In order to reach our ultimate holding, we must conduct an analysis of N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1—which require certain challenges to the acts of the General Assembly to be decided by a three-judge panel in Superior Court, Wake County, in order to determine if and how these statutes apply in this case. N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1 only apply to "facial challenge[s] to the validity of an act of the General Assembly[,]" not as-applied challenges, N.C.G.S. § 1-267.1(a1), and only

apply to civil proceedings, N.C.G.S. § 1-267.1(d). "A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, ___ U.S. ___, ___, 192 L. Ed. 2d 435, 443 (2015); *see also State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998). Presuming it was properly "raised" in the complaint, Plaintiffs' stated constitutional challenge presents a "facial" challenge to Rule 9(j), not an "as-applied" challenge, when Plaintiffs allege: "Rule 9(j) is an unconstitutional violation of the Seventh and Fourteenth Amendments of the United States Constitution and Article I, Sections 6, 18, 19, 25 and 32, and Article IV, Sections 1 and 13 of the North Carolina Constitution."

The General Assembly amended both N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1 in 2014 to require civil proceedings that challenge the facial validity of an act of the General Assembly to be heard and decided by a three-judge panel in the Superior Court of Wake County. 2014 N.C. Sess. Law 100, §§ 18B.16.(a) and (b). N.C.G.S. § 1-267.1(a1) states in relevant part:

> *[A]ny facial challenge* to the validity of an act of the General Assembly *shall be transferred* pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and *shall be heard and determined* by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

N.C.G.S. § 1-267.1(a1) (emphasis added). The language of N.C.G.S. § 1-267.1(a1) appears to require that "any facial challenge" to an act "shall be transferred" "and shall be heard and determined by a three-judge panel." *Id.* Although this language initially appears to mandate the transfer of *every* kind of facial challenge in a civil proceeding to the "validity of an act of the General Assembly[,]" N.C.G.S. § 1-267.1(a1) also states that transfer to a three-judge panel must be conducted *pursuant* to Rule 42(b)(4) (or "the Rule"), which limits the application of the statute in multiple ways. N.C.G.S. § 1-267.1(a1).

Further, Rule 42(b)(4) is written in such a manner that not all its requirements are clear on a first reading. It states in relevant part:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly . . . shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive

> pleading. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity. For a motion filed under Rule 11 or Rule 12(b)(1) through (7), the original court shall rule on the motion, however, it may decline to rule on a motion that is based solely upon Rule 12(b)(6). If the original court declines to rule on a Rule 12(b)(6) motion, the motion shall be decided by the three-judge panel. The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

N.C.G.S. § 1A-1, Rule 42(b)(4) (2017).

Because Rule 42(b)(4) includes multiple conditions, which are not presented in procedurally chronological order, we will consider the mandates of the Rule in an order that more clearly represents its dictates. The Rule first tracks the language of N.C.G.S. § 1-267.1(a1): "*[A]ny* facial challenge to the validity of an act of the General Assembly . . . *shall* be heard by a three-judge panel[.]" N.C.G.S. § 1A-1, Rule 42(b)(4) (emphasis added). However, the Rule then limits the application of N.C.G.S. § 1-267.1(a1) to only those facial challenges that were first "raised" in a complaint or an amended complaint; or "raised" by the "defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading." *Id.*[1] To simplify, we will refer to any facial challenge "raised" in a plaintiff's complaint or amended complaint, or in a defendant's answer, responsive pleading, or by

1. The word "raised" is not defined, and it is therefore uncertain whether "raising" a facial challenge in a complaint is synonymous with "pleading" a facial challenge, and subject to the pleading requirements set forth in Rule 8. *See* N.C.G.S. § 1A-1, Rule 8 (2017).

another appropriate means within thirty days of the filing of the defendant's answer or responsive pleading as "a properly raised challenge" or "properly raised challenges."

Rule 42(b)(4) further requires: "[T]he court shall, *on its own motion*, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel[.]" *Id.* (emphasis added). In other words, it is the trial court's role to recognize that a facial challenge has been made and, if appropriate, transfer the matter, *sua sponte*, at a time in accordance with the dictates of the Rule. We will discuss the timing requirements in detail below. Because we are not considering the merits of Plaintiffs' appeal, we make no determination concerning whether Plaintiffs properly "raised" their facial challenge to Rule 9(j) in their complaint; thus, upon remand, that will be for the trial court to decide. Because the trial court's decision on this matter will determine what courses of action are open to Plaintiffs, and we cannot presume what will happen upon remand, we believe a broader consideration of the relevant statutes is warranted.

Although the Rule requires that facial challenges raised in a complaint *must* be transferred, *sua sponte*, for a ruling by a three-judge panel, the language of the Rule does not expressly *prohibit* the trial court from deciding a facial challenge if it is *not* filed in accordance with the limitations included in Rule 42(b)(4). For example, Rule 42(b)(4), and therefore N.C.G.S. § 1-267.1(a1), does not *expressly* prohibit a facial challenge that is *first* raised in a motion for summary judgment filed *more* than thirty days after the filing of the defendant's answer or responsive pleading.[2] Further, the Rule mandates that the trial court transfer a facial challenge to a three-judge panel in certain circumstances, but does not *expressly prohibit* the trial court, in its discretion, from transferring a facial challenge that does not comply with the requirements of Rule 42(b)(4). *See Webster Enters., Inc. v. Selective Ins. Co.*, 125 N.C. App. 36, 46, 479 S.E.2d 243, 249–50 (1997) ("The trial court is vested with broad discretionary authority in determining whether to bifurcate a trial. This Court will not superimpose its judgment on the trial court absent a showing the trial court abused its discretion by entering an order manifestly unsupported by reason.") (citations omitted). Unfortunately, neither N.C.G.S. § 1-267.1(a1) nor Rule 42(b)(4) provide guidance on how

2. *See also*, N.C.G.S. § 1A-1, Rule 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.").

facial challenges in civil proceedings should be resolved when they are "raised" outside the Rule 42(b)(4) requirements.

Subsection (c) of N.C.G.S. § 1-267.1 serves to answer some of the questions concerning the authority of the trial court to rule on facial challenges, but also raises other questions. It states:

> No order or judgment [in a civil proceeding] shall be entered . . . [that] finds . . . an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by . . . subsection (b2) of this section.

N.C.G.S. § 1-267.1(c). Pursuant to a plain reading of N.C.G.S. § 1-267.1(c), *no court*, other than a three-judge panel granted jurisdiction pursuant to N.C.G.S. § 1-267.1, is permitted to make an initial ruling, and enter a judgment or order thereon, that an act of the General Assembly violates the North Carolina Constitution or any federal law. N.C.G.S. § 1-267.1(c).[3]

In addition, venue for facial challenges of the acts of the General Assembly is addressed in N.C.G.S. § 1-81.1(a1), which states:

> Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1-267.1(a1) and G.S. 1-1A, Rule 42(b)(4), claims described in this subsection that are filed or raised in courts other than Wake County Superior Court or that are filed in Wake County Superior Court shall be transferred to a three-judge panel of the Wake County Superior Court if, after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.

N.C.G.S. § 1-81.1(a1). This statute, like N.C.G.S. § 1-267.1(a1), contains facially conflicting mandates. It states that "[v]enue lies exclusively with

3. We do not address whether this statute is meant to apply to our appellate courts.

the Wake County Superior Court with regard to any claim" requesting that an act of the General Assembly not be enforced because it "is facially invalid on the basis that the act violates the North Carolina Constitution or federal law." N.C.G.S. § 1-81.1(a1). A reading of the plain language of this sentence would prevent any court other than the Superior Court of Wake County from considering any constitutional facial challenge to an act. However, the second sentence of the statute restricts the transfer *requirement* to only properly raised challenges as set forth in Rule 42(b)(4). Also, like N.C.G.S. § 1-267.1(a1), N.C.G.S. § 1-81.1(a1) does not expressly address how trial courts should resolve facial challenges that are not "properly raised" pursuant to Rule 42(b)(4).

Considered *in pari materia*, a plain reading of N.C.G.S. § 1-81.1(a1), N.C.G.S. §§ 1-267.1(a1) and (c), and Rule 42(b)(4), prohibits entry of *any* order or judgment in a civil proceeding that rules an act of the General Assembly facially unconstitutional, *unless*: (1) it was made by a three-judge panel granted jurisdiction pursuant to N.C.G.S. § 1-267.1; *and* (2) the underlying facial challenge to the act was "a properly raised challenge" as required by Rule 42(b)(4). A facial challenge made in a motion *later* than thirty days from the filing of the defendant's answer or responsive pleading, as determined by the Rule, is *not required* to be transferred to a three-judge panel by N.C.G.S. § 1-267.1 or N.C.G.S. § 1-81.1(a1), and there is nothing in these statutes expressly prohibiting the trial court from considering a facial challenge, *but* if the trial court were to determine that an act was facially unconstitutional or contrary to federal law, N.C.G.S. § 1-267.1(c) prohibits the trial court from entering any order or judgment to that effect. The plain language of both N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1(a1) does not prohibit a trial court from considering a facial challenge to an act, making a ruling, and entering a judgment or order thereon *so long as*: (1) the trial court's ruling in its judgment or order determines that the challenged act is *not* facially unconstitutional; and (2) the facial challenge was *not* filed in accordance with Rule 42(b)(4). N.C.G.S. § 1-267.1(c).

B.

The plain language of these three statutes, read *in pari materia*, raises issues concerning procedure, the rights of the parties to make facial challenges both during the period set by Rule 42(b)(4) and those facial challenges that arise later in the action, and the authority of the trial court to act in its discretion when a facial challenge is not expressly covered by Rule 42(b)(4). We review Plaintiffs' alleged facial challenge considering the relevant requirements of N.C.G.S. § 1-267.1 and N.C.G.S. § 1-81.1(a1).

We first note it is well settled that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citations omitted). Therefore, because Plaintiffs argue that the trial court erred in granting summary judgment on *both* constitutional and non-constitutional grounds, this Court would normally consider Plaintiffs' non-constitutional argument first. However, N.C.G.S. § 1-267.1(a1), including Rule 42(b)(4), governs our jurisdiction in this matter, and we must determine if Plaintiffs' claim is governed by the Rule. If so, we must then determine whether Plaintiffs and the trial court have handled Plaintiffs' claims in accordance with N.C.G.S. § 1-267.1(a1), which requires the transfer of a facial challenge to a three-judge panel be accomplished pursuant to the dictates of Rule 42(b)(4). Rule 42(b)(4) states that transfer of a facial challenge is only required if Plaintiffs "raise[d] such a challenge in [Plaintiffs'] complaint or amended complaint[.]" N.C.G.S. § 1A-1, Rule 42(b)(4).

Plaintiffs' complaint states in relevant part:

> Plaintiff[s] object[] to the pre-filing requirements of Rule 9(j) of the NC Rules of Civil Procedure as unconstitutional. Rule 9(j) effectively requires Plaintiff[s] to prove their case before factual discovery is undertaken, denies malpractice plaintiffs their rights of due process of law, or equal protection under the law, of the right to open courts, and of the right to a jury trial, in violation of the United States and North Carolina Constitutions. Rule 9(j) is an unconstitutional violation of the Seventh and Fourteenth Amendments of the United States Constitution and Article I, Sections 6, 18, 19, 25 and 32, and Article IV, Sections 1 and 13 of the North Carolina Constitution.

Therefore, it was the trial court's first duty to determine whether Plaintiffs' complaint "raised" a facial challenge to an act of the General Assembly in accordance with the Rule. The trial court's determination of this issue then would dictate the actions thereafter required. When a facial challenge is properly "raised" pursuant to Rule 42(b)(4), N.C.G.S. § 1-267.1 determines the jurisdiction over the action, or parts of the action, of the trial court, the three-judge panel, and the appellate courts. Under the requirements of the Rule, if Plaintiffs properly "raised" a facial challenge in their complaint, the facial challenge could only be heard and decided by a three-judge panel:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly . . . shall be heard by

> a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State[.]

N.C.G.S. § 1A-1, Rule 42(b)(4).

The trial court in this case had no jurisdiction to decide any facial challenge that was first "raised" in Plaintiffs' complaint. Instead, if the trial court determined Plaintiffs had properly "raised" a facial challenge to Rule 9(j) in their complaint, the trial court was required to determine "if, after all other matters in the action have been resolved, a determination as to the facial validity of [Rule 9(j)] must be made in order to completely resolve any matters in the case." *Id.* "All other matters" under Rule 42(b)(4) means "all matters that are [not] contingent upon the outcome of the challenge to the act's facial validity[.]" *Id.* Therefore, in this case, the trial court should have determined if there were any matters that were not "contingent upon the outcome of [Plaintiffs'] challenge to [Rule 9(j)'s] facial validity[.]" *Id.* If the trial court determined there *were* matters not "contingent upon the outcome of [Plaintiffs'] challenge to [Rule 9(j)'s] facial validity[,]" *id.*, the trial court was required to resolve those matters *prior* to considering whether Rule 42(b)(4) mandated transfer of Plaintiffs' facial challenge to the three-judge panel. *Id.* However, if the trial court determined that there were no such matters, Rule 42(b)(4) mandates that "the court *shall*, on its *own motion*, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel[.]" *Id.* (emphasis added).

In the present case, if the trial court had determined there were matters not "contingent upon the outcome of [Plaintiffs'] challenge to [Rule 9(j)'s] facial validity[,]" *id.*, and had decided such matters, it then would have had to decide whether "a determination as to the facial validity of [Rule 9(j)] [had to] be made in order to completely resolve any [remaining] matters in the case." *Id.* For example, if the trial court had found reason to grant summary judgment in favor of either Plaintiffs or Defendants, based upon matters not contingent on Plaintiffs' facial challenge, the trial court would not have transferred Plaintiff's facial challenge to a three-judge panel because the underlying action would have already been decided in full. However, if the trial court had decided all matters not "contingent upon the outcome of" resolution of Plaintiffs' facial challenge, but matters contingent on resolution of the facial challenge remained "in order to completely resolve" the action, the trial court would have been required, "on its own motion, [to] transfer that portion of the action challenging the validity of [Rule

9(j)] . . . for resolution by a three-judge panel[.]" *Id.*

Pursuant to Rule 42(b)(4), when a trial court transfers a facial challenge to a three-judge panel, it "maintain[s] jurisdiction over all matters other than the challenge to the act's facial validity." *Id.* However, once the transfer occurs:

> *The original court shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted.* Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters, as appropriate.

Id. (emphasis added). Thus, upon transfer, a trial court *must* stay any outstanding matters that cannot be fully resolved without resolution of the facial challenge by the three-judge panel. Only after final resolution of the facial challenge will that portion of the action be remanded or transferred back to the original trial court for final resolution of any remaining issues and entry of a final judgment. *Id.*

In the present case, the trial court granted summary judgment in favor of Defendant Duke. Even though findings of fact and conclusions of law are not required in an order granting summary judgment, and are not binding on this Court, *McArdle Corp. v. Patterson*, 115 N.C. App. 528, 531, 445 S.E.2d 604, 606 (1994), the trial court included the following findings and conclusions in its order granting summary judgment: "The [trial court] considered [P]laintiffs['] arguments that Rule 9(j) was unconstitutional; the [trial court] found no appellate authority in North Carolina to support that contention and the [trial court] concludes that Rule 9(j) is constitutional." Initially we note that the trial court's order is not in conflict with the express language of N.C.G.S. § 1-267.1(c)—*because it ruled in favor of the constitutionality of Rule 9(j)*. Based on a plain language reading of N.C.G.S. § 1-267.1(c), the statute would have prohibited entry of the order if the trial court had agreed with Plaintiffs and ruled that Rule 9(j) was facially *unconstitutional*.

However, because Plaintiffs included, *in their complaint*, a facial challenge to Rule 9(j), the trial court was required to proceed according to the provisions of N.C.G.S. § 1-267.1(a1) and Rule 42(b)(4). The trial court should have first determined whether Plaintiffs had properly "raise[d] . . . a [facial] challenge in [their] complaint or amended complaint

in any court in this State[.]" N.C.G.S. § 1A-1, Rule 42(b)(4). Assuming, *arguendo*, that Plaintiffs' complaint properly "raised" a facial challenge, the trial court was required to proceed pursuant to Rule 42(b)(4). There is no evidence that the trial court complied with the requirements of Rule 42(b)(4), which it must do *sua sponte*, if not raised by the parties. *Id.* If Plaintiffs' facial challenge was "raised" in their complaint, Rule 42(b)(4) mandated: "Pursuant to G.S. 1-267.1, [Plaintiffs'] facial challenge to the validity of [Rule 9(j)] . . . *shall* be heard by a three-judge panel[.]" *Id.* (emphasis added).[4] The trial court was required to transfer any properly "raised" facial challenge for decision by a three-judge panel "after all other matters in the action ha[d] been resolved[,]" *i.e.*, "all matters that [were not] contingent upon the outcome of the challenge to [Rule 9(j)'s] facial validity[.]" *Id.*

Further, the only other issue decided by the trial court in its 25 July 2018 order granting summary judgment was that Plaintiffs had failed to meet the pleading requirements of Rule 9(j), in large part based on the trial court's granting of Defendant Duke's motion to strike Dr. Bennett's affidavit. Although we are not deciding these matters on their merits, the trial court's ruling that Plaintiffs had failed to comply with Rule 9(j) would be rendered moot, effectively overruled, if the three-judge panel subsequently ruled that Rule 9(j) was unconstitutional on its face.

The statutes do not provide guidance for determining what matters constitute "matters that are contingent upon the outcome of the challenge to the act's facial validity[,]" but the trial court is in a far superior position than this Court to make the initial determination, based on the pleadings, filings, evidence, and legal arguments made directly to the trial court. Unlike the trial court, this Court cannot ask questions that might help resolve issues or prompt responses necessary to create a complete record. For this reason and others, we believe the trial court should generally make the determinations required by N.C.G.S. § 1-267.1(a1) and Rule 42(b)(4) in the first instance. On the facts before us, we hold that the trial court is required to make these determinations, including whether to transfer Plaintiffs' facial challenge, in the first instance.

Because the trial court did not act in accordance with N.C.G.S. § 1-267.1(a1), Plaintiffs' facial challenge, if it was properly "raised," has not been "heard by a three-judge panel" and decided. *Id.* The trial court was without jurisdiction to enter an order ruling on the facial

4. There is no exception in Rule 42(b)(4) that would allow Plaintiffs' facial challenge, if properly "raised" in their complaint, to be decided by the trial court on summary judgment.

constitutionality of Rule 9(j), and also without authority to enter an order ruling against Plaintiffs on the merits of the non-constitutional issue, because the ultimate decision of that issue was contingent on the three-judge panel's resolution of the facial challenge. Therefore, Plaintiffs' appeal is also interlocutory, and there is no right of interlocutory appeal provided by N.C.G.S. § 1-267.1(a1).

Though there are unanswered questions raised by the manner in which the relevant statutes are worded, in order to decide this appeal we hold it is the duty of the trial court to first determine whether Plaintiffs "raised" a facial challenge to Rule 9(j) in their complaint, thus invoking the provisions of N.C.G.S. § 1-267.1(a1) and Rule 42(b)(4). If Plaintiffs did properly "raise" a facial challenge in this case, the trial court is without jurisdiction to rule on the facial constitutionality of Rule 9(j) because sole jurisdiction to decide that matter resides with "the Superior Court of Wake County[,]" and the matter is required to "be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2)" of N.C.G.S. § 1-267.1. N.C.G.S. § 1-267.1(a1). The trial court also has to determine what issues, if any, are *not* "contingent upon the outcome of the challenge to the act's facial validity[,]" and resolve those issues before deciding whether it is necessary to transfer the facial challenge to the three-judge panel. If the trial court decides, after all issues not contingent on the outcome of Plaintiffs' facial challenge are resolved, that resolution of Plaintiffs' facial challenge to Rule 9(j) is still required to permit resolution of remaining issues, it shall, "on its own motion, transfer that portion of the action challenging the validity of [Rule 9(j)] to the Superior Court of Wake County for resolution by a three-judge panel[,]" and "stay all matters that are contingent upon the outcome of the challenge to [Rule 9(j)'s] facial validity pending a ruling on that challenge and until all appeal rights are exhausted." N.C.G.S. § 1A-1, Rule 42(b)(4).

III. Conclusion

Because the trial court did not comply with the mandatory requirements of N.C.G.S. § 1-267.1, it was without jurisdiction to enter its 25 July 2018 order. Thus, we vacate and remand this matter to the trial court to comply with the statutory mandates of N.C.G.S. § 1-267.1(a1) and N.C.G.S. § 1A-1, Rule 42(b)(4).

VACATED AND REMANDED.

Judge BERGER concurs in result only.

Judge COLLINS concurs.

IN THE ESTATE OF DAVID MAC GIDDENS

No. COA19-792

Filed 3 March 2020

1. Appeal and Error—abandonment of issues—raised for first time in reply brief—estate administration

In an estate dispute, where the decedent's children challenged in their reply brief—but not in their principal brief—the existence and legal effect of an agreement to apply the sale proceeds of the decedent's real property toward a deficiency judgment, the argument was waived because it was raised for the first time in the reply brief.

2. Estates—deficiency judgment—statutory spousal allowance—payment from sale of real estate—contractual agreement

Proceeds from the sale of decedent's real property were permitted to be used to pay the claims of decedent's estate—including a deficiency judgment for his wife's statutory year's allowance as surviving spouse (N.C.G.S. § 30-15)—where decedent's wife, children, and estate expressly agreed to the arrangement.

Appeal by Respondents from order entered 23 May 2019 by Judge Mary Ann Tally in Sampson County Superior Court. Heard in the Court of Appeals 4 February 2020.

Daughtry, Woodard, Lawrence & Starling, by Luther D. Starling, Jr., for Petitioner-Appellee.

Gregory T. Griffin for Respondents-Appellants.

INMAN, Judge.

This case concerns whether a decedent's estate, with the agreement of the administrator and all beneficiaries, can use surplus proceeds from the sale of real property to satisfy a deficiency judgment awarded to the surviving spouse for her statutory allowance. Even though two of the beneficiaries had a change of heart prompting this appeal, we affirm the trial court's enforcement of that agreement.

Respondents Allen Mac Giddens and Tonya Giddens Brown ("Respondents") appeal from the trial court's order vacating an order of the Sampson County Clerk of Superior Court and authorizing the use

of proceeds from the sale of real property to satisfy a spousal allowance deficiency judgment awarded to Petitioner Betty Jean Giddens ("Petitioner"). Respondents contend that a deficiency judgment for a spousal allowance can never be paid out of proceeds from the sale of real estate. After careful review, we disagree and affirm the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

Petitioner's husband and Respondents' father, David Mac Giddens, died intestate on 30 September 2015. Petitioner, who was also the administrator of her husband's estate (the "Estate"), requested her $30,000 statutory year's allowance as the surviving spouse pursuant to N.C. Gen. Stat. § 30-15 (2017).[1] That statute authorizes the surviving spouse of a decedent to claim an allowance "out of the personal property of the deceased spouse[.]"[2] *Id.*

The personal property in the Estate was insufficient to satisfy Petitioner's full allowance, so the clerk of superior court entered a deficiency judgment for the unsatisfied amount of $13,030.00 (the "Deficiency Judgment"). That Deficiency Judgment was later partially satisfied by an assignment from the Estate of $3,482.70 on 26 July 2016, leaving the final amount of deficiency at $9,547.30.[3]

With no personal property left in the Estate, the only asset available to satisfy its outstanding debts was a tract of real property known as the "Homeplace," which was owned by David Mac Giddens in life and passed in equal one-third undivided interests to Petitioner and Respondents on his death. Counsel for the Estate filed a motion to authorize the sale of the Homeplace and, on 28 December 2017, the clerk entered a consent order recognizing an agreement between Petitioner, Respondents, and the Estate to use the proceeds from the sale to "pay the claims

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1. The amount of the statutory spousal allowance was raised to $60,000 in 2019. N.C. Gen. Stat. § 30-15 (2019).

2. A surviving spouse may elect to receive an allowance of $60,000 outright, N.C. Gen. Stat. § 30-15 (2019), or may request a calculation of an allowance "sufficient for the support of petitioner according to the estate and decedent." N.C. Gen. Stat. § 30-31 (2019). That calculation must consider other persons entitled to any allowances and may not exceed one half of the deceased's average annual income for the past three years. N.C. Gen. Stat. § 30-31. The allowance itself "is designed to furnish members of the decedent's family a measure of security while the estate is being administered. It is an attempt to meet the daily needs of food and shelter until the estate is distributed." Wiggins, *The Law of Wills and Trusts in North Carolina*, § 15:1(a) (5th ed. 2019).

3. A clerical error in the Deficiency Judgment lists the final deficiency as "$9,5470.30" rather than the correct amount of $9,547.30.

of the Estate of David Mac Giddens and the cost of the administration of the estate."

The Homeplace sold for $50,400 and the co-commissioners of the sale filed a final report and account on 30 August 2018. That report listed $21,568.94 in funds available to "pay claims and costs of the Estate, [the] balance of which will be distributed to the heirs when the Estate is closed, if any[.]"

On 26 October 2018, counsel for the Estate filed a motion with the clerk seeking authorization for the payment of the Deficiency Judgment from those funds, averring that the "$21,568.94 is sufficient to pay all the claims, debts, costs and administration of the Estate, including the [D]eficiency [J]udgment[.]" Respondents opposed the motion, and the clerk denied the Estate's motion in an order entered 22 February 2019. The clerk's order cited N.C. Gen. Stat, § 30-18 (2019), which provides that the spousal allowance "shall be made in money or other personal property of the deceased spouse[,]" and concluded that it prohibited the use of the surplus sale proceeds to pay the Deficiency Judgment after quoting the following language from *Denton v. Tyson*, 118 N.C. 542, 24 S.E. 116 (1896):

> [T]he widow will not be entitled to any further payment on her year's support out of money arising from the sale of land. And if the land sold should bring more than is sufficient to pay the proper expenditures of the plaintiff in the course of his administration, the residue will remain real estate.

118 N.C. at 544, 24 S.E. at 116. The clerk's order did not address whether the parties had otherwise agreed to pay the Deficiency Judgment out of the proceeds from the sale of the Homeplace.

The Estate appealed the clerk's ruling to the superior court pursuant to N.C. Gen. Stat. § 1-301.3 (2019) and presented additional evidence to the trial court in a hearing. The trial court entered an order vacating the clerk's order. The trial court concluded that the clerk committed prejudicial error in failing to consider evidence of the agreement between the parties to use the Homeplace sale proceeds "to pay all claims against the Estate, specifically including the [Deficiency J]udgment referenced in Petitioner's motion[.]" The trial court further concluded that the language relied upon by the clerk from *Denton* was non-binding *dicta* and that, in any event, *Denton* was distinguishable. The trial court also made new findings of fact based on the additional evidence presented at the hearing, including findings that the parties had expressly agreed to

satisfy the Deficiency Judgment with the surplus proceeds from the sale of the Homeplace. Having distinguished *Denton* and based on the findings of an express agreement, the trial court allowed the Estate's motion to pay the Deficiency Judgment out of the Homeplace sale proceeds. Respondents now appeal.

II. ANALYSIS

A. Standard of Review

"On appeal to the Superior Court of an order of the clerk in matters of probate, the trial judge sits as an appellate court. . . . The standard of review in this Court is the same as in the Superior Court." *In re Estate of Pate*, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3 (1995) (citations omitted). Where the appellant asserts error in the findings of fact or conclusions of law made by the clerk in the order appealed, the superior court—and by extension this Court—applies the whole record test. *Id.* The superior court "reviews the Clerk's findings and may either affirm, reverse, or modify them." *Id.* at 403, 459 S.E.2d at 2 (citation omitted); *see also* N.C. Gen. Stat. § 1-301.3(d) (instructing the trial court to review whether the findings are supported by the evidence, whether the conclusions are supported by the findings, and whether the order comports with the conclusions and applicable law). Any "[e]rrors of law are reviewed *de novo*." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002) (citation omitted). N.C. Gen. Stat. § 1-301.3 also provides that when reviewing an appeal from the clerk's decision in a probate matter, the trial court may determine whether there was prejudicial error in the exclusion or admission of evidence and may take additional evidence to resolve the pertinent factual issue. N.C. Gen. Stat. § 1-301.3(d).

B. Respondents' Appeal

[1] In their principal brief, Respondents present the following arguments: the prohibition in *Denton* against using proceeds from the sale of real property prohibits the satisfaction of Petitioner's Deficiency Judgment out of the Homeplace sale proceeds, *Denton*'s holding accords with the current year's allowance statutes, and the trial court therefore erred in disregarding *Denton*'s holding. Respondents' principal brief does not challenge the trial court's findings and conclusions that: (1) the clerk committed prejudicial error in excluding evidence of an agreement between the parties to pay the Deficiency Judgment from the sale proceeds; (2) the parties had, in fact, entered into an express agreement to apply the sale proceeds toward the Deficiency Judgment; and (3) the proceeds could be used to satisfy the Deficiency Judgment in

accordance with that agreement. Respondents' principal brief also does not contend that the trial court applied the incorrect standard of review to the clerk's order, or that the trial court's order does not conform to the procedure set forth in N.C. Gen. Stat. § 1-301.3.

We acknowledge that Respondents' *reply* brief does challenge the existence and legal effect of the agreement found and enforced by the trial court. But our appellate rules expressly provide that "[i]ssues not presented and discussed in a party's brief are deemed abandoned[,]" N.C. R. App. P. 28(a) (2019), and appellants may not raise new arguments for the first time in their reply briefs. *See, e.g.*, *State v. Triplett*, ___ N.C. App. ___, ___, 810 S.E.2d 404, 407-08 (2018) ("Defendant may not use his reply brief to make new arguments on appeal. A reply brief is not an avenue to correct the deficiencies contained in the original brief." (citations, quotation marks, and alterations omitted)). Respondents' arguments concerning the validity, effect, and application of the agreement are therefore waived. *See, e.g.*, *Hazard v. Hazard*, 46 N.C. App. 280, 283, 264 S.E.2d 908, 910 (1980) (deeming the appellant's argument that a contract was contrary to law and public policy waived when he failed to preserve the argument under the then-applicable appellate rules).

Limiting our review to the issues properly raised by the Respondents, we hold that the express agreement found by the trial court distinguishes this case from *Denton* and we affirm the trial court's judgment as a result.

C. Denton and Its Application

[2] It is unsurprising that both the clerk and the trial court considered the applicability of *Denton* to this case, as that opinion appears to be the only appellate decision in this state directly addressing whether proceeds from the sale of real estate may be used to satisfy a deficiency in a surviving spouse's year's allowance. In *Denton*, a widow claimed her allowance and received all of the estate's personal property and $89.06 in cash from the administrator in partial satisfaction of the allowance. 118 N.C. at 543, 24 S.E. at 116. That payment exhausted the fungible assets of the estate, so the administrator paid $104 in outstanding administration costs and estate debts out of his own pocket. *Id.* The administrator then sought to recoup those expenses by petitioning for the sale of real property that was held by the decedent at his time of death and had since passed to several heirs. *Id.* Those heirs objected, arguing that if the administrator had not exhausted the estate by paying the spousal allowance first, the personal property and cash on hand would have been sufficient to cover the debts owed by the estate. *Id.* Our Supreme Court disagreed with the heirs, holding that the statutory spousal allowance

must be paid first and ahead of any creditors. *Id.* at 543-44, 24 S.E. at 116. It then held that the proceeds from the sale of the real property could be used to repay the administrator. *Id.* at 544, 24 S.E. at 116. The Court continued:

> But the widow will not be entitled to any further payment on her year's support out of money arising from the sale of land. And if the land sold should bring more than is sufficient to pay the proper expenditures of the plaintiff in the course of his administration, the residue will remain real estate.

Id.

Here, the trial court concluded in its order that the above language was non-binding *dicta*, despite the fact that it receives treatment as black-letter law in various treatises on estate administration in North Carolina. *See*, *e.g.*, Wiggins, § 15:3 (citing *Denton* for the proposition that proceeds from the sale of real estate may not be used to satisfy a deficiency in a claim for spousal year's allowance). We need not go so far as to declare the quoted passage *dicta*, however, and instead affirm the trial court's order solely because we agree that *Denton* is distinguishable from the facts presented in this case. *Denton* addresses only the statutory rights of a surviving spouse in receiving payment on her year's allowance; it does not determine whether heirs may, by agreement, consent to the use of proceeds from the sale of real estate to pay any deficiency once the estate's other debts have been paid. In other words, *Denton* stands for the singular proposition that a spouse is not entitled *by statute* to the satisfaction of her allowance out of real estate sale proceeds. 118 N.C. at 544, 24 S.E. at 116. So, while *Denton* held that the law will not recognize a *statutory* right to satisfaction of a deficiency out of the sale of real estate, its holding does not prohibit the creation and recognition of a private *contractual* claim to such proceeds where, as here, all other debts of the estate have been satisfied.

As detailed above, the trial court found that the parties expressly agreed that the Estate would pay the Deficiency Judgment from the surplus Homeplace sale proceeds, and it concluded that such an agreement was enforceable.[4] Respondents failed to challenge or address those findings and conclusions in their principal brief, and we will not disturb them. Respondents' only rebuttals—including the contention that such

4. It is unclear from the record whether the agreement was supported by consideration on Petitioner's part. However, Respondents make no argument that the agreement is unenforceable based on a lack of consideration.

a contract is contrary to law and public policy—are found only in their reply brief and are, per our earlier analysis, waived.

Even if we were to assume, *arguendo*, that Respondents' policy argument was preserved, it would fail on the merits. As previously explained, nothing in *Denton* restricts the rights of heirs and the estate to agree, by private contract, to settle a year's allowance deficiency judgment in this manner after all debts of the estate have been paid.[5] Nor are we aware of—and Respondents have not identified—any public policy concern that would prohibit the heirs and estate from mutually agreeing to such an arrangement. In actuality, our precedents suggest that the opposite is true:

> "Family settlements, . . . when fairly made, and when they do not prejudice the rights of creditors, are favorites of the law. . . . They proceed from a desire on the part of all who participate in them to adjust property rights, not upon strict legal principles, however just, but upon such terms as will prevent possible family dissensions, and will tend to strengthen the ties of family affection. The law ought to, and does respect such settlements; it does not require that they shall be made in accord with strict rules of law . . . ." Our Superior Courts will exercise their equity jurisdiction to affirm and approve family agreements when fairly and openly made. . . . Family settlements are almost universally approved.

In re Will of Pendergrass, 251 N.C. 737, 742-43, 112 S.E.2d 562, 566 (1960) (quoting *Tise v. Hicks*, 191 N.C. 609, 613, 132 S.E. 560, 562 (1926)). In light of the above, we hold that the trial court acted properly in vacating the clerk's order and allowing the Estate's motion to satisfy the Deficiency Judgment out of the surplus Homeplace sale proceeds.

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5. The year's allowance statutes, like *Denton*, also do not appear to prohibit parties from contracting as they did here. *See* N.C. Gen. Stat. §§ 30-15 *et seq*. (2019). Those statutes simply provide that the spousal allowance "shall be made in money or other personal property of the estate of the deceased spouse[,]" N.C. Gen. Stat. § 30-18, and that the clerk shall enter a judgment for any deficiency "to be paid when a sufficiency of such assets shall come into the personal representative's hands." N.C. Gen. Stat. § 30-20. So, while the year's allowance is "purely statutory[,]" *Broadnax v. Broadnax*, 160 N.C. 432, 433, 76 S.E. 216, 216 (1912), nothing in those statutes prohibits the recognition of the contractually created obligations at play in this case.

III. CONCLUSION

For the foregoing reasons, we affirm the order of the trial court vacating the clerk's order, allowing the Estate's motion, and remanding for further proceedings.

AFFIRMED.

Judges BRYANT and DILLON concur.

MARIA HONTZAS POULOS, PLAINTIFF
v.
JOHN EMANUEL POULOS, AJ PROPERTIES OF FAYETTEVILLE, LLC, BEAR ONE INVESTMENTS, LLC, BEAR PLUS ONE, LLC, BEAR SIX INVESTMENTS, LLC, CUMBERLAND RESEARCH ASSOCIATES, LLC, FAYETTEVILLE ENDOSCOPY, LLC, FAYETTEVILLE GASTROENTEROLOGY ASSOCIATES, PA, ICARIAN PARTNERS, LLC, JBV RENTAL PROPERTY, LLC, JEEM, LLC, JEP INVESTMENTS, LLC, JZJ, LLC, KPC COMMERCIAL, LLC, LUMBERTON SQUARE II, LLC, MEEJ, LLC, MEEJ II, LLC, PK PROPERTIES OF FAYETTEVILLE, LLC, VILLAGE AMBULATORY SURGERY ASSOCIATES, INC., OCIE F. MURRAY, JR., AS TRUSTEE OF THE JOHN E. POULOS FAMILY TRUST, JOHN EMANUEL POULOS, AS TRUSTEE OF THE KOULA POULOS REVOCABLE TRUST, DEFENDANTS

No. COA19-340

Filed 3 March 2020

Appeal and Error—interlocutory appeal—denial of motion to dismiss—substantial right—collateral estoppel

In a wife's action for post-separation support, alimony, and equitable distribution (ED), which included a claim for relief in the form of a constructive trust—based on an allegation that her ex-husband fraudulently transferred marital assets to corporate defendants (multiple trusts and businesses)—the trial court's order partially denying defendants' motion to dismiss was not immediately appealable. No substantial right was affected where defendants' request for a jury trial was properly rejected as not being available in an ED case, and defendants failed to demonstrate that collateral estoppel—regarding issues addressed in a related complex business case—barred plaintiff's claim to the remedy of a constructive trust.

Appeal by Defendants from Order entered 2 October 2018 by Judge A. Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 1 October 2019.

The Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and L. Lamar Armstrong, III, for plaintiff-appellee.

Player McLean, LLP, by Lonnie M. Player, Jr., for defendants-appellants AJ Properties of Fayetteville, LLC, Bear One Investments, LLC, Bear Plus One, LLC, Bear Six Investments, LLC, Cumberland Research Associates, LLC, Icarian Partners, LLC, JBV Rental Property, LLC, JEEM, LLC, JEP Investments, LLC, JZJ, LLC, KPC Commercial, LLC, Lumberton Square II, LLC, MEEJ, LLC, MEEJ II, LLC, PK Properties of Fayetteville, LLC, and John Emanuel Poulos, as Trustee of the Koula Poulos Revocable Trust.

Adams, Burge & Boughman, PLLC, by Harold Lee Boughman, Jr. and Vickie L. Burge, for defendant-appellant John Emanuel Poulos.

Hamilton Stephens Steele + Martin, PLLC, by Kenneth B. Dantinne and Sarah J. Sawyer, for defendant-appellant Ocie F. Murray, Jr., as Trustee of the John E. Poulos Trust.

HAMPSON, Judge.

AJ Properties of Fayetteville, LLC, Bear One Investments, LLC, Bear Plus One, LLC, Bear Six Investments, LLC, Cumberland Research Associates, LLC, Icarian Partners, LLC (Icarian), JBV Rental Property, LLC, JEEM, LLC, JEP Investments, LLC, JZJ, LLC, KPC Commercial, LLC, Lumberton Square II, LLC, MEEJ, LLC, MEEJ II, LLC, PK Properties of Fayetteville, LLC (Corporate Defendants), John Emanuel Poulos, individually (Defendant Poulos) and as Trustee of the Koula Poulos Revocable Trust (KP Trust), and Ocie F. Murray, Jr., as Trustee of the John E. Poulos Trust (JEP Trust), (collectively, Defendants)[1] appeal from an Order on Motions to Dismiss (Motion to Dismiss Order) denying in part Defendants' Motions to Dismiss. We, however, determine the Motion to Dismiss Order from which Defendants appeal is an interlocutory order that does not affect a substantial right of Defendants. Therefore, we dismiss this appeal.

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1. Defendants Fayetteville Endoscopy, LLC, Fayetteville Gastroenterology Associates, PA, and Village Ambulatory Surgery Associates, Inc. did not appeal the trial court's Order and are not parties to this appeal.

Factual and Procedural Background

Defendant Poulos and Maria Hontzas Poulos (Plaintiff) were married on 25 January 1992. On 12 July 2013, Defendant Poulos and Plaintiff separated. On 15 July 2013, Plaintiff filed her original Complaint (Complaint) in this action against Defendant Poulos in Cumberland County District Court (Divorce Case). Plaintiff's Complaint alleged three claims—Post-Separation Support, Alimony, and Equitable Distribution. Thereafter, on 8 October 2014, they were granted a judgment of absolute divorce.

On 11 February 2015, Plaintiff filed a separate lawsuit against Defendant Poulos, Icarian, MEEJ, LLC, JEP Investments, LLC, and the JEP Trust in Cumberland County Superior Court, which action was subsequently designated a mandatory complex business case and assigned to a special superior court judge for complex business cases in North Carolina Business Court (Business Court Case). In the Business Court Case, Plaintiff asserted claims for Fraud, Constructive Fraud, Breach of Fiduciary Duty, Fraudulent Transfers in violation of the North Carolina Uniform Voidable Transactions Act (UVTA), Setting Aside the JEP Trust under the North Carolina Uniform Trust Code (UTC), and an Accounting. Plaintiff also alleged Defendant Poulos had engaged in a pre-divorce "fraudulent scheme" whereby Defendant Poulos, beginning in late 2010 or early 2011, "transferred, concealed, and siphoned away marital assets to prevent [Plaintiff] from receiving distribution of this property in the" Divorce Case by transferring marital assets to third-party LLCs. Specifically, Plaintiff alleged Defendant Poulos transferred large portions of marital property from various Corporate Defendants to Icarian—an LLC in which Defendant Poulos was allegedly the sole interest owner—and in turn, Defendant Poulos caused Icarian to transfer a ninety-percent membership interest in Icarian to the JEP Trust. Plaintiff further contended these transfers breached the fiduciary duty Defendant Poulos owed her as his wife and constituted fraud. Therefore, Plaintiff requested the JEP Trust be voided and she be granted an accounting of the assets held by the JEP Trust.

After extensive discovery in the Business Court Case, the Business Court granted partial summary judgment on 26 September 2016, dismissing Plaintiff's claims for Constructive Fraud, Fraudulent Transfers under the UVTA under N.C. Gen. Stat. § 39-23.5(a), Breach of Fiduciary Duty in part, and Setting Aside the JEP Trust under the UTC and denying Defendants' motions for summary judgment on Plaintiff's remaining claims (Business Court Summary Judgment Order).

Defendants subsequently filed a motion to clarify the Business Court Summary Judgment Order, and Plaintiff filed a motion for reconsideration. On 6 June 2017, the Business Court entered its Order on Motion to Clarify, Motion for Reconsideration, and Motion to Revise Summary Judgment Order (Business Court Clarification Order). Relevant to the appeal *sub judice*, the Business Court Clarification Order identified four transfers at issue in the Business Court Case:

> [T]he MEEJ Transfers, the JEP Transfer, the Trust Transfer, and the Maria Transfer (collectively, the MEEJ Transfers, JEP Transfers, and Trust Transfer are referred to as the "Transfers"). The [Business Court Summary Judgment Order] defined the MEEJ Transfers as the real property deeded by MEEJ to Icarian on January 28, 2011 . . . and the JEP Transfer as the real property deeded by JEP to Icarian on January 28, 2011. . . . The [Business Court Summary Judgment Order] defined the Trust Transfer as the transfer of a 90% interest in Icarian into the [JEP Trust] on February 11, 2011.

First, the Business Court clarified, "the claims remaining for trial against [Defendant] Poulos individually are Plaintiff's claims for breach of fiduciary duty and fraud regarding the MEEJ Transfers and the JEP Transfer, and Plaintiff's claims under [N.C. Gen. Stat.] § 39-23.4(a)(1) regarding the MEEJ Transfers, the JEP Transfer, and the Trust Transfer. The MEEJ Transfers do not include transfers of security investments or other funds to Icarian." Second, the Business Court noted "issues of material fact existed regarding whether [Defendant] Poulos was the 100% owner of Icarian." On 13 July 2017, Plaintiff voluntarily dismissed without prejudice all claims remaining in the Business Court Case.

On 14 February 2018, Plaintiff filed an Amended Complaint (Amended Complaint) in the current action in Cumberland County District Court against Defendants.[2] In her Amended Complaint, Plaintiff added additional facts pertaining to the fraudulent scheme she alleged in the Business Court Case but asserted the same three claims as in her original Complaint—Post-Separation Support, Alimony, and Equitable Distribution. In addition, Plaintiff added a fourth "claim for relief" seeking a constructive trust. This fourth claim for relief alleged the following:

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2. Pursuant to certain Joinder Orders, the trial court joined all remaining Corporate Defendants, JEP Trust, and KP Trust in this action as necessary parties.

129. [Defendant] Poulos transferred legal title and ownership of [Plaintiff's] and [Defendant] Poulos' substantial marital property as stated above and summarized as follows:

    a. [Defendant] Poulos transferred his membership interests in the Corporate Defendants into Icarian.

    b. [Defendant] Poulos fraudulently induced [Plaintiff] to transfer her membership interests in the Corporate Defendants into Icarian.

    c. On 11 February 2011, [Defendant] Poulos created the JEP Trust and purported to assign and transfer ninety percent (90%) membership interest in Icarian into the JEP Trust.

    d. [Defendant] Poulos transferred substantial marital property into Icarian, and thus the JEP Trust.

    e. [Defendant] Poulos transferred substantial marital property into the KP Trust.

    f. Other assignments and transfers of marital property to third parties and to himself as shown above and as otherwise proven at trial.

    (collectively, "the Transfers").

130. As a result of the Transfers, the KP Trust, the JEP Trust, and the Corporate Defendants hold legal title to property that was marital property before the Transfers (the Transferred Property).

131. The Trust Defendants and the Corporate Defendants acquired legal title to the Transferred Property through [Defendant] Poulos' fraud, breach of duty, or some other circumstance making it inequitable for the Trust Defendants and Corporate Defendants to retain title to the Transferred Property.

132. [Plaintiff] is entitled to imposition of a constructive trust placed on the Transferred Property.

Accordingly, Plaintiff requested imposition of a constructive trust on the Transferred Property held by the Trust Defendants and Corporate Defendants.

From 17 April to 23 April 2018, Defendants filed Motions to Dismiss alleging, *inter alia*, Plaintiff's Amended Complaint was subject to dismissal because the doctrine of collateral estoppel barred Plaintiff's claims. After a hearing on Defendants' Motions to Dismiss, the trial court entered its Motion to Dismiss Order granting in part and denying in part Defendants' Motions. In light of the Business Court Case, the trial court granted Defendants' Motions "only as to the issues of whether the JEP Trust was validly created, and therefore whether the JEP Trust itself (not including any assets held in the JEP Trust) can be dissolved or in any way altered, through claims for breach of fiduciary duty, constructive fraud, or intentional fraud" based on the doctrine of collateral estoppel. Defendants timely filed Notices of Appeal from the trial court's Motion to Dismiss Order.

Appellate Jurisdiction

We must first address whether we have jurisdiction to review the trial court's Motion to Dismiss Order. As Defendants acknowledge, the trial court's Motion to Dismiss Order is interlocutory. *See Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007) ("Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendants that cannot be corrected upon appeal from final judgment." (citation and quotation marks omitted)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments. However, immediate appeal of an interlocutory order is available where the order deprives the appellant of a substantial right which would be lost without immediate review." *Whitehurst Inv. Props., LLC v. NewBridge Bank*, 237 N.C. App. 92, 95, 764 S.E.2d 487, 489 (2014) (citations and quotation marks omitted).

Defendants argue the Motion to Dismiss Order affects two substantial rights. First, Defendants contend the Order is "immediately appealable based on its denial of the Defendants' alternative requests for jury trial." Second, Defendants assert the Order affects a substantial right where its Motions to Dismiss made "a colorable assertion that the [Plaintiff's] claim is barred under the doctrine of collateral estoppel." We address each argument in turn.

With respect to Defendants' alleged right to a jury trial, our Court has explained a trial court's denial of a defendant's request for a jury

trial *may* in certain circumstances affect a substantial right, thereby rendering it immediately appealable. *See, e.g.*, *Dept. of Transportation v. Wolfe*, 116 N.C. App. 655, 656, 449 S.E.2d 11, 12 (1994) (citations omitted). However, our Supreme Court has long held no right to a jury trial exists in an equitable distribution action. *See Kiser v. Kiser*, 325 N.C. 502, 511, 385 S.E.2d 487, 492 (1989). As for the issue of a right to a trial by jury on the question of a constructive trust in the context of an equitable distribution action, our Court has stated:

> [T]he issue of constructive trust is not a cause of action which is to be severed from other actions, but rather is a request for equitable relief within the equitable distribution action itself. As such, all issues pertaining to the constructive trust are questions of fact arising in a proceeding for equitable distribution of marital assets, and thus, there is no constitutional right to trial by jury.

Sharp v. Sharp, 133 N.C. App. 125, 131, 514 S.E.2d 312, 316 (Timmons-Goodson, J., dissenting) (citation and quotation marks omitted), *rev'd per curiam for the reasons stated in dissent*, 351 N.C. 37-38, 519 S.E.2d 523 (1999). Thus, under *Sharp*, Defendants are not deprived of a substantial right by the trial court's denial of their alternative requests for a jury trial. *See id.*

Defendants next argue the trial court's interlocutory Motion to Dismiss Order affects a substantial right where the Order "was based in part on [the trial court's] rejection of the defense of collateral estoppel raised by each of the Defendants." It is well established "the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009). Nevertheless, we have also recognized "[i]ncantation of the [doctrine of collateral estoppel] does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting [that defense]." *Foster v. Crandell*, 181 N.C. App. 152, 162, 638 S.E.2d 526, 534 (2007). Thus, we must determine whether, at this preliminary stage, Defendants have made a colorable argument that the doctrine applies in this context in order to allow us to exercise jurisdiction over this appeal.

"Under the collateral estoppel doctrine, parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination." *Turner*, 363 N.C. at 558, 681 S.E.2d at 773 (alteration,

citation, and quotation marks omitted). "The issues resolved in the prior action may be either factual issues or legal issues." *Doyle v. Doyle*, 176 N.C. App. 547, 549, 626 S.E.2d 845, 848 (2006). The party alleging collateral estoppel must demonstrate

> that the earlier suit resulted in a final judgment on the merits, that the *issue in question was identical to an issue actually litigated* and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

State ex rel. Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (emphasis added) (alteration, citation, and quotation marks omitted).

For issues to be considered "identical" to ones "actually litigated and necessary" to a previous judgment:

> (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000) (citation omitted). "The burden is on the party asserting [collateral estoppel] to show with clarity and certainty what was determined by the prior judgment." *Miller Building Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (citation and quotation marks omitted).

Here, Defendants argue, "[i]n the Amended Complaint, Plaintiff contends that the Trust Defendants and Corporate Defendants acquired legal title to the Transferred Property, which Plaintiff alleges to be marital property or formerly marital property, through Defendant Poulos' 'fraud, breach of duty, or some other circumstance' making it inequitable for the Trust Defendants and Corporate Defendants to retain title to the Transferred Property. These issues, concerning fraud, breach of fiduciary duty, constructive fraud, etc. were *actually litigated* in the prior action, and were necessary to the judgment." Accordingly, Defendants contend collateral estoppel bars Plaintiff's request for a constructive trust over the Transferred Property. This contention, however, fails to

appreciate the nature of Plaintiff's equitable distribution claim and the issues necessary to its determination.

In the equitable distribution context, the trial court is required, *inter alia*, to classify, value, and distribute marital property. *See* N.C. Gen. Stat. § 50-20(a) (2019). Section 50-20 defines "marital property" as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned[.]" *Id.* § 50-20(b)(1). "[B]oth legal and equitable interest in real and personal property are subject to distribution under section 50-20." *Upchurch v. Upchurch*, 122 N.C. App. 172, 175, 468 S.E.2d 61, 63 (1996) (citations omitted). Further, "an equitable interest in property can be established in several situations, namely . . . constructive trusts." *Id.* (citation omitted). Regarding constructive trusts, *Upchurch* stated:

> A constructive trust is a duty imposed by courts of equity to prevent the unjust enrichment of the holder of title to property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it. It is not necessary to show fraud in order to establish a constructive trust. Such a trust will arise by operation of law against one who *in any way* against equity and good conscience holds legal title to property which he should not. The burden is on the party wishing to establish a trust to show its existence by clear, strong and convincing evidence. The determination of whether a trust arises on the evidence requires application of legal principles and is therefore a conclusion of law.

Id. at 175-76, 468 S.E.2d at 63 (alterations, citations, and quotation marks omitted); *see also Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 530, 723 S.E.2d 744, 752 (2012) (noting a trial court can impose a constructive trust even in the absence of a breach of fiduciary duty).

Here, the Business Court resolved the following issues in favor of Defendants in the Business Court Case: (1) Plaintiff could not show a fiduciary duty existed between her and Defendant Poulos regarding the creation of the JEP Trust and the Trust Transfer because Plaintiff was not a party to the agreements or transactions creating the JEP Trust and the Trust Transfer; (2) regarding the Constructive-Fraud Claim, Plaintiff presented no evidence Defendant Poulos benefited himself at Plaintiff's

expense to support this claim because the types of benefits Plaintiff alleged were not the types of *tangible* benefits required under North Carolina caselaw; and (3) Plaintiff's Fraud Claim based on the creation of the JEP Trust and the Trust Transfer also had to be dismissed because they did not involve an agreement or transaction between Plaintiff and Defendant Poulos.

These issues, however, are not necessary to a determination of whether Plaintiff is entitled to a *constructive trust* in the current equitable distribution action. Our Court has recognized, "a trial court may impose a constructive trust, *even in the absence of fraud or a breach of fiduciary duty*, upon the showing of either (1) some other circumstance making it inequitable for the defendant to retain the funds against the claim of the beneficiary of the constructive trust, or (2) that the defendant acquired the funds in an unconscientious manner." *Houston v. Tillman*, 234 N.C. App. 691, 697, 760 S.E.2d 18, 21 (2014) (emphasis added) (citations omitted). Accordingly, the fact the Business Court Case found Plaintiff could not prove claims for fraud, breach of fiduciary duty, or constructive fraud in the creation of the JEP Trust or the Trust Transfers because Plaintiff was not a party to the agreements or transactions creating the JEP Trust and the Trust Transfer is irrelevant to the question of whether Plaintiff is entitled to a constructive trust over a portion of the Transferred Property that constitutes marital or divisible property. *See id.* (citations omitted); *Variety Wholesalers, Inc.*, 365 N.C. at 530, 723 S.E.2d at 752 (noting a breach of fiduciary duty is not required for imposition of a constructive trust); *Upchurch*, 122 N.C. App. at 175, 468 S.E.2d at 61 ("It is not necessary to show fraud in order to establish a constructive trust."); *see also Weatherford v. Keenan*, 128 N.C. App. 178, 178-80, 493 S.E.2d 812, 813-14 (1997) (upholding constructive trust in equitable distribution action even absent any mention of fraud, breach of fiduciary duty, or wrongdoing).[3]

As the trial court below correctly noted, the Business Court Case only determined the issues of whether the JEP Trust was validly created, answering in the affirmative, and thus whether the JEP Trust could be *dissolved* through claims of breach of fiduciary duty, constructive fraud, or intentional fraud, answering in the negative. However, the resolution of these issues does not prevent Plaintiff from establishing a constructive trust over the *assets* held by this Trust because a constructive trust

3. We note the Business Court expressly declined to address dismissal of a constructive-trust remedy regarding the "assets that may be determined to have been improperly transferred in the MEEJ and JEP transfers" because it did not believe this was the subject of Defendants' Motion to Dismiss.

does not and cannot dissolve a trust and does not necessarily depend on proving breach of fiduciary duty, constructive fraud, or intentional fraud. *See Houston*, 234 N.C. App. at 697, 760 S.E.2d at 21 (citations omitted). Further, the fact the JEP Trust was validly created does not mean it is not marital or divisible property to which a constructive trust could attach. *See Weatherford*, 128 N.C. App. at 180, 493 S.E.2d at 814 ("In an action for equitable distribution, the trial court is entitled to create a constructive trust in order to . . . prevent the unjust enrichment of the holder of legal title to property." (citations omitted)). Indeed, the Business Court Summary Judgment Order left open numerous issues that would be relevant to such a determination, such as whether Defendant Poulos "misrepresented or failed to disclose the purpose behind the MEEJ and JEP transfers, and did not inform her that he had created the Family Trust or made the Trust Transfer." Thus, at this preliminary stage, Defendants have not shown the elements of collateral estoppel have been met.

Accordingly, because at this motion-to-dismiss stage Defendants have not shown collateral estoppel serves as a bar to Plaintiff's *remedy* of a constructive trust, Defendants have failed to meet their burden of demonstrating that the trial court's Motion to Dismiss Order "deprive[d] [Defendants] of a substantial right which would be lost without immediate review." *Whitehurst Inv. Props., LLC*, 237 N.C. App. at 95, 764 S.E.2d at 489 (citations omitted). Therefore, we lack jurisdiction over this appeal.

Conclusion

Accordingly, for the foregoing reasons, we dismiss Defendants' appeal.

DISMISSED.

Chief Judge McGEE and Judge COLLINS concur.

STATE OF NORTH CAROLINA
v.
MARDI JEAN DITENHAFER

No. COA16-965-2

Filed 3 March 2020

Obstruction of Justice—sufficiency of evidence—evidence of deceit and intent to defraud—denial of access to child sexual abuse victim

There was sufficient evidence, taken in the light most favorable to the State, of deceit and intent to defraud to support defendant mother's conviction of felonious obstruction of justice where she took steps to frustrate law enforcement's investigation and denied officers and social workers access to her child after the child alleged she had been sexually assaulted by her adoptive father and after defendant mother observed the adoptive father sexually assaulting her child.

Judge TYSON dissenting.

Appeal by Defendant from judgments entered 1 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Court of Appeals 15 May 2017. By opinion issued 20 March 2018, a divided panel of this Court affirmed in part and reversed in part the judgments of the trial court. The State filed a petition for discretionary review with the Supreme Court of North Carolina. After granting review, by opinion dated 1 November 2019, the Court affirmed in part and reversed in part the Court of Appeals' decision and remanded to the Court of Appeals with directions.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Jarvis John Edgerton, IV, for Defendant.

McGEE, Chief Judge.

Mardi Jean Ditenhafer ("Defendant") was convicted of two counts of felony obstruction of justice and one count of felony accessory after the fact to sexual activity by a substitute parent. In an opinion issued 20 March 2018, this Court held the trial court did not err in denying

Defendant's motion to dismiss the charge of felony obstruction of justice by pressuring the daughter to recant; however, the trial court did err in dismissing: (1) the charge of obstruction of justice based on denying investigators access to the daughter, and (2) the charge of being an accessory after the fact for her failure to report a crime. *State v. Ditenhafer*, ___ N.C. App. ___, 812 S.E.2d 896, *review on additional issues allowed*, ___ N.C. ___, 818 S.E.2d 107 (2018), *and aff'd in part, rev'd in part and remanded*, ___ N.C. ___, 834 S.E.2d 392 (2019). Because we held there was insufficient evidence to support Defendant's conviction for obstruction of justice based on Defendant's actions in denying investigators access to her daughter, we did not address whether there was sufficient evidence to enhance the charge from a misdemeanor to a felony under N.C.G.S. § 14-3(b). *Id.* at ___, 812 S.E.2d at 905.

In an opinion filed 1 November 2019, the North Carolina Supreme Court affirmed this Court's decision to the extent it held the trial court erred by denying Defendant's motion to dismiss the charge of accessory after the fact to sexual activity by a substitute parent but reversed this Court's holding that the trial court erred by denying Defendant's motion to dismiss the charge of obstruction of justice based on denying investigators access to the daughter. *State v. Ditenhafer*, ___ N.C. ___, ___, 834 S.E.2d 392, 401 (2019). The Supreme Court has instructed this Court, on remand, to determine whether there was sufficient evidence presented "to enhance the charge of obstruction of justice for denying access to [the daughter] from a misdemeanor to a felony under N.C.G.S. § 14-3(b)." We are therefore tasked with determining whether there was substantial evidence that Defendant acted with deceit and the intent to defraud when she obstructed justice by denying law enforcement access to the daughter. *See* N.C.G.S. § 14-3(b) (2017) ("If a misdemeanor offense as to which no specific punishment is prescribed be . . . done . . . with deceit and intent to defraud, the offender shall . . . be guilty of a Class H felony."). We hold that the evidence, viewed in the light most favorable to the State, supports a reasonable inference that Defendant acted with deceit and the intent to defraud necessary to commit felony common law obstruction of justice in denying access to the daughter.

Factual and Procedural History

A full recitation of the underlying factual and procedural history of this case can be found in the Supreme Court's decision in *Ditenhafer*, ___ N.C. ___, 834 S.E.2d 392. A brief discussion of facts pertinent to our decision follows: The State's evidence tended to show that Defendant and her husband, William Ditenhafer ("William") had two children. Their daughter ("the daughter") was Defendant's biological child and

William's adopted child and their son ("the son") was the biological child of both Defendant and William. When the daughter was approximately fifteen years old, William began giving the daughter full-body massages to "help [her] self-esteem," with Defendant's knowledge. One night, after massaging the daughter, William instructed the daughter to discard her towel and sit next to him; he then guided her hand along his penis until he ejaculated. After weeks of similar behavior, William began to force the daughter to perform oral sex on him. Following the daughter's sixteenth birthday, William engaged in vaginal intercourse with her on several occasions.

While visiting her relatives in Arizona in the Spring of 2012, the daughter told her paternal aunt that she was being sexually abused by William. The daughter's aunt promptly reported the abuse to Arizona law enforcement and to Defendant. The daughter returned to North Carolina but, on the way home from the airport, Defendant told the daughter she did not believe her and that she needed to recant her allegations of abuse.

As part of the investigation, Defendant and the daughter met with Susan Dekarske ("Ms. Dekarske"), a social worker with the Wake County Child Protective Services ("CPS"), and Detective Stan Doremus ("Detective Doremus") with the Wake County Sheriff's Department ("WCSD") on 11 April 2013 at Defendant's home. Over the following months, the daughter met with Ms. Dekarske several times, with Defendant present or "in listening distance." Ms. Dekarske testified that "[f]or the majority part of the investigation, [the daughter] continued to inform me that [Defendant] was pressuring her to recant the story." The daughter's therapist testified that "[the daughter] said that [Defendant] asked her to lie to me, to CPS, to the detectives, that her mother did not believe her and wanted her to recant because [the abuse] didn't happen."

During a meeting with Defendant, the daughter, Ms. Dekarske, and Detective Doremus on 21 June 2013, Defendant was seated "[s]houlder to shoulder" with the daughter, and "had her hand on [the daughter's] thigh virtually the whole time[.]" Detective Doremus testified that, when the daughter was asked questions, "Defendant was answering the questions for [the daughter]. The questions that were being asked of her, as soon as [the daughter] opened her mouth to talk, [D]efendant would answer the questions." During the interview, Defendant told Detective Doremus that "there is some truth to everything that [the daughter] says but not all of it is true" and told Ms. Dekarske that "she believes [the daughter] in regards to what she had disclosed; however, she still did not believe it was William who did that to her." Defendant told Detective

Doremus that she would not permit the daughter to speak with him alone and, when Detective Doremus informed her that she could not prohibit such a meeting, Defendant reiterated that she was not going to authorize the daughter to meet with Detective Doremus one-on-one.

In the car on the way to meet with Ms. Dekarske and Detective Doremus at CPS's office on 11 July 2013, the daughter told Defendant that, because she could no longer handle the pressure of Defendant's constant scolding her about her report of sexual abuse, she would recant her story. Defendant coached the daughter and told her what she should say. As a result of the daughter's promise to recant, Defendant allowed the daughter to meet with Ms. Dekarske and Detective Doremus alone.

Defendant sent text messages to her daughter throughout the course of the interview demanding information about what was being said and how long the interview would take. Detective Doremus testified that Defendant's conduct on 11 July 2013, including her sending text messages to the daughter, "moved [him] into investigator mode" because he "knew [he] probably had a limited amount of time to talk to [the daughter] before her mom pulled her out of that meeting[.]" Indeed, Defendant eventually did exactly that, cutting short Detective Doremus's opportunity to question the daughter about documentary evidence of the abuse. Detective Doremus testified that Defendant interrupted the interview and sat down at the table with a smirk; when he informed Defendant that the daughter had not recanted, Defendant's expression changed, and she grew angry. Defendant then ended the interview.

A few weeks later, on 5 August 2013, Ms. Dekarske met with the daughter and Defendant at Defendant's home. As Ms. Dekarske was pulling out of the driveway to leave, the daughter approached her car window and told her that she had made up everything. The daughter delivered the recantation in a "very robotic [manner], saying something that [had] been rehearsed for her to say" and Ms. Dekarske observed Defendant watching the exchange from a window. Two days later, on 7 August 2013, the daughter contacted Detective Doremus by phone and recanted her report of abuse. During the call, Detective Doremus heard another person on the line besides himself and the daughter. The daughter later e-mailed a recantation to Detective Doremus, with Defendant "prompt[ing] [the daughter] on what to write, and [the daughter] typ[ing] it up in [her] e-mail."

Detective Doremus went to the daughter's school on 29 August 2013 and the daughter told him, "I'm not supposed to talk to you." Detective Doremus assured the daughter that he was not going to ask her any

questions and informed her that the investigation into her report of abuse was ending as a result of the recantation and her being "in a home where [she was] not being supported[.]" The daughter testified that, during this time, she never wanted to recant her story and, if she had not been pressured by Defendant, she never would have recanted. Defendant's husband William, who had moved out of the family home when the investigation began, returned when the investigation was closed.

On 5 February 2014, William again demanded sex from the daughter. While William and the daughter were engaged in intercourse, Defendant entered the bedroom and witnessed the abuse. Later that day, Defendant instructed the daughter to accompany her to a McDonald's parking lot, where she was supposed to meet Detective Doremus to pick up a cell phone that had been searched in the earlier investigation. Defendant parked in the parking lot and the daughter told her everything she had reported in the investigation was true, to which Defendant replied, "I'm not sure if I believe you or not, but I just – I need to handle this first." Defendant exited the car and retrieved the phone from Detective Doremus. Defendant did not allow the daughter to get out of the car to speak with Detective Doremus. Having witnessed firsthand William's abuse of her daughter, Defendant failed to report it in a face-to-face meeting with law enforcement hours later. Defendant then instructed the daughter to not tell anyone about the abuse "[b]ecause it was family business." Defendant specifically instructed the daughter to not talk to social workers or law enforcement.

Defendant called her brother-in-law on 19 March 2014 and told him she had witnessed William's abuse of the daughter. Defendant assured her brother-in-law that the daughter and William were going to therapy together, and that she "was doing everything correctly and . . . to not involve anyone else or the authorities because that would cost . . . more money and time."

Defendant's brother-in-law sent an email to CPS to report William's abuse of the daughter on or around 28 April 2014. Defendant called her brother-in-law, was "very angry" with him, accused him of reporting the abuse to CPS, and told him that the investigation "was a nightmare." After receiving the report from Defendant's brother-in-law, a CPS assessor, Robin Seymore ("Ms. Seymore"), met the daughter at her school. The daughter immediately asked Ms. Seymore if Defendant was aware that Ms. Seymore was speaking with the daughter. When Ms. Seymore informed the daughter that Defendant did not know, the daughter said, "[c]an I go out and talk to my mom? I want to call my mom first."

The daughter attempted to call Defendant; however, she only reached her voicemail. The daughter told Ms. Seymore she "didn't really want to talk about it" and denied the abuse "[b]ecause it's what [she] was told to do by [Defendant]." Ms. Seymore described the daughter's demeanor as "very anxious . . . she kept saying, 'I want to call my mom. I need to talk to my mom.' " The daughter eventually got in touch with Defendant and Defendant picked the daughter up from school. They then traveled to the son's school, where Defendant burst into the room where Ms. Seymore was interviewing the son and said, "[a]bsolutely not. You're not going to talk to him. You are not going to talk to him. This is not happening."

Two days later, on 30 April 2014, Defendant agreed to speak to CPS at her home. Defendant refused to allow Ms. Seymore inside her home and insisted, despite heavy rain, wind, and forecasted thunderstorms, the interview take place outside in the downpour. Defendant informed Ms. Seymore that she was separated from William and that he was no longer allowed in the house "to avoid any more lies from [the daughter]." Defendant did not tell Ms. Seymore she had witnessed William's abuse of the daughter. Defendant instructed Ms. Seymore that CPS and its agents were not permitted to speak to her children at school unless a parent or attorney was present, and that the only place she would authorize contact would be outside of her house.

Warrants for Defendant's arrest were issued on 1 May 2014 for felony obstruction of justice and felony accessory after the fact to William's abuse of the daughter. On the same day, Detective Doremus accompanied other law enforcement officers and CPS's representative to Defendant's house for the purpose of removing the daughter from the home and arresting Defendant. Detective Deremus observed Defendant drive towards her home with the daughter and the son in her car; however, upon seeing the law enforcement officers, Defendant turned around in a driveway and drove off in the other direction. Detective Doremus and another investigator activated their blue lights and followed Defendant's car, stopping it before it exited the subdivision. Detective Doremus and a CPS worker approached Defendant's car, but she rolled up her car windows and locked the doors. At that point, Defendant told the daughter, "[d]on't say anything. Don't get out of the car. . . . If they try and take you away . . . don't go. Refuse to go. You know, lower your arm. Run down the street. Just don't go." Defendant finally exited the car and Detective Doremus allowed her to drive her children back to her home. Upon returning home, the daughter was instructed to collect her belongings; however, Defendant took the daughter's laptop and phone and would not allow her to take them with her.

Analysis

The North Carolina Supreme Court held there was sufficient evidence presented at the trial to support Defendant's conviction for obstruction of justice based on Defendant denying access to the daughter and, accordingly, held the trial court did not err in denying Defendant's motion to dismiss. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 401. The elements of felony obstruction of justice are: (1) unlawfully and willfully (2) acting to prevent, obstruct, impede, or hinder justice (3) in secret and with malice or with deceit and intent to defraud. *See, e.g.*, *State v. Cousin*, 233 N.C. App. 523, 531, 757 S.E.2d 332, 339 (2014)[1] (holding no error in denying a motion to dismiss a charge of felony obstruction of justice where there was sufficient evidence the defendant "(1) unlawfully and willfully (2) obstructed justice by providing false statements to law enforcement officers investigating [a crime] (3) with deceit and intent to defraud"). If the State introduces substantial evidence of the third element demonstrating deceit and intent to defraud, the obstruction charge may be elevated from a misdemeanor to a felony. *See* N.C.G.S. § 14-3(b).

Our Supreme Court has defined substantial evidence as "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). Such substantial evidence may be "direct, circumstantial, or both[,]" *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988), and we consider it "in the light most favorable to the State with every reasonable inference drawn in the State's favor." *Cousin*, 233 N.C. App. at 529–30, 757 S.E.2d at 338 (citation omitted).

The dissent asserts "the majority's opinion cannot draw a legally culpable distinction or definition between solely obstructing access as is alleged in the indictment and condemning Defendant with felonious 'deceit and intent to defraud.' " The Supreme Court explicitly held that the State presented sufficient evidence that Defendant did, in fact, obstruct justice by denying officers and social workers access to the daughter throughout their investigation. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 401. The *only* question before this Court is whether there is sufficient evidence of deceit and the intent to defraud to elevate the

1. The dissent would read *Cousin*, 233 N.C. App. 523, 757 S.E.2d 332, to hold that absent evidence of a substantial burden imposed on investigators, Defendant's illegal acts were not done with deceit and the intent to defraud. However, *Cousin* imposes no such requirement on the State. *Id.* at 531, 757 S.E.2d at 339. Instead, *Cousin* simply held that such evidence, like other circumstantial evidence of intent, supported a felony obstruction of justice charge. *Id.*

charge of obstruction of justice from a misdemeanor to a felony. To the extent the dissent points to facts demonstrating Defendant did not obstruct justice by denying access to the daughter, we are bound by the law of the case. *See Weston v. Carolina Medicorp, Inc.*, 113 N.C. App. 415, 417, 438 S.E.2d 751, 753 (1994) ("According to the doctrine of the law of the case, 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." (citation omitted)).

Defendant's argument on appeal that she was acting in service of the truth is entirely inconsistent with the evidence discussed below. The record demonstrates that the State introduced evidence, taken in the light most favorable to it, that Defendant acted with deceit and the intent to defraud. For example, the State's evidence showed Defendant believed the daughter had been abused by someone. Defendant told Ms. Dekarske "she believe[d the daughter] in regards to what she had disclosed; however, she still did not believe it was William who did that to her" and told Detective Doremus that "there is some truth to everything that [the daughter] sa[id] but not all of it is true." Despite believing abuse had occurred, Defendant took steps to frustrate attempts by law enforcement and social workers to investigate that abuse. Defendant remained within hearing distance or was present in almost every interview with CPS and WCSD, did not permit her daughter to answer questions and answered for her in one interview, sent text messages and physically interrupted another interview, and sought to constantly influence her daughter's statements in those interviews by verbally abusing and punishing the daughter for the statements she was making. Defendant also instructed the daughter not to speak with investigators and directed investigators not to speak with the daughter in private, ensuring that the daughter did not have the opportunity to give investigators truthful statements regarding the abuse.

Evidence of Defendant's intent goes beyond her efforts to intervene in the investigation. Defendant controlled the narrative by coaching the daughter on what to say, listening on the line when the daughter recanted her story to Detective Doremus, and "prompt[ing the daughter] on what to write" in the email in which the daughter recanted her story. Notably, Defendant did not merely encourage the daughter to tell the truth as Defendant believed it; she specifically pressured the daughter to *lie*. The daughter's therapist testified that "[the daughter] said that [Defendant] asked her to lie to me, to CPS, to the detectives, that her mother did not believe her and wanted her to recant because [the abuse]

didn't happen." Thus, the evidence of Defendant's conduct surrounding and during the interviews with investigators was sufficient to allow a reasonable juror to infer that her denial of access was committed with deceit and intent to defraud.

The State also introduced evidence of Defendant's actions *after* she witnessed the abuse firsthand demonstrating she acted with deceit and the intent to defraud during the time period alleged in the indictment. After catching William in the act of raping her daughter, she instructed the daughter to not tell anyone about the abuse "[b]ecause it was family business" and specifically directed the daughter to not talk to social workers or law enforcement. Subsequently, when Ms. Seymore met with the daughter at her school, the daughter was "very anxious," insisted on calling her mom, and denied the abuse "[b]ecause it's what [she] was told to do by [Defendant]." Defendant finally agreed to meet Ms. Seymore at her house; however, she insisted the interview take place outside in a rainstorm. Defendant instructed Ms. Seymore that CPS and its agents were not permitted to speak to her children alone at school and she would only authorize contact outside, but not inside, of her house. A few days later, upon realizing officers were at her home to arrest her, Defendant instructed the daughter, "[d]on't say anything. Don't get out of the car." This evidence of Defendant's actions after witnessing the abuse firsthand was sufficient to allow a reasonable juror to infer that, between 11 July and 1 September 2013, Defendant acted with deceit and the intent to defraud by denying investigators access to the daughter.

The dissent asserts that "[t]he only relevant evidence to elevate the obstruction of access to a felony must have occurred between the alleged dates of between 11 July to 1 September 2013" and "[t]he lengthy recitation of facts in the majority's opinion regarding Defendant's actions that led to her daughter's recanting allegations are outside of the time frame and dates alleged in the indictment before us and are also not before us on remand." Evidence regarding Defendant's actions after 1 September 2013 provides circumstantial evidence of her deceit and intent to defraud during the relevant period. *State v. Smith*, 211 N.C. 93, 95, 189 S.E. 175, 176 (1937) ("Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred."). Moreover, the Supreme Court considered evidence of Defendant's actions *after* 1 September 2013 in holding that there was sufficient evidence supporting Defendant's conviction for obstruction of justice based upon Defendant's actions in denying access to the daughter. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 400–01.

We also reject the dissent's argument that there is no independent evidence to prove Defendant acted with deceit and the intent to defraud in denying access to the daughter. To the extent the dissent makes a double jeopardy argument by asserting the same evidence cannot be used to support both the charge of felony obstruction of justice by denying access to the daughter and felony obstruction of justice for encouraging the daughter to recant, Defendant has not made this argument on appeal. *State v. Collington*, ___ N.C. App. ___, ___, 814 S.E.2d 874, 883–84 (2018) ("Where a defendant's appellate counsel fails to raise an argument on appeal, that argument is deemed abandoned, as it is not the job of this Court to make a defendant's argument for him." (internal quotation marks, citation, and brackets omitted)). This Court has recognized that:

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

State v. Murray, 310 N.C. 541, 548, 313 S.E.2d 523, 529 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). The facts alleged in the indictment alleging obstruction of justice for pressuring the daughter to recant are different than the facts alleged in the indictment alleging obstruction of justice for denying access to the daughter. As proof of an additional fact is required for each obstruction charge, double jeopardy does not apply. *See id*.

Finally, the inferences the dissent draws from the evidence presented at trial are contrary to our standard of review. *See State v. Morris*, 102 N.C. App. 541, 544, 402 S.E.2d 845, 847 (1991) ("When the trial court is ruling on a defendant's motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn from the evidence presented; all contradictions and discrepancies are resolved in the State's favor."). First, the dissent asserts that Defendant's instructions to investigators to not meet with the daughter alone "does not show she acted with deceit and intent to defraud to deny access within the specific dates alleged in the indictment." This inference is clearly drawn in favor of Defendant. The same is true of the dissent's contention that "[t]he detective's assertion that he could meet and speak with the daughter without seeking an order or warrant tends to show these multiple charges

were duplicative and in response to Defendant-mother's demand for the investigators to follow the law and obey the Constitution, if they desired additional unrestricted access to this minor female." Such a conclusion is plainly prohibited by our standard of review; further, this Court will not presume that prosecutors acted in bad faith, certainly short of any evidence in this regard.

Conclusion

Viewing all the evidence in the light most favorable to the State and giving it the benefit of every reasonable inference drawn therefrom, as we are required to do, we conclude that it was sufficient to allow a reasonable inference that Defendant acted with deceit and the intent to defraud necessary to commit felony common law obstruction of justice in denying access to the daughter.

NO ERROR.

Judge INMAN concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

Upon remand from the Supreme Court, this Court is directed to determine "whether there is sufficient evidence to enhance the charge of obstruction of justice for denying access to [the daughter] from a misdemeanor to a felony pursuant to N.C.G.S. § 14-3(b)." *State v. Ditenhafer*, ___ N.C. ___, ___, 834 S.E.2d 392, 401 (2019). This statute provides: "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." N.C. Gen. Stat. § 14-3(b) (2019).

To elevate misdemeanor obstruction of justice for denial of access to a felony, the statute requires the State to additionally prove Defendant's obstruction was committed "with deceit and intent to defraud." *Id.* The Supreme Court held the State's evidence is sufficient to overcome Defendant's motion to dismiss and submit obstruction of justice based upon denial of access to the jury. *Ditenhafer*, ___ N.C. at ___, 834 S.E.2d at 401.

I do not, and cannot, minimize the trauma and abuse this young woman experienced by her stepfather, William. He pled guilty to six

rape, assault, and abuse crimes and is serving long prison sentences for his crimes. His acts and crimes are not before us here. The repeated recitation of his crimes in the majority's opinion has no relevance to the issue our Supreme Court tasked this Court on remand.

The lengthy recitation of facts in the majority's opinion regarding Defendant's actions that led to her daughter's recanting allegations are outside of the time frame and dates alleged in the indictment before us and are also not before us on remand. Defendant stands convicted for her felonious actions underlying that separate obstruction crime.

The majority's opinion agrees with the State's assertion Defendant is subject to additional felony criminal liability for obstructing justice, because she failed to provide law enforcement with access to her daughter throughout the course of the investigation, and she additionally acted feloniously with deceit and intent to defraud. N.C. Gen. Stat. § 14-3(b). This conclusion is not what the indictment alleges nor what the State's evidence shows.

The only relevant evidence to elevate the obstruction of access to a felony must have occurred between the alleged dates of between 11 July to 1 September 2013. After reciting the repetitive, inflammatory, and extraneous facts, the majority's opinion cannot draw a legally culpable distinction or definition between solely obstructing access as is alleged in the indictment and condemning Defendant with felonious "deceit and intent to defraud." The evidence shows Defendant presented her daughter and allowed access every time upon request. This fact negates "deceit and intent to defraud." Such evidence is not argued to be "deceit and intent to defraud" nor so proven by the State. I respectfully dissent from the majority's opinion.

I. Analysis

Defendant is under no legal obligation to: (1) voluntarily provide *any* access to her minor daughter; (2) allow investigators into her home without an order or warrant; (3) voluntarily transport her minor daughter to and from the repeated interviews and sessions; (4) sit silently or be excluded without an order or warrant, while her minor daughter was interrogated, examined, and probed by strangers concerning the most intimate aspects and details of the assaults and rapes by her stepfather.

Our Supreme Court has defined common law obstruction of justice as "any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) (citation omitted); *see also State v. Wright*, 206 N.C. App. 239, 241, 696 S.E.2d

832, 834-835 (2010). No credible evidence supports elevating the charge of obstruction of justice by Defendant purportedly acting with deceit and intent to defraud for the investigators' alleged lack of access to the daughter, when they did absolutely nothing legally required to gain that access in the absence of consent by her mother.

Merriam-Webster defines access, in part, as "permission, liberty, *or ability . . . to approach or communicate with a person*[.]" *Access*, Merriam-Webster, https://www.merriam-webster.com/dictionary/access (last visited Feb. 18, 2020) (emphasis supplied). The record clearly indicates, and the State acknowledges, Defendant provided both Detective Doremus of WCSD and Ms. Dekarske of CPS with repeated access and permission to interview her minor daughter to negate "deceit and intent to defraud."

Defendant voluntarily signed a safety agreement and required the stepfather to move out of the marital residence. Defendant also voluntarily transported her underage daughter to and from several interviews, and she allowed the daughter to be interviewed both at home and at the CPS office *each time* such access was requested.

The record is replete with evidence of such meetings taking place between April 2013, when the investigation opened, and August 2013. Even within the narrowed dates alleged within this specific indictment, 11 July to 1 September 2013, unchallenged and uncontested evidence shows Defendant voluntarily provided access to investigators to interview her minor daughter multiple times which negates Defendant acting with deceit and intent to defraud.

During the specific time period alleged in the indictment, the record evidence shows at least three specific times when Defendant voluntarily allowed CPS investigators to interview the daughter: (1) an in-person meeting on 11 July; (2) an in-person meeting on 25 July; and, (3) an in-person meeting on 5 August. The WCSD detective was also present at the 11 July interview. In addition, the daughter called the CPS investigator two additional times, on 22 July and 24 July, both within the dates alleged in the indictment.

In addition to these interviews, Defendant drove her daughter to and from, and the daughter consistently attended, CPS-requested therapy sessions; at least three of those sessions occurred within the date range specified in the indictment. These sessions continued through January 2014 and also negate that Defendant acted with "deceit and intent to defraud."

The majority's opinion points to the 11 July meeting with Detective Doremus and Ms. Dekarske as a specific example to show Defendant acted with deceit and intent to defraud to deny investigators access to her daughter. The record evidence shows Defendant voluntarily drove her daughter to the meeting and waited outside while the daughter went in and met alone with both the WCSD detective and the CPS investigator.

Any evidence concerning Defendant texting or "putting pressure" on her daughter *to recant*, which may support the other indictment and conviction for obstruction of justice, is simply not applicable for this separate charge of obstruction by denying "access" by Defendant feloniously acting with deceit and intent to defraud.

In support of her argument asserting the State did not prove deceit and intent, Defendant points to the undisputed fact that she told the detective that he could not speak with her daughter without a third party in the room. She argues a requirement that a third party be present shows the opposite of any intention by her to deceive.

In *State v. Cousin*, this Court reviewed a defendant's assertion that the trial court had erred by denying his motions to dismiss the charges of felonious obstruction of justice and accessory after the fact based upon the insufficiency of the evidence. *State v. Cousin*, 233 N.C. App. 523, 529, 757 S.E.2d 332, 338 (2014). The defendant in *Cousin* argued there was no evidence his statements were intentionally false or misleading. *Id.* at 531, 757 S.E.2d at 339. This Court listed the eight written statements the defendant provided to law enforcement. *Id.* at 530, 757 S.E.2d at 338.

In two statements, the defendant in *Cousins* denied being at the murder scene but identified others who were present. *Id.* In the next four statements, the defendant admitted being present but identified various others as the perpetrator of the murder. *Id.* at 530-31, 757 S.E.2d at 339. A State Bureau of Investigation ("SBI") agent testified to the significant burden imposed on the investigation resulting from the conflicting statements.

The SBI eventually determined each person named by the defendant had an alibi. This Court held "when viewed in the light most favorable to the State, a jury question existed as to whether Defendant (1) unlawfully and willfully (2) obstructed justice by providing false statements to law enforcement officers investigating the death of [the victim] (3) with deceit and intent to defraud." *Id.* at 531, 757 S.E.2d at 339. This Court held the trial court had properly denied the defendant's motion to dismiss the felonious obstruction of justice charge. *Id.*

No testimony from the State shows a significant burden imposed upon the sheriff's department or CPS resulting from Defendant's denial of access to make her conduct felonious. No additional evidence shows Defendant's deceit and intent to defraud, other than the underlying actions the State used to prove the other obstruction charge to recant that is not before us.

The State must offer other substantial evidence of each element charged. *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.*

Detective Doremus and Ms. Dekarske were able to interview the daughter alone for a period of time before Defendant ended the meeting. Defendant was clearly within her parental rights to terminate the interview without the investigators from WCSD and CPS possessing or seeking a noninterference order or a warrant. Defendant cooperated with CPS' request that her daughter begin therapy and selected a therapist for her daughter. She allowed investigators into her home without a warrant to interview her daughter and drove the daughter to and from requested meetings held in other locations.

If the investigators were inhibited by Defendant feloniously acting with deceit and intent to defraud to deny them access to interfere with their investigation, they were obligated to seek a warrant based upon probable cause or to petition the court for a noninterference order. U.S. Const. amend. IV; *see* N.C. Gen. Stat. § 7B-303(a) (2019) ("If any person obstructs or interferes with an assessment . . . the director may file a petition naming that person as respondent and requesting an order directing the respondent to cease the obstruction or interference.").

Detective Doremus also expressly told Defendant at the 21 June 2013 meeting that Defendant could not prohibit him from speaking with her daughter alone. If so, he should have applied for a warrant and demonstrated probable cause before a magistrate. The State, not Defendant, carries the burden to explain investigators' failures to either demonstrate probable cause for the warrant or petition for the order. Trying to draw a line to find Defendant obstructed justice by not providing access, while feloniously acting with deceit and intent to defraud, creates arbitrary and unworkable distinctions in our jurisprudence and is error.

The State's evidence does not support the elements and allegations in this indictment of Defendant acting with deceit and intent to defraud to elevate the obstruction of access from a misdemeanor to a felony. Neither Defendant's presence at nor her ending of the investigators'

discussions with her daughter, without investigators and detectives seeking a noninterference order or asserting probable cause for a warrant, justifies elevating this charge of obstruction by failing to provide access from a misdemeanor to a felony. *See Wright*, 206 N.C. App. at 241, 696 S.E.2d at 834-35.

II. Conclusion

We and the Supreme Court agreed that the State presented sufficient evidence to allow the jury to convict Defendant of felony obstruction of justice for her actions leading her daughter to recant her allegations. That same evidence cannot also be used to support the same elements of felony obstruction on lack of access within the dates alleged within this specific indictment, 11 July to 1 September 2013. No independent evidence proves Defendant-mother failed to deliver and present her minor daughter for all requested meetings and therapy sessions and wanted a third party present, while additionally acting with deceit and intent to defraud.

The State failed to present evidence of the elements of felony obstruction of justice by Defendant-mother allegedly acting with deceit and intent to defraud to restrict access of investigators from WCSD and CPS without them securing either a noninterference order or a warrant to gain unrestricted access to further interview her minor daughter alone. She is not obligated under threat of felony to do their jobs, make them easier, or be punished for making investigators follow the statutory procedures and obey the Constitution for a warrant.

Defendant told the investigator not to meet with her minor daughter without her consent or without a third party being present. This demand, as a mother of a minor daughter, she unquestionably had the right to assert and enforce without felonious criminal liability. Her asserting these parental rights does not show she acted with deceit and intent to defraud to deny access within the specific dates alleged in the indictment.

In contrast, during the specific time periods alleged in the indictment, the record clearly shows Defendant voluntarily transported her underage daughter three (3) times to and from interviews; she allowed the daughter to be interviewed both at home and at the CPS office *each time* such access to her was requested and drove her to therapy sessions three (3) times, with two (2) additional phone calls between the daughter and CPS. Defendant agreed to and signed a safety agreement and required the abusive stepfather to move out of the marital residence.

Our Supreme Court concluded the State presented evidence to support a misdemeanor obstruction charge on access to survive Defendant's motion to dismiss and support a conviction, but remanded and questioned whether the evidence is sufficient to prove a felony. It is not an obstruction with fraud or deceit to demand and compel governmental agents to comply with the statutes and Constitution, petition for and secure the statutory noninterference order, or to show probable cause to obtain a warrant from a magistrate.

These investigators did neither. Government agents should not be excused from their failure to do so and attempt to shift their failures onto Defendant, who possesses statutory and Constitutional rights as both a parent and an individual under the Fourth Amendment, through seeking felony criminal obstruction charges against her. U.S. Const. amend. IV; N.C. Gen. Stat. § 7B-303(a).

The detective's assertion that he could meet and speak with the daughter without seeking an order or warrant tends to show these multiple charges were duplicative and in response to Defendant-mother's demand for the investigators to follow the law and obey the Constitution, if they desired additional unrestricted access to her minor daughter.

This Court and our Supreme Court have both concluded some of these charges were so without merit to not survive Defendant's motion to dismiss. There is no evidence within the specific time period alleged in the indictment that Defendant acted to deny access with deceit and an intent to defraud to obstruct justice to elevate this charge from a misdemeanor to a felony. I respectfully dissent.

STATE v. LEAKS

[270 N.C. App. 317 (2020)]

STATE OF NORTH CAROLINA
v.
JAMES EDWARD LEAKS

No. COA19-479

Filed 3 March 2020

1. Homicide—request for jury view—scene of crime—abuse of discretion analysis

In a murder prosecution arising from an altercation between defendant and his ex-girlfriend's boyfriend, the trial court did not abuse its discretion under N.C.G.S. § 15A-1229(a) by denying defendant's motion for a jury view of the crime scene. The court made a reasoned decision based on the State's and defense counsel's intent to introduce photographs of the crime scene to the jury and the fact that the crime occurred in the daylight (indicating that eyewitnesses would be able to testify to events they saw clearly).

2. Homicide—self-defense—jury instruction—"necessary to kill" victim to avoid death or bodily harm

In a murder prosecution arising from an altercation between defendant and his ex-girlfriend's boyfriend, the trial court did not err when it instructed the jury that it could find defendant stabbed the boyfriend in self-defense if it found defendant believed it was "necessary to kill" the boyfriend to avoid death or bodily harm. Although a footnote in the North Carolina Pattern Instructions directs trial courts to substitute "to use deadly force against the victim" for "to kill the victim" when the evidence shows a defendant intended to disable rather than kill the victim, binding Supreme Court precedent expressly held that this substitution was unnecessary.

3. Sentencing—prior record level—calculation—prayer for judgment continued—proof of prior conviction—harmless error

In a murder prosecution, the trial court properly sentenced defendant as a prior record level IV based on eleven prior convictions, four of which defendant challenged. Specifically, the court correctly found that defendant's assault with a deadly weapon conviction, which resulted in a prayer for judgment continued, added one point to his prior record level; the court correctly added another point where the State proved by a preponderance of the evidence that defendant was convicted of breaking and entering and injury to real property (the charges were consolidated and defendant pleaded

guilty); and, where the court potentially erred in counting a misdemeanor conviction as a felony, such error was harmless because defendant would have remained a prior record level IV under the correct calculation.

Appeal by Defendant from Judgment entered 8 August 2018 by Judge Carla Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 December 2019.

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

William D. Spence for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James Edward Leaks (Defendant) appeals from Judgment entered 8 August 2018 upon his conviction for Second-Degree Murder. The Record before us, including evidence presented at trial, tends to show the following:

On the afternoon of 16 August 2016, around 4:00 p.m., Sylvia Moore (Ms. Moore), her brother Eric Moore (Mr. Moore), and Darrell Cureton (Decedent) were outside Ms. Moore's apartment doing yardwork. Ms. Moore and Decedent had been dating for approximately two years. Some time prior to her relationship with Decedent, Ms. Moore had dated Defendant for approximately five years. Ms. Moore testified her relationship with Decedent was "pretty good" after they broke up and that there had been no confrontations between Defendant and Decedent prior to 16 August 2016.

Decedent began cutting the grass while Ms. Moore watered her plants. After Decedent finished mowing the lawn, Ms. Moore heard a voice ask Mr. Moore for a cigarette. Ms. Moore looked up and saw Defendant and a man, later identified as Calvin Mackin (Mackin), standing by her yard. Conflicting testimony was presented at trial as to what transpired following that interaction; however, an altercation erupted between Defendant and Decedent, resulting in Defendant stabbing Decedent in the chest. Although Emergency Management Services was called to the scene, Decedent died from his injuries. Later that same day, the Charlotte-Mecklenburg Police Department arrested Defendant for first-degree murder. At Defendant's trial, the Medical Examiner testified

Decedent's cause of death was a stab wound to the chest, stating it appeared the "knife was coming out at least partially and going back in three separate times."

Defendant's trial came on for hearing on 30 July 2018. During pretrial motions, Defendant submitted a Motion for Jury View (Motion for Jury View), requesting a jury view of the crime scene, which the trial court, in its discretion, denied. The State began its case by calling Ms. Moore. Ms. Moore testified after she heard the men asking Mr. Moore for a cigarette, she heard a crashing in some bushes behind her and saw Defendant on her porch. She observed Defendant exit her porch, "bump" into Decedent, and run off. Ms. Moore further testified after the encounter she saw Defendant holding a knife. She turned to Decedent to find him holding his chest. Ms. Moore testified she saw a little bit of blood, and she told Mr. Moore to call 911. On cross-examination, Ms. Moore admitted she was not paying much attention to the events until she noticed Defendant on her porch.

Mr. Moore also testified at trial to his recollection of the 16 August 2016 events. Mr. Moore testified that he was at Ms. Moore's residence to help with yardwork. As Mr. Moore was sitting on Ms. Moore's steps, Defendant and Mackin stopped and asked him for a cigarette. Mr. Moore testified that, at that time, Decedent was on the side of the house doing yardwork. Mr. Moore gave Defendant and Mackin each a cigarette. By that point, Decedent had walked over and was standing behind Mr. Moore. Defendant stared at Decedent and "patted his knife." Decedent then walked to his truck and picked up a two by four, telling Defendant to "go on." Mr. Moore testified Decedent held the two by four with a hand on each end across his chest. Mr. Moore witnessed Defendant move toward Decedent, causing Decedent to drop the two by four and attempt to run. Mr. Moore then saw Defendant stab Decedent. Mr. Moore called 911 as Defendant walked away.

The State also called Theresa McCormick-Dunlap (Dunlap) as a witness. Dunlap testified that as she was exiting a house across the street accompanied by her friend Veronica Streeter (Streeter), she saw the two men fighting, one in retreat, Decedent, and one in pursuit, Defendant. Dunlap described Decedent as holding a "long piece of wood" to "shield himself" and described Defendant as "making jabbing motions" but she could not see anything in Defendant's hands. Dunlap testified Defendant "swaggered off" after he "landed a good blow or whatever . . . ." She then saw Decedent stagger toward the stairs to sit down. Dunlap ran over and saw blood on Decedent's shirt. She stayed at the scene until the

ambulance arrived. The next day, Dunlap gave a recorded statement to the Charlotte-Mecklenburg Police Department.

Defendant testified at trial in his defense. Defendant testified on the afternoon of 16 August 2016 he was walking to the 7-Eleven with his cousin Mackin. Defendant recounted Mackin asking Mr. Moore for a cigarette while Mr. Moore was sitting on the steps. He described Ms. Moore as being on the front porch and Decedent in front of the home as well. Defendant continued: "[Mackin] was coming back across the street with the cigarette and he said look out," and that was when Decedent "swung at [him] with the two by four." Defendant "started to fear for [his] life" as Decedent was holding the two by four as a baseball bat. Defendant testified after Decedent hit him a couple more times with the two by four, he stabbed Decedent one time in the chest with his knife. Defendant stated he stabbed Decedent with the intent to "get him off me," and he stated he did not intend to kill Decedent.

At the close of trial, the State and Defense Counsel both submitted proposed jury instructions. In Defendant's proposed instructions, Defense Counsel modified North Carolina Pattern Instruction 206.10, in line with footnote four of the pattern instructions, to read: "First, the defendant believed it was necessary to *use deadly force against* the victim in order to save the defendant from death or great bodily harm." The trial court declined to adopt Defendant's proposed modification and presented the following unmodified instruction to the jury: "The Defendant would be excused of first-degree murder and second-degree murder on the ground of self-defense if, first, the Defendant believed it was necessary to *kill* the victim in order to save the Defendant from death or great bodily harm."

On 8 August 2018, the jury returned a verdict finding Defendant guilty of Second-Degree Murder, a Class B1 felony. The trial court sentenced Defendant in the presumptive range. The trial court calculated Defendant had eleven prior-record-level points, rendering his prior-record level IV. Defendant objected to the trial court's determination of his prior-record level. Defendant gave Notice of Appeal in open court.

Issues

There are three issues before this Court on appeal: (I) whether the trial court abused its discretion in denying Defendant's Motion for Jury View; (II) whether the trial court erred in its jury instructions when it stated the Defendant "believed it was necessary to *kill* the victim" instead of "necessary to *use deadly force against* the victim"; and (III)

whether the trial court erred by determining Defendant has a prior-record level of IV.

Analysis

I. Defendant's Motion for Jury View

[1] Defendant first contends the trial court abused its discretion when it denied his Motion for Jury View. We disagree.

> [N.C. Gen. Stat.] § 15A-1229(a) provides that the decision to permit a jury view lies within the discretion of the trial court. The decision will not be disturbed absent an abuse of that discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Fleming, 350 N.C. 109, 134, 512 S.E.2d 720, 737 (1999) (citations and quotation marks omitted); *see* N.C. Gen. Stat. § 15A-1229(a) (2019) ("The trial judge in his discretion may permit a jury view.").

In the present case, the trial court heard arguments on Defendant's Motion for Jury View from the State and Defense Counsel. Defendant argued a jury view was important to give the jury "an accurate view of what [the testifying eyewitnesses] would have been able to see and what kind of obstruction would have been in the line of sight that they would have, the area where this was occurring, as well as the distance involved[.]" The State and Defendant both indicated their intent to introduce photographs of the crime scene for the jury. The trial court considered "the availability of photographs, diagrams, and other material [ ]" and noted the alleged crime occurred during daylight and, in its discretion, denied Defendant's Motion. Accordingly, the trial court's denial of Defendant's Motion for Jury View was the result of a reasoned decision and was not an abuse of discretion.

II. Jury Instructions

[2] Defendant next contends the trial court erred in its instructions to the jury pertaining to Defendant's requested instruction on self-defense. Specifically, Defendant argues the trial court erred in instructing the jury that "the defendant believed it was necessary to *kill* the victim in order to save the defendant from death or great bodily harm[,]" and instead should have instructed the jury that Defendant "believed it was necessary to *use deadly force against* the victim." Defendant's argument raises a question of law, which we review de novo. *See State v. Edwards*,

239 N.C. App. 391, 393, 768 S.E.2d 619, 621 (2015) ("We hold that where the request for a specific instruction raises a question of law, the trial court's decisions regarding jury instructions are reviewed de novo by this Court." (citation and quotation marks omitted)).

At the close of evidence, the trial court held a charge conference with counsel for both parties. Both parties submitted proposed instructions; Defense Counsel requested the trial court instruct the jury, in part: "The defendant would be excused of first degree murder and second degree murder on the ground of self-defense if: First, the defendant believed it was necessary to *use deadly force against* the victim in order to save the defendant from death or great bodily harm." N.C.P.I. –Crim 206.10 (June 2014). This modification was supported by a footnote in the pattern instructions directing the trial court to "[s]ubstitute 'to use deadly force against the victim' for 'to kill the victim' when the evidence tends to show that the defendant intended to use deadly force to disable the victim, but not to kill the victim. *See State v. Watson*, 338 N.C. 168 (1994)." N.C.P.I.–Crim. 206.10 n.4. The trial court, after hearing arguments, held Defendant was entitled to an instruction on self-defense; however, the trial court declined Defendant's requested modification and instructed the jury in accordance with the unmodified pattern instructions.

Defendant argues the trial court's instruction of "to kill" instead of "to use deadly force against" prejudiced Defendant because "an instruction that a defendant must have believed he needed to kill, might be construed by a jury as allowing it to reject defendant's self-defense claim on the ground that defendant did not entertain such a belief[.]" We first recognize "[t]he preferred method of instructing the jury is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Solomon*, 117 N.C. App. 701, 706, 453 S.E.2d 201, 205 (1995). Here, the trial court's instruction to the jury, other than the modification at issue, was identical to the North Carolina Pattern Jury Instruction in N.C.P.I.–Crim. 206.10 submitted by Defendant.

In *State v. Richardson*, our Supreme Court addressed the specific language at issue in the present case. 341 N.C. 585, 587, 461 S.E.2d 724, 726 (1995). The *Richardson* Court, engaging in a thorough analysis of North Carolina's self-defense instructions, held:

> The language in *Watson* indicating that in certain situations, the self-defense instruction should read that it was necessary 'to shoot or use deadly force' was *dicta*, and that language is now expressly disavowed. We conclude that it is not necessary to change the self-defense instruction to

> read necessary 'to shoot or use deadly force' in order to properly instruct a jury on the elements of self-defense.[1]

Id. at 592, 461 S.E.2d at 729. The *Richardson* Court emphasized "the [to kill] language in the self-defense instruction does not read into the defense an 'intent to kill' that is not an element of second-degree murder." *Id.* at 594, 461 S.E.2d at 730.

Defendant acknowledges our Supreme Court's decision in *Richardson* discussing the relevant language in *Watson* as *dicta*; however, Defendant argues the 2011 enactment of N.C. Gen. Stat. §§ 14-51.2, 14-51.3, creating statutory rights to self-defense, supersedes *Richardson*. In particular, N.C. Gen. Stat. § 14-51.3, titled "Use of force in defense of person; relief from criminal or civil liability," provides

> (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 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 G.S. 14-51.2.

N.C. Gen. Stat. §14-51.3 (a) (2019).

Specifically, Defendant argues Section 14-51.3 does not require a person believe it necessary to *kill* his or her assailant in order to save himself or herself from death or bodily harm. Section 14-51.3 authorizes the use of deadly force if a person is "in any place he or she has the lawful right to be" and "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself . . . ."

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1. The North Carolina Supreme Court revisited this same issue eight years later in *State v. Carter* and expressly reaffirmed its holding in *Richardson*. *State v. Carter*, 357 N.C. 345, 361, 584 S.E.2d 792, 803-04 (2003) ("In *Richardson*, we approved a jury instruction that was, in all relevant respects, identical to the instruction at issue in the present case. Since *Richardson*, we have declined opportunities to reconsider the issue. After carefully examining defendant's argument, we find no reason to depart from our prior holdings." (citations omitted)).

Id. Defendant contends the trial court's instruction allowing the jury to excuse Defendant of first-degree or second-degree murder "if, first, the Defendant believed it was necessary to *kill* the victim in order to save the Defendant from death or great bodily harm" imputes an "intent to kill" requirement that was not retained in N.C. Gen. Stat. § 14-51.3. We acknowledge the extent to which our general statutes codifying the right to self-defense, including Section 14-51.3, supplements or supersedes *Richardson* and its progeny is unsettled. *See State v. Lee*, 370 N.C. 671, 678, 811 S.E.2d 563, 568 (2018) ("In 2011, however, the General Assembly enacted N.C.G.S. §§ 14-51.3 and 14-51.4, which at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another." (Martin, C.J., concurring)). However, until our Supreme Court provides further guidance on this issue, we are bound by its decision in *Richardson*. *See Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) ("[The Court of Appeals] has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." (alterations in original) (quotation marks omitted)).

Accordingly, we conclude the trial court did not err when it instructed the jury according to N.C.P.I Crim–206.10. The North Carolina Pattern Jury Instructions were revised in 2014 and include efforts to harmonize our common law right to self-defense with the 2011 enactment of Sections 14-51.2, 14-51.3, and 14-51.4. *See* N.C.P.I.–Crim 206.10 n.6 ("Pursuant to N.C. Gen. Stat. § 14-51.4(1), self-defense is also not available to a person who used defensive force and who was [attempting to commit] [committing] [escaping after the commission of] a felony. If evidence is presented on this point, then the instruction should be modified accordingly to add this provision."); N.C.P.I.–Crim 206.10 n.8 ("N.C. Gen. Stat. §14-51.3 (a)"). "[Our Supreme Court] has previously stated that as long as the trial court gives a requested instruction in substance, it is not error for a trial court to refuse to give a requested instruction verbatim, even if the request is based on language from this Court." *State v. Lewis*, 346 N.C. 141, 146, 484 S.E.2d 379, 382 (1997) (citations and quotation marks omitted). Our Supreme Court's decision in *Richardson*, reaffirmed in *Carter*, expressly held that an instruction including the disputed phrase "to kill" was correct. *Richardson*, 341 N.C. at 592, 461 S.E.2d at 729. Thus, the trial court did not err in its instructions to the jury.

III. Prior-Record-Level Determination

[3] Defendant contends the trial court erred by incorrectly calculating he was a prior-record level IV, arguing instead that Defendant is

a prior-record level III. "[I]n evaluating defendant's challenge to his prior record level calculation, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, [and] the trial court's conclusions of law are reviewed *de novo* by this Court." *State v. Mullinax*, 180 N.C. App. 439, 442, 637 S.E.2d 294, 296 (2006). Under N.C. Gen. Stat. § 15A-1340.14(f)(4), the State must prove the existence of a prior conviction by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.14(f)(4) (2019).

The trial court determined Defendant had eleven prior-record-level points, thereby rendering his prior-record level IV. Defendant contends the evidence at trial supports only nine prior-record-level points, rendering his prior-record level III. Prior to sentencing, Defendant challenged four convictions that were submitted by the State on Defendant's Prior Record Level Worksheet; specifically, a 1992 Felony Breaking and Entering, a 1991 Misdemeanor Breaking and Entering, a 1991 Injury to Real Property, and a 1989 Assault with a Deadly Weapon. The trial court requested and received certified copies from the Clerk of Superior Court of Defendant's criminal records.

Defendant contends the 1989 Misdemeanor Assault with a Deadly Weapon incorrectly added one prior-record-level point to his Prior Record Level Worksheet because the Record does not show "exactly what defendant was convicted of nor the sentence." Our review of the Record reflects that a finding of guilty was entered and Defendant received a Prayer for Judgment Continued (PJC) for twelve months. This Court has held a PJC may be used when calculating a defendant's prior-record level. *See, e.g.*, *State v. Graham*, 149 N.C. App. 215, 220, 562 S.E.2d 286, 289 (2002) ("formal entry of judgment is not required in order to have a conviction" (citations and quotation marks omitted)). Thus, the trial court did not err by finding Defendant's 1989 conviction, which resulted in a PJC, added one prior-record-level point to his Prior Record Level Worksheet.

Defendant next challenges both of his 1991 convictions. The Record reflects the trial court added one point to Defendant's calculation for two convictions: Misdemeanor Breaking and Entering and Injury to Real Property. Defendant argues these convictions should carry no points because the Record shows no sentence. However, the Record reflects these charges were consolidated and a plea of guilty entered. Thus, the State submitted sufficient evidence for the trial court to find by a preponderance of the evidence that Defendant was convicted of Misdemeanor Breaking and Entering and Injury to Real Property, and the trial court

did not err in adding one prior-record-level point to Defendant's Prior Record Level Worksheet.

For the 1992 Breaking and Entering, Defendant argues the conviction was erroneously counted as a felony, resulting in the addition of two prior-record-level points to his Prior Record Level Worksheet instead of one prior-record-level point for a misdemeanor. Defendant contends the Record is insufficient and unclear because the certified copy of his criminal record submitted to the trial court lists the Charge Offense only as "M charge change Felonious B & E." Assuming this evidence was insufficient to establish Defendant's 1992 conviction was indeed a felony instead of a misdemeanor, this would result in the reduction of one prior-record-level point from Defendant's Prior Record Level Worksheet. With ten prior-record-level points, Defendant would remain a prior-record level IV, rendering the purported error harmless. *See State v. Smith*, 139 N.C. App. 209, 220, 533 S.E.2d 518, 524 (2000) (holding that an error in calculating prior-record-level points is harmless if it does not affect the ultimate prior-record-level determination). Thus, Defendant was correctly sentenced as a prior-record level IV.

Conclusion

Accordingly, for the foregoing reasons, we conclude the trial court did not abuse its discretion when it denied Defendant's Motion for Jury View. We further conclude the trial court did not err in its self-defense instructions to the jury, and the trial court did not err when it sentenced Defendant as a prior-record level IV.

NO ERROR.

Judges BRYANT and COLLINS concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY MANGUM, JR., DEFENDANT

No. COA18-850

Filed 3 March 2020

1. Appeal and Error—filing of appeal after order rendered but not entered—failure of record to show jurisdiction—motion to amend record

The Court of Appeals had jurisdiction to hear an appeal from a civil judgment for attorney fees in a criminal case, even though defendant entered notice of appeal and filed the record after the trial court rendered an oral ruling but before it entered a written order, because Rule 3 of the Rules of Civil Procedure allows for appeal of an order once it has been rendered by a trial court and the Court of Appeals had the authority to grant defendant's motion to amend the record to include the written order once it was filed. Assuming arguendo that amending the record failed to cure defendant's jurisdictional deficiency, defendant's petition for writ of certiorari was granted to obtain jurisdiction.

2. Attorney Fees—court-appointed attorneys—opportunity to be heard

In a trial for possession of a stolen motor vehicle and attaining habitual felon status, the trial court erred by ordering payment of attorney fees without affording defendant the opportunity to be heard.

Judge BERGER concurring with separate opinion.

Judge TYSON dissenting.

Appeal by Defendant from judgment entered 4 April 2018 by Judge Thomas H. Lock in Superior Court, Johnston County. Heard in the Court of Appeals 23 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.

McGEE, Chief Judge.

I. Procedural and Factual Background

Billy Ray Mangum, Jr. ("Defendant") was indicted on 5 March 2018 for possession of a stolen motor vehicle and attaining habitual felon status. Defendant pleaded guilty to the charges on 4 April 2018, and the trial court sentenced Defendant to twenty-four to forty-one months' imprisonment. Following its oral rendering of Defendant's sentence, the trial court stated that "[c]ourt costs and attorney's fees are taxed against [Defendant] as a civil judgment." The trial court entered judgment ordering "all costs and attorney fees to be docketed as a civil judgment." The amount of costs and attorney's fees were not indicated in court or in the judgment. Defendant filed written notice of appeal on 10 April 2018.

Defendant's sole proposed issue on appeal is: "Did the trial court err by failing to give [] Defendant the opportunity to be heard on attorney's fees?" Defendant filed his appellate brief on 24 September 2018 in which, citing N.C.G.S. § 7A-27(b)(1) (2019) and *State v. Pell*, 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011), he stated that he had a right of appeal from the part of the 4 April 2018 judgment that ordered him to pay attorney's fees because that part of the judgment was a civil judgment and he had timely entered written notice of appeal. Defendant simultaneously filed a petition for writ of certiorari ("PWC") "out of an abundance of caution," "in the event this Court deem[ed] his notice of appeal insufficient."

The State responded to Defendant's PWC on 28 September 2018, arguing the PWC should be dismissed because it did not contain a "certified cop[y] of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition[,]" *see* N.C. R. App. P. 21(c) and, quoting *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990), contending " 'this Court is without authority to entertain an appeal where there has been no entry of judgment.' " The State filed a motion to dismiss Defendant's appeal on 28 September 2018, quoting *State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007), and arguing this Court lacked jurisdiction to consider Defendant's appeal because the record contained no "civil judgment . . . ordering payment of attorney fees," and the record must contain the order or judgment from which Defendant appeals in order to confer jurisdiction on this Court for review. The State further argued that Defendant "failed to comply with the mandatory requirements of Rule 3." The State filed its brief on 2 October 2018, in which it also argued that this Court lacked jurisdiction to consider Defendant's appeal.

Defendant filed his response to the State's motion to dismiss and filed a motion to amend the record on appeal, both on 10 October 2018. In his response, Defendant noted that the civil judgment ordering Defendant to pay $390.00 in attorney's fees was not entered until 3 October 2018, but his 10 April 2018 notice of appeal was sufficient to preserve appellate review of the 3 October 2018 order because judgment was rendered on 4 April 2018, and "rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 804, 486 S.E.2d 735, 738 (1997) (emphasis in original) (citations omitted). In his motion to amend the record, Defendant requested this Court allow amendment of the record to include the 3 October 2018 order, entered under the same file number as the 4 April 2018 judgment—18-CRS-50682. The State responded to Defendant's motion to amend the record on 28 October 2018, arguing that the notice of appeal in this matter was only from "the judgment entered in this cause on April 4, 2018[,]" not from the "rendering" of the civil judgment concerning attorney's fees in open court.

II. Jurisdiction

[1] While we agree with the State that Defendant did not follow the correct procedure for appealing the entry of the 3 October 2018 civil judgment ordering him to pay attorney's fees, Defendant's procedural missteps have not deprived this Court of jurisdiction to consider his appeal, either upon direct appeal or by granting certiorari. As with a judgment requiring a defendant to register as a sex offender, even though Defendant in this case was convicted of a crime, the order at issue is civil in nature, accomplished through entry of a civil judgment. *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842; *see also Pell*, 211 N.C. App. at 377, 712 S.E.2d at 190. "Therefore, an appeal from a sentence requiring a defendant to [pay attorney's fees as a civil judgment] is controlled by civil procedure," *id.* (citations omitted), and by Rule 3 of our Rules of Appellate Procedure. *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842. As in this case, the underlying criminal judgment from which the defendant in *Pell* appealed was based upon a guilty plea. *Pell*, 211 N.C. App. at 376, 712 S.E.2d at 190. In this case, the State argues that N.C.G.S. § 15A-1444 (2019), involving appeals from a guilty plea, removes appellate jurisdiction to consider Defendant's arguments. However, in *Pell*,

> [the d]efendant specifically appeal[ed] from the portion of his sentence requiring him to register as a sex offender. While a defendant is entitled to appeal from a guilty plea in

> limited circumstances, *see* N.C. Gen. Stat. § 15A-1444(a2) (2009), *Defendant's appeal does not arise from the underlying convictions*, therefore these limitations are inapplicable to the current action. Accordingly, Defendant's appeal is properly before this Court for appellate review.

Id. at 377, 712 S.E.2d at 190 (emphasis added). The defendant's notice of appeal in *Pell* did not specifically mention mandatory registration as a sex offender, as the notice of appeal in this case does not specifically mention attorney's fees. As with imposition of SBM in *Pell*, Defendant's appeal in this case "does not arise from the underlying convictions" and N.C.G.S. § 15A-1444(a2) does not deprive this Court of jurisdiction. *Id.* at 377, 712 S.E.2d at 190.

A. *Rule 3*

Rule 3(a) requires: "Any party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court . . . within the time prescribed by subsection (c) of this rule." N.C. R. App. P. 3(a). The dissenting opinion argues that this Court lacks jurisdiction because "Rule 3(a) and binding Supreme Court precedents . . . prohibit this Court from granting Defendant's motion to amend the record of a purported appeal that does not exist, and consequently, over which this Court unquestionably does not possess and cannot assert jurisdiction[.]" Concerning the time for filing notice of appeal in a civil matter, this Court held in *Abels*: "Notwithstanding defendant's protestations that plaintiff's appeal was premature, . . . plaintiff timely appealed in that her notice was filed and served subsequent to the trial court's rendering of its order, albeit prior to entry of said order." *Abels*, 126 N.C. App. at 804, 486 S.E.2d at 738. This is because "rendering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served [in civil matters]. N.C. R. App. P. 3(c)." *Id.* (citations omitted); *see also State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574–75 (2012) (citation omitted) (in criminal cases "written notice may be filed at any time between the date of the rendition of the judgment or order and the fourteenth day after entry of the judgment or order"). Therefore, Defendant's 10 April 2018 written notice of appeal from the *rendering* of the civil judgment for attorney's fees on 4 April 2018 was sufficient to *preserve* Defendant's right to appeal the civil judgment ordering attorney's fees *once that judgment was entered* on 3 October 2018. Defendant's notice

of appeal was timely filed. However, Defendant's appeal was *docketed* in this Court prior to entry of the 3 October 2018 judgment.

B. *Sufficiency of Record*

Defendant's mistake was not in the timing of the filing of his notice of appeal, *Abels*, 126 N.C. App. at 804, 486 S.E.2d at 738, but in the timing of the filing of the record. The State did not object or otherwise respond to Defendant's proposed record on appeal within thirty days of service, so the record was settled pursuant to N.C. R. App. P. 11(b), and the appeal was docketed pursuant to N.C. R. App. P. 12(b) when the record was filed with this Court on 22 August 2018. However, since the judgment from which appeal was taken, being the order imposing attorney's fees, had not yet been entered, the record was not in compliance with Rule 9(a)(1)(h.) when it was docketed. "To make [the trial court's] purpose a judgment, it must be entered of record, and until this shall be done, there is nothing to appeal from." *Logan v. Harris*, 90 N.C. 7, 7 (1884). Defendant should not have filed the record and proceeded with this appeal until *after* entry of the 3 October 2018 order, and that order needed to be included in the record on appeal in order to confer regular appellate jurisdiction on this Court. *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842 ("[B]ecause there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue. *See* N.C. R. App. P. 3(a); *id.* 9(a)(1)(h).").

The dissenting opinion, citing Rule 3(a), contends that this Court cannot grant "Defendant's motion to amend the record of a purported appeal . . . over which this Court unquestionably does not possess and cannot assert jurisdiction[.]" However, Defendant filed a motion pursuant to N.C. R. App. P. 9(b)(5) on 10 October 2018, requesting amendment of the record to include the 3 October 2018 civil judgment ordering Defendant to pay attorney's fees. Motions pursuant to Rule 9(b)(5) are routinely granted in order to amend the record for the purpose of correcting jurisdictional defects caused by violations of the appellate rules. Rule 9(b)(5) states in relevant part:

> *Motions Pertaining to Additions to the Record*. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content.

N.C. R. App. P. 9(b)(5)(b.). Our Supreme Court has made clear this Court's authority to amend the record to obtain jurisdiction over an appeal:

> In *Felmet*, the defendant moved for leave to amend the record to include "the judgment of the district court which reflected defendant's appeal therefrom to the superior court" to show how the superior court obtained subject matter jurisdiction over his case. *Felmet*, 302 N.C. at 174, 273 S.E.2d at 710. The Court of Appeals denied the motion. We concluded that the denial was a decision within the discretion of the Court of Appeals and that we could find no abuse of that discretion. Nevertheless, we held the record should be amended to reflect subject matter jurisdiction so that we could reach the substantive issue of the appeal. In so holding, we stated, "[this] is the better reasoned approach and avoids undue emphasis on procedural niceties."
>
> While we find no abuse of discretion on the part of the Court of Appeals in denying the State's motion to amend, we elect as we did in *Felmet* to allow the State leave to amend.
>
> When the record is amended to add the presentment, it is clear the superior court had jurisdiction over these misdemeanors under N.C.G.S. § 7A-272(2) [and, therefore, appellate jurisdiction also existed].

State v. Petersilie, 334 N.C. 169, 177–78, 432 S.E.2d 832, 837 (1993) (citations omitted); *see also State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (our Supreme Court "decided to allow the amendment [pursuant to Rule 9(b)(5)(b.)] to reflect subject matter jurisdiction and then pass upon the substantive issue of the appeal"); *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 367, 724 S.E.2d 543, 548 (2012) ("The original record on appeal contained no notice of appeal[.] However, . . . the . . . [p]laintiffs moved to amend the record on appeal pursuant to Rules 9(b)(5) and 37 of the North Carolina Rules of Appellate Procedure. We allow the . . . [p]laintiffs' motion to amend the record on appeal to include the notice of appeal" and address the merits.).

As noted by our Supreme Court, whether to grant or deny a motion to amend the record is "a decision within the discretion of the Court of Appeals" that constitutes a legitimate application of our appellate rules absent "an abuse of discretion." *Petersilie*, 334 N.C. at 177, 432 S.E.2d at 837 (citation omitted). Contrary to the dissenting opinion's assertion,

this Court has the authority and the jurisdiction to amend a record that does not confer jurisdiction for appellate review into one that demonstrates our appellate jurisdiction.[1] *Id.* In any event, no grant of certiorari is required for this Court to allow Defendant's motion to amend the record, Rule 9(b)(5)(b.) provides that authority. *Petersilie*, 334 N.C. at 177–78, 432 S.E.2d at 837 (and other opinions cited above).

We decide, in our discretion, to grant Defendant's motion to amend the record to include the 3 October 2018 judgment. *Felmet*, 302 N.C. at 176, 273 S.E.2d at 711. Although Defendant's appeal was docketed on 22 August 2018 when the record was filed, it only became "properly perfected" through granting Defendant's motion to amend the record to include the 3 October 2018 judgment. *Swilling v. Swilling*, 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991) (citation omitted). Therefore, because the 3 October 2018 judgment is now properly part of the record before us, the jurisdictional defects cited in *Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842, are no longer an issue in this matter and we address the merits of Defendant's appeal.

C. *Certiorari*

1. Rule 21(a)(1)

Assuming, *arguendo*, the rule set forth in *Abels*, 126 N.C. App. at 804–05, 486 S.E.2d at 738, does not apply, and our amendment of the record to include the 3 October 2018 judgment did not cure the jurisdictional deficiency, Defendant also petitioned this Court to grant a writ of certiorari, stating correctly: "Under N.C. R. App. P 21(a)(1), this Court may issue its writ of certiorari . . . to permit review of a trial tribunal's order 'when the right to prosecute an appeal has been lost by the failure to take timely action[.]' " In *Anderson v. Hollifield*, 345 N.C. 480, 480 S.E.2d 661 (1997), the appellant failed to file a notice of appeal, and the appellee argued "that such a failure to file a notice of appeal deprives the appellate courts of jurisdiction to rule upon the merits[.]" *Id.* at 482, 480 S.E.2d at 663. Our Supreme Court noted that the failure to file a notice of appeal eliminated jurisdiction for regular appellate review, but held: "[W]e conclude that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner. Therefore, we conclude that the Court of Appeals properly granted certiorari in

1. Of course, if amendment of the record fails to confer jurisdiction for appellate review, this Court will either dismiss the appeal, or consider whether it can obtain jurisdiction through grant of certiorari.

this case." *Id.* This use of certiorari is proper even though "[c]ompliance with the requirements for entry of notice of appeal is jurisdictional. *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 365 (2008)." *Oates*, 366 N.C. at 266, 732 S.E.2d at 573; *Dogwood*, 362 N.C. at 197 n.3, 657 S.E.2d at 365 n.3 (citations omitted) ("We recognize that discretionary avenues of appellate jurisdiction exist in addition to those routes of mandatory review conferred by statute."). We grant Defendant's petition for writ of certiorari, and thereby obtain jurisdiction to consider the merits of Defendant's appeal even if Defendant's right to appeal the 3 October 2018 judgment "has been lost by failure to take timely action." N.C. R. App. P 21(a)(1); *Anderson*, 345 N.C. at 482, 480 S.E.2d at 663; *see also* N.C.G.S. § 7A-32(c) and *State v. Ledbetter*, 371 N.C. 192, 196–97, 814 S.E.2d 39, 42–43 (2018).

2. N.C.G.S. § 7A-32(c)

The dissenting opinion argues that Defendant's appeal "does not exist" due to Rule 3 violations and "binding Supreme Court precedents"; therefore, we are without jurisdiction to amend the record pursuant to Rule 9(b)(5), and that "review by certiorari is not available . . . by statute or by precedents to Defendant." Defendant's PWC and his motion to amend the record are separate requests, and we do not need to grant certiorari in order to grant Defendant's motion to amend. Further, the dissenting opinion appears to conflate this Court's jurisdiction to consider arguments raised on direct appeal with this Court's jurisdiction to consider arguments pursuant to the authority given this Court by the General Assembly to grant extraordinary writs such as certiorari. Direct appeal and certiorari are two distinct avenues by which this Court may obtain jurisdiction over a matter: When "this Court cannot hear defendant's direct appeal [due to violation of a jurisdictional appellate rule], it does have the discretion to consider the matter by granting a petition for writ of *certiorari[.]*" *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320–21 (2005) (citation omitted).[2] Violations of certain appellate rules, such as Rule 3, can divest this court of jurisdiction to consider an appellant's *direct appeal*. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 610 S.E.2d 360 (2005). However, our Supreme Court has repeatedly held that when N.C.G.S. § 7A-32(c), or any other act of the General Assembly, has provided jurisdiction for this Court to grant certiorari in its discretion, that jurisdiction be cannot revoked or limited by our appellate rules:

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2. There are, of course, jurisdictional defects that cannot be "cured" by granting certiorari. For example, if the trial court lacked subject matter jurisdiction, its judgment would be a nullity, and we could not obtain jurisdiction to review that judgment by granting certiorari.

> [T]he General Assembly has stated that the Court of Appeals "has jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . *in aid of its own jurisdiction*, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A-32(c).

State v. Stubbs, 368 N.C. 40, 42, 770 S.E.2d 74, 76 (2015) (emphasis added). Our Supreme Court subsequently reaffirmed this holding: "[A]s we explained in *Stubbs*, if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." *State v. Thomsen*, 369 N.C. 22, 27, 789 S.E.2d 639, 643 (2016) (citation omitted).

In *State v. Ledbetter*, 250 N.C. App. 692, 794 S.E.2d 551 (2016), *rev'd*, 371 N.C. 192, 814 S.E.2d 39 (2018), this Court reviewed *Stubbs* and *Thomsen*, then held that even if a statute granted this Court *jurisdiction*, the Rules of Appellate Procedure could still restrict our *authority to exercise* that jurisdiction. *Id.* at 697, 794 S.E.2d at 555. Our Supreme Court disagreed:

> By concluding it is procedurally barred from exercising its discretionary authority to assert jurisdiction in this appeal, the Court of Appeals has, as a practical matter, set its own limitations on its jurisdiction to issue writs of certiorari. . . . .
>
> [However], the Court of Appeals had both the jurisdiction and the discretionary authority to issue defendant's writ of certiorari. *Absent specific statutory language limiting the Court of Appeals' jurisdiction*, the court maintains its jurisdiction and discretionary authority to issue the prerogative writs, including certiorari. Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued.

Ledbetter, 371 N.C. at 196–97, 814 S.E.2d at 42–43 (emphasis added).

General statutory authority to grant Defendant's PWC and review his arguments is provided in N.C.G.S. § 7A-32(c); therefore, the proper inquiry is whether another *statute* serves to limit that jurisdiction. *Id.* We have found no limiting statute; however, we do find substantial precedent, cited above, that this Court may grant certiorari in support of our appellate jurisdiction for the purpose of considering the merits of an appeal otherwise jurisdictionally precluded from review on direct

appeal.[3] *See State v. Smith*, __ N.C. App. __, __, 832 S.E.2d 921, 924 (2019) (citation omitted) ("Due to questions about trial counsel's notice of appeal, Defendant has filed a petition for writ of certiorari in order to preserve his right to appeal the immediate matter. Writs of certiorari are considered to be 'extraordinary remedial writ[s]' and can serve as substitutes for an appeal."). Similar to this case, "[i]n *State v. Friend*, the trial court did not inform the defendant of his right to be heard on the issue of attorney's fees and costs. [T]his Court granted the defendant's untimely appeal as to the civil judgment." *State v. Baker*, __ N.C. App. __, __, 817 S.E.2d 907, 909–10 (2018) (citations omitted). This Court held that "[b]ased on the facts of the case *sub judice*, we grant Defendant's petition for writ of certiorari to review this issue on appeal[.]" *Id.* at __, 817 S.E.2d at 910 (citation omitted); *see also State v. Patterson*, __ N.C. App. __, __ S.E.2d __, 2020 WL 542812 (filed 4 Feb. 2020) (granting the State's motion to dismiss the defendant's appeal for failure to file a written notice of appeal from civil judgment entering attorney's fees, but allowing the defendant's motion to amend the record to include the civil judgment, granting certiorari to consider the merits, and vacating civil judgment for remand and hearing affording the defendant an opportunity to contest the amount of fees assessed).

This Court is also free to grant certiorari *ex mero motu* in order to allow appellate review in circumstances similar to those before us: *Matter of E.A.*, __ N.C. App. __, __, 833 S.E.2d 630, 631 (2019) (citations omitted) (certiorari properly granted even though "the order [from which the appellant purported to appeal] was filed *after* [the appellant] filed his notice of appeal[,]" because "this Court has the discretionary authority . . . to 'treat the purported appeal as a petition for writ of certiorari and grant it in our discretion' ");[4] *see also Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) (analysis and cases cited). "When *certiorari* is granted, the case is before us in all respects as an appeal." *Furr v. Simpson*, 271 N.C. 221, 223, 155 S.E.2d 746, 748 (1967) (citation omitted). Assuming, *arguendo*, Defendant's appeal violates Rule 3, we exercise our discretion and grant certiorari for the purpose of considering the merits of Defendant's arguments on appeal.

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3. Again, with certain clear exceptions such as lack of jurisdiction in the trial court, or if no judgment or order has been entered in the matter by the trial court.

4. In *E.A.* this Court did not address the rule set forth in *Abels*, 126 N.C. App. at 804–05, 486 S.E.2d at 738, and *Oates*, 366 N.C. at 268, 732 S.E.2d at 574–75.

D. *State v. McKoy*

We note that the dissenting opinion cites our opinion in *State v. McKoy*, __, N.C. App. __, __ S.E.2d __, (2020) (unpublished), filed concurrently with this opinion, in support of its contention that "a purported appeal [] taken before and docketed without any order or judgment having been entered . . . must be dismissed. There is no final entered order nor anything else properly before this Court to review." However, in *McKoy* the defendant specifically argued that he was *not* appealing the civil judgment ordering restitution itself, but the trial court's *rendering* of that judgment at trial. We denied the defendant's PWC, not on a jurisdictional basis, but based on our conclusion that he could not demonstrate any prejudice and, therefore, review of the merits of his appeal would be pointless. *Id*. *McKoy* is unpublished, and it contains no holding relevant to this case. Further, in this case we granted Defendant's motion to amend the record, and the 3 October 2018 civil judgment is properly before us for review. N.C. R. App. P. 9(b)(5)(b.). In *McKoy* the defendant did not seek to amend the record to include the civil judgment, if one existed.

III. Defendant's Appeal

[2] Defendant contends that the trial court erred in ordering payment of attorney fees without affording him an opportunity to be heard. We agree.

While trial courts are permitted "to enter a civil judgment against an indig[e]nt defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel[,]" it is well established that defendants must first "be given notice and an opportunity to be heard[.]" *Baker*, __ N.C. App. at __, 817 S.E.2d at 911. In this case, the trial court simply stated that it was going to enter a civil judgment against Defendant for the repayment of his attorney's fees, and it provided Defendant no opportunity to be heard on the matter. As this Court stated in *State v. Friend*, __ N.C. App. __, 809 S.E.2d 902 (2018):

> [B]efore entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 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.

Id. at __, 809 S.E.2d at 907 (citations omitted); *see also* N.C.G.S. § 7A-455 (2019); *Baker*, __ N.C. App. at __, 817 S.E.2d at 911–12; *State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005) ("this Court vacated a civil judgment imposing attorney's fees on the defendant where, notwithstanding a signed affidavit of indigency, there was 'no indication [in the record] that [the] defendant received any opportunity to be heard on the matter' of attorney's fees").

"Therefore, in light of the foregoing, we vacate the trial court's imposition of attorney's fees in this matter" and remand. *Id.* at 236, 616 S.E.2d at 317. "On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [D]efendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney." *Id.* Defendant does not otherwise challenge the judgment entered 4 April 2018, and the remainder of that judgment is unaffected by our decision.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judge BERGER concurs with separate opinion.

Judge TYSON dissents.

BERGER, Judge, concurring in separate opinion.

$390.00. That is what this appeal concerns.

Defendant knows from the initial appointment of counsel that he is responsible for his court-appointed attorney's fees. But, this Court has created an avenue for these procedural appeals where defendants suffer no prejudice. These appeals cost countless man-hours and tens-of-thousands of dollars, and elevate form over substance. Because our precedent has opened this door, I concur in result only. However, anyone interested in efficiencies and saving taxpayer dollars should hope the Supreme Court of North Carolina takes advantage of this opportunity to return us to the plain language of N.C. Gen. Stat. § 15A-1444(a2).

TYSON, Judge, dissenting.

I vote to dismiss this purported appeal and Defendant's motion to amend the record, and to deny Defendant's petition for a writ of certiorari. I respectfully dissent.

"It is not the role of the appellate courts to create an appeal for an appellant. . . . Our Supreme Court previously stated that the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 118-19, 665 S.E.2d 493, 497-98 (2008) (quoting *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005)); *see also State v. Bursell*, __ N.C. __, __, 827 S.E.2d 302, 304 (2019) ("[F]ailure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith, may impede the administration of justice. Accordingly, the Rules of Appellate Procedure are mandatory and not directory." (citations and internal quotation marks omitted)).

I. No Jurisdiction, No Merit, No Prejudice

Our Supreme Court and this Court have previously analyzed and addressed each of the issues presented here. "This Court is without authority to entertain appeal of a case which lacks entry of judgment. Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (citations omitted), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

Under the statute, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2017). Multiple precedential and procedural rules hold that, absent an entry of judgment, this Court is without jurisdiction or authority to entertain this appeal. *Abels*, 126 N.C. App. at 803, 486 S.E.2d at 737; *see also State v. Jacobs*, 361 N.C. 565, 566, 648 S.E.2d 841, 842 (2007) (citing N.C. R. App. P. 3(a), 9(a)(1)(h)) (where "there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue.").

Defendant seeks to excuse his jurisdictional failures and criminal, civil, and appellate rules violations with a circuitous path of unsupported motions and specious arguments. His arguments are machinations to dodge and weave through the jurisdictional and procedural bars, and multiple violations of the Rules and precedents in

an attempt to give credence to Defendant's un-merited notions and non-prejudicial motions.

None of these notions or motions carry Defendant's burden to demonstrate appellate jurisdiction, merit, or any prejudice. Defendant has failed to invoke the jurisdiction of this Court with his notice or record on appeal, to demonstrate any merit in his claim, or to suffer any prejudice from the trial court's civil judgment.

Defendant requested and was appointed defense counsel. He knowingly and voluntarily pled guilty to all charges, including attaining the status of a habitual felon. Defendant was also informed by the trial court and agreed that his appointed counsel is not a free counsel, and in the event he pled or was found guilty, he was responsible for reimbursing his state-paid counsel's fees. *See* N.C. Gen. Stat. § 7A-455 (2019).

Defendant was present in court and was ordered to pay his attorney's fees at sentencing. He was free to question or challenge the court's order, but failed to do so. Defendant did not inform the State or trial court that his guilty pleas were conditioned upon appeal to preserve any issue to seek appellate review. *See* N.C. Gen. Stat. § 15A-1444 (2019).

The trial court determined the "extraordinary sum" of $390.00 in attorney's fees was owed and to be reimbursed to the State. The trial court entered a civil judgment to reimburse the taxpayers on 3 October 2018. *State v. Baker*, __ N.C. App. __, __, 817 S.E.2d 907, 911 (2018) (trial courts are permitted "to enter a civil judgment against an indig[e]nt defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel" (citation omitted)). The majority's opinion recognizes this sum is a valid debt owed by Defendant to be entered again on remand. Defendant cannot demonstrate any merit in his argument nor any prejudice to pay what he owes.

We all agree with the State's arguments that Defendant has wholly failed to comply with the mandatory appellate rules and criminal and civil procedures for appealing from the entry of the 3 October 2018 civil judgment, which ordered him to reimburse his agreed-upon and justly-due attorney's fees. Defendant's failure to comply with the multiple Rules deprives this Court of jurisdiction to consider his assertions upon direct appeal. *Abels*, 126 N.C. App. at 803, 486 S.E.2d at 737. We all also agree that multiple prior precedents hold that violations of certain appellate rules, including Rule 3, divest this Court of jurisdiction to consider an appellant's *direct appeal* and mandates dismissal: "Failure to follow the rules will subject an appeal to dismissal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d

361, 363 (2008) (citations and alterations omitted). Defendant's appeal is properly dismissed.

II. Amendment Does Not Cure Jurisdictional Defaults

We also all agree Defendant was required by the Rules to file the record and proceed with this appeal only *after* entry of the 3 October 2018 order, and that entered order was required to be included in the record on appeal in order to confer regular appellate jurisdiction on this Court. *See* N.C. R. App. P. 3(d); *see also Jacobs*, 361 N.C. at 566, 648 S.E.2d at 842 ("because there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had *no subject matter jurisdiction* on this issue" (emphasis supplied) (citations omitted)).

"The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case." *Dogwood*, 362 N.C. at 197, 657 S.E.2d at 364-65 (citations omitted). "It is fundamental that a court cannot create jurisdiction where none exists." *Ponder v. Ponder*, 247 N.C. App. 301, 306, 786 S.E.2d 44, 48 (2016) (citations and internal quotation marks omitted).

Appellate Rule 3(a) requires: "Any party entitled by law to appeal from a judgment or order of a superior . . . court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court . . . within the time prescribed by subsection (c) of this rule." N.C. R. App. P. 3(a). The State correctly argues: (1) Defendant failed to comply with the mandatory requirements of Rule 3; (2) this Court *lacks jurisdiction* to consider Defendant's purported notice of appeal; and, (3) the appeal must be dismissed. *Id.*; *see also Viar*, 359 N.C. at 401, 610 S.E.2d at 361. "Stated differently, a jurisdictional default brings a purported appeal to an end before it ever begins." *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365.

"It is well established in this jurisdiction that it is the duty of the appellant to see that the record on appeal is properly made up and transmitted." *State v. Dellinger*, 308 N.C. 288, 294, 302 S.E.2d 194, 197 (1983) (citation omitted). The record on appeal was proposed by Defendant and became the settled record on this appeal as a matter of law on 20 August 2018, after the State decided not to challenge or to serve notice of approval or objections, amendments, or an alternative proposed record. *See* N.C. R. App. P. 11(b).

Defendant's purported appeal was taken and docketed in this Court prior to entry of the 3 October 2018 civil judgment from which he

purports to appeal. The record was not compliant with Rules 9(a)(1)(h) and 11(b) and long-standing precedents when it was docketed without and prior to the civil judgment being entered. Over 136 years ago, our Supreme Court held: "To make [the trial court's] purpose a judgment, it must be entered of record, and until this shall be done, there is nothing to appeal from." *Logan v. Harris*, 90 N.C. 7, 7 (1884). Compliance with the requirements for entry of notice of appeal is jurisdictional. *Dogwood*, 362 N.C. at 197-98, 657 S.E.2d at 365. Appellate Rule 2 cannot be used to grant appellate review, where no jurisdiction exists. *See Ponder*, 247 N.C. App. at 306, 786 S.E.2d at 48.

In its response to Defendant's motion seeking to amend the record to add the missing judgment, the State also correctly argues that binding precedents show Defendant's notice of appeal was only from "the judgment entered in this cause on April 4, 2018," and not from the "rendering" of the civil judgment concerning attorney's fees in open court. As a result, the State also correctly argues that N.C. Gen. Stat. § 15A-1444 limits appeals from guilty pleas and removes this Court's appellate review to consider Defendant's arguments here. *See* N.C. Gen. Stat. § 15A-1444; *State v. Pimental*, 153 N.C. App. 69, 73, 568 S.E.2d 867, 870, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002).

Rule 3(a) and binding Supreme Court precedents also prohibit this Court from granting Defendant's motion to amend the record of a purported appeal that does not exist, and consequently, over which this Court unquestionably does not possess and cannot assert jurisdiction, *i.e.*, the *power* to act. N.C. R. App. P. 3(a) (2019); *Logan*, 90 N.C. at 7. None of these binding precedents or Rules, facts, or arguments are refuted by Defendant or explained away in the majority's opinion, which expressly recognizes the Rules and precedents. Defendant's purported direct appeal is properly dismissed and is not saved through Defendant's motion for a purported amendment.

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 ("PWC").

"*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). To warrant consideration, our Supreme Court held Defendant's "petition for the writ must show merit or that error was probably committed below." *Id.* (citation omitted). Without threshold allegations of merit and prejudice, review by certiorari is not

available to either by statute or by precedents to Defendant. *Id.*; N.C. Gen. Stat. §§ 15A-1442, 15A-1444(g).

To warrant issuance of the writ, Defendant's petition must show the purported issue on appeal has potential merit and, even if meritorious, that he suffered prejudice. *Id.* While his petition is not required to show he is certain to prevail on the merits, it alleges no potential of merit, asserts no prejudice or probability of a different result on remand. Defendant's meritless petition is properly denied. *See id.*

The majority's opinion does not state any basis to allow the petition or invoke Rule 2, but nonetheless grants Defendant's petition, purports to amend the record, and address the merits. As such, I also address Defendant's lack of demonstrated merit or prejudice in the underlying issue.

Defendant recognizes "his notice of appeal [was] insufficient" to invoke jurisdiction. As a result, he filed a PWC "out of an abundance of caution." In response to Defendant's PWC, the State again correctly states and argues our rules and precedents require the purported PWC be dismissed, as required by the Appellate Rules. N.C. R. App. P. 21(c) ("petition shall contain a . . . certified cop[y] of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition."). The State also correctly asserts, "this Court is without authority to entertain an appeal where there has been no entry of judgment." *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990) (citation omitted).

Unlike here, all cases cited in the majority's opinion *allowing* an amendment added an *existing* judgment entered *prior to* the appeal being taken to the record on appeal, but was mistakenly omitted therefrom. *State v. Petersilie*, 334 N.C. 169, 177-78, 432 S.E.2d 832, 837 (1993); *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981) (our Supreme Court "decided to allow the amendment [pursuant to Rule 9(b)(5)(b)] *to reflect* subject matter jurisdiction and then pass upon the substantive issue of the appeal" (emphasis supplied)); *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 367, 724 S.E.2d 543, 548 (2012).

None of these cases support allowing an amendment to include a judgment, which had *not yet been entered* when the appeal was taken and docketed, in order to retroactively supply jurisdiction, which did not exist when Defendant's appeal was taken or docketed.

We also all agree that even if a civil judgment has been entered, because Defendant failed to include it in the record, this Court lacks

jurisdiction to review it, and no relief from that order could be granted. By extension, if a purported appeal is taken before and docketed without any order or judgment having been entered, the appeal must be dismissed. There is no final entered order nor anything else properly before this Court to review. *Logan*, 90 N.C. at 8; *State v. McKoy*, No. COA18-599, __ N.C. App. __, __ S.E.2d __ (2020) (unpublished); *Searles*, 100 N.C. App. at 725, 398 S.E.2d at 56.

IV. Conclusion

The record on appeal contains no entered order that Defendant properly appealed from to invoke appellate jurisdiction for this Court to review. Defendant's purported notice of appeal is fatally defective and must be dismissed. *See* N.C. R. App. P. 3(a). Amendment does not provide jurisdiction to an appeal taken and docketed months prior to the entry of the civil judgment on 3 October 2018 and also does not include the judgment purportedly appealed from.

Defendant's purported notice of appeal only asserts review of Defendant's criminal judgment entered upon his guilty pleas, which is barred by statute. N.C. Gen. Stat. § 15A-1444(a1) (2019). We all agree Defendant does not otherwise challenge the sentence or judgment entered on 4 April 2018 pursuant to his guilty pleas and those judgments are undisturbed.

Defendant has failed to demonstrate any prejudice. The majority's decision remands for the trial court to again enter the *same judgment* it has already entered. The purported appeal does not invoke this Court's appellate jurisdiction and the Defendant's PWC is wholly without merit.

I also concur with Judge Berger's separate concurring in the result only opinion, wherein he concludes these procedural appeals cost countless hours of labor and tens-of-thousands of dollars, and "elevates form over substance. . . . [A]nyone interested in efficiencies and saving taxpayer dollars should hope the Supreme Court of North Carolina takes advantage of this opportunity to return us to the plain language of N.C. Gen. Stat. § 15A-1444(a2)."

Scarce judicial resources and taxpayer funds are wasted with these purported "appeals," which show no jurisdiction, assert no merits, result in no prejudice, and where the trial court will enter the same civil judgment of $390.00 on remand that Defendant acknowledged he owes.

There is nothing before this Court to properly review or remand. I vote to dismiss Defendant's purported appeal and motion to amend, and to deny his PWC. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
MICHAEL ADDIB NAZZAL, DEFENDANT

No. COA19-552

Filed 3 March 2020

1. Motor Vehicles—driving while impaired—felony death by vehicle—sufficiency of the evidence—impairment

The trial court improperly denied defendant's motions to dismiss charges for driving while impaired and felony death by vehicle because the State presented insufficient evidence that defendant was appreciably impaired at the time he crashed his car, killing a man. Only one law enforcement officer opined that defendant was impaired after observing defendant approximately five hours after the crash, and the officer neither asked defendant to perform any field sobriety tests nor asked him if or when he had ingested any impairing substances.

2. Motor Vehicles—failure to maintain lane control—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss a charge of failure to maintain lane control where—while driving on the highway at a high rate of speed, late at night, and in icy road conditions—defendant veered to the right of a parked tow truck that partially obstructed the right lane, attempted to pass the truck on the shoulder of the road, and struck a man standing on the shoulder. There was substantial evidence from which a jury could infer that defendant tried to pass the truck in this manner without first ascertaining that he could do so safely.

3. Homicide—second-degree murder—malice—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss his second-degree murder charge arising from a car crash in which defendant—while driving on the highway at a high rate of speed, late at night, and in icy road conditions—struck and killed a man while trying to pass a parked tow truck by veering on to the shoulder of the road. There was substantial evidence of malice where defendant had an extensive record of driving-related offenses and involvement in car accidents, was driving with a revoked license during the crash, drove away from the scene without checking whether anyone was harmed, washed his damaged car (suggesting

he was aware that he needed to remove blood from his vehicle), and downplayed the severity of the crash despite police informing him that he had killed someone.

4. Motor Vehicles—driving while impaired—evidence of prior drug use—harmless error

On appeal from convictions for driving while impaired (DWI), second-degree murder, and other offenses arising from a car crash, the Court of Appeals declined to review the denial of defendant's motion to suppress evidence of his prior drug use where the evidence was used solely to prove defendant's impairment at the time of the crash, the Court of Appeals had already reversed defendant's DWI conviction for insufficient evidence of impairment, and the impairment issue was irrelevant to the other charges (thus, any error was harmless).

5. Homicide—second-degree murder—request for jury instruction—accident as defense—harmless error

In a murder prosecution arising from a car crash, the trial court's decision not to instruct the jury on the defense of accident was, at most, harmless error where the court did instruct the jury on two lesser-included offenses (involuntary manslaughter and misdemeanor death by vehicle) that did not involve intentional killings, but the jury still convicted defendant of second-degree murder based on malice (thereby rejecting the idea that defendant acted unintentionally).

Appeal by defendant from judgments entered 22 February 2018 by Judge Rebecca W. Holt in Orange County Superior Court. Heard in the Court of Appeals 5 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryne E. Hathcock, for the State.

M. Gordon Widenhouse, Jr., for defendant.

ARROWOOD, Judge.

Michael Addib Nazzal ("defendant") appeals from judgments sentencing him upon his convictions for second-degree murder, driving while impaired ("DWI"), felony death by motor vehicle, and failure to maintain lane control. For the following reasons, we reverse defendant's convictions for DWI and felony death by motor vehicle. We otherwise hold that defendant's trial was free of prejudicial error.

I. Background

This case arises from an automobile collision caused by defendant on Interstate 40 West ("I-40 West") resulting in the death of Francisco Nolasco ("Mr. Nolasco"). As a result of this collision, defendant was indicted on 15 May 2017 for felony hit and run causing death, driving while license revoked ("DWLR"), DWLR for impaired driving, displaying revoked tags, operating a vehicle without insurance, failing to maintain lane control, DWI, felony death by motor vehicle, and second-degree murder. Defendant's case came on for trial before the Honorable Rebecca W. Holt at the 12 February 2018 Criminal Session of Orange County Superior Court. The evidence at trial tended to show the following.

Just before 2:00 a.m. on 17 December 2016, Mr. Nolasco's pickup truck was involved in a single-vehicle accident requiring assistance on I-40 West in Orange County. Road conditions that night were wet and icy. Mr. Nolasco called his friend and tow truck driver Omar Castillo ("Mr. Castillo") for assistance, and he arrived shortly thereafter. Upon realizing that Mr. Nolasco's pickup was precariously positioned partially in the right lane of traffic, Mr. Castillo immediately set about removing the vehicle from the road.

Mr. Castillo testified that he then positioned his tow truck in front of Mr. Nolasco's pickup, partially in the right lane of traffic. For unknown reasons, the tow truck's cable system failed to lift the pickup onto its rollback. At this time, Mr. Nolasco was standing on the shoulder of the road, with the tow truck between himself and the westbound lanes of traffic. Mr. Castillo began walking around the front of the tow truck to address the cable system malfunction. As he was in front of the tow truck, he heard screeching tires, dove over the guardrail, and observed a black Honda crash into the guardrail and hurdle forward, hitting the pickup and tow truck before proceeding down the shoulder between the tow truck and guardrail, hitting Mr. Nolasco and knocking him into the road.

Mr. Castillo testified that he went into the road to assist Mr. Nolasco and found him unconscious. He tried to signal oncoming cars but they did not see him, and he had to leave Mr. Nolasco in the road to preserve his own safety. Then another car traveling about forty seconds behind defendant ran over Mr. Nolasco. Based on his observation of the collision's intensity and Mr. Nolasco's unconscious body in the roadway, Mr. Castillo opined that defendant's black Honda killed him before the second car arrived. He testified that the second car stopped immediately after hitting Mr. Nolasco, but defendant only stopped briefly and then continued.

Austin Phillips ("Mr. Phillips"), the driver of the second car, testified that he saw the tow truck's flashing lights and switched from the right to left lane of westbound traffic in order to "avoid any contact with the person that may be getting out of the tow truck[.]" After realizing he had run over a human body, Mr. Phillips immediately pulled over and called 911 for assistance.

Trooper Kyle Underwood testified that he, Trooper Matthew Morrison, and one other highway patrolman arrived at the scene at 1:54 a.m. and began taking measurements, recording witness statements, and investigating the wreckage and other evidence at the scene. Trooper Underwood noted damage to the shoulder's guardrail at a position prior to the tow truck, damage to Mr. Nolasco's pickup, and a missing passenger side mirror on the tow truck. He discovered the front bumper of a black Honda 99 feet away.

After searching the serial number on the bumper, the troopers discovered that it belonged to a 2010 Honda Accord registered to defendant's name at a Greensboro address. They also determined that defendant's tags and registration were currently revoked due to a failure to carry insurance and his driver's license was currently suspended for a previous DWI conviction. The troopers then contacted the Guilford County Sheriff's Office for assistance locating defendant.

Sergeant James Meacham and Master Corporal Todd Riddle of the Guilford County Sheriff's Office arrived at defendant's Greensboro address just after 4:00 a.m. Thirty minutes later, defendant arrived in a black Honda Accord with significant front-end damage. This damage included deployed airbags, no front bumper, a shattered windshield, damage to the hood, missing headlights, and general body damage on the front of the car. Sergeant Meacham called Trooper Morrison and informed him that they had detained defendant at his residence. In his conversation with the deputies, defendant admitted that he had been involved in a collision but said "it wasn't a very bad one[,]" so he drove away. Sergeant Meacham testified that "[defendant's] actions indicated just a very carefreeness [sic] attitude about what had transpired[.]" The two deputies were relieved by deputies on the day shift at around 6:00 a.m.

Troopers Underwood and Morrison obtained an arrest warrant for felony hit and run and arrived at defendant's residence in Greensboro at around 7:00 a.m. Trooper Morrison observed that defendant's car was covered in droplets of ice and appeared to be much cleaner than his own patrol vehicle covered in road salt, despite both cars making a similar drive from Orange County to Greensboro in identical weather

conditions. Defendant was arrested and transported by the troopers to the Orange County Sheriff's Office for booking. Two cell phones found on defendant's person at the time of his arrest were seized.

Based upon his observations of defendant while they were en route to the sheriff's office, Trooper Underwood testified that he formed an opinion that defendant was appreciably impaired to the extent that it was unsafe for him to drive an automobile at the time of the collision five hours earlier. In addition to the mere nature of the collision site and his flight therefrom, Trooper Underwood based this opinion on the following evidence. When he observed defendant at approximately 7:00 a.m., defendant had red, glassy eyes, was unsteady on his feet, and at times was "speaking out of his head" and "rambling, going on with half sentences, speaking [in a way] that just did not make sense." Defendant also made contradictory statements regarding his location at the time of the collision, seeming confused about where it occurred. Additionally, defendant fell asleep on the ride to the sheriff's office. Trooper Underwood found this very strange because defendant had just been told the jarring news that he had killed a man. He stopped his patrol vehicle and had Trooper Morrison shake defendant awake, upon which defendant stated that he was fine. No other testifying officer formed the opinion that defendant was impaired at the time of the collision. Nor did any investigating officer ever subject defendant to any of the numerous field tests for impairment utilized by law enforcement.

A later search of defendant's phones revealed text messages tending to suggest he had been attempting to buy crack cocaine earlier in the day before the collision. The search also led the State to two testifying witnesses. Tiffany Haynes ("Ms. Haynes") testified that defendant called her for a "date" the day of the collision, stating that he would drive from Cary to her motel room in Greensboro that night. Because they had done the same thing on a previous "date" three weeks prior, Ms. Haynes believed that defendant intended to smoke crack with her, engage her in sexual intercourse, and then smoke marijuana. Robert Tate testified that defendant had bought an ounce of high-grade marijuana from him the day before the collision.

Defendant moved to dismiss the charges against him at the close of the State's evidence. The trial court denied the motions. The jury returned verdicts finding defendant guilty of DWLR, DWLR for impaired driving, displaying revoked tags, operating a vehicle without insurance, failing to maintain lane control, DWI, felonious hit and run causing injury, felony death by motor vehicle, and second-degree murder. The trial court arrested judgment on defendant's convictions for DWI

and felony death by motor vehicle. The court consolidated judgment on defendant's remaining convictions and sentenced him to 175 to 222 months' imprisonment. Defendant timely appealed.

II. Discussion

On appeal, defendant argues that the trial court erred by: (a) denying his motions to dismiss the charges of second-degree murder, DWI, felony death by motor vehicle, and failure to maintain lane control; (b) denying his motion to suppress evidence obtained from a search of his cell phones; (c) admitting prejudicial testimony of prior drug use; and (d) refusing to instruct the jury on the defense of accident. For the foregoing reasons, we reverse defendant's convictions for DWI and felony death by vehicle and otherwise hold his trial was free of prejudicial error.

A. Motions to Dismiss

Defendant argues that substantial evidence did not support his convictions for DWI, felony death by vehicle, and failure to maintain lane control, and thus the trial court erred in denying his motion to dismiss those charges. He further contends that the trial court erred in denying his motion to dismiss his second-degree murder charge, because the jury was instructed that defendant would need to be found guilty of either DWI or failure to maintain lane control to be guilty of second-degree murder.

We hold that the trial court erred in denying defendant's motion to dismiss the DWI and felony death by vehicle charges due to insufficient evidence of impairment. The trial court properly submitted the failure to maintain lane control charge to the jury. Substantial evidence supported the element of malice in defendant's commission of this offense, therefore the trial court did not err in submitting the second-degree murder charge to the jury.

1. 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) (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 (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).

2. DWI and Felony Death by Vehicle

[1] Defendant maintains that the trial court erred in denying his motions to dismiss the charges of DWI and felony death by vehicle because the State presented insufficient evidence that he was appreciably impaired at the time he caused the collision and hit Mr. Nolasco. We agree.

"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 . . . [w]hile under the influence of an impairing substance . . . ." N.C. Gen. Stat. § 20-138.1(a)(1) (2019). The person must "hav[e] his physical or mental faculties, or both, appreciably impaired by an impairing substance." N.C. Gen. Stat. § 20-4.01(48b) (2019).

We find our opinion in *State v. Eldred* to be instructive in the instant case. 259 N.C. App. 345, 815 S.E.2d 742 (2018). In *Eldred*, officers got a report of a wrecked, abandoned car on the roadside at 8:30 p.m. *Id.* at 346, 815 S.E.2d at 743. Though he did not testify how soon after the report the interaction occurred, an officer observed the defendant walking along the roadside approximately two to three miles from the car. *Id.* The defendant had visible head injuries, stated that he was "smoked up on meth" and needed medical attention, and exhibited signs of impairment such as twitching and having difficulty walking straight. *Id.* at 346-47, 815 S.E.2d at 743. The defendant was then taken to the hospital, where a highway patrolman observed him at 9:55 p.m. *Id.* at 346, 815 S.E.2d at 743. He told the patrolman that he had been driving his car and set out on foot when it ran out of gas, later indicated that he had been hurt in a car wreck "a couple of hours ago[,]" and stated that he was currently "on meth." *Id.* at 347, 815 S.E.2d at 743 (internal quotation marks omitted). After observing the defendant exhibit numerous signs of impairment at the hospital, the patrolman formed the opinion that the defendant was appreciably impaired. *Id.*

This Court held this evidence insufficient to prove that the defendant was appreciably impaired at the time he wrecked his car. It observed that:

> [The first officer], who first found Defendant after he had walked two or three miles beyond his vehicle, did not determine whether Defendant's condition was caused by an impairing substance or by the injury that resulted in emergency medical personnel taking Defendant to the hospital. [The patrolman], who interviewed Defendant in the hospital, did not obtain information concerning when or where Defendant had consumed meth or any other impairing substance. Neither officer even knew when Defendant's vehicle had veered off the highway.

Id. at 350, 815 S.E.2d at 745.

In the instant case, Trooper Underwood formed his opinion of impairment entirely through passive observation of defendant. He did not request defendant to perform any of the several field tests law enforcement officers often use to gauge a motorist's impairment. Moreover, as in *Eldred*, he did not ask defendant if or when he had ingested any impairing substances. Trooper Underwood was the only law enforcement officer that observed defendant and formed an opinion that he was appreciably impaired. These observations occurred at 6:48 a.m., approximately five hours after the collision occurred. This lapse of time is over three times longer than the one that was found unacceptable in *Eldred*.

The State argues that the signs of impairment observed by Trooper Underwood five hours later, when coupled with the very nature of the collision, defendant's immediate flight from the scene, and his gross understatement of the collision's severity, provide substantial evidence that defendant was appreciably impaired at the time of the collision. We disagree. Hit and run and DWI are separate offenses for a reason. Without more, the former cannot suffice as substantial evidence of the latter. Furthermore, defendant's understatement of the collision's severity can more readily be interpreted as downplaying his culpability than an impaired perception of events. Again, without more this cannot suffice as substantial evidence of appreciable impairment at the time of the collision. There must be some evidence closer to that time which more than circumstantially implies that defendant was impaired. *See State v. Rich*, 351 N.C. 386, 398-99, 527 S.E.2d 299, 305-306 (2000) (upholding trial court's admission of officer opinion of appreciable impairment

based upon investigation of accident scene, defendant's high rate of speed, observation of defendant's combative behavior with EMS at scene and bloodshot, watery eyes shortly after wreck, no indication of injuries to defendant, and smell of alcohol observed at hospital two hours later).

Therefore, the trial court erred in denying defendant's motion to dismiss the DWI charge. The trial court also erred in denying defendant's motion to dismiss the felony death by motor vehicle charge, because DWI is a necessary element of this offense. *See* N.C. Gen. Stat. § 20-141.4(a1)(2) (2019). Since the trial court arrested judgment on both convictions, we reverse them without remand.

3. Failure to Maintain Lane Control

[2] Defendant argues that the State failed to present substantial evidence that he violated N.C. Gen. Stat. § 20-146(d)(1) (2019) by veering to the right of Mr. Castillo's tow truck and attempting to pass it on the shoulder of the road. We disagree.

"Whenever any street has been divided into two or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." *Id.* Defendant argues that because the evidence showed that Mr. Castillo's tow truck partially obstructed the right lane in which he was traveling, it was not "practicable" for him to drive entirely within that lane of traffic.

According to defendant, the offense has not been committed if a motorist recklessly veers out of his lane when it is no longer practicable to remain there due to an upcoming obstruction. In other words, defendant interprets the statute such that impracticability is an absolute defense. Although defendant's Memorandum of Additional Authority includes N.C.P.I. Crim. 207.90 (2019), which he argues supports this interpretation, we note that on appeal defendant has not challenged any of the trial court's jury instructions omitting the practicability element from the offense.

We do not interpret N.C. Gen. Stat. § 20-146(d)(1) to apply only to situations where it is practicable for a motorist to stay within his current lane of traffic. Rather, this provision contains two disjunctive mandates. A motorist must drive his vehicle "as nearly as practicable entirely within a single lane[.]" *Id.* A motorist must also refrain from changing lanes unless he "has first ascertained that such movement can be made with safety." *Id.*

Here, there was substantial evidence from which the jury could infer that defendant did not ascertain that veering onto the shoulder and passing the tow truck on its right side could be done with safety. Viewing the evidence in a light most favorable to the State, defendant was driving late at night at a speed unreasonably fast for the icy conditions. Upon seeing Mr. Castillo's tow truck partially obstructing his current lane of traffic, defendant decided to pass the vehicle on the shoulder without first determining what, if any, further perils lay in his redirected course. The tow truck obstructed his view of at least some portion of the shoulder through which he would soon drive. As evidenced by the testimony of Mr. Phillips, a reasonable motorist would not have attempted to pass the tow truck to its right along the shoulder. A motorist traveling 40 seconds behind defendant ascertained that passing the tow truck on the shoulder-side could not be done with safety. From this evidence a reasonable juror could find that defendant did not make such a determination before conducting his maneuver.

Even under defendant's interpretation of N.C. Gen. Stat. § 20-146(d)(1), there was substantial evidence on each side of the practicability issue from which the jury could make its own determination. In negligence *per se* cases interpreting N.C. Gen. Stat. § 20-146(d)(1), we have previously held that where a plaintiff puts forth evidence that the defendant crossed the center line into oncoming traffic and the defendant puts forth evidence that it was impracticable to stay within his lane "for reasons other than his own negligence," the conflicting evidence "merely . . . raise[s] an issue of credibility for the jury to resolve." *Sessoms v. Roberson*, 47 N.C. App. 573, 579, 268 S.E.2d 24, 28 (1980) (citations omitted). Mr. Castillo testified that road conditions were icy, he heard screeching tires before the collision, and defendant's vehicle passed his tow truck traveling at a high rate of speed. From this a reasonable juror could infer that, had defendant been traveling at a reasonable speed for conditions, it may have been practicable for him to come to a complete stop, or significantly slow his speed before proceeding, without departing from the right lane of I-40 West.

Therefore, substantial evidence supported submission of the failure to maintain lane control charge to the jury. The trial court did not err in denying defendant's motion to dismiss this charge.

4. Second-Degree Murder

[3] Defendant argues that the State failed to present substantial evidence of certain elements of second-degree murder. We disagree.

In the instant case, the jury was instructed that defendant would need to be found guilty of either DWI or failure to maintain lane control to be guilty of second-degree murder. *See State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (limiting review of substantial evidence supporting conviction to limited theory of conviction on which jury was instructed). On appeal, defendant does not dispute that the State presented substantial evidence that he drove the car that hit Mr. Nolasco and proximately caused his death. Defendant's only argument is that a lack of substantial evidence supporting malice and either DWI or failure to maintain lane control mandates reversal of his conviction for second-degree murder.

Because we uphold defendant's conviction for failure to maintain lane control, our only remaining task is to determine whether the State presented substantial evidence of defendant's malice in the commission of this offense.

> Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation. Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice. . . . Accordingly, in [cases where the defendant is charged with committing second-degree murder by vehicle], it [i]s necessary for the State to prove only that [the] defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind. The State [i]s not required to show that [the] defendant had a conscious, direct purpose to do specific harm or damage, or had a specific intent to kill.

Rich, 351 N.C. at 395, 527 S.E.2d at 304 (internal quotation marks and citations omitted).

Viewing the evidence in a light most favorable to the State, defendant was driving while his license was revoked both for prior DWI and non-DWI offenses. He failed to insure his car. It was late at night, and road conditions were icy. Defendant was driving at a speed that was irresponsible in these driving conditions and did not allow him to maintain control of his vehicle and make safe maneuvers around potential hazards. He became aware that a tow truck with flashing lights was in the process of loading another car onto its rollback, sitting partially within his current lane of traffic. Rather than switching to the left lane as Mr. Phillips did, defendant veered his vehicle to the right in an attempt

to pass the tow truck along the shoulder of the interstate. In so doing, he was unaware of what additional obstacles or people may be on the portion of the shoulder obstructed from his view by the tow truck. *See State v. Schmieder*, 265 N.C. App. 95, 102, 827 S.E.2d 322, 328 (finding substantial evidence of malice where, in addition to extensive driving record, defendant "was driving above the speed limit, following too close to see around the cars in front of him, and passing across a double yellow line without using turn signals"), *disc. rev. dismissed*, 372 N.C. 711, 830 S.E.2d 832 (2019).

Defendant lost control of his vehicle and hit the guard rail, the tow truck, and Mr. Nolasco. He stopped briefly. The collision was so severe that it ripped the front bumper from his car, cracked the windshield, broke the headlights, and deployed the airbags. Despite the severity of the collision, defendant did not try to ascertain if anyone was harmed or attempt to render assistance of any sort. He drove away and washed his car, suggesting he was aware that he had hit someone and needed to remove blood and other evidence from his vehicle. *See State v. Tellez*, 200 N.C. App. 517, 525, 684 S.E.2d 733, 739 (2009) (finding substantial evidence of malice where, among other things, defendant fled scene of accident and took steps to avoid apprehension without rendering any assistance or checking on safety of others involved in accident). In his interactions with law enforcement officers at his home, he casually downplayed the severity of the collision despite being informed that he had killed someone.

The State published a redacted version of defendant's extensive driving record to the jury. In addition to six speed-related offenses, two willful refusals to submit to a chemical test for intoxicants, and two prior convictions for driving while license revoked, defendant's driving record revealed that his license was revoked for a DWI conviction at the time of the collision. The jury also heard testimony from a law enforcement officer that arrested defendant on suspicion of DWI on a prior occasion. Defendant had boasted to this officer that he "kn[e]w how to work [the system]" and avoid the consequences of his conduct behind the wheel. Furthermore, defendant's driving record revealed that he had been involved in five car accidents in the last twenty years, two of which caused personal injury. *Schmieder*, 265 N.C. App. at 99, 827 S.E.2d at 326 ("This Court has held evidence of a defendant's prior traffic-related convictions admissible to prove the malice element in a second-degree murder prosecution based on vehicular homicide. Likewise, whether defendant knew that he was driving with a suspended license tends to show that he was acting recklessly, which in turn tends to show malice.") (internal quotation marks, citations, and alterations omitted).

Thus, the jury could infer that defendant was aware of the risk to human life caused by his behavior on the road.

From all this evidence, the jury could infer that defendant was well aware of the dangers to human life posed by his pattern of behavior behind the wheel, and on this occasion once again engaged in dangerous driving with indifference to its consequences. Therefore, substantial evidence supported the element of malice by reckless disregard for human life. Accordingly, the trial court did not err in submitting the second-degree murder charge to the jury.

B. Motion to Suppress and Admission of Witness Testimony

[4] Defendant next argues that the trial court erred in denying his motion to suppress evidence obtained as fruits of the search of his two cellular phones. He further argues that the trial court erred in admitting the testimony of Ms. Haynes relating to his prior use of crack cocaine.

We have determined that substantial evidence supported defendant's second-degree murder conviction on the theory of failure to maintain lane control with malice. We have also reversed defendant's conviction for DWI. We agree with the concession of defendant's counsel at oral argument: the evidence obtained from his cell phones was used solely to prove his impairment at the time of the collision. Because we have vacated the driving while impaired conviction, we need not address defendant's arguments regarding the alleged error in the denial of defendant's motion to suppress and admission of evidence obtained as fruits of the search of his phones. Because this evidence is not relevant to the remaining charges, any error is harmless.

C. Jury Instruction on Accident

[5] Defendant's final argument is that the trial court erred by denying his request for a jury instruction on accident. Accepting defendant's position *arguendo*, we find this error harmless in light of other instructions given to the jury.

"The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another." *State v. Riddick*, 340 N.C. 338, 342, 457 S.E.2d 728, 731 (1995) (internal quotation marks and citation omitted). We have previously held that failure to give an instruction on accident in a trial court's instructions on murder is harmless error if the jury is instructed on lesser-included offenses that do not require a *mens rea* of intent. *Id.* at 343-44, 457 S.E.2d at 732. In *Riddick*, the trial court gave an instruction on involuntary manslaughter as a

lesser-included offense and the jury found the defendant guilty of first-degree murder. *Id.* Assuming *arguendo* that failure to give an accident instruction was error, we held that this error was harmless. *Id.* Because first-degree murder requires specific intent to kill, we reasoned that the jury's verdict expressed rejection of any notion that defendant's conduct was accidental. *Id.*

In the instant case, the trial court instructed the jury on second-degree murder and the lesser-included offenses of involuntary manslaughter and misdemeanor death by vehicle, noting that both lesser offenses involved killings that were unintentional. The jury chose to convict defendant of second-degree murder, which requires a *mens rea* of malice: that defendant intentionally performed "an inherently dangerous act or omission, done in . . . a reckless and wanton manner . . . manifest[ing] a mind utterly without regard for human life and social duty and deliberately bent on mischief." N.C. Gen. Stat. § 14-17(b)(1) (2019). As in *Riddick*, the jury's verdict rejects the notion that defendant's passing of the tow truck along the shoulder was unintentional. Therefore, any error in failing to give an instruction on accident was harmless.

III. Conclusion

For the foregoing reasons, we reverse defendant's convictions for DWI and felony death by vehicle due to insufficient evidence of impairment. Defendant's trial was otherwise free of prejudicial error.

REVERSED IN PART; NO ERROR IN PART.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
LUIS GUILLERMO NEIRA, DEFENDANT

No. COA19-653

Filed 3 March 2020

Motor Vehicles—speeding to elude arrest—eligibility for expunction—offenses involving impaired driving

The trial court erred as a matter of law in determining that defendant's conviction for speeding to elude arrest was ineligible for expunction as an "offense involving impaired driving" under N.C.G.S. § 15A-145.5(a)(8a). Even though defendant committed the offense while drunk and was simultaneously convicted of driving while impaired, the offense itself does not meet the controlling statutory definition of an "offense involving impaired driving."

Appeal by Defendant from order entered 13 June 2019 by Judge Vinston Rozier in Wake County Superior Court. Heard in the Court of Appeals 21 January 2020.

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

Anton M. Lebedev for the Defendant.

BROOK, Judge.

Luis Guillermo Neira ("Defendant") appeals from an order denying his petition for the expunction of his conviction over ten years ago of felonious speeding to elude arrest. Because we hold that the trial court erred in determining that Defendant was ineligible for an expunction, we reverse and remand.

I. Background

Defendant was charged 9 January 2007 by arrest warrant with felony speeding to elude arrest and by criminal citation with speeding and driving while impaired ("DWI") in Wake County District Court. Defendant's arrest warrant charged that Defendant

> operate[d] a motor vehicle on a higway [sic] while fleeing or attempting to elude [a law enforcement officer] who was in lawful perforance [sic] of his duties by

(1) speeding in excess of 15 mph over the speed limit[]

(2) reckless driving

(3) gross impairment of an impairing substance[.]

Defendant was indicted 6 March 2007 in Wake County District Court for felonious speeding to elude and DWI; the charges stemmed from the same events of 9 January 2007. Defendant was convicted by a jury on 12 September 2007 of felonious speeding to elude arrest and of DWI. The trial court found, as a mitigating factor, that "Defendant was significantly impaired by alcohol" when he committed the offense. The trial court sentenced Defendant to four to five months in the custody of the North Carolina Department of Corrections for the charge of speeding to elude. The trial court also sentenced Defendant to 120 days on the charge of impaired driving. It suspended that sentence upon Defendant's successful completion of 24 months' supervised probation.

Defendant filed a petition for expunction of the speeding to elude charge in Wake County Superior Court on 1 November 2018. As part of his petition, Defendant submitted affidavits of support from members of the community asserting that he has good character and a good reputation in the community. The State opposed expunction because the charge for "fleeing to elude [was filed under] the same file number as DWI. This is an offense 'involving impaired driving.' " The trial court denied Defendant's petition for expunction, finding he was ineligible for an expunction because the offense "involve[d] impaired driving per [N.C. Gen. Stat. §]15A-156.6(a)(8a)[.]"

II. Jurisdiction

Defendants who have been denied the expunction of a conviction have no appeal as of right. *See* N.C. Gen. Stat. § 15A-1444 (2019). However, Defendant filed a petition for writ of certiorari on 14 June 2019, which this Court allowed on 3 July 2019.

III. Analysis

Defendant contends that the lower court erroneously determined Defendant was ineligible for an expunction and, as a result, erroneously denied his expunction petition. We agree.

A. Standard of Review

Whether to grant an expunction is a discretionary determination. North Carolina General Statutes § 15A-145.5(c) provides that a person convicted of a nonviolent misdemeanor or nonviolent felony, but who

has no other misdemeanor or felony convictions other than traffic violations, may petition for expunction of that person's criminal record. N.C. Gen. Stat. § 15A-145.5(c) (2019). If the trial court finds the petitioner eligible for expunction, "it *may* order that such person be restored . . . to the status the person occupied before such arrest or indictment or information." *Id.* (emphasis added). Given its discretionary nature, the review of a denial of an expunction will generally be reviewed solely for an abuse of discretion. *See Little v. Penn Ventilator Co.*, 317 N.C. 206, 217-18, 345 S.E.2d 204, 211-12 (1986) ("may" indicates discretion).

Here, however, Defendant alleges that the trial court misapplied our statutes in holding that it had no choice but to deny Defendant's expunction petition. Alleged errors in statutory interpretation are errors of law that we review de novo. *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998); *see also State v. Cotton*, 318 N.C. 663, 668, 351 S.E.2d 277, 280 (1987) ("Where the trial court has discretion but erroneously fails to exercise it and rules as a matter of law, the prejudiced party is entitled to have the matter reconsidered."). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted). We therefore review the question of whether the trial court erroneously denied Defendant's expunction petition de novo.

B. Denial of Expunction Petition

Defendant contends that the trial court erred in concluding that the offense that Defendant sought to have removed from his criminal record "involve[d] impaired driving per [N.C. Gen. Stat. §]15A-156.6(a)(8a)" and, as such, was ineligible for expunction.

Under N.C. Gen. Stat. § 15A-145.5(a)(8a), a petitioner is ineligible for an expunction of a conviction for "[a]n offense involving impaired driving as defined in G.S. 20-4.01(24a)." N.C. Gen. Stat. § 15A-145.5(a)(8a) (2019). North Carolina General Statutes § 20-4.01(24a) states:

> Offense Involving Impaired Driving. – Any of the following offenses:
>
> a. Impaired driving under G.S. 20-138.1.
>
> b. Any offense set forth under G.S. 20-141.4 when conviction is based upon impaired driving or a substantially similar offense under previous law.

> c. First or second degree murder under G.S. 14-17 or involuntary manslaughter under G.S. 14-18 when conviction is based upon impaired driving or a substantially similar offense under previous law.
>
> d. An offense committed in another jurisdiction which prohibits substantially similar conduct prohibited by the offenses in this subsection.
>
> e. A repealed or superseded offense substantially similar to impaired driving, including offenses under former G.S. 20-138 or G.S. 20-139.
>
> f. Impaired driving in a commercial motor vehicle under G.S. 20-138.2, except that convictions of impaired driving under G.S. 20-138.1 and G.S. 20-138.2 arising out of the same transaction shall be considered a single conviction of an offense involving impaired driving for any purpose under this Chapter.
>
> g. Habitual impaired driving under G.S. 20-138.5.

N.C. Gen. Stat. § 20-4.01(24a) (2019).

Here, the lower court denied Defendant's petition for expunction, finding Defendant not "eligible for an expunction of the offense[] listed . . . because [the offense] involves impaired driving per 15A-145.5(a)(8a)." As a matter of fact, the felonious fleeing to elude conviction Defendant seeks to have expunged here involved impaired driving; it arose from the same incident resulting in his DWI conviction. But the statutory regime defines expunction eligibility in term of the *offense* in question. Felonious speeding to elude arrest is not an *offense* involving impaired driving per N.C. Gen. Stat. § 20-4.01(24a). And, while it may seem counterintuitive that an offense committed while driving impaired is not an offense "involving impaired driving," the statutory definition controls in this inquiry. *See In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974) (noting that where a statute "contains the definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be."). Therefore, the lower court's determination that Defendant was ineligible for an expunction of his fleeing to elude conviction was an error of law.

The State notes that even "a person with an eligible conviction is not entitled to expungement" because N.C. Gen. Stat. § 15A-145.5(c) grants trial courts the discretion to grant or deny expunctions sought by eligible petitioners. We agree with the State that whether to grant an expunction

is a discretionary matter, and that the trial court could have, in its discretion, denied Defendant's petition after considering, for example, that the sentencing court found Defendant was "significantly impaired by alcohol[.]" However, the trial court did not deny Defendant's petition as an exercise of discretion but rather because it found Defendant was ineligible for expunction; this determination reflects an error of law.

IV. Conclusion

Having concluded that the trial court made an error of law in determining that Defendant was ineligible for expunction of the offense of fleeing to elude arrest, we must reverse the denial of Defendant's petition for expunction and remand to the trial court for it to exercise its discretion in determining whether to grant the petition.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

STATE OF NORTH CAROLINA
v.
CHARLES EDGAR PRATT, DEFENDANT

No. COA19-435

Filed 3 March 2020

1. Criminal Law—jury instructions—requested defense—entrapment—predisposition to commit crime

In a prosecution for multiple drug trafficking offenses, defendant was not entitled to a jury instruction on the defense of entrapment where the evidence showed defendant's predisposition to commit the offenses for which he was charged. Although the State's confidential informant encouraged defendant to obtain illegal drugs in order to trade them for home repair work, defendant first learned of the drugs-for-work idea from a third party unaffiliated with the State, and it was defendant who then brought the idea to the attention of the State's informant.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

After defendant was convicted of multiple drug trafficking offenses, the trial court erred by entering a civil judgment against

defendant for attorney fees without affording defendant notice and an opportunity to be heard as required by N.C.G.S. § 7A-455.

Appeal by Defendant from judgments entered 2 May 2018 and 4 May 2018 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 22 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for Defendant-Appellant.

COLLINS, Judge.

Defendant Charles Edgar Pratt appeals from: (1) the 2 May 2018 criminal judgment entered upon his convictions for (a) trafficking in opium by transport, (b) trafficking in opium by possession, and (c) possession with intent to sell and/or deliver methadone; and (2) the 4 May 2018 civil judgment ordering that Defendant pay attorney's fees in connection with his defense. Defendant contends that the trial court erred by: (1) entering the criminal judgment after denying Defendant's request that the trial court instruct the jury on the affirmative defense of entrapment; and (2) entering the civil judgment without giving Defendant notice and an opportunity to be heard on the attorney's fees. We affirm in part and vacate and remand in part.

I. Background

Defendant was arrested on 7 August 2015 by the Onslow County Sheriff's Office on suspicion of drug trafficking. On 14 February 2017, Defendant was indicted by an Onslow County grand jury on the following charges: (1) trafficking in more than four but less than 14 grams of opium by manufacturing, in violation of N.C. Gen. Stat. § 90-95(h)(4); (2) trafficking in more than four but less than 14 grams of opium by transport, in violation of N.C. Gen. Stat. § 90-95(h)(4); (3) trafficking in more than four but less than 14 grams of opium by possession, in violation of N.C. Gen. Stat. § 90-95(h)(4); and (4) possession with intent to sell and deliver methadone, in violation of N.C. Gen. Stat. § 90-95(a)(1). Defendant pled not guilty on all counts, and gave notice that he would seek to assert the affirmative defense of entrapment.

The matter came on for trial on 30 April 2018. At the close of State's evidence, Defendant moved to dismiss the trafficking by manufacturing

count, which the State joined and the trial court allowed. At the charge conference, Defendant requested that the jury be instructed on entrapment, and the State objected. The trial court denied Defendant's request, stating that Defendant "failed to show that he was not otherwise willing to" commit the crimes with which he was charged.

On 2 May 2018, Defendant was convicted on the trafficking by transport, trafficking by possession, and possession with intent to sell and/or[1] deliver counts. The trial court entered judgment upon the convictions the same day, and sentenced Defendant to 70 to 93 months' imprisonment. The trial court also imposed court costs and fines of $51,072.50 and stated that Defendant would be required to reimburse the State for the costs of his defense "in an amount to be determined[,]" which the trial court ordered Defendant's trial counsel to calculate and submit an application for the next day. Defendant gave notice of appeal in open court.

Defendant's trial counsel filed a fee application with the trial court later that day, and on 4 May 2018, the trial court entered a civil judgment against Defendant for $3,300 of attorney's fees.

II. Appellate Jurisdiction

Defendant's oral notice of appeal in open court was sufficient to invoke this Court's jurisdiction to review the criminal judgment entered against him. N.C. Gen. Stat. § 7A-27(b)(1) (2018); N.C. R. App. P. 4(a)(1).

Defendant did not file a written notice of appeal from the civil judgment against him. However, Defendant has filed a petition for a writ of certiorari with this Court asking that we review the civil judgment, and we exercise our authority under North Carolina Rule of Appellate Procedure 21 to grant Defendant's petition and review that judgment as well.[2]

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1. Although Defendant was indicted for "possess[ion] with the intent to sell *and* deliver" methadone, and was thereafter convicted of "POSSESSION WITH INTENT TO SELL *AND/OR* DELIVER METHADONE" (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)).

2. The State filed a motion to dismiss Defendant's appeal from the civil judgment based upon Defendant's failure to timely file written notice appeal therefrom. Because we grant Defendant's petition for a writ of certiorari and will review the civil judgment, we deny the State's motion to dismiss.

III. Discussion

Defendant contends that the trial court erred by (1) denying Defendant's request for an entrapment instruction and (2) entering the civil judgment without giving Defendant an opportunity to be heard on the attorney's fees. We address each argument in turn.

A. Criminal Judgment/Entrapment Instruction

[1] Our Supreme Court has said:

> Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law.
>
> The defense of entrapment consists of two elements:
>
> > (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime[; and]
> >
> > (2) [that] the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.
>
> In the absence of evidence tending to show *both* inducement by government agents *and* that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury.

State v. Walker, 295 N.C. 510, 513, 246 S.E.2d 748, 749-50 (1978) (internal quotation marks and citations omitted).

While the burden is on the defendant to "first present credible evidence tending to support a defense of entrapment before a trial court may submit the question to a jury[,]" *State v. Thompson*, 141 N.C. App. 698, 706, 543 S.E.2d 160, 165 (2001), where "the State's own evidence raises an inference of entrapment . . . the submission of the defense is obviously proper[.]" *State v. Neville*, 302 N.C. 623, 626, 276 S.E.2d 373, 375 (1981). "If defendant's evidence creates an issue of fact as to

entrapment, then the jury *must* be instructed on the defense of entrapment." *State v. Branham*, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002) (emphasis added). "Whether the evidence, taken in the light most favorable to the defendant, is sufficient to require the trial court to instruct on a defense of entrapment is an issue of law that is determined by an appellate court de novo." *State v. Ott*, 236 N.C. App. 648, 651, 763 S.E.2d 530, 532 (2014).

When viewed in the light most favorable to Defendant, the record contains credible evidence tending to show that Defendant was persuaded by Jason Ford, a confidential informant working with the Onslow County Sheriff's Office, to commit the crimes for which Defendant was tried and convicted. The State conceded at the charge conference that Ford acted as a confidential informant for the State and, as discussed more fully below, Defendant testified that Ford encouraged Defendant to obtain methadone and exchange it for assistance with repairing the roof of Defendant's house. Accordingly, we conclude that Defendant met his burden of showing the first element of entrapment, i.e., "acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime[.]" *Walker*, 295 N.C. at 513, 246 S.E2d at 749-50.

However, our Supreme Court has made clear that a showing of such persuasion is insufficient standing alone to entitle a defendant to an entrapment instruction:

> The defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime *and when the origin of the criminal intent lies with the law enforcement agencies. We note that this is a two step test and a showing of trickery, fraud or deception by law enforcement officers alone will not support a claim of entrapment. The defendant must show that the trickery, fraud or deception was practiced upon one who entertained no prior criminal intent.*

State v. Hageman, 307 N.C. 1, 28, 296 S.E.2d 433, 449 (1982) (emphasis added) (internal quotation marks and citations omitted). Put another way, "[t]he defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials." *Thompson*, 141 N.C. App. at 706, 543 S.E.2d at 165. "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where

the police merely afford the defendant an opportunity to commit the crime." *Hageman*, 307 N.C.at 31, 296 S.E.2d at 450.

Defendant's own testimony establishes that: (1) the criminal opportunity—that Defendant would obtain methadone and exchange it for assistance repairing the roof of his house—originated with a third party who is not alleged to have been working for or affiliated with the State; (2) Defendant told Ford about the opportunity; and (3) Ford thereafter encouraged Defendant to take advantage of the opportunity and offered to help facilitate.

At trial, Defendant testified as follows:

> Q. Go back to where it all started, and tell the Court about that.
>
> A. Month earlier, I had an opportunity -- well, messed up opportunity -- but **I had an opportunity through a buddy of my nephew's to do some work for some methadones**.
>
> Q. And when you say "to do some work for some methadones," are you saying that you were going to do work for methadones, or someone else was?
>
> A. Someone else was.
>
> Q. Okay. And what was the work?
>
> A. Frame my roof in, and do my roof.

Soon thereafter, during a colloquy with the trial court, Defendant said that "Mr. Ford is my buddy, or was my friend[,]" and not merely a "buddy of [Defendant's] nephew's." And regarding Ford's involvement in the drugs-for-work "opportunity[,]" Defendant testified as follows:

> Q. Okay. Was Mr. Pratt -- or, sorry -- was Mr. Ford aware of this?
>
> A. He should have been. He -- he did -- yes, he was.
>
> Q. All right. Did you and Mr. Ford ever have conversations about getting the roof done if you paid the methodones [sic] --
>
> A. Yeah.
>
> Q. -- or words to that effect?
>
> A. **He offered to help me, five methadones, telling me that it would be a good deal. He'd have his -- some of his -- he'd ask some of his friends to get some methadones**

> **and everything, and he'd help me get the amount that I needed so I could do that roof**.

Defendant's own testimony therefore indicates that it was an unidentified third party—a "buddy of [Defendant's] nephew's[,]" rather than Ford, who Defendant testified was his own friend—who proposed the drugs-for-work "opportunity" that was the genesis of the drug deal that ultimately led to Defendant's convictions, and that Ford merely "offered to help" facilitate the "opportunity" and opined that it was "a good deal[.]"

Our Supreme Court has made clear that a law-enforcement officer or agent does not entrap a defendant by offering to help facilitate a criminal scheme that the defendant already has in place. *See Hageman*, 307 N.C. at 29-30, 296 S.E.2d at 449 ("It is well settled that the defense of entrapment is not available to a defendant who has a predisposition to commit the crime independent of governmental inducement and influence. The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment."). Indeed, the Court has stated that the second element of entrapment is concerned with whether "the crime is the product of the creative activity of the law enforcement authorities." *Walker*, 295 N.C. at 513, 246 S.E.2d at 750; *see also Hageman*, 307 N.C. at 28, 296 S.E.2d at 449 (entrapment defense only available "when the origin of the criminal intent lies with the law enforcement agencies"). As the criminal scheme in this case originated between Defendant and a third party, and the State's agent merely offered to assist in seeing that scheme realized, the crime was not the product of the creative activity of law enforcement.

Defendant urges in his brief on appeal that "it was Jason Ford's idea for [Defendant] to use methadone to pay for his roof being repaired[,]" because Ford "offered to help [Defendant] fix his roof in exchange for 'five methadones.' " But Defendant's position both lacks evidentiary support and contradicts his position below. First, Defendant's testimony that Ford "offered to help" him to take advantage of the "opportunity" to have his nephew's friend fix his roof negates the idea that Ford came up with the criminal scheme; plainly, one offers to "help" with a task that has already been conceived. And second, Defendant's characterization impermissibly contradicts his trial counsel's arguments at the charge conference that the drugs-for-work "opportunity" did not originate with Ford, who "heard this idea from someone else."[3] *See Weil v. Herring*,

3. At the charge conference, Defendant's trial counsel argued that Ford "heard that idea and also encouraged [Defendant] to do it," which in Defendant's trial counsel's

207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("the law does not permit parties to swap horses between courts in order to get a better mount").

Accordingly, the record demonstrates that Ford "merely afford[ed] the defendant an opportunity to commit the crime[s,]" which Defendant was predisposed to commit. *Hageman*, 307 N.C. at 31, 296 S.E.2d at 450. Our conclusion that Defendant was predisposed to commit the trafficking and possession offenses is buttressed by Defendant's testimony that he (1) sold Ford methadone one month prior to his arrest in this case and (2) set up the drug deal that led to his arrest entirely independently of Ford or any other agent of the State.

Because, in the light most favorable to Defendant, the record demonstrates that (1) neither the drugs-for-work "opportunity" nor the drug deal that Defendant pursued to take advantage thereof originated with Ford or any other agent of the State and (2) Defendant himself brought the criminal opportunity to Ford's attention, we conclude that Defendant has failed to demonstrate that "the origin of the criminal intent lies with the law enforcement agencies" and that he "entertained no prior criminal intent" for purposes of showing the second element of entrapment. *Id.* at 28, 296 S.E.2d at 449 (internal quotation marks, emphasis, and citation omitted). We accordingly conclude that Defendant was not entitled to an entrapment instruction, and that the trial court did not err by denying Defendant's request for the same.

B. Civil Judgment/Opportunity To Be Heard

[2] N.C. Gen. Stat. § 7A-455 allows the trial court to enter a civil judgment against a convicted indigent defendant for attorney's fees and costs. Before a judgment imposing attorney's fees may be entered against him, an indigent criminal defendant must be given notice and an opportunity to be heard thereupon. *State v. Jacobs*, 172 N.C. App. 220, 235-36, 616 S.E.2d 306, 316-17 (2005) (vacating civil judgment for attorney's fees because "there is no indication in the record that defendant was notified of and given an opportunity to be heard regarding the appointed attorney's total hours or the total amount of fees imposed").

Defendant argues that he was not given an opportunity to be heard regarding the attorney's fees contemplated within the civil judgment entered against him, and the State concedes in its brief that, if we grant Defendant's petition for a writ of certiorari and reach the civil judgment

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understanding meant that the trial court "can strike out the first person"—i.e., the person who originated the criminal plan—for purposes of analyzing the second element of entrapment.

as we have, the trial court's failure to provide Defendant with an opportunity to be heard before the civil judgment was entered was error. We agree with the parties that the civil judgment must accordingly be set aside.

IV. Conclusion

Because we conclude that Defendant failed to make the requisite showing to be entitled to an instruction on the affirmative defense of entrapment, we discern no error in the criminal judgment, and affirm it. Because Defendant was not given an opportunity to be heard before the trial court entered the civil judgment against him, we vacate the civil judgment and remand to the trial court for a new hearing on attorney's fees.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

Judges ARROWOOD and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 MARCH 2020)

CUEVAS v. DAVIS No. 19-631	Henderson (17CVD1195)	Dismissed
CUNNINGHAM v. PRINCIPLE LONG TERM CARE, INC. No. 18-1275	N.C. Industrial Commission (16-024794)	Vacated and Remanded
EST. OF SEYMOUR v. ORANGE CNTY. BD. OF EDUC. No. 19-334	Orange (18CVS1029)	Reversed
GORDON v. HANCOCK No. 19-712	Durham (16CVS4615)	Reversed and Remanded
IN RE S.T. No. 19-423	Wake (14JA304)	Affirmed
INDUS. HEMP MFG., LLC v. AM. HEMP SEED GENETIC, LLC No. 19-679	Wake (18CVS12556)	Affirmed
STATE v. ESKRIDGE No. 19-431	Cleveland (15CRS912)	No Error
STATE v. GRIFFIN No. 19-657	Beaufort (18CRS371) (18CRS372) (18CRS373) (18CRS374) (18CRS50013) (18CRS50014)	NO ERROR IN PART; DISMISSED IN PART
STATE v. GUARASCIO No. 19-486	Durham (18CRS1925)	Dismissed
STATE v. HODGES No. 19-266	Orange (17CRS52067)	No Error
STATE v. JOYNER No. 19-651	Pitt (77CRS581) (77CRS582) (77CRS726-27) (77CRS7711)	Affirmed
STATE v. LEMUS No. 19-582	Granville (18CRS050036)	Affirmed

STATE v. McKOY No. 18-599	Iredell (13CRS56739)	Dismissed
STATE v. POCKNETT No. 19-744	New Hanover (17CRS56263)	No Error
STATE v. SCOTT No. 19-607	Pitt (17CRS50855)	No Error
STATE v. WESTBROOK No. 19-331	Mecklenburg (15CRS244732-36) (16CRS14126) (17CRS236924)	NO ERROR IN PART; VACATED AND REMANDED IN PART; DISMISSED WITHOUT PREJUDICE IN PART
STATE v. WHITE No. 19-664	Duplin (17CRS51941-42)	NO PREJUDICIAL ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR
STATE v. WILSON No. 19-556	Forsyth (17CRS56929)	No Error
STATE v. YATES No. 19-348	Cabarrus (16CRS54344) (16CRS54463-66)	No error in part; vacated in part and remanded.

JULIE BERKE, Plaintiff
v.
FIDELITY BROKERAGE SERVICES, the ESTATE OF GARY IAN LAW, and AMAN MASOOMI, Individually and as Sole Heir and Executor of the ESTATE OF SHARON LEE DAY, Defendants

No. COA19-641

Filed 17 March 2020

Estates—beneficiary—motion for directed verdict—genuine question of material fact

After plaintiff initiated an action seeking a declaratory judgment that she was the sole beneficiary of her ex-husband's retirement accounts, the trial court erred by denying plaintiff's motion for directed verdict because there was no genuine question of material fact whether anyone other than plaintiff was the beneficiary of the accounts—the parties' pretrial stipulations acknowledged that plaintiff was the designated beneficiary two days prior to her ex-husband's death and there were no records indicating the beneficiary had been changed.

Appeal by Plaintiff from judgment entered 10 October 2018 by Judge Carolyn J. Thompson in Durham County Superior Court. Heard in the Court of Appeals 4 December 2019.

Tillman, Whichard & Cagle, PLLC, by Willis P. Whichard and Sarah Elizabeth Tillman, for the Plaintiff-Appellant.

Roberti, Wicker, Lauffer & Cinski, P.A., by R. David Wicker, Jr., for the Defendant-Appellees.

BROOK, Judge.

Julie Berke ("Plaintiff") appeals from judgment entered upon a jury verdict finding that the estate of Gary Law, her former husband, is the beneficiary of certain retirement accounts. We hold that the trial court erred by submitting this issue to the jury because there was insufficient evidence that anyone other than Plaintiff was the beneficiary of these accounts at the time of Mr. Law's death. It was therefore error to deny Plaintiff's motion for directed verdict on this issue and her motion for judgment notwithstanding the verdict. Accordingly, we reverse the trial court's judgment and award of costs.

I. Background

Plaintiff was married to Mr. Law on 24 May 1992. The couple separated on 25 January 2014, entered a Separation and Property Settlement Agreement ("the Separation Agreement") on 12 February 2015, and then divorced on 9 April 2015. Mr. Law died on 17 September 2015 and his sister and sole heir, Sharon Day, died on 2 December 2015. When Mr. Law died, he owned three retirement accounts in the custody of Fidelity Brokerage Services LLC ("Fidelity").

On 6 May 2016, Plaintiff initiated an action for a declaratory judgment that she was the beneficiary of Mr. Law's retirement accounts at Fidelity at the time of his death. In a 2 October 2017 answer, Mr. Law's estate admitted that the Separation Agreement entered into by Plaintiff and Mr. Law expressly provided that there was no release of property and estate rights with respect to any beneficiary designations existing at the time of the execution of the Agreement or made thereafter; that Mr. Law never made any changes to the beneficiary designations for his Fidelity accounts after the execution of the Agreement; and that Plaintiff therefore remained the beneficiary of Mr. Law's accounts at Fidelity ending in numbers 4418, 1424, and 2628 at the time of his death. Mr. Law's estate thus conceded in its 2 October 2017 answer that Plaintiff was entitled to a declaratory judgment that she was the beneficiary of the Fidelity accounts at the time of Mr. Law's death.

The executor and sole heir of Mr. Law's sister, however, did not so concede. In answers filed on 23 June 2016, 27 October 2017, and 3 November 2017, the executor and sole heir of Ms. Day, Aman Masoomi, disputed whether Plaintiff was entitled to the assets in the Fidelity accounts in both his personal capacity and as Ms. Day's executor. If the accounts had no beneficiary at the time of Mr. Law's death, Mr. Masoomi had an interest in the accounts: (1) he was Ms. Day's sole heir; (2) Ms. Day was Mr. Law's sole heir; and (3) Ms. Day and Mr. Law had both since passed away.

In an order entered 3 April 2018 denying Plaintiff's partial motion for summary judgment on the issue of whether she was the beneficiary of the accounts, the trial court determined that there was a genuine issue of material fact as to whether Mr. Masoomi had an interest in the accounts. Before the court at this summary judgment hearing were documents that purported to be letters from Mr. Law and Ms. Day to Fidelity. Each of these letters purportedly pre-dated the death of the

respective decedent, and each appeared to attempt to change the beneficiary designations of Mr. Law's retirement accounts.[1]

However, ruling on a motion in limine in August 2018, the court determined that there was a genuine issue as to the authenticity of these documents. And, before trial began, the parties stipulated that (1) "Fidelity ha[d] not been able to locate any records in its custody and control that indicate that Fidelity received any written changes, modifications, or revocations from Gary Ian Law to the beneficiary designation for account #1424, #4418 prior to September 17, 2015"; and (2) "[o]n September 15, 2015, Julie L. Berke-Law was listed in Fidelity's records as the designated beneficiary of Gary Ian Law's account #4418, #1424, and #2628." In granting Plaintiff's motion and excluding the letters from the jury's consideration, the trial court found not only that there was a genuine issue as to the authenticity of the documents, but also that, based on the parties' pretrial stipulations regarding the absence of any record communications changing the beneficiary designations for the accounts and receipt of the same by Fidelity, "the probative value of the letters [was] outweighed by the unfair prejudice they would offer to the jury."

The case came on for trial before the Honorable Carolyn J. Thompson in Durham County Superior Court on 10 September 2018. Judge Thompson presided over a six-day trial. At the close of the evidence, Plaintiff moved for a directed verdict on the issue of whether she was the beneficiary of the retirement accounts, which the trial court denied. On 21 September 2018, the jury returned a verdict in favor of Mr. Masoomi, finding in relevant part that Mr. Law's estate was the beneficiary of the accounts, not Plaintiff. Plaintiff moved for judgment notwithstanding the verdict, which the trial court denied. The trial court entered a judgment upon the verdict on 10 October 2018.

Plaintiff entered timely written notice of appeal on 18 October 2018.

II. Analysis

The dispositive issue in this appeal is whether the trial court erred in concluding that there was sufficient evidence that someone other than Plaintiff was the beneficiary of Mr. Law's retirement accounts when

1. Mr. Masoomi testified at deposition that he wrote the purported letter from Mr. Law at Mr. Law's request, took Mr. Law to get the document notarized, and recalled observing Mr. Law put the document in an envelope after it was notarized. Mr. Masoomi testified further that although he never witnessed Mr. Law put the letter in mail, he did supply Mr. Law with a stamp for the envelope.

it submitted this question to the jury, denying Plaintiff's motion for directed verdict.[2] Viewing the evidence in the light most favorable to Mr. Masoomi, as we are required to do, we hold that the admissible, record evidence at the time Plaintiff moved for a directed verdict was insufficient to support a finding by the jury that anyone other than Plaintiff was the beneficiary of the accounts. The trial court therefore erred in denying Plaintiff's motion for directed verdict on this issue and motion for judgment notwithstanding the verdict after the jury returned a verdict in favor of Mr. Masoomi.

"Under Rule 50 of the North Carolina Rules of Civil Procedure, a party may move for a directed verdict at the close of the evidence offered by the opponent and at the close of all of the evidence." *Buckner v. TigerSwan, Inc.*, 244 N.C. App. 385, 390, 781 S.E.2d 494, 498 (2015). The motion is "only [] proper in a jury trial." *Id.* (citation omitted). It "tests the sufficiency of the evidence to go to the jury and to support a verdict for the non-moving party." *McMahan v. Bumgarner*, 119 N.C. App. 235, 237, 457 S.E.2d 762, 763 (1995) (citation omitted). Thus, "[a] motion for a directed verdict presents the same question for both trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, is sufficient for submission to the jury." *Smith v. Moody*, 124 N.C. App. 203, 205, 476 S.E.2d 377, 379 (1996) (citation omitted).

Likewise, "[a] motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient for submission to the jury." *Loftis v. Little League Baseball, Inc.*, 169 N.C. App. 219, 221, 609 S.E.2d 481, 483 (2005) (citation omitted). Just as a motion for directed verdict "tests the sufficiency of the evidence to go to the jury," *McMahan*, 119 N.C. App. at 237, 457 S.E.2d at 763, so too, "a motion for judgment notwithstanding the verdict challenges[] whether evidence presented at trial [*was*] legally sufficient to go to the jury," *Hinnant v. Holland*, 92 N.C. App. 142, 144, 374 S.E.2d 152, 154 (1988) (emphasis added). Its resolution requires consideration of this question after the jury has already considered the evidence and rendered a verdict rather than before being charged. *Kaperonis v. Underwriters*, 25 N.C. App. 119, 123, 212 S.E.2d 532, 535 (1975). "[O]ur standard of review for a judgment notwithstanding the verdict is the same as that for a directed verdict; that is, whether the evidence was sufficient to go to the jury." *Papadopoulos v. State Capital Ins. Co.*, 183 N.C. App. 258, 262, 644 S.E.2d 256, 259 (2007) (citation omitted).

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2. In her appellate brief, Plaintiff does not argue that the trial court erred in denying her partial motion for summary judgment, abandoning this issue. *See* N.C. R. App. P. 28 ("Issues not presented and discussed in a party's brief are deemed abandoned.").

In the present case, Paragraph 4 of the Separation Agreement entered into by Plaintiff and Mr. Law on 12 February 2015 provides as follows:

> 4. RELEASE OF PROPERTY AND ESTATE RIGHTS. Except as otherwise provided herein, each party hereby waives, relinquishes, renounces and quitclaims unto the other any and all rights, title, interest and control he or she may now have or shall hereafter acquire under the present or future laws of any jurisdiction, in, to or over the person, property or estate of the other, arising by reason of their marital relationship or under any previously executed instrument or will, made by either of them, including, but not limited to, dower, courtesy, statutory allowance, widow's allowance, homestead rights, right to take in event of intestacy, right to any share as the surviving spouse, any right of election, right to take against the last will and testament of the other or to dissent therefrom, right to act as administrator or executor of the estate of either, and any and all rights, title or interest of any kind in and to any said property or estate of any kind of the other, except as to Wife's marital interest in the Rollover IRA #2628 held with Fidelity in Husband's name as set forth in Paragraph 8.F. *This provision shall not apply to any Social Security benefits the parties may have by reason of their marriage to each other, to any real property retained by the parties as tenants by the entirety so long as said estate by entireties continues, and to* ***any beneficiary designations remaining after the date of the execution of this Agreement which name the other as beneficiary***. In addition, except as otherwise provided herein, each party waives, releases and renounces, and hereby conveys, quitclaims and assigns over to the other party and his or her heirs, executors and administrators, any right of inheritance under a will executed by the other party prior to the date of this Agreement, [and] any beneficial or administrative right arising under any trust created by the other party prior to the date of this Agreement.

(Emphasis added.)

Paragraph 8.F of the Separation Agreement, referenced in Paragraph 4, goes on to provide:

F. Retirement Benefits. The parties have retirement accounts with Fidelity.

The following accounts with Fidelity shall be and belong to the Wife, free from any claim by the Husband: Roth IRA #1416; Deferred Annuity #8739 (Wife's separate property); SRA International Inc. 401(k) Savings Plan #5813; Rollover IRA #4335. Wife also has an account with her current employer through The Standard. This account shall be and belong to the Wife, free of any claim by the Husband.

The following accounts with Fidelity shall be and belong to the Husband, free from any claim by the Wife: Rollover IRA #4418; Roth IRA #1424; Individual Brokerage #6727; VZ Gary Law Stock Options Plan.

The Rollover IRA #2628 held with Fidelity in the approximate amount of $724,589.32 as of January 31, 2014 is in Husband's name and is partially Husband's separate premarital asset and is partly marital; however due to the cost and difficulty of obtaining this information from the original plan administrator, there has been no financial disclosure by Husband of the exact amounts that were earned prior to marriage and each party waives full and complete disclosure beyond what has been provided. The parties agree that in order to accomplish a reasonable and equitable distribution of the marital retirement funds held by both parties, a lump sum amount of $250,000 (Two Hundred Fifty Thousand Dollars), to be valued as of the date of transfer, shall be transferred from Husband's Fidelity Rollover IRA #2628 into a Fidelity IRA in Wife's name, and the remainder of said Husband's Rollover IRA account shall be Husband's sole and separate property. This transfer to Wife shall be accomplished so as to effect a non-taxable trustee to trustee transfer of this sum from Husband's aforesaid Fidelity Rollover IRA to Wife's Fidelity IRA account in accordance with Internal Revenue Code Section 408(d)(6), with said transfer to be incident to the parties' divorce decree and to be effected pursuant to an IRA transfer order to be entered with the court contemporaneously with or promptly following any divorce of the parties. Wife shall bear the cost of the drafting of the Court Order to divide the Account and the Order shall be subject to review by Husband and Husband's attorney.

> The parties shall sign any Order or documents necessary to effectuate the aforesaid transfer, including the full execution of any documents required by Fidelity.

At the time of Mr. Law's death in 2015, however, Plaintiff remained the beneficiary of Mr. Law's accounts at Fidelity, as his estate admitted in its answer to Plaintiff's 29 August 2017 amended complaint. Indeed, the parties stipulated to as much before trial, stipulating as follows:

> h. When Gary Ian Law died, he held three Fidelity IRA accounts: Rollover IRA #2628, #4418 and #1424.
>
> i. When Gary Ian Law created and opened account #1424 in 2006, he designated Julie L. Berke-Law as the primary beneficiary of the account.
>
> j. When Gary Ian Law created and opened account #4418 in April 2008 he designated Julie L. Berke-Law as the primary beneficiary of the account.
>
> k When Gary Ian Law created and opened account #2628 in May 2008 he designated Julie L. Berke-Law as the beneficiary of that account.
>
> l. Fidelity has not been able to locate any records in its custody or control that indicate that Fidelity received any written changes, modifications, or revocations from Gary Ian Law to the beneficiary designation for account #1424, #4418 prior to September 17, 2015 [the date of Mr. Law's death].
>
> m. On September 15, 2015, Julie L. Berke-Law was listed in Fidelity's records as the designated beneficiary of Gary Ian Law's accounts #4418, #1424, and #2628. However, this is not a factual determination of the beneficiary and said issue remains before the trier of fact.
>
> n. The Fidelity IRA Custodial Agreement and the Fidelity Roth IRA Custodial Agreement constitute the agreement between Gary Law and Fidelity regarding his IRAs.

These stipulations were based on Fidelity's responses to written discovery propounded by Plaintiff, in which Fidelity specifically admitted in response to Interrogatory No. 1 of Plaintiff's First Set of Interrogatories and Request for Production of Documents that it had never received "any written communication from Gary Ian Law prior to his death requesting to change the beneficiary of any of his Fidelity accounts."

Thus, the language of Paragraph 8.F of the Separation Agreement suggesting that Mr. Law might have planned to change the beneficiary of the accounts ending in numbers 4418, 1424, and 2628 after entering into the Separation Agreement on 12 February 2015 notwithstanding, no evidence was presented to the jury during the trial that anyone other than Plaintiff was the beneficiary of the accounts. Accordingly, we hold that the evidence that anyone other than Plaintiff was the beneficiary of the accounts was not "sufficient for submission to the jury." *Smith*, 124 N.C. App. at 205, 476 S.E.2d at 379.

Viewing the evidence in the light most favorable to Mr. Masoomi, as we must, we note that testimony was elicited during the course of the trial that certain Custodial Agreements governed Mr. Law's Fidelity accounts and that Massachusetts law was the controlling law under the terms of these Agreements. The Custodial Agreements were published to the jury, as was the Massachusetts statute identified as the applicable one on the present facts, Chapter 190B of the Massachusetts Probate Code, Article II, Section 2-804. The trial court then included the following in its charge to the jury:

> This Court has taken judicial notice of Section 2-804 of the General Laws of Massachusetts, which is Plaintiff's Exhibit Number 25, and the North Carolina General Statute Section 32A in its entirety, which is Defendant's Exhibit Number 2.
>
> The law provides that the Court may take judicial notice of certain facts that are so well known or so well documented that they are not subject to reasonable dispute. When the Court takes judicial notice of a fact, neither party is required to offer proof as to such fact.
>
> Therefore, you will accept as conclusive that: Section 2-804 of the General Laws of Massachusetts provide[s], in part, the following regarding Revocation of Probate and Non-probate Transfers by divorce; no revocation by other changes of circumstances.
>
> In Subsection (a), Sub 4, "governing instrument" refers to a governing instrument executed by the divorced individual before the divorce or annulment of the individual's marriage to the individual's former spouse.
>
> Subsection (b), *Except as provided by the expressed terms of a governing instrument, a court order or a contract related to the division of a marital estate made*

> *between the divorced individuals before or after marriage, divorce or annulment*, the divorce or annulment of a marriage revokes, Number 1, revokes any revocable disposition or appointment of property made by a divorced individual to the individual's former spouse in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

(Emphasis added.) The jury was thus read a judicially noticed provision of a Massachusetts statute, and this statute and a comparable North Carolina statute were published to the jury. Then, in the absence of any evidence that anyone other than Plaintiff was the beneficiary of Mr. Law's Fidelity accounts at the time of his death—and where the parties had essentially stipulated before trial based on Fidelity's discovery responses that the only record evidence not excluded by the trial court's 3 August 2018 order granting Plaintiff's motion in limine was that Plaintiff was the beneficiary—the jury's verdict in favor of Mr. Masoomi appears to reflect an attempt by the jury to apply the Massachusetts statute—though incorrectly—to the facts found by the jury.

"[W]here the facts are controverted, or more than one inference can be drawn from them, it is the province of the jury to pass upon an issue involving it." *Tillett v. Norfolk & W.R. Co.*, 118 N.C. 1031, 24 S.E. 111, 112 (1896). When the applicable legal standard is disputed and the facts are controverted, "it becomes the duty of the judge . . . to tell the jury how to apply the law . . . to the various phases of the testimony, and the office of the jury to make the application of the law, as given by the court, to the facts as found by them." *Id.*

There was no evidence presented during the trial of this case that anyone other than Plaintiff was the beneficiary of Mr. Law's Fidelity accounts at the time of his death; indeed, the parties stipulated to as much before trial. It was not the province of the jury to determine a question of law – whether the effect of a Massachusetts statute was to revoke Mr. Law's beneficiary designations for his Fidelity accounts when the Release of Property and Estate Rights contained in Paragraph 4 of his Separation Agreement with Plaintiff specifically excepted from the Release "beneficiary designations remaining after the date of the execution of [the] Agreement which name the other as beneficiary." We therefore hold that the trial court erred in submitting the issue of whether Plaintiff was the beneficiary of the Fidelity accounts to the jury. We further hold that the Massachusetts statute in question explicitly states it does not override terms such as those found in Paragraph 4 of

the Separation Agreement, specifically excepting from the general rule of revocation upon divorce where "a court order or a contract related to the division of a marital estate made between the divorced individuals before or after marriage, divorce or annulment" provides otherwise. Mass. Gen. Laws ch. 190B, § 2-804 (2016). These holdings entail that the trial court erred both in denying Plaintiff's motions for directed verdict and for judgment notwithstanding the verdict.

III. Conclusion

The trial court erred by denying Plaintiff's motion for directed verdict on the issue of whether she was the beneficiary of her former husband's accounts at Fidelity at the time of his death. The trial court also erred in denying Plaintiff's motion for judgment notwithstanding the verdict, as our holding that the trial court erred in denying Plaintiff's motion for directed verdict entails. We therefore reverse the trial court's judgment and award of costs.

REVERSED.

Judges STROUD and ARROWOOD concur.

MICHAEL STACY BUCHANAN, Plaintiff
v.
NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., Defendant

No. COA19-887

Filed 17 March 2020

1. Insurance—homeowners—policy terms—appraisal condition precedent to filing suit—motion to stay

In an insurance contract dispute, the trial court properly granted an insurance carrier's motion seeking to stay the proceedings and compel an appraisal of plaintiff's home where the plain language of the policy contract required appraisal prior to filing suit to determine the amount of loss.

2. Unfair Trade Practices—homeowners insurance—issuance and handling of policy—summary judgment

In an insurance contract dispute over the amount of loss from a home fire, plaintiff-homeowner failed to demonstrate the existence

of any genuine issue of material fact in his claim for unfair and deceptive trade practices where he presented no evidence that the carrier made any misrepresentations with regard to issuance of the policy or that the carrier's conduct in settling the claim and making payments were not in accordance with the policy terms or otherwise in violation of N.C.G.S. § 58-63-15.

3. Evidence—expert witness—home value report—exclusion—value of loss from fire already settled

In an insurance contract dispute over the amount of loss after a home fire, there was no error in the exclusion of testimony and a report from plaintiff's expert witness where the witness inspected the home and prepared his report long after the parties settled the amount of loss through an appraisal process conducted in accordance with the insurance policy.

4. Contracts—breach—directed verdict—different judge than one who ruled on summary judgment motion

The Court of Appeals rejected an argument by plaintiff-homeowner in an insurance contract dispute that a second judge could not enter a directed verdict for the insurance carrier on plaintiff's breach of contract claim after the first judge denied the carrier's motion for summary judgment on that claim, because a summary judgment order has no effect on a later order granting or denying a directed verdict on the same issue.

Appeal by plaintiff from orders entered 8 December 2017 and 21 June 2019 by Judges Mark E. Powell and Robert Bell, respectively, in Mitchell County Superior Court. Heard in the Court of Appeals 3 March 2020.

Charlie A. Hunt, Jr. for plaintiff-appellant.

Marcellino & Tyson, PLLC, by Clay A. Campbell, for defendant-appellee.

TYSON, Judge.

Michael Stacy Buchanan ("Plaintiff") appeals from the order granting, in part, North Carolina Farm Bureau Mutual Insurance Company's ("Defendant") motion for summary judgment, and also from the order granting Defendant's motion for a directed verdict. We affirm the trial court's orders.

I. Background

Plaintiff applied for homeowner's insurance with Defendant in December 2012. His application asserted his residence ("the Home") was built in 1957. After Defendant issued Plaintiff a homeowner's policy ("the Policy"), it learned the Home had actually been built in 1933. Defendant sent Plaintiff a letter on 8 February 2013, cancelling the Policy effective as of the end of that month.

Plaintiff submitted a homeowner change application to Defendant on 20 February 2013, requesting a decrease in coverage on the Policy. Defendant reissued the Policy to Plaintiff and backdated coverage to 19 December 2012. Plaintiff renewed the Policy on 19 December 2013.

The Home and some of Plaintiff's personal property were damaged by fire on 10 June 2014. Plaintiff reported the loss to Defendant. An employee of Defendant met with Plaintiff at the Home later that day. Plaintiff informed Defendant's employee he could not enter the Home until the fire investigation was complete. Defendant's employee issued Plaintiff a check for $2,000.00 towards Plaintiff's living expenses.

Todd Kirby, a large-loss adjuster for Defendant, met with Plaintiff and inspected and photographed the damage to the Home on 12 June 2014, and again on 28 June 2014. Kirby prepared an estimate of $76,877.72 to repair the damages. Kirby mailed the estimate to Plaintiff on 1 July 2014. Plaintiff sent Kirby a letter on 5 August 2014, stating he would not be restoring or rebuilding the Home, objecting to Defendant requiring him to inventory his damaged personal property, wishing to conclude the settlement process, and requesting $217,000.00 to settle his claims.

Kirby replied to Plaintiff with a letter sent 18 August 2014, and enclosed a section of the Policy outlining, among other duties, Plaintiff's duty to prepare and submit an inventory after a loss. On 25 August 2014, Defendant mailed Plaintiff a check for $4,800.00 to cover additional living expenses for six months. Plaintiff provided an initial personal property inventory to Defendant in late August 2014.

Kirby reviewed Plaintiff's inventory and sent a letter to Plaintiff on 10 September 2014 explaining the Policy provisions relating to the differences between actual cash value ("ACV") and replacement cost value ("RCV") for losses. The letter included a check to Plaintiff for $9,066.16 for the ACV of the property listed in his inventory. Kirby discussed the estimate with Plaintiff on 15 September 2014 and advised Plaintiff he could submit his own estimate from a contractor of his choice.

Defendant mailed Plaintiff a second living expenses check for $4,800.00 on 20 November 2014.

Defendant mailed Plaintiff a check for the damage to the Home in the amount of $74,377.72, the amount of Kirby's estimate less Plaintiff's deductible, on 13 January 2015. Plaintiff voided and returned that check to Defendant in a letter from his counsel on 22 May 2015, which also included an estimate prepared by a general contractor indicating $147,125.34 would be a reasonable cost for repairs. Defendant replied to Plaintiff's counsel seeking supporting documentation for the estimate. Plaintiff's counsel submitted additional pages of inventory to Defendant on 31 July 2015.

Kirby determined the ACV of the additional inventory was $8,870.82, and Defendant issued a check to Plaintiff for that amount on 28 August 2015. Defendant reiterated its request for supporting documentation in letters to Plaintiff's counsel on 27 October 2015 and 16 February 2016.

Plaintiff filed suit against Defendant on 15 November 2016, seeking damages caused by the fire and alleging breach of the Policy contract and unfair and deceptive trade practices. Defendant filed a motion to stay the proceedings and compel appraisal pursuant to the Policy on 9 December 2016. The trial court granted Defendant's motion to stay and compelled appraisal by order entered on 2 March 2017.

Plaintiff moved to terminate the stay on 30 May 2017, after retaining his own appraiser, alleging dilatory inaction by Defendant. The trial court denied Plaintiff's motion and modified the order granting the stay to set a calendar for the appraisal. The chosen umpire made his appraisal award in September 2017.

Plaintiff appealed the order on 2 October 2017, and also filed a motion to stay the proceedings pending its appeal. Defendant filed three motions with the trial court on 10 October 2017: to dismiss Plaintiff's appeal, for summary judgment, and to confirm the appraisal award. The trial court entered a series of orders on 8 December 2017: denying Plaintiff's motion to stay, dismissing Plaintiff's appeal, and granting partial summary judgment in favor of Defendant on the issue of unfair and deceptive trade practices.

Plaintiff appealed the trial court's grant of partial summary judgment. This Court dismissed his appeal as interlocutory in an unpublished opinion on 16 April 2019. *Buchanan v. N.C. Farm Bureau Mut. Ins. Co.* __ N.C. App. __, 825 S.E.2d 704 (2019) (unpublished). The parties proceeded to trial in May 2019.

Defendant made several motions *in limine* prior to trial, including to exclude any information that arose after the appraisal award, specifically identifying a report by Plaintiff's proposed expert witness, Terry LaDuke, based on his inspection of the Home in September 2018. The trial court preliminarily reserved ruling on the motion.

Defendant's counsel renewed his motion *in limine* prior to LaDuke taking the stand as Plaintiff's final witness. The trial court heard arguments, allowed Defendant's motion, and excluded LaDuke's proposed testimony and report from evidence. Plaintiff rested his case, and Defendant moved for a directed verdict. The trial court granted Defendant's motion for a directed verdict and entered its order on 21 June 2019. Plaintiff filed timely notice of appeal.

II. Jurisdiction

Plaintiff's brief does not include a statement of the grounds for appellate review, as required by N.C. R. App. P. 28(b)(4). "Compliance with the rules . . . is mandatory." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 362 (2008) (citations omitted).

However, "noncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal." *Id.* at 194, 657 S.E.2d at 363 (citation omitted). "Noncompliance with [Appellate Rule 28(b)], while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction." *Id.* at 198, 657 S.E.2d at 365.

Plaintiff's failure to comply with Appellate Rule 28(b)(4) is nonjurisdictional and does not mandate dismissal. *See id.* Counsel is admonished that our Appellate Rules are mandatory, compliance is expected therewith, and sanctions are available for violation. *Id.*; N.C. R. App. P. 28(b)(4). This appeal is properly before us pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

III. Issues

Plaintiff argues the trial court erred by granting: (1) Defendant's motion to stay the trial proceedings and compel appraisal of the Home; (2) Defendant's motion for summary judgment in part, on the unfair and deceptive trade practices claim; (3) Defendant's motion *in limine* to exclude the testimony of his environmental expert; and, (4) Defendant's motion for directed verdict on his breach of contract claim at the close of Plaintiff's evidence.

IV. Appraisal

A. Standard of Review

"A trial court's denial of a motion to stay is subject to an abuse of discretion standard of review." *Park East Sales, LLC v. Clark-Langley, Inc.*, 186 N.C. App. 198, 209, 651 S.E.2d 235, 242 (2007).

B. Analysis

[1] Our Supreme Court has stated, "an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (citation omitted). Plaintiff argues the trial court erred in granting Defendant's motion to stay the trial and compelling an appraisal of the Home. Defendant argued, and the trial court agreed, such appraisal was compelled by the terms of the Policy and this Court's precedent. *See Patel v. Scottsdale Ins. Co.*, 221 N.C. App. 476, 482-83, 728 S.E.2d 394, 398-99 (2012) (interpreting insurance policy language as requiring appraisal process as condition precedent to filing suit against insurer).

Plaintiff argues the reasoning in *Patel* is inapplicable to this case, because the Policy at bar states the amount of loss payment "may be determined by . . . [e]ntry of a final judgment." Plaintiff argues this provision necessarily provides for determining the amount of loss by filing suit. Plaintiff cites two cases, neither of which are binding upon this Court, to distinguish *Patel*.

Plaintiff cites *Hayes v. Allstate Ins. Co.*, as persuasive authority to support its argument. *Hayes v. Allstate Ins. Co.*, 722 F.2d 1332 (7th Cir. 1983). The policy under review in *Hayes* did not expressly provide that no action could be maintained upon it until after the loss was determined by appraisal. *Id.* at 1335.

The Policy before us expressly provides: "No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy." Section I of the Policy includes an appraisal clause: "If you and we fail to agree on the value or amount of any item or loss, either may demand an appraisal of such item or loss." Plaintiff's reliance on *Hayes* is unsupported and without merit.

Plaintiff also cites *Otto Indus. N. Am. v. Phx. Ins. Co.*, No. 3:12-CV-717-FDW-DCK, 2013 WL 2124163 (W.D.N.C. May 15, 2013). The federal trial court in *Otto* distinguished the Court's holding in *Patel*, because the interpretation and application of the terms and conditions of

the policy at issue "includ[ed] the number of occurrences, the existence and scope of coverage for equipment breakdowns[,] and whether repair or replacement coverage is appropriate." *Otto*, 2013 WL 2124163, at *2. The court also noted the case before it "involves allegations concerning [the insurer's] bad faith conduct that are not subject to appraisal." *Id.*

Plaintiff argues the trial court erred in following *Patel*, because his allegations against Defendant assert bad faith conduct. Plaintiff failed to allege any issues concerning the interpretation and application of the terms and conditions of the policy, as were raised in *Otto*. Although Plaintiff alleges bad faith conduct by Defendant, such conduct alone does not justify disregarding the plain language of the Policy, which requires appraisal as a condition precedent to suit when the loss amount is disputed.

Plaintiff has failed to show the trial court abused its discretion by granting Defendant's motion to stay. Plaintiff's argument is overruled.

V. Unfair and Deceptive Trade Practices

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted).

When reviewing a trial court's entry of summary judgment, "[a]ll facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense." *Id.*

B. Analysis

[2] Plaintiff argues the trial court erred in granting Defendant's motion for summary judgment on his unfair and deceptive trade practices claim. Plaintiff alleges Defendant violated N.C. Gen. Stat. §§ 58-63-15(11) and 75-1.1 (2019) in both the issuance and handling of the Policy. Plaintiff alleges Defendant committed six of the unfair claim settlement practices listed in § 58-63-15(11):

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

. . .

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

. . .

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

. . .

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled;

. . .

l. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of-loss forms, both of which submissions contain substantially the same information

N.C. Gen. Stat. § 58-63-15(11).

Although N.C. Gen. Stat. § 58-63-15(11) (2019) requires a plaintiff show the alleged violations were committed "with such frequency as to indicate a general business practice . . . . unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58, but are also actionable under N.C. Gen. Stat. § 75-1.1." *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 243-44, 563 S.E.2d 269, 277 (2002) (citations and internal quotation marks omitted).

A violation of N.C. Gen. Stat. § 58-63-15 constitutes a violation of N.C. Gen. Stat. § 75-1.1. *Id.* at 244, 563 S.E.2d at 278 (citation omitted). It is also "unnecessary to determine whether the plaintiffs had established

that the acts occurred with such frequency as to constitute a general business practice" in order to recover against an insurer under N.C. Gen. Stat. § 75-1.1. *Id.* (citation omitted).

1. Issuance

Plaintiff first alleges Defendant violated N.C. Gen. Stat. § 58-63-15(11)(a) by agreeing to insure the Home for $149,000.00 prior to inspecting the property, then cancelling the policy and offering a lower coverage upon learning of the true construction date. Plaintiff argues he was then induced by Defendant's agent to pay an extra premium to get 25% more coverage. Plaintiff does not argue or allege any misrepresentation of pertinent facts or insurance policy provisions by Defendant in this assertion.

Although Plaintiff and Defendant dispute who bears the responsibility for the basis of 1957 being the Home's construction year on the original application, this purported issue does not raise a question of material fact. Reviewing all facts asserted by Plaintiff as true, with all inferences therefrom viewed in the light most favorable to him, Plaintiff failed to show a misrepresentation of "pertinent facts or insurance policy provisions relating to coverages at issue." N.C. Gen. Stat. § 58-63-15(11)(a).

Between December 2012 and June 2014, when the Home burned, Plaintiff had eighteen months to seek either coverage with another insurer or to propose amendments or endorsements to the Policy with Defendant. Defendant informed Plaintiff in February 2013 it was cancelling the Policy, in part because it was "unsure of the year of construction and square footage" of the Home. The record on appeal does not reflect any protest or challenge of this decision by Plaintiff. Instead, Plaintiff submitted a homeowner change policy, which Defendant accepted. Defendant reissued the Policy and backdated coverage to its original issuance date. Plaintiff chose to renew the Policy for an additional year in December 2013.

Plaintiff has not shown a misrepresentation by Defendant of any "pertinent facts or insurance policy provisions relating to coverages at issue." *Id.* Plaintiff has also not shown any inducement by Defendant tending to show unfair and deceptive trade practices. N.C. Gen. Stat. § 75-1.1. Plaintiff's argument concerning Defendant's issuance of the Policy is overruled.

2. Handling

Plaintiff further argues Defendant committed several unfair claim settlement practices listed in § 58-63-15(11) in its interactions with

Plaintiff after the fire. Specifically, Plaintiff alleges Defendant: (1) sent an unlicensed adjustor to conduct its estimate, who (2) "made a very brief examination of the premises and offered [Plaintiff] about half of the replacement cost" of the Home and personal property; (3) forced Plaintiff to obtain at his own expense documentation of the damages; (4) ignored Plaintiff's submitted valuation; and, (5) only requested an appraisal two and a half years after the fire.

Plaintiff asserts Kirby was not a licensed insurance adjuster at the time of his inspection of the Home. Plaintiff proffered as evidence a print-out of a North Carolina Department of Insurance online licensee search showing no results for Kirby as of 15 October 2017. Kirby proffered as evidence a copy of his license from the Department of Insurance and a print-out of an online search result from the North Carolina Licensing Board for General Contractors showing his status as a licensee as of 25 January 2017. Based upon the record before us, Plaintiff does not show Kirby was unlicensed in June 2014.

The remainder of Plaintiff's arguments all arise from Defendant's conduct pursuant to the Policy, and Plaintiff's displeasure with their handling and payments of his claims. While Plaintiff clearly suffered from the fire and loss, he was advanced multiple payments and tenders due for his losses and has failed to forecast evidence Defendant engaged in any of the alleged unfair and deceptive trade practices he asserts as grounds to show the trial court erred in granting Defendant's motion for summary judgment.

Defendant has performed its duties under the provisions of the Policy. Accepting all inferences asserted from Plaintiff's facts in the light most favorable to him, he cannot prove Defendant committed unfair and deceptive trade practices in its handling of his claims under the Policy. *See Dobson*, 352 N.C. at 83, 530 S.E.2d at 835. Defendant's argument is overruled.

VI. Exclusion of Expert Testimony

A. Standard of Review

"A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial . . . . A trial court's ruling on a motion *in limine* will not be reversed absent an abuse of discretion." *Luke v. Omega Consulting Grp., LC*, 194 N.C. App. 745, 750, 670 S.E.2d 604, 609 (2009) (citations and internal quotation marks omitted).

B. Analysis

[3] Plaintiff argues the trial court erred in refusing to allow the testimony and report of his expert witness, Terry LaDuke. Plaintiff sought to introduce this evidence to show Defendant should have known possible contamination of the Home posed a potentially dangerous threat to human occupancy, and Defendant should have inspected the damage more thoroughly.

Defendant objected to LaDuke's proposed testimony and report on the grounds that LaDuke had inspected the Home and prepared his report in 2018, long after the loss and appraisal award had been entered. Under the Policy, the parties had already conducted the appraisal process and settled upon the value of the Home without LaDuke's report.

When Defendant renewed its motion *in limine* before LaDuke's testimony, the trial court asked Plaintiff's counsel if Defendant knew about the contamination of the Home when it made an offer to Plaintiff. Plaintiff's counsel admitted he did not know whether Defendant "knew the extent" of the contamination. The trial court further asked if Plaintiff had raised the issue of potential contamination during the appraisal process. Plaintiff's counsel did not directly answer the trial court. Instead, Plaintiff's counsel argued it would be unreasonable for Defendant to spend tens of thousands of dollars to rebuild a home that would be purportedly uninhabitable.

The trial court granted Defendant's motion and disallowed LaDuke from testifying. Considering the sole issue remaining before the court was the breach of contract, and the parties had settled the value of the Home in the appraisal process, LaDuke's testimony would have been irrelevant. Plaintiff has failed to show the trial court erred in granting Defendant's motion for summary judgment. Plaintiff's argument is overruled.

VII. Directed Verdict

A. Standard of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citation omitted).

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as

> true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke University, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) (citation omitted).

B. Analysis

[4] Plaintiff does not argue his claim for breach of contract withstands Defendant's motion for a directed verdict. Instead, he argues different superior court judges ruled upon Defendant's motions for summary judgment and directed verdict, and because Defendant had argued in both motions that the appraisal of the Home resolved the contract issues in this case, the judge who entered the directed verdict did not have the authority to overrule the previous judge's summary judgment ruling on this same issue.

This Court has previously rejected this argument. "[A] pretrial order denying summary judgment has no effect on a later order granting or denying a directed verdict on the same issue or issues." *Clinton v. Wake County Bd. of Education*, 108 N.C. App. 616, 621, 424 S.E.2d 691, 694 (1993).

In *Clinton*, the appellant asserted error in the trial judge's entry of directed verdict on claims, which a different judge had previously denied summary judgment. *Id.* This Court declined to review the appellant's arguments based upon the prior denial of summary judgment. *Id.* The "denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in trial on the merits." *Id.* (quoting *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985)). Plaintiff's argument is overruled.

VIII. Conclusion

Plaintiff has failed to show the trial court abused its discretion in granting Defendant's motion to stay the trial proceedings and to compel an appraisal of the Home. The appraisal process was required by the Policy as a condition precedent to Plaintiff filing suit against Defendant.

Accepting all facts asserted by Plaintiff on his unfair and deceptive trade practices claim as true, and viewing all inferences therefrom in the light most favorable to him, Plaintiff failed to show a misrepresentation by Defendant of "pertinent facts or insurance policy provisions relating

to coverages at issue" in the issuance of the Policy. N.C. Gen. Stat. § 58-63-15(11)(a).

Plaintiff failed to show Kirby was an unlicensed contractor when he inspected the Home. All of Plaintiff's other allegations of unfair and deceptive trade practices arise from Defendant's asserted conduct pursuant to the provisions of the Policy. Defendant performed its duties and exercised it rights reserved under the Policy. Plaintiff cannot show a genuine issue of material fact exists to support his unfair and deceptive trade practices claims.

The trial court did not abuse its discretion in granting Defendant's motion *in limine* to exclude Plaintiff's proffered expert witness. The proposed evidence did not and could not relate to the remaining issue of breach of contract at trial.

Denial of a motion for summary judgment is not reviewable on appeal from a directed verdict and judgment rendered after trial on the merits. *Clinton*, 108 N.C. App. at 621, 424 S.E.2d at 694. Plaintiff's argument asserting the trial court erred in directing a verdict in favor of Defendant on the same issue, where a previous superior court judge had denied summary judgment, is precluded by precedent. *See id.*

The trial court's orders are affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge YOUNG concur.

HARPER v. VOHRA WOUND PHYSICIANS OF NY, PLLC

[270 N.C. App. 396 (2020)]

JAMES GARRETT HARPER, M.D., PLAINTIFF
v.
VOHRA WOUND PHYSICIANS OF NY, PLLC; VOHRA WOUND PHYSICIANS MANAGEMENT, LLC; VOHRA HEALTH SERVICES, PA; JAPA VOLCHOK, D.O.; AND AMEET VOHRA, M.D., DEFENDANTS

No. COA18-355

Filed 17 March 2020

1. Contracts—employment agreement—breach—ambiguous terms—judgment notwithstanding the verdict

In a dispute regarding an employment agreement between a physician (plaintiff) and a medical practice (defendant) involving plaintiff's Medicare eligibility, the jury's verdict on defendant's counterclaim for breach of contract in favor of plaintiff was properly left undisturbed after defendant moved for judgment notwithstanding the verdict where the terms of the agreement were subject to more than one interpretation and therefore presented an ambiguity that required resolution by the jury.

2. Pleadings—reply to amended counterclaim—timeliness of filing—trial court's discretion

In an employment dispute between a physician (plaintiff) and a medical practice (defendant), the trial court did not abuse its discretion by allowing plaintiff to file an untimely reply to defendant's amended counterclaim, even though the court failed to consider whether plaintiff showed excusable neglect pursuant to Civil Procedure Rule 6(b), because defendant was not prejudiced by the error. Plaintiff's failure to timely file a new reply did not amount to an admission under Civil Procedure Rule 8(d) where he would have merely been asserting in negative form the allegations he made in the complaint, and the fact that he had already denied the allegations in the first set of counterclaims in a reply put defendant on notice that he would also deny the additional allegations asserted in the amended counterclaim.

3. Damages and Remedies—Wage and Hour Act—liquidated damages—based on gross rather than net pay—statutory interpretation

In a dispute regarding an employment agreement between a physician (plaintiff) and a medical practice (defendant) in which plaintiff asserted a claim for relief under the North Carolina Wage and Hour Act (NCWHA), the trial court properly based its reward

of liquidated damages on plaintiff's gross pay rather than net pay. Although undefined in the NCWHA, the "unpaid amounts" due plaintiff (N.C.G.S. § 95-25.22) for a violation of the Act included "wages" as defined by N.C.G.S. § 95-25.2(16) that should have been paid out to plaintiff or for his benefit.

Appeal by Defendants from Order and Judgment entered 22 June 2017 and Order Denying Defendants' Post-Judgment Motions entered 18 July 2017 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 November 2018.

Brown, Faucher, Peraldo & Benson, PLLC, by Drew Brown, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, Robert H. Edmunds, Jr., and Kip D. Nelson, for defendants-appellants.

MURPHY, Judge.

On appeal, Defendant contends the trial court erred by: (1) denying its motion for judgment notwithstanding the verdict on its breach of contract counterclaim; (2) permitting Plaintiff to file an untimely reply to Defendant's amended counterclaims; and (3) awarding liquidated damages based on gross pay rather than net pay. For the reasons discussed below, we disagree and affirm.

BACKGROUND

Dr. James Garrett Harper ("Dr. Harper") began practicing medicine as a plastic surgeon in Charlotte in 2012. The practice that employed Dr. Harper did not accept Medicare or Medicaid due to the effect on "billing and reimbursements from other insurance companies" and its ability to "get paid more for a [given] surgery" if Medicaid and Medicare were not accepted. As an employee of the practice, Dr. Harper completed a "Medicare Opt-Out Affidavit." The Opt-Out Affidavit allowed Dr. Harper to "provide services to Medicare beneficiaries only through private contracts that meet the criteria of §40.8 for services that, but for their provision under a private contract, would have been Medicare-covered services." However, the Opt-Out Affidavit prevented Dr. Harper from submitting "a claim to Medicare for any service furnished to a Medicare beneficiary during the opt-out period" and receiving "direct or indirect Medicare payment for services . . . furnish[ed] to Medicare beneficiaries with whom [Dr. Harper] privately contracted[.]" Dr. Harper completed

his most recent Opt-Out Affidavit in 2014, and the opt-out period was two years.

Dr. Harper ended his employment with this practice in 2015. While litigating the enforceability of his non-compete agreement with the practice, Dr. Harper decided to apply for a position with Vohra Wound Physicians of NY ("Vohra") until he could return to the field of plastic surgery. Vohra provides wound management services primarily to elderly patients in nursing homes in various states, including North Carolina. In his role with Vohra, Dr. Harper would travel around the state, primarily to "understaffed and undermanned" nursing care facilities.

On his application to Vohra, Dr. Harper was asked to "[d]escribe any past/pending disciplinary/restriction in relation to Medicare/Medicaid." Dr. Harper answered, "None, but I did not accept Medicaid/Medicare at my last job." After multiple subsequent rounds of interviews, Dr. Harper was offered the physician position with Vohra, and the parties entered into an "Employment Agreement" in June 2015. Under "Article II: Duties and Responsibilities" of the employment agreement, the parties agreed to the following provision:

> 2.5 General Professional Qualifications and Obligations. At all times during the term of this Agreement, EMPLOYEE:
>
> . . .
>
> (b) shall be qualified to participate and shall participate in Medicare, Medicaid and other state medical assistance and federal programs, and not be under current exclusion, debarment or sanction by any state or federal health care program, including Medicare and Medicaid;

At the start of his employment, Dr. Harper completed a "Medicare Enrollment Application" and "Reassignment of Medicare Benefits" to Vohra and made Vohra his surrogate for the Medicare enrollment process. Yet, approximately twelve days later, Vohra was informed that Dr. Harper's Medicare enrollment application was denied. The denial cited Dr. Harper's 2014 Medicare Opt-Out Affidavit, stating: "The provider has an active opt-out affidavit effective until 07/23/2016. The provider cannot enroll in Medicare until after this date." The Opt-Out Affidavit could not be withdrawn.

The Vice-President of Vohra Wound Physicians Management, LLC called Dr. Harper upon learning of his ineligibility. Dr. Harper "stated that in his previous job there was no Medicare that was accepted by the practice, they had opted out of Medicare." Dr. Harper stopped

seeing patients, and Vohra decided to "stop all processes related to Dr. Harper[,]" and withhold a portion of Dr. Harper's October 2015 wages for several weeks while it was "doing an investigation[.]" On 30 November 2015, Vohra terminated Dr. Harper's employment[1] and requested that Dr. Harper reimburse the practice for $88,133.43 it claimed the practice incurred "[a]s a result of [Dr. Harper's] failure to disclose this critical information[.]"

Dr. Harper filed suit against Vohra[2], alleging, among other claims, a violation of the North Carolina Wage and Hour Act.[3] Vohra subsequently asserted counterclaims for fraud and breach of contract. After a trial in Mecklenburg County Superior Court, the jury returned a verdict finding that $29,035.50 in wages was owed to Dr. Harper. Regarding Vohra's counterclaims, the jury found that Dr. Harper had not breached his contract and that Vohra was not damaged by any fraud of Dr. Harper. Vohra filed post-judgment motions requesting that the trial court enter a directed verdict on its breach of contract counterclaim and amend the damages award. The trial court denied these motions. Vohra timely appeals.

ANALYSIS

A. Breach of Contract Counterclaim

[1] Vohra first argues the trial court erred in denying its motion for judgment notwithstanding the verdict on the breach of contract counterclaim. We disagree.

We have described our review of trial court rulings on motions for judgment notwithstanding the verdict:

> A motion for a judgment notwithstanding the verdict is, fundamentally, the renewal of an earlier motion for a directed verdict. When a motion for judgment notwithstanding the verdict is brought, the issue is whether the evidence is sufficient to take the case to the jury and to support a verdict for the non-moving party. The evidence is to be considered in the light most favorable to the non-moving party, and the non-moving party is entitled

1. The Employment Agreement signed by the parties listed "EMPLOYEE'S exclusion or debarment from the Medicare or Medicaid programs" as a ground for immediate termination.

2. We refer to all Defendants collectively as "Vohra."

3. The other claims in Dr. Harper's complaint are not relevant to this appeal.

> to all reasonable inferences that can be drawn from that evidence.

Ridley v. Wendel, 251 N.C. App. 452, 458, 795 S.E.2d 807, 812-13 (2016) (citations, alterations, and internal quotation marks omitted). This is a high standard for the party moving for judgment notwithstanding the verdict, and the trial court is required to deny the motion where the verdict for the non-moving party is supported by "more than a scintilla of evidence . . . ." *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 410, 677 S.E.2d 485, 491 (2009). We review a trial court's order ruling on a motion for judgment notwithstanding the verdict de novo. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 341-42, 658 S.E.2d 1, 4, (2008).

The elements of a breach of contract claim are well established: (1) existence of a valid contract and (2) breach of the terms of that contract. *Montessori Children's House of Durham v. Blizzard*, 244 N.C. App. 633, 636, 781 S.E.2d 511, 514 (2016). In determining whether there has been a breach of the terms of a valid contract, we must necessarily look to the language of those terms. "When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties." *Lynn v. Lynn*, 202 N.C. App. 423, 431, 689 S.E.2d 198, 205 (2010) (citation, ellipses, and internal quotation marks omitted). Conversely, if the contract is ambiguous, "interpretation of the contract is a matter for the jury." *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 422, 547 S.E.2d 850, 852 (2001).

Ambiguity exists in a contract's terms "when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 525, 723 S.E.2d 744, 748 (2012). "Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was." *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 690, 564 S.E.2d 641, 643 (2002) (internal citation and quotation marks omitted).

The Employment Agreement signed by both parties contained the following provision:

> 2.5 General Professional Qualifications and Obligations. At all times during the term of this Agreement, EMPLOYEE:
>
> . . .
>
> (b) shall be qualified to participate and shall participate in Medicare, Medicaid and other state medical assistance

> and federal programs, and not be under current exclusion, debarment or sanction by any state or federal health care program, including Medicare and Medicaid;

The provision of the Employment Agreement does not define the term "exclusion" by health care programs.

Dr. Harper argues there is ambiguity in the requirements of Section 2.5(b). Namely, he contends the clause "and not be under current exclusion, debarment or sanction by any state or federal health care program . . . " qualifies the preceding requirement that he be qualified to participate—and shall participate—in the listed health care programs and that the words "current exclusion, debarment or sanction" are vague and ambiguous. He contends these terms suggest *disciplinary* action by a health care program, "which limit the first portion of the provision." Thus, his argument is that the language does not unambiguously cover a voluntary opt-out affidavit. Given the placement of the clause and the absence of a definition for the term "exclusion" in the Employment Agreement, we conclude this to be a reasonable interpretation.

In contrast, Vohra argues the language of Section 2.5(b) contains two distinct requirements of the employee, Dr. Harper, with respect to Medicare: that he (1) shall be qualified to participate in Medicare and shall participate in Medicare and (2) not be under current exclusion, debarment, or sanction. Vohra contends the language that required Dr. Harper to be "qualified to participate" and to participate in Medicare is a stand-alone requirement and that this language is unambiguous – it required Dr. Harper to be qualified to participate and to participate in Medicare, which he could not do because of the Opt-Out Affidavit. Vohra argues the remaining requirement that Dr. Harper "not be under current exclusion, debarment, or sanction" is a separate requirement and does not qualify or describe the first requirement regarding participation. This interpretation is also reasonable.

The existence of more than one reasonable interpretation of the language in Section 2.5(b) is precisely what renders that provision ambiguous. *See Variety Wholesalers, Inc.*, 365 N.C. at 525, 723 S.E.2d at 748. Given this ambiguity, the interpretation of Section 2.5(b) was properly placed before the jury. Moreover, because it is a reasonable inference that Section 2.5(b) did not cover or address a voluntary opt-out affidavit, we cannot conclude the trial court erred in declining to disturb the jury's verdict finding that Dr. Harper did not breach the contract. *See N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979) ("[I]t is proper to direct verdict for the party with the burden of proof if the evidence so clearly establishes the fact in issue that no reasonable

inferences to the contrary can be drawn."). We affirm the trial court's decision to deny Vohra's motion for directed verdict on this claim.

B. Reply to Counterclaim

[2] Vohra next argues the trial court abused its discretion in permitting Dr. Harper to file an untimely reply to Vohra's amended counterclaims for fraud and breach of contract. We disagree.

1. Procedural History

In its original answer to Dr. Harper's complaint, Vohra asserted counterclaims for fraud and breach of contract, to which Dr. Harper filed a timely reply. Dr. Harper moved to dismiss these counterclaims approximately two months later, and Vohra filed a motion for leave to amend its counterclaims. The trial court granted that motion, ordering Vohra to file and serve its amended counterclaims within two days and Dr. Harper to reply within thirty days. In its amended counterclaims, Vohra added allegations to support its claims of fraud and breach of contract. Dr. Harper did not file a reply to the amended counterclaims within the thirty-day time period.

Prior to trial, Vohra filed a motion in limine "to exclude evidence in opposition" to the allegations added in the amended counterclaim. The trial court indicated that it agreed with the motion in limine, but held open the question of whether assertions of law in a counterclaim are deemed admitted when no reply is made. When the issue arose again during trial, Dr. Harper sought to file a handwritten reply to the amended counterclaims denying the added allegations. The trial court reversed its initial decision regarding Vohra's motion in limine and allowed Dr. Harper to file the handwritten reply.

2. Discussion

We review the trial court's exercise of discretion in allowing the admission of an untimely reply to a counterclaim for an abuse of that discretion. *Rossi v. Spoloric*, 244 N.C. App. 648, 654, 781 S.E.2d 648, 653 (2016). "An 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.' " *Id.* at 651, 781 S.E.2d at 651-52 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

When a trial court orders a reply to a counterclaim, the plaintiff must serve his or her reply to the counterclaim "within 30 days after service of the order, unless the order otherwise directs." N.C.G.S. § 1A-1, Rule 12(a)(1) (2017). However, Rule 6(b) of the North Carolina Rules of Civil Procedure "gives the trial court wide discretionary authority to enlarge

the time within which an act may be done" and permit an otherwise untimely reply. *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 130, 203 S.E.2d 421, 423 (1974). Rule 6(b) states, "Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect." N.C.G.S. §1A-1, Rule 6(b). Thus, the trial court retains "broad authority" to extend the time period for a responsive pleading and permit an otherwise untimely reply "upon a finding of excusable neglect." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (internal quotation marks omitted).

Rule 8(d) governs the effect of a party's failure to deny averments made in a pleading to which a responsive pleading is required. The rule states: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." N.C.G.S. § 1A-1, Rule 8(d) (2017). In limited circumstances, however, we have declined to strictly adhere to Rule 8(d) "in the context of a plaintiff's failure to file a reply to a counterclaim[.]" *Crowley v. Crowley*, 203 N.C. App. 299, 307, 691 S.E.2d 727, 733 (2010) (quoting *Connor v. Royal Globe Ins. Co.*, 56 N.C. App. 1, 5, 286 S.E.2d 810, 814 (1982)). Specifically, we held "that a plaintiff's failure to file a reply re-asserting allegations already made in the complaint in response to averments in a defendant's counterclaim which do no more than present denials in affirmative form of the allegations of the complaint does not amount to an admission pursuant to . . . Rule 8(d)." *Id.* at 307, 691 S.E.2d at 733 (internal quotation marks omitted).

In so holding, we looked to federal decisions for guidance. In *Vevelstad v. Flynn*, 230 F.2d 695 (9th Cir. 1956), *cert. denied*, 352 U.S. 827, 1 L. Ed. 2d. 49 (1956), the defendants filed an answer containing a section entitled "a fourth defense and counterclaim." *Id.* at 703. The plaintiffs failed to reply to the counterclaim, which the defendants argued "constituted an admission of the allegations of that part of the answer." *Id.* The trial court noted, and the Ninth Circuit affirmed:

> Obviously, by incorporating such allegations into what is denominated a defense and counterclaim, the defendant may not compel the plaintiff to repeat, in negative form in a reply, the allegations of his complaint, and hence, I conclude that the failure to file a reply in the instant case does not constitute an admission under rules 7(a) and 8(d) F.R.C.P.

Id. (internal quotation marks omitted). We found this interpretation "persuasive and in line with the spirit of our Court's prior decisions

interpreting . . . Rule 8." We stated, "Because of our general policy of proceeding to the merits of an action when to do so would not violate the letter or spirit of our Rules, this Court has refused to adhere strictly to Rule 8(d) in the context of a plaintiff's failure to file a reply to a counterclaim in *Eubanks v. Insurance Co.* and *Johnson v. Johnson*." *Crowley*, 203 N.C. App. at 307, 691 S.E.2d at 733 (citation, alterations, and internal quotation marks omitted).

Here, the trial court found *Crowley* applicable and determined Dr. Harper's failure to file a reply to Vohra's amended counterclaim did not amount to admissions under Rule 8(d). Nevertheless, the trial court permitted Dr. Harper to file the untimely reply to Vohra's amended counterclaims denying the amended allegations therein. Since the trial court permitted Dr. Harper to file the untimely reply, rather than simply denying Vohra's motion in limine, it was required to consider whether there was a showing of excusable neglect and exercise its discretion under that standard. *See Chantos*, 21 N.C. App. at 131, 203 S.E.2d at 423 ("If the request for enlargement of time is made after the expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect."). We agree with Vohra that the trial court did not consider excusable neglect and did not exercise discretion under that standard, thus his decision to permit an untimely reply was an abuse of discretion. *See State v. Nunez*, 204 N.C. App. 164, 170, 693 S.E.2d 223, 227 (2010) ("When a trial judge acts under a misapprehension of the law, this constitutes an abuse of discretion."). However, we conclude this procedural error did not prejudice Vohra, as we agree with the trial court that Dr. Harper's failure to file a reply did not amount to an admission under Rule 8(d).

In his complaint, Dr. Harper asserted, among other things, that he was an employee and was owed compensation under the North Carolina Wage and Hour Act for his services rendered during October 2015. In its amended answer to Dr. Harper's claims, Vohra submitted affirmative defenses of fraud and breach of contract. In its affirmative defense for fraud, Vohra stated:

> Second Affirmative Defense: Fraud
>
> The contract upon which this action is based was procured by fraud in that Plaintiff intentionally misrepresented his ability to accept Medicare/Medicaid on his employment application. The contract is thus unenforceable against Defendants and this action is barred.
>
> . . .

Fifth Affirmative Defense: Breach by Plaintiff

> Due to Plaintiff's material misrepresentation on his employment application he was in breach of the contract from the moment the contract was entered into. The contract is thus unenforceable against Defendants and this action is barred.

Vohra asserted counterclaims seeking relief for the same alleged fraud and breach of contract, and the amended counterclaims included additional allegations related to and in support of the counterclaims.

The counterclaims for fraud and breach of contract do no more than present denials of the complaint's allegations in affirmative form. As evidenced by their inclusion as affirmative defenses, Vohra asserted fraud and breach of contract as defenses to Dr. Harper's claim. That is, it argued that Dr. Harper's employment agreement was an unenforceable contract due to fraud and material misrepresentation. The counterclaims for fraud and breach of contract merely reiterated these defenses in affirmative form and sought relief therefrom. As such, Dr. Harper needed not repeat in negative form the allegations of his complaint. Accordingly, the trial court did not err in its determination that Dr. Harper's failure to file a reply to the amended counterclaims did not amount to admissions under Rule 8(d).

Additionally, we note the trial court's decision not to adhere strictly to Rule 8(d) in this context was in line with our "general policy of proceeding to the merits of an action." *Crowley*, 203 N.C. App. at 307, 691 S.E.2d at 733 (citation and internal quotation marks omitted). Dr. Harper filed a reply to Vohra's original counterclaims for fraud and breach of contract. In this reply, he denied the allegations therein. When Vohra amended its counterclaims to include additional allegations supporting the counterclaims, it was on notice that Dr. Harper would similarly deny the additional allegations and suffered no prejudice. We affirm.

C. Damages

[3] In its final argument, Vohra contends the trial court erred in awarding liquidated damages under the North Carolina Wage and Hour Act (NCWHA) to an amount equaling Dr. Harper's gross pay rather than his net pay. It contends that recovery under the NCWHA for "unpaid amounts" must be interpreted as recovery of net pay, or the employee's gross pay less proper withholdings. Accordingly, Vohra argues the liquidated damages award should have been $18,483.76, Dr. Harper's gross pay of $29,035.50 less withholdings.

The question of whether damages awarded under the NCWHA must be gross or net wages is a question of statutory interpretation and requires us to turn to the language of the NCWHA. "We review questions of statutory interpretation de novo." *City of Asheville v. Frost*, 370 N.C. 590, 591, 811 S.E.2d 560, 561 (2018). "Legislative intent controls the meaning of a statute." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986). "To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895–96 (1998) (citing *Shelton*, 318 N.C. at 81-82, 347 S.E.2d at 828). "First among these considerations, however, is the plain meaning of the words chosen by the legislature; if they are clear and unambiguous within the context of the statute, they are to be given their plain and ordinary meanings." *Id.* at 522, 507 S.E.2d at 895–96.

N.C.G.S. § 95-25.22 specifically provides for the recovery of unpaid wages based upon a violation of the NCWHA:

> (a) Any employer who violates the provisions of [N.C.G.S. § 95-25.7 (Payment to Separated Employees)] shall be liable to the employee or employees affected in the amount of their . . . unpaid amounts due under [N.C.G.S. § 95-25.7], as the case may be, plus interest at the legal rate set forth in [N.C.G.S.] § 24-1, from the date each amount first came due.
>
> (a1) In addition to the amounts awarded pursuant to subsection (a) of this section, the court shall award liquidated damages in an amount equal to the amount found to be due as provided in subsection (a) of this section, provided that if the employer shows to the satisfaction of the court that the act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Article, the court may, in its discretion, award no liquidated damages or may award any amount of liquidated damages not exceeding the amount found due as provided in subsection (a) of this section.

N.C.G.S. § 95-25.22(a)-(a1) (2017). Neither N.C.G.S. § 95-25.22 nor any other provision in the NCWHA defines "unpaid amounts," and we have no caselaw addressing whether such amounts should be calculated as gross or net pay. The NCWHA does, however, define "wages":

> "Wage" paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities. For the purposes of G.S. 95-25.6 through G.S. 95-25.13 "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

N.C.G.S. § 95-25.2(16) (2017).

Equally informative, N.C.G.S. § 95-25.22 explains that the amounts to be paid are determined by N.C.G.S. §§ 95-25.6-.12, which provide specific provisions for different types of wages. *See generally* N.C.G.S. § 95-25.1 *et seq*. (2017). Here, Dr. Harper's claim for payment was based on N.C.G.S. § 95-25.7, which states:

> Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday either through the regular pay channels or by mail if requested by the employee. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture.

N.C.G.S. § 95-25.7 (2017).

The NCWHA authorizes employers to withhold taxes from wages. *See* N.C.G.S. § 95-25.8 (2017) ("An employer may withhold or divert any portion of an employee's wages when: (1) The employer is required or empowered to do so by State or federal law[.]"). Thus, based upon the plain language of the NCWHA, the "unpaid amounts" due under § 95-25.7 were Dr. Harper's "wages" as defined by N.C.G.S. § 95-25.2(16). N.C.G.S. § 95-25.22; *see* N.C.G.S. § 95-25.1 *et seq*. Consequently, the fact that Vohra could "withhold or divert" a portion of Dr. Harper's "wages" in accordance with state and federal law does not change the fact that they are "unpaid amounts" which the employer should have paid out, either directly to the employee or for the employee's benefit, but for the violation of the NCWHA. N.C.G.S. § 95-25.8; *see generally* N.C.G.S. § 95-25.1

et seq. The plain language of N.C.G.S. § 95-25.22 provides that upon violation the employer must pay the "unpaid" amounts to the employee. *See* N.C.G.S. § 95-25.22. Here, the amount left unpaid by Vohra's NCWHA violation was $29,035.50. Moreover, liquidated damages may be awarded in an amount "equal" to the unpaid amount, which is exactly what the trial court did in awarding "liquidated damages to Dr. Harper in the amount of $29,035.50."[4] *Id*.

A plain reading of the NCWHA is sufficient to resolve the issue of damages in this case. The NCWHA does not explicitly define "unpaid amounts" but its definition of "wages" read in concert with the relevant provisions described above demonstrates that the trial court did not err in awarding Dr. Harper liquidated damages based upon his gross pay. The trial court's order is affirmed as it relates to the issue of damages.

CONCLUSION

The trial court did not err in denying Vohra's motion for judgment notwithstanding the verdict on the breach of contract counterclaim where the jury's verdict was supported by more than a scintilla of evidence. The trial court's decision to permit Dr. Harper to file an untimely reply to Vohra's amended counterclaims did not prejudice Vohra. Lastly, the trial court did not err in awarding liquidated damages based upon gross pay. For these reasons, we affirm.

AFFIRMED.

Judges STROUD and DIETZ concur.

4. The trial court could in its discretion award a lesser amount, but Vohra has not argued on appeal the trial court abused its discretion in awarding the maximum liquidated damages award allowed under the statute. *See* N.C.G.S. § 95-25.22 (2017).

IN RE A.K.G.

[270 N.C. App. 409 (2020)]

IN THE MATTER OF A.K.G.

No. COA18-1222

Filed 17 March 2020

Appeal and Error—mootness—juvenile case—permanency planning order—juvenile turning eighteen years old during appeal

A father's appeal from a permanency planning order, which ceased reunification efforts with his daughter, was dismissed as moot where his daughter reached the age of majority while the appeal was pending (thereby terminating the trial court's jurisdiction in the underlying juvenile proceeding and preventing an appellate ruling from having any practical effect) and where the appeal did not fit into any exception to the mootness doctrine.

Appeal by respondent from order entered 26 March 2018 by Judge Lora C. Cubbage in Guilford County District Court. Heard in the Court of Appeals 31 October 2019.

Christopher L. Carr and Taniya Reaves for petitioner-appellee Guilford County Department of Health and Human Services.

Anné C. Wright for respondent-appellant father.

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

DIETZ, Judge.

Respondent appeals a permanency planning order that changed the permanent plan for his daughter Adele.[1] While this appeal was pending, Adele reached the age of majority, thus terminating the trial court's juvenile jurisdiction.

This Court ordered supplemental briefing to address whether the appeal is now moot. After reviewing the parties' submissions, we hold that Respondent's appeal does not fall within any applicable exceptions to the mootness doctrine.

The challenged order, which merely changed Adele's permanent plan, does not create the sort of collateral consequences that exist with

1. We use a pseudonym to protect the juvenile's identity.

an order adjudicating a juvenile as neglected or an order terminating parental rights. Similarly, there is nothing about the trial court's fact-bound permanency planning decision, unique to this particular case, that could warrant application of the public interest exception. Finally, the particularized trial court errors that Respondent asserts in this appeal are not the sort of issues that are "capable of repetition yet evading review" so as to preclude mootness.

We therefore dismiss this appeal as moot. We note, however, that our State's appellate system goes to rather extraordinary lengths to expedite these juvenile cases and it is, and should be, rare for a juvenile case to be rendered moot in this way.

Facts and Procedural History

In 2016, the Guilford County Department of Health and Human Services filed a petition alleging Adele was a neglected and dependent juvenile and took custody of Adele later that day. After a hearing, the trial court entered an order adjudicating Adele to be a neglected and dependent juvenile. The court set Adele's primary permanent plan of care as reunification with a parent and set her secondary plan as guardianship with a relative.

Following this initial adjudication, the trial court conducted a series of permanency planning review hearings. In 2017, the trial court changed the primary permanent plan to guardianship with a relative with reunification as the secondary plan. Then, in 2018, the trial court changed the primary permanent plan to adoption and the secondary plan to guardianship with a relative, thus ceasing reunification efforts with Respondent. The court found Respondent was making some progress on his case plan, but that he failed to address his past issues with domestic violence. Respondent appealed the trial court's order on 25 September 2018. The case was heard by this Court on 31 October 2019. Adele reached eighteen years of age several days later.

Analysis

Respondent appeals the trial court's permanency planning order, arguing that the trial court failed to make sufficient findings and improperly ceased reunification efforts and set Adele's permanent plan as adoption.

While this appeal was pending, Adele reached eighteen years of age. In a juvenile proceeding, "jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat.

§ 7B-201(a). Thus, the trial court no longer has subject matter jurisdiction in this proceeding and the permanent plan is no longer in effect. This, in turn, means that even if this Court determined that the trial court erred in its order changing Adele's permanent plan, we could not remand the matter to correct that error and our ruling would have no practical effect. *Id.*; *see also* N.C. Gen. Stat. § 7B-1000(b).

Ordinarily, this Court must dismiss an appeal as moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *In re B.G.*, 207 N.C. App. 745, 747, 701 S.E.2d 324, 325 (2010). But there are a narrow set of exceptions to the mootness doctrine, some of which apply to juvenile proceedings. We asked the parties for supplemental briefing to assess whether this appeal is moot. Respondent offered three arguments against mootness. We address those arguments in turn below.

First, Respondent contends that the challenged permanency planning order might have adverse "collateral consequences" for him. An appeal from a juvenile ruling "which creates possible collateral legal consequences for the appellant is not moot." *In re A.K.*, 360 N.C. 449, 453, 628 S.E.2d 753, 755 (2006). In other words, although the *juvenile* (now an adult) is no longer affected by the challenged order, the case might not be moot if the order could have future adverse effects on the *parent* who filed the appeal.

For example, our Supreme Court has held that an order adjudicating a child as neglected is not mooted when the juvenile reaches the age of majority because the finding of neglect can be used to support an adjudication of neglect for other children living in the same home. *Id.* at 456–57, 628 S.E.2d at 757–58. Similarly, this Court has held that an order terminating parental rights has possible collateral consequences because it can be used to support termination of the parent's rights to another child. *In re C.C.*, 173 N.C. App. 375, 379, 618 S.E.2d 813, 816–17 (2005).

Respondent concedes that the *legal effect* of an order changing a juvenile's permanent plan, unlike an order adjudicating a juvenile as neglected or terminating parental rights, does not have any collateral consequences. But Respondent contends that the challenged order has collateral legal consequences because it includes unfavorable *findings of fact*, including a finding that Respondent failed to address his ongoing domestic violence issues. Respondent argues that in a future proceeding, such as a custody dispute involving a future child, a court might either take judicial notice of those unfavorable fact findings or rule that Respondent is collaterally estopped from disputing them. We reject this argument.

First, Respondent mischaracterizes the way judicial notice works. A judicially noticed fact is "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. R. Evid. 201(b). Findings of fact in a court order from an unrelated legal proceeding are not proper subjects of judicial notice. *See In re K.A.*, 233 N.C. App. 119, 128 n.4, 756 S.E.2d 837, 843 n.4 (2014); *State v. Cooke*, 248 N.C. 485, 493–94, 103 S.E.2d 846, 852 (1958). Thus, Respondent's judicial notice argument is meritless.

Second, Respondent ignores that the challenged findings are duplicative of other unchallenged findings made by the trial court in orders throughout this juvenile proceeding. Thus, even if a court were to permit the highly disfavored use of non-mutual collateral estoppel to bar Respondent from challenging these unfavorable findings in "a custody dispute regarding a later born child"—and that is, at best, an exceedingly remote possibility—other substantially identical findings would still be available even if those in this order were not. Thus, Respondent has not shown that the challenged order exposes him to any adverse collateral consequences that would not exist without it.

Next, Respondent argues that his appeal falls under the public interest exception to mootness. Again, we reject this argument. A court may choose to hear an otherwise moot appeal if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). However, "this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest." *Anderson v. North Carolina State Bd. of Elections*, 248 N.C. App. 1, 13, 788 S.E.2d 179, 188 (2016).

Respondent contends that "[t]he best interests of children and the effect of trial court decisions related to these best interests is of public interest and general importance." But that mischaracterizes the scope of the challenged order. The order is, at most, a fact-bound ruling involving the permanent plan for a particular juvenile in a case with particularized facts. The proper resolution of every juvenile case is important both to the litigants and to society as whole. But this case does not present anything so exceptionally important to the public interest that it should be treated as different from all other juvenile cases.

Finally, Respondent argues that the issues raised in this appeal are capable of repetition, yet evading review. This argument, too, is meritless. The capable-of-repetition exception applies only when "(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." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703–04 (2002). Thus, this exception applies to cases in which the underlying lawsuit involves some action that is capable of repetition. It does not apply in a case like this one, where a litigant argues that the trial court made legal errors in its fact findings and legal conclusions that are particular to the case.

In sum, this appeal is moot and we are unable to adjudicate the merits of Respondent's claims. We note that our State's appellate system has taken a number of steps to ensure that juvenile cases will not be mooted on appeal, including rather extraordinary departures from the usual rules governing preparation of the record, drafting of briefs, and the availability of extensions of time. *See* N.C. R. App. P. 3.1. Juvenile cases that are rendered moot while an appeal is pending are rare. But it can happen and here it did. The challenged order, which did nothing more than change the permanent plan for Adele, was rendered moot when Adele reached the age of majority, depriving the trial court of any further jurisdiction over the matter.

Conclusion

We dismiss Respondent's appeal as moot.

DISMISSED.

Judges STROUD and HAMPSON concur.

IN RE B.S.

No. COA19-789

Filed 17 March 2020

1. Mental Illness—involuntary commitment—sufficiency of evidence—dangerous to self—future danger

The trial court's findings were sufficient to justify respondent's involuntary commitment and supported the court's ultimate determination that respondent was a danger to himself and was likely to suffer harm in the near future. Evidence showed that respondent was unable to care for himself without constant supervision and medical treatment and that he exhibited grossly delusional behavior, including denying his own identity along with the fact that he had ever been diagnosed with or treated for mental illness, despite having been admitted for psychiatric care on eleven prior occasions.

2. Appeal and Error—preservation of issues—involuntary commitment order—improper commitment period

Respondent's challenge to an involuntary commitment order on the basis that the commitment period exceeded the maximum statutory period was automatically preserved where the order violated the statutory mandate contained in N.C.G.S. § 122C-271.

3. Mental Illness—involuntary commitment—split commitment—maximum statutory period

The trial court's involuntary commitment order imposing thirty days of inpatient treatment and ninety days of outpatient treatment was reversed for exceeding the statutory maximum of ninety total days in violation of N.C.G.S. § 122C-271.

Appeal by Respondent from order entered 3 April 2019 by Judge Elizabeth Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 4 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for the Respondent-Appellant.

COLLINS, Judge.

Respondent B.S. appeals from an involuntary commitment order committing him to inpatient treatment, followed by outpatient treatment. Respondent argues (1) that the trial court's findings of fact fail to support its conclusion that Respondent was dangerous to himself and dangerous to others and (2) that the trial court violated N.C. Gen. Stat. § 122C-271(b)(2) when it ordered a split commitment that exceeded the maximum authorized period of 90 days of commitment. As to Respondent's first argument, we affirm. As to the second argument, we remand for entry of a commitment period that complies with the statutory mandate of a maximum of 90 days' commitment.

I. Procedural History

On 15 March 2019, an affidavit and petition for involuntary commitment was presented to a Mecklenburg County magistrate alleging that Respondent was (1) mentally ill and dangerous to self or others and (2) a substance abuser and dangerous to self or others. The affidavit and petition stated that Respondent was (1) abusing alcohol and marijuana; (2) diagnosed with "schizoaffective disorder-bipolar" and was not taking his medications; (3) saying inappropriate things to children and neighbors; (4) breaking into vehicles in his neighborhood; and (5) dragging his dog through the neighborhood causing it injury and telling the dog to bite others. That same day, the magistrate found that both grounds were supported by the factual allegations and ordered Respondent into custody so that an examination could be completed within 24 hours at Behavioral Health Charlotte ("BHC"). On 16 March 2019, Dr. S. Solimon, a psychologist with BHC, conducted an examination of Respondent to determine the necessity for involuntary commitment. Solimon determined Respondent to be dangerous to himself and others, and recommended 30 days' inpatient commitment.

On 3 April 2019, the trial court conducted an involuntary commitment hearing for Respondent. At the conclusion of the hearing, the trial court ordered Respondent committed to inpatient treatment at BHC or Broughton Hospital for a period not to exceed 30 days, followed by a commitment to outpatient treatment at BHC or Broughton Hospital for a period not to exceed 90 days.

Respondent gave verbal notice of appeal in open court on 3 April 2019 and filed written notice of appeal on 22 April 2019.

II. Factual Background

Dr. David Litchford, a psychiatrist with BHC, testified at the involuntary commitment hearing to Respondent's mental health history. He

testified that Respondent has "schizo-affective disorder" and that he was "well-known" at BHC because he had previously been admitted at least six times. Respondent was admitted at least five additional times to Old Vineyard Hospital, Rowan Hospital, and Broughton Hospital. Litchford testified that Respondent had been "very aggressive" during a previous commitment hearing, and "assaultive" after that commitment hearing, and had to be transferred to Broughton Hospital, where he remained for two years. Respondent was discharged from Broughton Hospital in January 2019 but had to be admitted to BHC on 15 March 2019 for medication noncompliance.

Litchford testified that when Respondent was admitted to the BHC emergency room on 15 March 2019, he was very angry. Respondent hit his fists on the walls, exposed himself to hospital staff, threatened to urinate on the floor, claimed that he was raped in the Emergency Room, and claimed that "he [did] not know who [B.S.] is." Respondent claimed to be "Brian Mohammad Allah Gomez." Respondent said that he "has never been aggressive towards people, he's never been assaultive, that he's never been psychiatrically hospitalized before and never been required to take psychiatric medication or had a diagnosis." Litchford explained that Respondent's denial of his identity "persists through today."

Litchford explained that Respondent is "delusional[,] . . . grandiose and paranoid." Respondent told his psychiatrist that he was hospitalized "because the government—the United States government is trying to intimidate him to prevent his political campaign of globalism." He made numerous phone calls to customer care hotlines and claimed that he had been abused and neglected at BHC. He also wrote letters to the customer care hotlines, stating that he was "fearful for [his] life" and claiming that Litchford told him, "You're going to be here a while because I said, and that's all that matters. I own you. You're mine and might as well call me master[.]" Litchford testified that this was "never, ever vocalized" to Respondent.

Respondent had to be forcibly medicated while at BHC due to his anger and aggression towards the hospital staff. He was "manic with pressured speech, high energy, not sleeping. He was intrusive, demanding." Given his "history of volatility," hospital staff placed Respondent on forced injection and forced tablet medications. When Litchford asked Respondent if he would commit to taking the medications after release from BHC, he "ple[]d the fifth" and stated that he does not have a mental illness and does not need the medication. Litchford concluded that, as of the date of the hearing, Respondent "remains very angry, irritated, and defensive[;] . . . [and] extremely psychotic and . . . unpredictable at this time."

Respondent testified at the hearing and requested that federal authorities verify his identity through a DNA test. He explained that he has "three twins. Three identical triplet twins. I am a quadruplet[,]" and asked the trial court to determine the legitimacy of his identity. Respondent testified that he refused medication because he did not believe it was right or medically just to be injected with needles, and stated that he had not been harmful to himself or to others.

III. Discussion

1. Dangerous to Self and Others

[1] Respondent first argues that the facts recorded in the trial court's commitment order do not support its ultimate findings that he is dangerous to himself and dangerous to others.

"To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others . . . ." N.C. Gen. Stat. § 122C-268(j) (2019). Findings of mental illness and dangerousness to self are ultimate findings of fact. *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980). This Court reviews an involuntary commitment order to determine whether the ultimate findings of fact are supported by the trial court's underlying findings of fact and whether those underlying findings, in turn, are supported by competent evidence. *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016); *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74. Unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal." *In re Moore*, 234 N.C. App. 37, 43, 758 S.E.2d 33, 37 (2014) (citation omitted). On appeal, "[w]e do not consider whether the evidence of respondent's mental illness and dangerousness was clear, cogent, and convincing. It is for the trier of fact to determine whether the competent evidence offered in a particular case met the burden of proof." *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74.

N.C. Gen. Stat. § 122C-3 provides, in relevant part, that a person is dangerous to himself if, within the relevant past, he has acted in such a way as to show:

> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and

> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself . . . .

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2019).[1]

Subsection 11(a)(1)(II) prohibits a trial court from involuntarily committing a person based only on a finding that the person had a history of mental illness or behavior before the commitment hearing; the trial court must find that there is a reasonable probability of some harm in the near future if the person is not treated. *In re J.P.S.*, 823 S.E.2d 917, 921 (N.C. Ct. App. 2019). "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." *Id.* (citing *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012)).

A person is dangerous to others if,

> [w]ithin the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. . . .

N.C. Gen. Stat. § 122C-3(11)(b) (2019).

In *In re Zollicoffer*, 165 N.C. App 462, 598 S.E.2d 696 (2004), this Court determined that the trial court's ultimate finding of dangerousness to self was supported by the underlying findings. Based on a treating physician's examination and recommendation, the trial court found

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1. Subsection 11(a) was amended effective 1 October 2019 to alter pronouns and word choice. 2019 N.C. Sess. Laws ch. 76, § 1. We apply and quote in this opinion the version of the statute extant at the time the trial court conducted the hearing. We note that the 2019 amendment made no substantive change to the relevant portions of the statute.

> that respondent has a history of chronic paranoid schizophrenia, that respondent admits to medicinal non-compliance which puts him "at high risk for mental deterioration," that respondent does not cooperate with his treatment team, and that he "requires inpatient rehabilitation to educate him about his illness and prevent mental decline."

Id. at 469, 598 S.E.2d at 700. Explaining that "the failure of a person to properly care for his/her medical needs, diet, grooming and general affairs meets the test of dangerousness to self[,]" *id.* (quoting *In re Lowery*, 110 N.C. App. 67, 72, 428 S.E.2d 861, 864 (1993) (internal quotation marks omitted)), we concluded that the findings of fact supported the conclusion of law that respondent was dangerous to himself. *Id.*

In this case, the trial court made the following relevant findings of fact:

> Since respondent presented in the emergency department, he has acted in such a way as to show that he is unable without constant professional 24 hour supervision and medical treatment to exercise self-control, judgment and discretion in the conduct of his daily responsibilities and social relations to satisfy his need for nourishment, personal or medical care, self protection and safety and is likely to suffer debilitation without treatment. His behavior, during his admission, has been grossly irrational and he has demonstrated severely impaired insight and judgment.
>
> Respondent has been admitted to this facility on six prior occasions for acute psychiatric treatment; three times to Broughton Hospital and twice to other facilities for psychiatric treatment. He was admitted to Broughton Hospital after being assaultive during an involuntary commitment hearing. He remained in the hospital for two years and was discharged in January 2019. Since that discharge, over the subsequent two months, Respondent did not engage in treatment or take prescribed medication resulting in a rapid deterioration of his mental status. Respondent is grossly delusional, paranoid and manic. He has been at all times during this admission, angry, agitated and defensive.
>
> Respondent has been intrusive which risks substantial conflict and risk of harm outside the medical facility. Respondent denies his identity. He denies ever being

> diagnosed with a mental illness, being prescribed medication or being treated at this or any other psychiatric treatment facility. Respondent denies he is [B.S.] unless there is DNA evidence to prove this.

The trial court also found as fact and incorporated by reference all matters set out in Solimon's examination report on Respondent and Litchford's testimony, discussed in Section I. *supra*. Solimon conducted an examination of Respondent in order to determine any necessity for involuntary commitment. Solimon concluded that Respondent has schizoaffective disorder, was dragging his dog around the neighborhood and ordering the dog to bite people, was "alleged to be breaking into cars," and that his "loss of touch with reality makes it difficult for him to exercise judgment in the conduct of his daily affairs."

As in *In re Zollicoffer*, these findings of fact are sufficient to support an ultimate finding that Respondent was dangerous to himself and that there was a "reasonable probability" of near-future harm, as required by N.C. Gen. Stat. § 122C-3(11)(a)(1)(I-II). *Zollicoffer*, 165 N.C. App. at 469, 598 S.E.2d at 700. The trial court's findings that (1) Respondent is unable "without constant professional 24 hour supervision and medical treatment" to satisfy his needs for personal or medical care, self-protection, and safety; (2) Respondent is "grossly delusional, paranoid, and manic[,]" and "is likely to suffer debilitation without treatment"; (3) Respondent's "loss of touch with reality makes it difficult for him to exercise judgment in the conduct of his daily affairs"; and (4) Respondent is "at risk of harm outside the medical facility[,]" show that Respondent was dangerous to himself and that there was a reasonable probability that he would suffer imminent harm absent commitment.

Moreover, the trial court's findings that Respondent was "grossly irrational," "demonstrated severely impaired insight and judgment," and was "extremely psychotic" as of the hearing date show that Respondent was unable to care for himself, and thus likely to suffer harm in the near future, without treatment. These findings support that Respondent was unable "to properly care for his[] medical needs . . . and general affairs," and they thus "meet[] the test of dangerousness to self." *Lowery*, 110 N.C. App. at 72, 428 S.E.2d at 864.

Under N.C. Gen. Stat. § 122C-3(11), the trial court need only determine that a respondent is dangerous to themselves *or* dangerous to others to support commitment. Here, the findings sufficiently support the trial court's ultimate determination that Respondent was dangerous to himself, and thus we need not determine whether the findings of fact adequately support that Respondent was dangerous to others.

2. Maximum Commitment of 90 Days

Respondent next argues that the trial court erred by imposing a split commitment that exceeded the maximum statutory period of 90 days.

[2] As a preliminary matter, we first address the State's argument that Respondent's appeal of the commitment period is moot because "the commitment order . . . expired, . . . [and] no longer involves the kind of question challenging the involuntary commitment proceeding[.]" The State claims that Respondent essentially asks for the trial court "to retrieve the original order from the clerk's office, strike out the '90 days' ordered for outpatient commitment, enter some number between 1 and 60 . . . and then store the case file away again." The State further argues that Respondent waived appellate review when he failed to object at trial to the length of the commitment. We determine the State's claims to be meritless.

"When a statute is clearly mandatory, and its mandate is directed to the trial court, the statute automatically preserves statutory violations as issues for appellate review." *In re E.D.*, 372 N.C. 111, 117, 827 S.E.2d 450, 454 (2019) (internal quotation marks and citations omitted). In *In re Carter*, 25 N.C. App. 442, 213 S.E.2d 409 (1975), this Court explained that

> the statute expressly provides that appeal may be had from a judgment of involuntary commitment in the district court to this court, as in civil cases. Since the statute also directs that the initial period of commitment may not exceed 90 days, . . . there would be little reason to provide a right of appeal if the appeal must be considered moot solely because the period of commitment expires before the appeal can be heard and determined in this court.

Id. at 444, 213 S.E.2d at 410. "[I]n order to challenge the improper commitment period contained in the . . . order, [Respondent] was required to appeal that [] order pursuant to N.C. Gen. Stat. § 122C–272 . . . ." *In re Webber*, 201 N.C. App. 212, 222, 689 S.E.2d 468, 476 (2009). Thus, an improper commitment period constitutes reversible error. *Id.* at 218, 689 S.E.2d at 473. ("By statute, the court was only authorized to order commitment . . . for 90 days . . . ."). Respondent's appeal of the length of his commitment is properly before this Court.

[3] N.C. Gen. Stat. § 122C-271 provides that a trial court "may order outpatient commitment for a period not in excess of 90 days[,]" "may order inpatient commitment at a 24-hour facility . . . for a period not in excess of 90 days[,]" or "may order a combination of inpatient and outpatient

commitment . . . for a period not in excess of 90 days." N.C. Gen. Stat. § 122C-271 (2019). Whether a trial court orders inpatient treatment, outpatient treatment, or a combination of both, the maximum commitment period cannot exceed 90 days. *Id.*

Here, the trial court committed Respondent to 30 days of inpatient treatment and 90 days of outpatient treatment, for a total commitment period of 120 days. This it could not do. As the trial court impermissibly ordered a commitment period in excess of the maximum allowed by N.C. Gen. Stat. § 122C-271, we reverse the 120-day commitment period ordered in this case.

III. Conclusion

As the trial court's findings of fact supported the ultimate finding that Respondent was a danger to himself, the trial court did not err in concluding that Respondent was dangerous to himself and ordering commitment. However, because the trial court impermissibly committed Respondent to a term in excess of the statutory maximum, we reverse the trial court's entry of a 120-day commitment period and remand the case to the trial court for entry of a commitment period in compliance with N.C. Gen. Stat. § 122C-271.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges STROUD and BERGER concur.

IN RE K.G.

[270 N.C. App. 423 (2020)]

IN THE MATTER OF K.G.

No. COA19-424

Filed 17 March 2020

Native Americans—Indian Child Welfare Act—notice—no evidence in record

Where a neglected child was removed from her mother's care and the mother indicated that she was of Cherokee ancestry, the trial court had reason to know the child may be an Indian child as defined in 25 U.S.C. § 1903(4). Because the record contained no evidence that the appropriate tribes actually received notice of the proceedings pursuant to the Indian Child Welfare Act, the matter was remanded so that the trial court could ensure that notice was sent and that the trial court did have subject matter over the case.

Appeal by Respondent-Mother from order entered 14 February 2019 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 19 February 2020.

Erika Hamby for petitioner-appellee Wilkes County Department of Social Services.

Steven S. Nelson for respondent-appellant mother.

Nelson Mullins Riley & Scarborough LLP, by Carrie A. Hanger, for guardian ad litem.

MURPHY, Judge.

"The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes[.]" U.S. Const. art. I, § 8, cl. 3. "[T]hrough this [clause] and other constitutional authority, Congress has plenary power over Indian affairs[.]" 25 U.S.C. § 1901(1) (1978). In recognition of that power—and in response to the "wholesale removal of Indian children from their homes"—Congress passed the Indian Child Welfare Act ("ICWA"), "which establishes federal standards that govern state-court child custody proceedings involving Indian children." *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 642, 186 L. Ed. 2d 729, 736 (2013).

Although the parties to this appeal present arguments on a number of issues, our analysis of this case need not go beyond the first issue

presented: whether the trial court erred in concluding ICWA did not apply to its *Permanency Planning Order* entered 14 February 2019. We hold the trial court erred because "the question of [its] jurisdiction under . . . ICWA cannot be resolved based on the evidence [in the] record." *In re: A.P.*, 818 S.E.2d 396, 400 (N.C. Ct. App. 2018) (internal quotation marks and citation omitted). We remand to confirm notice of these proceedings is provided to the relevant tribes and that the trial court has properly determined whether it has subject matter jurisdiction of this case.

Appellant argues the trial court failed to comply with ICWA's notice provisions because it did not ensure the record included "return receipts or other proof of actual delivery in the record to confirm delivery of the notices in compliance with 25 C.F.R. [§] 23[-]111." This provision, 25 C.F.R. § 23-111(a), is nearly identical to 25 U.S.C. § 1912(a); both describe the measures a state court must take to notice federally recognized tribes of involuntary proceedings that may involve an "Indian child," as that term is defined under 25 U.S.C.§ 1903(4) (2018).[1] Under ICWA:

> In any involuntary proceeding in a State court, where the court knows *or has reason to know* that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary . . . .

25 U.S.C. § 1912(a) (2018).

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1. An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C.§ 1903(4) (2018). The determination of whether a child is an Indian child "*is solely within the jurisdiction and authority of the Tribe* . . . ." 25 C.F.R. § 23.108(b) (2016) (emphasis added).

We interpreted ICWA's notice requirement as it is set out in the current federal guidelines most recently in *A.P.*, 818 S.E.2d at 400.[2] As is the case here, in *A.P.* the issue before us was, "[w]hether the evidence presented [to the trial court] should have caused [it] to have reason to know an 'Indian child' may be involved and trigger the notice requirement . . . ." *Id.* at 399. In *A.P.*, we reasoned ICWA:

> proscribes that once the court has reason to know the child could be an "Indian child," but does not have conclusive evidence, the court should confirm and "work with all of the Tribes . . . to verify whether the child is in fact a member." 25 C.F.R. § 23.107(b)(1). Federal law provides: "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary[.]" 25 U.S.C. § 1912(a). Further, a court must "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an 'Indian child.' " 25 C.F.R. § 23.107(b)(2).

Id. We held a trial court has "reason to know the child could be an 'Indian child,' " in instances where "it appears that the trial court had at least some reason to suspect that an Indian child may be involved." *Id.* (*quoting In re A.R.*, 227 N.C. App. 518, 523, 742 S.E.2d 629, 633 (2013)).

In *A.P.*, we also cited with approval our reasoning from *A.R.* that, "[t]hough from the record before us we believe it unlikely that [the juveniles] are subject to the ICWA, we prefer to err on the side of caution by remanding for the trial court to . . . ensure that the ICWA notification requirements, if any, are addressed . . . since failure to comply could later invalidate the court's actions." *A.R.*, 227 N.C. App. at 524, 742 S.E.2d at 634; *see also A.P.*, 818 S.E.2d at 399. We find this approach is consistent with ICWA's overall purpose of protecting "the best interests of Indian children and [promoting] the stability and security of Indian tribes and families[.]" 25 U.S.C. § 1902 (2018). Likewise, such a cautious approach is consistent with the federal guidelines promulgated with the latest major reworking of ICWA, which provides an example of a situation where a state court would be warranted in ceasing to treat a child as an "Indian child":

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2. *See* 25 C.F.R. § 23.111 (2016) (effective 12 Dec. 2016); *In re L.W.S.*, 255 N.C. App 296, 298, 804 S.E.2d 816, 818-19, n. 3-4 (2017).

> If a Tribe fails to respond to multiple repeated requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), and the agency has repeatedly sought the assistance of BIA in contacting the Tribe, a court may make a determination regarding whether the child is an Indian child . . . based on the information it has available.

U.S. Dept. of the Interior, Bureau of Indian Affairs, RIN 1076-AF25, Indian Child Welfare Act Proceedings 109 (2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc1-034238.pdf (hereinafter Indian Child Welfare Act Proceedings).

Here, the record shows the trial court had reason to know an "Indian child" may be involved. In its *Order on Need for Continued Nonsecure Custody*, entered 14 August 2017, the trial court noted "The mother indicates that she is of Cherokee ancestry, but did not know a specific tribe. The Department is sending notice to both the Eastern Band Cherokee as well as Cherokee Nation." Although it had reason to know an "Indian child" may be involved in these proceedings, the trial court did not ensure that the Cherokee Nation or the Eastern Band of Cherokee Indians were actually notified.

For example, there is no evidence of multiple repeated requests for verification to the relevant tribes, or that the agency sought the assistance of the Bureau of Indian Affairs ("BIA") in contacting the Tribes. In fact, the record shows DSS sent notice to the Cherokee Nation and Eastern Band of Cherokee Indians, but does not indicate DSS or the trial court ever received confirmation that either Tribe even received the notice, or that DSS sent any additional notices to the Tribes or the BIA. This is, as Appellant notes, inconsistent with ICWA's mandate that trial courts ensure that "[a]n original or a copy of each notice sent . . . is filed with the court *together with any return receipts or other proof of service*." 25 C.F.R. § 23.111(a)(2) (2016) (emphasis added).

"[T]he question of [the trial] court's jurisdiction under . . . ICWA cannot be resolved based on the evidence [in the] record." *A.P.*, 818 S.E.2d at 400 (internal quotation marks and citation omitted). The record does not indicate the trial court ensured ICWA's notification requirements were complied with. For instance, the record does not show "a Tribe fail[ed] to respond to multiple repeated requests for verification regarding whether a child is in fact a citizen (or a biological parent is a citizen and the child is eligible for citizenship), [or] the agency ha[d] repeatedly sought the assistance of BIA in contacting the Tribe[s] . . . ." Indian Child Welfare Act Proceedings 109. "We

remand to the trial court to issue an order requiring notice to be sent . . . as required by 25 U.S.C. § 1912(a), and which complies with the standards outlined in 25 C.F.R. § 23.111 . . . ." *Id.*

REMANDED.

Judges DIETZ and COLLINS concur.

IN THE MATTER OF N.U.

No. COA19-652

Filed 17 March 2020

Mental Illness—involuntary commitment—danger to self—sufficiency of evidence and findings

An involuntary commitment order was reversed where neither the evidence nor the trial court's findings of fact supported the conclusion that respondent was dangerous to herself. While evidence of respondent's schizophrenia and prior involuntary commitments showed that she had been a danger to herself in the past, that history alone could not support a finding that she would be a danger to herself in the future, especially where other evidence showed respondent's mental health had recently stabilized.

Appeal by Respondent from order entered 17 January 2019 by Judge Adam S. Keith in Granville County District Court. Heard in the Court of Appeals 19 February 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for the Respondent-Appellant.

COLLINS, Judge.

Respondent N.U. appeals from an involuntary commitment order committing her to inpatient treatment, followed by outpatient treatment. Respondent argues that the trial court erred because neither the evidence nor the findings of fact supported the trial court's conclusion that

Respondent was dangerous to herself. As neither the record evidence nor the findings support the trial court's conclusion that Respondent was dangerous to herself, we reverse the trial court's involuntary commitment order.

I. Background

On 5 November 2018, Respondent presented in the emergency department at UNC Rex Healthcare. Dr. Jun He, the physician on call in the emergency department on 5 November 2018, observed Respondent's behavior and became concerned for her mental health. Dr. He filed an affidavit and petition for involuntary commitment, affirming that Respondent was "mentally ill and dangerous to self" as she has schizoaffective disorder, presented in the emergency department with "bizarre, disorganized behavior," and stated that Respondent was "aggressive (kicking, spitting, hitting the staff)" and "adamantly refuse[d] to take any medication, . . . [and] has no insight of her mental illness."

That same day, Respondent underwent an "Examination and Recommendation to Determine Necessity for Involuntary Commitment" ("ERIC"). Dr. He found that Respondent "presented with bizarre, aggressive behaviors . . . , she continues to be psychotically paranoid and aggressive, has NO insight, refused all her medication, [and] thus needs to . . . be referred to inp[atient] psych[iatric] hospital." Dr. He recommended that Respondent be committed inpatient for seven days. Following the ERIC, a magistrate judge ordered Respondent to be committed inpatient at Central Regional Hospital.

On 8 November 2018, UNC Rex Healthcare transferred Respondent to the care of Central Regional Hospital. On 8 and 9 November, Respondent underwent two more ERICs. After the 9 November ERIC, Dr. Stephen Panyko, a physician with Central Regional Hospital, determined that Respondent has "multiple past psychiatric admissions, including 3 admissions to N.C. state hospitals within the past year," and that she had "threatened staff [at UNC Rex Healthcare], . . . and required [forced] meds and mechanical restraints. She continues to be paranoid, verbally aggressive, . . . [and] is at high risk of harm to self and others . . . ." Panyko recommended that Respondent be committed for inpatient treatment for 60 days and committed for outpatient treatment for 30 days.

On 15 November 2018, the trial court found that Respondent was mentally ill and dangerous to herself and others, and ordered Respondent committed for inpatient treatment for 60 days and committed for outpatient treatment for 30 days. Respondent did not appeal this commitment order.

On 4 January 2019, Respondent underwent another ERIC at Central Regional Hospital. It was determined that Respondent has "schizophrenia" and that "continued hospitalization is warranted as [she] has little insight and is at risk for decompensation without medication, as she has a history of repeated hospitalizations this past year, as such she represents a danger to herself." On 9 January 2019, Dr. Christina Murray filed the ERIC and recommended that Respondent be committed for inpatient treatment for an additional 30 days and committed for outpatient treatment for an additional 60 days.

The recommitment hearing took place on 17 January 2019. Panyko was admitted as an expert in psychiatry and testified as Respondent's attending physician. Panyko testified to Respondent's history of commitments, her behavior and progress while committed for inpatient treatment, explained that he had completed a petition for guardianship, and that the guardianship hearing would take place in February 2019. Panyko also testified that Respondent was "stable" as of 17 January 2019 and was not experiencing any "acute paranoia or agitation."

Following Panyko's testimony, Respondent's attorney made a motion to dismiss, arguing that Respondent no longer met the criteria listed in N.C. Gen. Stat. § 122C. Respondent then took the stand to testify on her own behalf. She affirmed that she had secure housing, was taking her medication and would continue to take her medication once released, and that she was willing to see a doctor and receive outpatient treatment upon release. She also explained that she had stopped taking her medication in the past due to homelessness and because she did not have a doctor who would prescribe the medications for her. Respondent acknowledged that her past commitments had been based on her failure to take her necessary medications. Respondent's attorney renewed the motion to dismiss and again argued that Respondent no longer met the criteria listed in § 122C because Respondent was "at baseline, she is stable, and she is not acute." The trial court denied Respondent's motion.

The trial court made oral findings of fact that (1) Respondent lacked insight into her mental illness; (2) Respondent had four psychiatric stays within the past two years and which all resulted in readmission; (3) within the relevant past, Respondent had been unable to care for herself and stay on her medication; and (4) there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment is given." The trial court concluded that Respondent was mentally ill and a danger to herself. The trial court incorporated the oral findings of fact into its

written order, and ordered Respondent committed inpatient for 30 days and committed outpatient for 60 days.

That same day, on 17 January 2019, Respondent appealed the recommitment order.

II. Discussion

Respondent argues that the trial court erred by involuntarily committing her when neither the evidence nor the trial court's findings of fact supported the conclusion that she was dangerous to herself.

As an initial matter, we note that Respondent's appeal is not moot although her commitment period has lapsed because " 'the challenged judgment may cause collateral legal consequences for the appellant.' " *In re J.P.S.*, 823 S.E.2d 917, 920 (N.C. Ct. App. 2019) (quoting *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008)). "Such collateral legal consequences might include use of the judgment to attack the capacity . . . of a defendant . . . or to form the basis for a future commitment[,]" and thus the appeal is properly before this Court for review. *Id.*

"To support an involuntary commitment order, the trial court is required to 'find two distinct facts by clear, cogent, and convincing evidence: first that the respondent is mentally ill, and second, that he is dangerous to himself or others.' " *In re W.R.D.*, 248 N.C. App. 512, 515, 790 S.E.2d 344, 347 (2016) (quoting *In re Lowery*, 110 N.C. App. 67, 71, 428 S.E.2d 861, 863-64 (1993)). "These two distinct facts are the 'ultimate findings' on which we focus our review." *Id.* (citation omitted). These ultimate findings, standing alone, are insufficient to support the trial court's order; the trial court must also "record the facts upon which its ultimate findings are based." *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980); N.C. Gen. Stat. § 122C-268(j) (2019). We must "determine whether there was any competent evidence to support the facts recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self . . . were supported by the facts recorded in the order." *Id.* (internal quotation marks and emphasis omitted).

N.C. Gen. Stat. § 122C-3(11) provides, in relevant part, that a person is dangerous to himself if, within the relevant past, he has acted in such a way as to show:

> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social

> relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
>
> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself . . . .

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2019).[1]

Here, the trial court's written findings of fact stated that:

1. The Respondent has had 4 seperate [sic] state psychiatric hospitalizations within the relevant past.
2. She is unable to care for herself for daily responsibilities and taking medications.
3. The Respondent would likely decompensate if discharged today.
4. She has the mental illness of schizophrenia.

The trial court also incorporated by reference any oral findings and facts made during the hearing. The trial court's oral findings were that (1) Respondent lacked insight into her mental illness; (2) Respondent had four psychiatric stays within the past two years and which all resulted in readmission; (3) within the relevant past, Respondent had been unable to care for herself and stay on her medication; and (4) there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment is given."

The findings that Respondent "would likely decompensate if discharged today" and that there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment was given" are not supported by any evidence in the record. Panyko testified about Respondent's

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1. Subsection 11(a) was amended effective 1 October 2019 to alter pronouns and word choice. 2019 N.C. Sess. Laws ch. 76, § 1. We apply and quote in this opinion the version of the statute extant at the time the trial court conducted the hearing. We note that the 2019 amendment made no substantive change to the relevant portions of the statute.

history of mental illness and prior noncompliance, but stated that as of the hearing date, Respondent "has gotten stable enough we've actually been able to decrease her oral dose a little bit and are in the process of potentially still being able to do that." Panyko then stated, "I believe that she is [at her baseline] . . . . She is stable." Panyko testified that he still recommended 30 days inpatient commitment for Respondent because it would "get us . . . importantly through the guardianship hearing, which . . . is February 7th."

On cross-examination, Respondent's attorney asked Panyko to explain how Respondent was a danger to herself when his testimony was that she was stable and not acute. Panyko replied that, in the past, "[Respondent] has stopped taking medications . . . and become dangerous to herself." When questioned as to whether Respondent was acute or a danger to herself "at this present time," Panyko answered, "[T]he patient's symptoms have been well treated . . . . She's not having acute paranoia or agitation at this time." And that Respondent "[was stabilized] within the past three weeks or so" to the extent that she was "able to start to come down on that dose [of haldol]."

Panyko's testimony shows that, as of the hearing date, Respondent was stabilized, medicated, and not suffering from any acute symptoms. While evidence of Respondent's mental illness and involuntary commitment history show that she had been a danger to herself in the past, that history alone cannot support a finding that Respondent would be a danger to herself in the future. *See In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012) (determining that respondent's history of bipolar disorder and prior involuntary commitments failed to show that she would be a danger to herself within the future). After reviewing Panyko's testimony and Respondent's testimony, there is no record evidence to support the findings that Respondent "would likely decompensate if discharged today" or that there was a reasonable probability that Respondent would suffer "serious physical debilitation within the near future unless continued adequate treatment was given." Thus, those findings cannot support the trial court's ultimate finding that Respondent was dangerous to herself.

The trial court's findings that Respondent has "had four . . . psychiatric stays" within the past two years and that she "has the mental illness of schizophrenia" do not support the conclusion she would be a danger to herself "within the near future." *Id.* Similarly, the findings that Respondent lacks "insight into her mental illness" and is "unable to care for herself for daily responsibilities and taking medications" are also

insufficient to show that Respondent was a danger to herself as there is "no evidence that Respondent's refusal to take [her] medication creates a serious health risk in the near future." *See W.R.D.*, 248 N.C. App. at 516, 790 S.E.2d at 348 (determining that findings that respondent "refus[ed] to acknowledge his mental illness, and refus[ed] to take his prescription medication" did not demonstrate "that the health risk will occur in the near future . . . .") (internal quotation marks and citation omitted).

III. Conclusion

As neither the record evidence nor the findings of fact support the trial court's conclusion that Respondent was dangerous to herself, we reverse the trial court's involuntary commitment order.

REVERSED.

Judges DIETZ and MURPHY concur.

STATE OF NORTH CAROLINA
v.
DERRICK CASH, DEFENDANT, AND 1ST ATLANTIC SURETY COMPANY, SURETY

No. COA19-460

Filed 17 March 2020

1. Bail and Pretrial Release—motions to set aside bond forfeitures—signed by corporate officer—unauthorized practice of law

A corporation that posted a bail bond for a criminal defendant engaged in the unauthorized practice of law (pursuant to N.C.G.S. § 84-5) when it allowed one of its corporate officers to sign and file a motion to set aside a bond forfeiture. Because the officer was not authorized to sign the motion, the trial court properly denied the motion.

2. Bail and Pretrial Release—motions to set aside bond forfeitures—sanctions—unauthorized signature

The trial court erred by imposing a sanction upon a corporation for failure to sign a motion to set aside a bond forfeiture (pursuant to N.C.G.S. § 15A-544.5(d)(8)) where the motion was signed—but signed by an unauthorized person.

Appeal by Surety from order entered 11 March 2019 by Judge James Hardin in Granville County Superior Court. Heard in the Court of Appeals 13 November 2019.

Hill Law, PLLC, by M. Brad Hill, and Ragsdale Liggett PLLC, by Mary M. Webb and Amie C. Sivon, for Surety-Appellant.

Tharrington Smith, L.L.P., by Stephen G. Rawson and Colin Shive, for Appellee Granville County Board of Education.

COLLINS, Judge.

1st Atlantic Surety Company ("Surety") appeals from the trial court's order (1) denying its motion to set aside a bond forfeiture and (2) granting the Granville County Board of Education's (the "Board") motion for sanctions. Surety contends that the trial court erred by (1) concluding that an unauthorized party had signed the motion to set aside the bond forfeiture and (2) granting the Board's motion for sanctions based upon that ruling. Because we conclude that signing and filing a motion to set aside a bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5 constitutes the practice of law within the meaning of N.C. Gen. Stat. § 84-5, we affirm the trial court's denial of Surety's motion to set aside the bond forfeiture. However, we reverse the trial court's order imposing a sanction against Surety.

I. Background

Defendant Derrick Cash was arrested and charged with conspiracy to sell or deliver cocaine in early 2018. On 4 June 2018, Defendant was released from custody after Surety—through bail agent Mary E. Faines—posted a bond securing Defendant's release, pending disposition of his criminal charges in Granville County Superior Court.

On 29 August 2018, Defendant failed to appear in court as scheduled, and the trial court issued an order for Defendant's arrest for his failure to appear. On 31 August 2018, the trial court issued a bond forfeiture notice and the clerk of superior court mailed it to Surety.

On 28 January 2019, Surety moved to set aside the bond forfeiture (the "Motion") pursuant to N.C. Gen. Stat. § 15A-544.5(b)(4), which states that a forfeiture "shall be set aside" if "[t]he defendant has been served with an Order for Arrest for the Failure to Appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record." N.C. Gen. Stat. § 15A-544.5(b)(4) (2019). The Motion appended a certificate signed by an Oxford Police

Department officer indicating that he served Defendant with the arrest order on 12 September 2018. The Motion was signed on Surety's behalf by Derrick Harrington as a "corporate officer" of Surety.

The Board[1] filed an objection to the Motion on 7 February 2019. In its objection, the Board asked the trial court to deny the Motion "because the [Motion] was not signed as required by N.C. Gen. Stat. § 15A-544.5." The Board also asked the trial court to impose sanctions upon Surety for this purported deficiency.

On 11 March 2018, the trial court entered an order denying the Motion. The trial court concluded that N.C. Gen. Stat. § 15A-544.5(d)(1) establishes which parties can sign an order to set aside a bond forfeiture, and that because Harrington was neither a bail agent nor a licensed attorney, he was not authorized to sign the Motion on Surety's behalf. The trial court accordingly denied the Motion and sanctioned Surety in the amount of $1000.

Surety timely appealed.

II. Discussion

On appeal from an order denying a motion to set aside a bond forfeiture, "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). "Questions of law, including matters of statutory construction, are reviewed de novo." *State v. Knight*, 255 N.C. App. 802, 804, 805 S.E.2d 751, 753 (2017).

A. Denial of bond forfeiture motion

[1] The facts are not in dispute. Rather, the parties' arguments concern whether, as a matter of law, it was proper for Harrington, as a corporate officer of Surety, to sign and file the Motion on Surety's behalf. The Board argues that making a motion to set aside a bond forfeiture constitutes the practice of law within the meaning of N.C. Gen. Stat. § 84-5 and thus Harrington, who was not a licensed attorney, was prohibited from signing and filing the Motion on Surety's behalf. Surety, on the other hand, argues that making a motion to set aside a bond forfeiture is not the practice of law, and that Harrington was therefore authorized as a corporate officer to sign and file the Motion on Surety's behalf.

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1. The Board, as beneficiary of the forfeiture pursuant to Article XI, section 7, of the North Carolina Constitution, has statutory authority pursuant to N.C. Gen. Stat. § 544.5(d)(3) to appear before the court to contest motions to set aside bond forfeitures.

Article 26 of the North Carolina Criminal Procedure Act contains the statutory framework governing bail bonds in our State. N.C. Gen. Stat. § 15A-544.5, the relevant statute governing how and when bond forfeitures can be set aside, reads as follows:

> (1) At any time before the expiration of 150 days after the date on which notice was given under [N.C. Gen. Stat. §] 15A-544.4, any of the following parties on a bail bond may make a written motion that the forfeiture be set aside:
>
> (a) The defendant.
>
> (b) Any surety.
>
> (c) A professional bondsman or a runner acting on behalf of a professional bondsman.
>
> (d) A bail agent acting on behalf of an insurance company.
>
> (2) The motion shall be filed in the office of the clerk of superior court of the county in which the forfeiture was entered.

N.C. Gen. Stat. § 15A-544.5(d) (2019). "Surety" is defined in Article 26's "Definitions" section as including an "insurance company, when a bail bond is executed by a bail agent on behalf of an insurance company." N.C. Gen. Stat. § 15A-531(8)(a) (2019). While N.C. Gen. Stat. § 15A-544.5(d)(1) expressly authorizes a surety to make a motion to set aside a bond forfeiture, it does not expressly indicate whether such motion may or must be made by an attorney, *see Lexis-Nexis*, *Div. of Reed Elsevier*, *Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002) (adopting the general rule that "in North Carolina a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*"), or made by a corporate officer, *see State v. Pledger*, 257 N.C. 634, 637, 127 S.E.2d 337, 339 (1962) ("A corporation can act only through its officers, agents and employees."). We must thus determine whether signing and filing such motion constitutes the practice of law within the meaning of N.C. Gen. Stat. § 84-5.

Chapter 84 of our General Statutes governs attorneys-at-law. N.C. Gen. Stat. § 84-5 specifically concerns the "practice of law by corporation[s]" and states, in relevant part, "It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State . . . and no corporation shall . . . draw

agreements, or other legal documents . . . .” N.C. Gen. Stat. § 84-5 (2019). “The phrase ‘practice law’ as used in . . . Chapter [84] is defined to be performing any legal service for any other person, firm or corporation, ... specifically including . . . the preparation and filing of petitions for use in any court . . . .” N.C. Gen. Stat. § 84-2.1 (2019).

As “a written motion that a forfeiture be set aside” to be “filed in the office of the clerk of superior court” is, by its plain language, a “legal document” and a “petition for use in” court, signing and filing a motion to set aside a bond forfeiture under N.C. Gen. Stat. § 15A-544.5(d) is the practice of law within the meaning of N.C. Gen. Stat. § 84-5. As a corporation is prohibited from practicing law, and because “a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*[,]” *Lexis-Nexis*, 155 N.C. App. at 209, 573 S.E.2d at 549, Harrington was not authorized to sign and file the Motion on Surety’s behalf.

Surety argues that *State ex rel. Guilford Cty. Bd. of Educ. v. Herbin*, 215 N.C. App. 348, 716 S.E.2d 35 (2011), controls the present case. We disagree. In *Herbin*, this Court held that “filing a motion to set aside a bond forfeiture is not considered an appearance before a judicial body in the manner contemplated by [N.C. Gen. Stat.] § 84-4 and, therefore, does not constitute the practice of law.” *Id.* at 355, 716 S.E.2d at 39. *Herbin* concerned whether an *individual bail agent* was prohibited by N.C. Gen. Stat. § 84-4, which governs the unauthorized practice of law by individuals, from filing a motion to set aside a bond forfeiture. *Herbin* does not apply here where Surety is a corporation that violated N.C. Gen. Stat. § 84-5, which governs the unauthorized practice of law by corporations.

Because we conclude that Harrington’s filing and signing the Motion on Surety’s behalf amounted to the unauthorized practice of law within the meaning of N.C. Gen. Stat. § 84-5, and thus Harrington was not authorized to sign and file the Motion, we affirm the trial court’s order denying Surety’s Motion.

B. Sanctions

[2] Surety next argues that the trial court erred by imposing a sanction for failing to sign the Motion. We agree.

N.C. Gen. Stat. § 15A-544.5(d)(8) provides:

> If at the hearing the court determines that the motion to set aside *was not signed* . . ., the court may order monetary sanctions against the surety filing the motion, unless

> the court also finds that the failure to sign the motion or attach the required documentation was unintentional.

N.C. Gen. Stat. § 15A-544.5(d)(8) (2019) (emphasis added).

There is no dispute that Surety's Motion was signed. The sole issue on appeal is the legal significance and validity of the Motion's signatory. The trial court made no findings to support its conclusion that a sanction be imposed, or its necessarily-implied conclusion that an *unauthorized* signature is the equivalent of *no* signature. We thus conclude that the trial court committed an error of law in making this equivalency and by ordering Surety to pay a sanction, and reverse that portion of the trial court's order.

III. Conclusion

Because we conclude that Surety engaged in the unauthorized practice of law within the meaning of N.C. Gen. Stat. § 84-5 by allowing Harrington, its corporate officer, to sign and file the Motion, we conclude that the trial court did not err by denying the Motion. However, because we conclude that the trial court erred in allowing the Board's motion for sanctions and imposing a sanction against Surety, we reverse that portion of the order.

AFFIRMED IN PART. REVERSED IN PART AND REMANDED.

Judges TYSON and YOUNG concur.

STATE OF NORTH CAROLINA
v.
JUSTIN BLAKE CROMPTON, DEFENDANT

No. COA19-504

Filed 17 March 2020

1. Probation and Parole—probation revocation—absconding—willfulness

The trial court did not abuse its discretion by revoking defendant's probation for willfully absconding where defendant cancelled a meeting with his probation officer via voicemail and missed two additional appointments and where the probation officer was unable to locate or contact defendant by visiting defendant's last known address twice, by calling all of defendant's contact numbers, and by checking to see whether defendant was incarcerated, at the local hospital, or at the vocational program defendant was ordered to attend.

2. Probation and Parole—probation revocation—discretion to order concurrent sentences

After finding that defendant had willfully absconded in violation of the terms of his probation, the trial court did not abuse its discretion by declining to modify defendant's original judgment to have his suspended sentences run concurrently rather than consecutively because the trial court recognized its authority to modify but declined to do so out of deference to the original sentencing judge.

3. Judgments—criminal—clerical error—probation violation—finding of additional violations

After finding that defendant willfully absconded in violation of the terms of his probation in open court, the trial court committed a clerical error by finding two additional probation violations in its written judgment. The trial court's only finding in open court related to absconding, so the matter was remanded for the limited purpose of correcting the written judgment to accurately reflect the finding made in open court.

Chief Judge McGEE concurring in part and dissenting in part.

Appeal by defendant from judgments entered 25 October 2018 by Judge Marvin P. Pope, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 12 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brenda Eaddy, for the State.

Office of the Appellate Defender, by Appellate Defender Glenn Gerding and Assistant Appellate Defender Sterling P. Rozear, for defendant-appellant.

BERGER, Judge.

On October 25, 2018, Justin Blake Crompton ("Defendant") had his probation revoked and his suspended sentences activated after the trial court found that Defendant had absconded from supervision pursuant to N.C. Gen. Stat. § 15A-1343(b)(3a). As a result of his suspended sentences being activated, Defendant was ordered to serve a total of 36 to 102 months in prison for nine separate offenses. On appeal, Defendant argues (1) the trial court abused its discretion when it revoked Defendant's probation and activated his suspended sentences; (2) the trial court abused its discretion when it declined to consolidate Defendant's active sentences upon revocation of probation; and (3) the judgments which revoked probation contained clerical errors regarding the violations found. We conclude that the trial court did not abuse its discretion when it revoked Defendant's probation or required Defendant to serve consecutive sentences. However, we remand for the limited purpose of correcting clerical errors in the written judgments.

Factual and Procedural Background

On April 24, 2017, Defendant pleaded guilty to nine separate charges involving breaking and entering, felony larceny, obtaining property by false pretense, carrying a concealed weapon, and possession of a firearm with an altered serial number. The trial court imposed six judgments with separate sentences totaling 36 to 102 months in prison. The trial court suspended Defendant's sentences and placed him on probation for 36 months.

On June 28, 2017, Defendant's probation officer filed violation reports which alleged several revocation-ineligible parole violations. On September 7, 2017, the trial court found that Defendant violated his probation and entered orders which modified the monetary conditions of Defendant's probation and required Defendant to serve ninety days in prison followed by ninety days of house arrest.

On May 23, 2018, additional violation reports were filed which alleged Defendant "willfully violated," among other things:

> 1. Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT HAS FAILED TO REPORT[] AS DIRECTED BY THE OFFICER, HAS FAILED TO RETURN THE OFFICER[']S PHONE CALLS, AND HAS FAILED TO PROVIDE THE OFFICER WITH A CERTIFIABLE ADDRESS. THE DEFENDANT HAS FAILED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS DIRECTED BY HIS OFFICER, THEREBY ABSCONDING SUPERVISION. THE OFFICER[']S LAST FACE TO FACE CONTACT WITH THE OFFENDER WAS DURING A HOME CONTACT ON 4/16/19.

The matter came on for hearing on October 22, 2018. At the hearing, Defendant waived a formal reading of the violation reports and admitted the violations. Defendant's probation officer testified that Defendant had failed to report as directed by the officer, failed to return the officer's phone calls, and failed to provide the officer with a verifiable address.

The officer further testified that on May 14, 2018, he received a voicemail from Defendant informing the officer that he would not be attending an appointment that day. The probation officer returned Defendant's call and left a voicemail informing Defendant to report two days later. Defendant's probation officer subsequently initiated an absconding investigation. During this investigation, the officer went to Defendant's last known residence twice, called all of Defendant's references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend. According to the probation officer, Defendant also failed to report for scheduled appointments on May 16 and May 23 without contacting the probation officer.

After exhausting all available avenues of contacting Defendant, the probation officer entered an absconding violation on May 23, 2018. At the violation hearing, the officer recommended revocation of Defendant's probation and requested that the sentences not be consolidated.

At the close of the hearing, the trial court found that Defendant had "willfully and intentionally violated the terms and conditions of the probationary sentence by absconding." The court revoked Defendant's probation and activated Defendant's suspended sentences as originally entered on April 24, 2017. The trial court entered written judgments against Defendant on October 25, 2018. Defendant timely appeals.

Analysis

On appeal, Defendant argues (1) the trial court abused its discretion when it revoked Defendant's probation and activated his suspended sentences; (2) the trial court abused its discretion when it declined to consolidate Defendant's active sentences upon revocation of probation; and (3) the judgments which revoked Defendant's probation contain clerical errors. We conclude that the trial court did not abuse its discretion when it revoked Defendant's probation or when it declined to consolidate his active sentences. However, we remand for the limited purpose of correcting clerical errors in the written judgments.

I. Revocation of Probation and Activation of Suspended Sentences

[1] This Court reviews the trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014). The State must produce sufficient evidence "to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant willfully violated a valid condition upon which probation can be revoked." *State v. Newsome*, ___ N.C. App. ___, ___, 828 S.E.2d 495, 498 (2019) (*purgandum*). An abuse of discretion occurs "when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Maness*, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009) (citation and quotation marks omitted).

"Probation or suspension of sentence comes as an act of grace to one convicted of, or pleading guilty to, a crime." *Murchison*, 367 N.C. at 463, 758 S.E.2d at 358 (citation and quotation marks omitted). "A probation revocation proceeding is not a formal criminal prosecution," and an "alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt." *Id.* at 464, 758 S.E.2d at 358 (citations and quotation marks omitted).

N.C. Gen. Stat. § 15A-1343(b) provides the regular conditions of probation that apply to all defendants absent a specific exemption by the presiding judge. Relevant here, a probationer must:

> (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

> (3a) Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation.

N.C. Gen. Stat. § 15A-1343(b)(3), (3a) (2019).

A violation of Section 15A-1343(b)(3), *without more*, would not merit revocation of a defendant's probation unless the requirements of Section 15A-1344(d2) have also been met. *State v. Williams*, 243 N.C. App. 198, 204, 776 S.E.2d 741, 745 (2015). Pursuant to Section 15A-1344(d2), a defendant's parole may be revoked following a violation of Section 15A-1343(b)(3) where the defendant has already served two periods of confinement stemming from other parole violations. N.C. Gen. Stat. § 15A-1344(d2) (2019). However, where the trial court finds that a defendant has absconded in violation of Section 15A-1343(b)(3a), then the trial court may revoke probation and activate a defendant's suspended sentence based solely upon this finding. N.C. Gen. Stat. § 15A-1344(a); *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498.

Under the plain language of Section 15A-1343(b)(3a), a defendant "absconds" by either (1) "willfully avoiding supervision" or (2) "willfully making the defendant's whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a). Although Section 15A-1343 does not define "willfully," the term is well-defined by our case law. "When used in criminal statutes, 'willful' has been defined as 'the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law.' " *State v. Bradsher*, 255 N.C. App. 625, 633, 805 S.E.2d 191, 196 (2017) (quoting *State v. Brackett*, 306 N.C. 138, 142, 291 S.E.2d 660, 662 (1982)). Additionally, we note that establishing a defendant's willful intent "is seldom provable by direct evidence and must usually be shown through circumstantial evidence." *State v. Walston*, 140 N.C. App. 327, 332, 536 S.E.2d 630, 633 (2000) (*purgandum*). In determining the presence or absence of the element of intent, the fact finder may consider the acts and conduct of the defendant and general circumstances existing at the time of the charged probation violation. *See id.* at 332, 536 S.E2d at 634.

Where a probation violation report specifically alleges that a defendant has absconded and the State brings forth competent evidence establishing the violation, then the State has met the burden required of Section 15A-1344(a) to warrant revocation of a defendant's probation. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 499-500. Once the State has met its burden, the task falls upon the defendant to demonstrate his

inability to comply with the terms of his probation. *State v. Talbert*, 221 N.C. App. 650, 652, 727 S.E.2d 908, 910-11 (2012). Phrased differently, the task falls upon the defendant to demonstrate that his noncompliance was not "willful."

In this case, the probation officer's violation report specifically alleged, and the State presented competent evidence to support the trial court's finding, that Defendant violated the conditions of his probation by absconding. At the revocation hearing, the officer testified that Defendant had failed to report as directed by the officer, failed to return the officer's phone calls, and failed to provide the officer with a verifiable address. Based on these violations of Section 15A-1343(b)(3), the officer initiated an absconding investigation to determine whether Defendant was also in violation of Section 15A-1343(b)(3a).

Pursuant to this investigation, Defendant's probation officer exhausted all available avenues of contacting Defendant. At trial, Defendant's probation officer testified that he went to Defendant's last known residence twice, called all of Defendant's references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend. While the investigation was ongoing, Defendant also failed to report to scheduled appointments on May 16 and May 23 without contacting the officer. Defendant never made contact with his probation officer, and the officer was completely unaware of Defendant's whereabouts from at least May 14, 2018 to May 23, 2018. Based upon Defendant's actions, on May 23, 2018, the probation officer entered an absconding violation.

Importantly, as discussed above, the State does not bear the burden of proving that Defendant absconded beyond a reasonable doubt. *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358. Rather, the State is merely required to produce sufficient evidence to satisfy the trial court in the exercise of its sound discretion. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498. Cognizant of this burden, we conclude the State presented sufficient competent evidence by which the trial court could find that Defendant absconded by willfully avoiding supervision or willfully making his whereabouts unknown to his probation officer in violation of Section 15A-1343(b)(3a).

Relying on *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), and *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018), our dissenting colleague contends that the State has failed to present sufficient evidence to support a finding that Defendant absconded in

violation of Section 15A-1343(b)(3a). The dissent's reliance on these cases is misplaced.

In *Williams*, our Court concluded that the State failed to carry its burden of showing a defendant had absconded from supervision where the violation report entered against the defendant failed to specifically allege a violation of Section 15A-1343(b)(3a) and the defendant's probation officer made telephone contact with the defendant on several occasions. 243 N.C. App. at 205, 776 S.E.2d at 746. In fact, in that case, the State did not even argue that the defendant had absconded from supervision. *Id.* at 200, 776 S.E.2d at 743. Accordingly, *Williams* stands for the proposition that a defendant's probation violations, other than violations listed in Section 15A-1344(a), cannot serve as the basis for revocation of the defendant's probation unless the requirements of Section 15A-1344(d2) are also met. This conclusion is plainly consistent with the language of Section 15A-1344(a). N.C. Gen. Stat. § 15A-1344(a) ("The court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), except as provided in G.S. 15A-1344(d2).").

However, the dissent would now have us expand the holding of *Williams* to conclude that a violation report alleging *willful* violations of Section 15A-1343(b)(3) which together amount to the defendant "willfully avoiding supervision" or "willfully making the defendant's whereabouts unknown to the supervising probation officer" also fail to qualify as "absconding" within the meaning of Section 15A-1343(b)(3a). Such an interpretation of *Williams* runs counter to the plain language of Section 15A-1343(b) and would work to eliminate absconding as a ground for probation revocation in our State.

The distinction between a violation of Section 15A-1343(b)(3) and 15A-1343(b)(3a) is primarily one of *mens rea*. A defendant does not have to act "willfully" or wrongfully "without justification or excuse" to be found in violation of the conditions of Section 15A-1343(b)(3). N.C. Gen. Stat. § 15A-1343(b)(3); *see State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citation and quotation marks omitted) (defining "willful"). For instance, in *State v. Johnson*, a defendant asked to reschedule a probation appointment because he lacked transportation, and the probation officer declined the request. 246 N.C. App. 139, 140, 783 S.E.2d 21, 23 (2016). After the defendant failed to appear at the appointment, the officer filed a violation report for absconding and the trial court subsequently revoked the defendant's probation. *Id.* at 140, 783 S.E.2d at 23. On appeal, our Court determined that the defendant's actions "while clearly a violation of [Section] 15A-1343(b)(3), . . . do not rise

to 'absconding supervision' in violation of [Section] 15A-1343(b)(3a)." *Id*. at 145, 783 S.E.2d at 25. According to this Court,

> [a]llowing actions which explicitly violate a regular or special condition of probation other than those found in [Section] 15A-1343(b)(1) or [Section] 15A-1343(b)(3a) to also serve, *without the State showing more*, as a violation of [Section] 15A-1343(b)(1) or [Section] 15A-1343(b)(3a) would result in revocation of probation without following the mechanism the General Assembly expressly provided in [Section] 15A-1344(d2).

Id. at 146, 783 S.E.2d at 26 (emphasis added).

However, in our case, the State did not merely allege violations of Section 15A-1343(b)(3). Where a violation report alleges that willful violations of Section 15A-1343(b)(3) together amount to the defendant "willfully avoiding supervision" or "willfully making the defendant's whereabouts unknown" in violation of Section 15A-1343(b)(3a), and the State subsequently proffers sufficient evidence to establish those willful violations, then revocation of the defendant's probation should be left to the sound discretion of the trial court. *See* N.C. Gen. Stat. § 15A-1344(a); *State v. Mills*, ___ N.C. App. ___, ___ S.E.2d ___, ___, COA 19-597, 2020 N.C. App. LEXIS 142, **7-8 (considering violations of Section 15A-1343(b)(3) in determining a defendant absconded in violation of Section 15A-1343(b)(3a)). In this case, the State undoubtedly made that additional showing required by Section 15A-1343(b)(3a) and contemplated by this Court in *Johnson*. Therefore, this case plainly falls beyond the scope of *Williams*.

Not only would the dissent's expanded reading of *Williams* fail to align with the plain language of Sections 15A-1343(b) and 15A-1344(a), it would also operate to eliminate absconding as a ground for probation revocation. As a practical matter, those conditions laid out in Section 15A-1343(b)(3) make up the necessary elements of "avoiding supervision" or "making [one's] whereabouts unknown." A defendant cannot avoid supervision without failing to report as directed to his probation officer at reasonable times and places. Neither can a defendant make his whereabouts unknown without failing to answer reasonable inquiries or notify his probation officer of a change of address.

Accordingly, should we adopt a reading of *Williams* that prevents the State from using the language of Section 15A-1343(b)(3) to describe violations of Section 15A-1343(b)(3a), then it is unclear what exactly would continue to constitute "absconding" within the meaning of Section

15A-1343(b)(3a). As a result, violations of Section 15A-1343(b)(3a) would likely cease to be allowed as a ground for probation revocation.

Alternatively, our dissenting colleague relies upon *Melton* to argue that the State has failed to sufficiently show that Defendant acted "willfully" in violation of Section 15A-1343(b)(3a).

In *Melton*, this Court held that the State failed to present competent evidence that a defendant willfully violated Section 15A-1343(b)(3a) where "the probation officer could not testify with any specificity" and "the State's evidence only include[d] that a defendant failed to attend scheduled meetings, and the probation officer [was] unable to reach a defendant after merely two days of attempts, only leaving messages with a defendant's relatives." 258 N.C. App. 134, 140, 811 S.E.2d 678, 682-83 (2018).

Relying on *Melton*, the dissent contends that the evidence produced by the State was insufficient for the trial court to conclude that Defendant willfully violated Section 15A-1343(b)(3a) because the State failed to show that "Defendant[,] in fact[,] knew Defendant's probation officer was attempting to contact him." However, the State's evidence was more than sufficient to allow for the reasonable inference that Defendant was aware his probation officer was attempting to contact him, knew how to contact his probation officer, and willfully failed to make himself available for supervision.

The State was not required to prove beyond a reasonable doubt that Defendant willfully violated Section 15A-1343(b)(3a). *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358. In a probation revocation hearing, the State must only provide sufficient evidence "to reasonably satisfy the trial court in the exercise of its sound discretion that the defendant willfully violated a valid condition upon which probation can be revoked." *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498 (*purgandum*). Neither was the State required to produce direct evidence of Defendant's willful intent. *Walston*, 140 N.C. App. at 332, 536 S.E.2d at 633. As previously discussed, establishing a defendant's willful intent "is seldom provable by direct evidence and must usually be shown through circumstantial evidence." *Id.* at 332, 536 S.E.2d at 633 (*purgandum*).

In the instant case, the evidence put forth by the State was much more compelling than that found in *Melton*. Defendant's probation officer received a voicemail from Defendant informing the officer that he would not be attending an appointment on May 14, 2018. That same day, the probation officer returned Defendant's call and left a voicemail informing Defendant to report two days later. From this evidence, the

trial court could reasonably infer that Defendant was aware his probation officer was attempting to make contact. As discussed at length above, the officer never again heard from Defendant, even though Defendant knew he was contacted by his probation officer and knew how to contact his probation officer.

Moreover, Defendant's probation officer was completely unaware of Defendant's whereabouts and exhausted all available avenues of contacting Defendant over the course of ten days. During the officer's absconding investigation, the officer visited Defendant's last known residence twice, called all of Defendant's references and contact numbers, called the local hospital, checked legal databases to see whether Defendant was in custody, and called the vocational program Defendant was supposed to attend. While the investigation was ongoing, Defendant also failed to report to scheduled appointments on May 16 and May 23 without contacting the officer. From this evidence, the trial court could reasonably conclude that Defendant was attempting to thwart supervision.

Accordingly, the State's evidence was more than sufficient to allow for the reasonable inference that Defendant was not only aware his probation officer was attempting to contact him over the course of ten days, but that Defendant knew how to contact his probation officer and willfully failed to make himself available for supervision. Thus, the evidence was sufficient to reasonably satisfy the trial court, in the exercise of its sound discretion, that Defendant violated Section 15A-1343(b)(3a), a condition upon which probation can be revoked. N.C. Gen. Stat. § 15A-1344(a); *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498. Therefore, the conclusion reached by this Court in *Melton* should not be controlling in this case.

Following the State's presentation of competent evidence establishing the absconding violation alleged by Defendant's violation report, the burden then shifted to Defendant to demonstrate his inability to comply with the terms of his probation. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 498. At the revocation hearing, Defendant admitted to absconding and failed to put forth any evidence demonstrating that his failure to comply with the requirements of his probation was not willful.

Based on the foregoing evidence, the trial court found that Defendant "willfully and intentionally violated the terms and conditions of the probationary sentence by absconding." Having determined that the State satisfied its evidentiary burden, we conclude that the trial court's conclusion was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *Maness*, 363 N.C. at 279, 677 S.E.2d at 808 (citation and quotation marks omitted).

Therefore, the trial court did not abuse its discretion when it revoked Defendant's probation and activated his suspended sentence pursuant to Section 15A-1344(a).

II. Imposition of Consecutive Sentences

[2] Defendant next argues the trial court abused its discretion when it declined to consolidate his active sentences following revocation of his probation. According to Defendant, the trial court imposed consecutive sentences under the mistaken belief that it lacked the authority to modify Defendant's original suspended sentences.

Before activating a suspended sentence, the trial court may reduce the sentence or change the structure of the sentence so that it runs concurrently with other sentences. N.C. Gen. Stat. § 15A-1344(d). The trial court's decision to reduce a prison sentence or modify the structure of a sentence is reviewed for abuse of discretion. *State v. Partridge*, 110 N.C. App. 786, 788, 431 S.E.2d 550, 551-52 (1993). As previously noted, an abuse of discretion results "when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Maness*, 363 N.C. at 279, 677 S.E.2d at 808 (citation and quotation marks omitted).

In the present case, at the revocation hearing, Defendant requested that the activated sentences run concurrently. Defendant's probation officer requested that the sentences run consecutively. The trial judge then addressed both requests, stating in pertinent part,

> I'm not going to modify Judge Powell's [original] judgment. I mean, he entered the judgment as he saw fit. All I have in front of me is the probation violation. So[,] I'm not going to modify Judge Powell's judgment. I'm going to go [with] exactly what it was. . . . [I]t was a plea agreement, so he knew exactly what the deal was in the time. And I'm not going to second guess Judge Powell's wisdom on it.

From the record, it is clear that the trial court recognized its authority to modify the structure of Defendant's sentences and, in the court's discretion, simply chose not to consolidate the active sentences. The trial court expressly acknowledged its discretionary authority, stating, "I'm not going to modify Judge Powell's [original] judgment." Therefore, Defendant's argument that the trial court imposed consecutive sentences under the mistaken belief that it lacked the authority to modify Defendant's original suspended sentences is meritless. Rather, the record indicates that the trial court refused to modify the original judgment out of deference to the superior court judge who originally

sentenced Defendant and was more familiar with the relevant facts and circumstances of Defendant's case. Such a decision is not manifestly unsupported by reason. Accordingly, we conclude the trial court did not abuse its discretion when it declined to consolidate Defendant's active sentences.

III. Clerical Errors

[3] Lastly, Defendant argues the judgments upon revocation of probation contained clerical errors regarding the violations found. Specifically, Defendant contends that the trial court's only probation violation finding made in open court referred to the absconding violation in paragraph one of the probation officer's violation reports, while the written judgments entered referred to two additional violations in paragraphs two and three of the officer's violation reports. We agree with Defendant that this discrepancy appears to be the result of clerical errors and remand for correction of the written judgments.

When a clerical error is discovered in the trial court's judgment on appeal, it is appropriate to remand the judgment for the limited purpose of correcting the error "because of the importance that the record speak the truth." *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 500 (citation and quotation marks omitted). Where the trial court's findings made in open court do not align with the findings made in its written judgment, our Court will remand for correction of the written judgment. *State v. Jones*, 225 N.C. App. 181, 186, 736 S.E.2d 634, 638 (2013).

Here, the trial court's only finding relating to Defendant's probation violations was that "the defendant willfully and intentionally violated the terms and conditions of the probationary sentence by absconding" as alleged in paragraph one of the probation officer's violation reports. However, in the written judgments, the trial court also found that Defendant violated the conditions of his probation by testing positive for an illegal drug (alleged in paragraph two of the violation reports) and failing to report as directed by his probation officer (alleged in paragraph three of the violation reports). Accordingly, we remand for the limited purpose of correcting the clerical errors made in the trial court's written judgments so that these judgments align with the findings made in open court on October 22, 2018.

Conclusion

For the reasons stated herein, we affirm the trial court's judgments. However, we remand for the limited purpose of correcting the clerical errors described above.

AFFIRMED IN PART AND REMANDED IN PART.

Judge BRYANT concurs.

Chief Judge McGEE concurs in part and dissents in part by separate opinion.

McGEE, Chief Judge, concurs in part, dissents in part, with separate opinion.

Because I believe the State did not present sufficient competent evidence to support a finding of willful absconding under the General Statutes and this Court's opinions interpreting them in *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), and *State v. Melton*, ___ N.C. App. ___, 811 S.E.2d 678 (2018), I concur in part and respectfully dissent in part.

The General Assembly enacted the Justice Reinvestment Act ("JRA") in 2011 as "a part of a national criminal justice reform effort which, among other changes, made it more difficult to revoke offenders' probation and send them to prison." *State v. Johnson*, 246 N.C. App. 139, 143, 783 S.E.2d 21, 24 (2016) (citation and quotation marks omitted).

> The enactment of the JRA . . . brought two significant changes to North Carolina's probation system. First, . . . the JRA limited trial courts' authority to revoke probation to those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of CRV [confinement in response to violations] under N.C. Gen. Stat. § 15A-1344(d2). See N.C. Gen. Stat. § 15A-1344(a). For all other probation violations, the JRA authorizes courts to alter the terms of probation pursuant to N.C. Gen. Stat. § 15A-1344(a) or impose a CRV in accordance with N.C. Gen. Stat. § 15A-1344(d2), but not to revoke probation. *Id.*
>
> Second, "the JRA made the following a regular condition of probation: 'Not to abscond, by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer.' "

State v. Williams, 243 N.C. App. 198, 199-200, 776 S.E.2d 741, 742-43 (2015) (citations omitted).

Prior to enactment of the JRA, the General Statutes did not define the term "abscond." *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 746. Instead, "the term 'abscond' ha[d] frequently been used when referring to violations of the longstanding statutory probation conditions to 'remain within the jurisdiction of the court' or to 'report as directed to the officer.' " *State v. Hunnicutt*, 226 N.C. App. 348, 355, 740 S.E.2d 906, 911 (2013) (citing *State v. Brown*, 222 N.C. App. 738, 731 S.E.2d 530 (2012); *State v. High*, 183 N.C. App. 443, 645 S.E.2d 394 (2007); *State v. Coffey*, 74 N.C. App. 137, 327 S.E.2d 606 (1985)). In a series of cases following the enactment of the JRA, this Court recognized a purpose of the JRA was to place "a heightened burden on the State to establish not only that a probation officer was unable to locate or contact a defendant placed on supervised probation, but that such inability was due to the willful efforts of the defendant." *State v. Whitmire*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2020 WL 70713, at *3 (citations omitted) (unpublished); *see, e.g.*, *Williams*, 243 N.C. App. 198, 776 S.E.2d 741.

In *Williams*, this Court reversed a trial court order revoking the defendant's probation on the grounds of willful absconding. *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 746. We held that the probation violation report did not support a finding of absconding where the report merely realleged conduct that violated N.C.G.S. § 15A-1343(b)(2), which requires probationers to "remain within the jurisdiction of the Court unless granted written permission to leave." The probation violation report alleged the defendant "[wa]s not reporting as instructed or providing the probation officer with a valid address at th[at] time[,] . . . [wa]s also leaving the state without probation[,] . . . [and] [d]ue to [the d]efendant knowingly avoiding the probation officer and not making his true whereabouts known [the d]efendant ha[d] absconded supervision." *Id.* at 200-01, 776 S.E.2d at 743. This Court reasoned that "[p]rior to the amendment of N.C. Gen. Stat. § 15A-1343(b) to include not 'absconding' as a condition of probation, 'abscond' ha[d] traditionally been used to refer to other conditions of probation[,]" specifically the requirements to " 'remain within the jurisdiction of the court' or to 'report as directed to the officer.' " *Id.* at 205, 776 S.E.2d at 745-46 (citations omitted). We held that, as a result of the JRA amendment to make "absconding" a violation of the conditions of probation, merely re-alleging conduct that violates N.C.G.S. §§ 15A-1343(b)(2) and (3) cannot support finding a violation of N.C.G.S. § 15A-1343(b)(3a), even if the alleged violations are labelled "absconding supervision" in the report. *Id.* at 205, 776 S.E.2d at 745-46. Thus, more is required to support a finding of willful absconding under N.C.G.S. § 15A-1343(b)(3a).

In *Melton*, this Court clarified that, in determining whether the allegations support a finding of absconding, this Court is limited to considering support for the specific allegations of absconding made in the violation report. *See Melton*, ___ N.C. App. at ___, 811 S.E.2d at 681 (reviewing whether there was sufficient evidence of absconding based on dates alleged in violation reports). We held the trial court erred in its consideration of evidence from 2 November 2016, "on or about" when the violation report alleged the defendant absconded, until 9 December 2016, when the defendant was arrested, rather than from 2 November 2016 until 4 November 2016, when the reports were filed. *Id.* at ___, 811 S.E.2d at 681. The rationale for this holding was that the probation reports "provide a defendant with notice of the allegations against him, as required by N.C. Gen. Stat. § 15A-1345(e)[.]" *Id.* at ___, 811 S.E.2d at 681 (citation omitted). This Court then held the trial court abused its discretion because the State failed to show willful absconding for the relevant period between 2 November and 4 November 2016 since, although the evidence showed the officer attempted to contact the defendant, "there was no showing that a message was given to [the] defendant or, more generally, that [the] defendant knew [the officer] was attempting to contact her." *Id.* at ___, 811 S.E.2d at 682.

Notably, in addition to holding 2 November to 4 November 2016 was "the only time period [this Court] c[ould] consider under the violation report and the court's written finding," this Court in *Melton* also did not consider allegations of conduct made in the same violation report for other reportable conditions of probation in determining whether the trial court's finding that the defendant absconded was supported by competent evidence. *See id.* at ___, 811 S.E.2d at 679-80 (noting that violation reports alleged violations of N.C.G.S. §§ 15A-1343(b)(3) and (9) in addition to N.C.G.S. § 15A-1343(b)(3a)).

In the present case, the majority did not note this Court's precedent in *Williams* and *Melton*, nor the purpose behind the JRA, in holding that Defendant absconded based on the probation violation report and facts before us. The record shows that the violation report that included absconding, filed on 23 May 2018, contained the following allegation for absconding (hereinafter, allegation 1):

> 1. Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, THE DEFENDANT HAS FAILED TO REPORT[] AS DIRECTED BY THE OFFICER, HAS

> FAILED TO RETURN THE OFFICER[']S PHONE CALLS, AND HAS FAILED TO PROVIDE THE OFFICER WITH A CER[T]IFIABLE ADDRESS. THE DEFENDANT HAS FAILED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS DIRECTED BY HIS OFFICER, THEREBY ABSCONDING SUPERVISION. THE OFFICER[']S LAST FACE TO FACE CONTACT WITH THE OFFENDER WAS DURING A HOME CONTACT ON 4/16/18.

As an initial matter, I note that, under *Melton*, the trial court and this Court are limited by the allegations in allegation 1 of the violation report to considering evidence for absconding in the time period between 16 April 2018 and 23 May 2018, the period between when the report alleged the absconding began and the date the violation report was filed. Moreover, although Defendant's probation officer alleged Defendant had absconded since his "last face to face contact" with the probation officer on 16 April 2018, the officer testified he only initiated the investigation for absconding after Defendant "called him on [14 May 2018] and said he got in a fight with his brother and couldn't make his appointment that day," and Defendant's probation officer called Defendant later that day and left him a message saying "let me know what you work out for housing and report two days later." Since Defendant's probation officer acknowledged Defendant affirmatively contacted him on 14 May 2018, I would hold there is no substantial evidence of absconding prior to that date.

Furthermore, although the conduct in allegation 1 of the violation report is characterized as "absconding supervision," the allegations only describe violations of N.C.G.S. § 15A-1343(b)(3). N.C.G.S. § 15A-1343(b)(3) provides the following are regular conditions of probation:

> Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.

N.C.G.S. § 15A-1343(b)(3). "Fail[ing] to report as directed by the officer," "fail[ing] to provide the officer with a cer[t]ifiable address," and "fail[ing] to make himself available for supervision as directed by his officer" are only allegations of violations of N.C.G.S. § 15A-1343(b)(3)—a separate condition of probation from absconding. Here, as in *Williams*, "[a]lthough the report alleged that Defendant's actions constituted

'abscond[ing] supervision,' this wording cannot convert violations of N.C. Gen. Stat. §[] 15A-1343(b)[](3) into a violation of N.C. Gen. Stat. § 15A-1343(b)(3a)." *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 745. Therefore, even though Defendant admitted to the allegations, allegations that fall within N.C.G.S. § 15A-1343(b)(3) do not support a finding of willful absconding under N.C.G.S. § 15A-1343(b)(3a).

Assuming the allegations do not only allege conduct that violates N.C.G.S. § 15A-1343(b)(3), all the alleged acts in allegation 1, taken together, still do not establish a violation of N.C.G.S. § 15A-1343(b)(3a), because they do not adequately allege willfulness by Defendant. In *Melton*, this Court held that "although there was competent evidence that [the probation officer] attempted to contact [the] defendant, there was insufficient evidence that [the] defendant willfully refused to make herself available for supervision . . ." where "there was no showing that a message was given to [the] defendant or, more generally, that [the] defendant knew [the officer] was attempting to contact her." *Melton*, ___ N.C. App. at ___, 811 S.E.2d at 682. Here, as in *Melton*, the allegations in the report, even though admitted by Defendant, as well as Defendant's probation officer's testimony that he attempted to call and to locate Defendant and also called Defendant's contacts, fail to show Defendant in fact knew Defendant's probation officer was attempting to contact him. For instance, although Defendant's probation officer testified he left a message for Defendant, there was no allegation that Defendant in fact received the message.

The majority relies on *State v. Newsome*, ___ N.C. App. ___, 828 S.E.2d 495 (2019), to support its holding that Defendant absconded on the facts before us. In *Newsome*, the defendant received a suspended sentence after pleading guilty to a crime and was placed on probation. *Newsome*, ___ N.C. App. at ___, 828 S.E.2d at 497. During the defendant's probationary period, his probation officer filed multiple violation reports and his probation was modified and extended by the trial court for an additional twelve months for his failure to comply with the monetary terms of his probation. *Id.* at ___, 828 S.E.2d at 497. The probation officer filed a violation report for absconding when the defendant failed to make himself available after multiple attempts to contact him and he was arrested and held in custody until he posted bond. *Id.* at ___, 828 S.E.2d at 497. Prior to his release, the defendant "had been instructed to make contact with the probation officer within 72 hours of his release from custody," *id.* at ___, 828 S.E.2d at 497, which he failed to do. *Id.* at ___, 828 S.E.2d at 497. The probation officer then called the defendant and, after seeing him enter his residence, went to the door and spoke

with the defendant's mother, who told the probation officer he was not home. *Id.* at ___, 828 S.E.2d at 497. The probation officer filed an addendum to the prior violation report alleging the defendant absconded by failing to report as instructed and the trial court found the defendant had absconded. *Id.* at ___, 828 S.E.2d at 497.

This Court held the trial court did not abuse its discretion by finding that the defendant had absconded because "[the d]efendant knew or should have known upon being served with the [first absconding] violation report that he was considered to be an absconder by his probation officer[.]" Furthermore, upon his subsequent release from custody, the defendant knew or should have known that the instruction to make contact with the probation officer "was more than a regular office visit," and "[i]t was a special requirement imposed upon defendant because he was considered to be an absconder[.]" *Id.* at ___, 828 S.E.2d at 499. This Court held that "[t]he requirement for [the d]efendant to contact the probation officer within 72 hours of release from custody alerted [the d]efendant that his probation officer was attempting to actively monitor him." *Id.* at ___, 828 S.E.2d at 499. In holding the defendant willfully absconded, this Court specifically noted that he "had not simply missed appointments or phone calls," but that he "knowingly failed to notify his probation officer of his release from custody" and pursued "a willful course of conduct . . . that thwarted supervision." *Id.* at ___, 828 S.E.2d at 500.

The majority's reliance on *Newsome* is misplaced. First, in *Newsome*, the defendant was placed on notice that making contact with his probation officer was "a special requirement imposed upon [him] because he was considered to be an absconder," whereas in this case Defendant had no such notice that he was considered an absconder and subject to a special requirement to contact his probation officer; rather, the appointments Defendant missed were "regular office visit[s]." *Id.* at ___, 828 S.E.2d at 499. Unlike the defendant in *Newsome*, who was specifically instructed, there is no evidence Defendant here in fact heard the voicemail message from his probation officer telling him to report in two days. Second, the defendant in *Newsome* "had not simply missed appointments or phone calls," but had actively avoided the officer by failing to notify him after his release from custody and hiding in his residence while his mother asserted he was not there; here, the only specific acts by Defendant that were alleged by the probation officer in the violation report were missing appointments and failing to return phone calls. *See id.* at ___, 828 S.E.2d at 497, 500. Finally, the defendant in *Newsome* "ma[de] himself unavailable for supervision . . . for almost one month[,]"

while Defendant in this case contacted his probation officer on 14 May 2018, only nine days prior to the filing of the violation report. *Id.* at ___, 828 S.E.2d at 499-500. For these reasons, the present case is distinguishable from *Newsome*.

A primary purpose of the General Assembly in enacting the JRA was to "ma[k]e it more difficult to revoke offenders' probation and send them to prison." *Johnson*, 246 N.C. App. at 143, 783 S.E.2d at 24 (citation and quotation marks omitted). Consistent with the General Assembly's purpose, I would hold that merely failing to contact a probation officer during this brief nine-day period, without more, does not show sufficient evidence of willfulness to support a finding of willful absconding under N.C.G.S. § 15A-1343(b)(3a).

Because the State has not shown Defendant "willfully refused to make [him]self available for supervision" during "the only time period we can consider" (between 14 May 2018, when Defendant last contacted his probation officer, and 23 May 2018, when the violation report for absconding was filed), and because the conduct admitted by Defendant only amounts to violations of N.C.G.S. § 15A-1343(b)(3), I would hold the State's evidence was insufficient to support a finding of absconding under N.C.G.S. § 15A-1343(b)(3a) and the trial court abused its discretion by revoking Defendant's probation on that ground. *Melton*, ___ N.C. App. at ___, 811 S.E.2d at 682; *Williams*, 243 N.C. App. at 205, 776 S.E.2d at 745. I would reverse the judgment of the trial court. Therefore, I dissent from the majority on this issue. I concur with the majority's holdings that the trial court did not abuse its discretion when it declined to consolidate Defendant's active sentences and that there were clerical errors in the written judgment.

STATE OF NORTH CAROLINA
v.
JEREMY WADE DEW, DEFENDANT

No. COA19-737

Filed 17 March 2020

1. Appeal and Error—preservation of issues—motion to dismiss—different theory argued on appeal

Where defendant's motion to dismiss multiple assaults with a deadly weapon, kidnapping, and other charges hinged on whether his hands could be considered deadly weapons and that the bills of information had incorrect dates of the offenses, he failed to preserve for appellate review his argument that he could not be convicted of multiple counts of assault where there was evidence of only one assault resulting in multiple injuries because he did not present the trial court with that argument. Even assuming arguendo the issue was properly preserved, the State submitted sufficient evidence to support each assault charged.

2. Assault—with a deadly weapon—hands, feet, and teeth as deadly weapons

In a prosecution for assault with a deadly weapon inflicting serious injury, the State presented substantial evidence from which the jury could determine that defendant used his hands, feet, and teeth as deadly weapons while assaulting his girlfriend over several hours, including the relative size difference between defendant and his girlfriend as well as the manner in which he used his body to inflict multiple injuries.

3. Criminal Law—section 15A-1231—charge conference—material prejudice

Defendant did not demonstrate he was materially prejudiced by the trial court's failure to hold a charge conference pursuant to N.C.G.S. § 15A-1231 where the record showed that the trial court conducted a charge conference and that defendant participated and had multiple opportunities to object to proposed jury instructions.

Appeal by defendant from judgments entered 7 February 2018 by Judge John Nobles in Carteret County Superior Court. Heard in the Court of Appeals 19 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney Generals Wes Saunders and Daniel P. O'Brien, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant-appellant.

BERGER, Judge.

Jeremy Wade Dew ("Defendant") was found guilty of kidnapping, two counts of assault with a deadly weapon inflicting serious injury ("AWDWISI"), one count of assault on a female, and one count of communicating threats. Defendant was sentenced to 75 to 102 months in prison. Defendant appeals, contending that the trial court erred when it (1) denied Defendant's motion to dismiss because the evidence before the trial court established only one assault that resulted in multiple injuries, not multiple assaults; (2) instructed the jury that Defendant's hands, feet, and teeth could be deadly weapons; and (3) failed to conduct a charge conference. We find no error.

Factual and Procedural Background

On the weekend of July 29-31, 2016, Defendant and the victim traveled to Atlantic Beach, North Carolina for a vacation with the victim's parents. At the time, the victim and Defendant were in a relationship and lived together.

On July 30, 2016, Defendant took some form of pain medication, went to the liquor store, and began drinking. Later in the evening, Defendant obtained the victim's car keys, and stated that he was leaving to "get some cocaine and [expletive deleted]." Defendant drove off, and the victim went to a neighbor for help. By the time she got help, Defendant returned to the vacation home and locked the victim out.

When Defendant eventually allowed the victim inside, she went into the bedroom. Defendant hit the victim in the head while she was seated on the bed. Defendant continued to hit the victim with both his hands and fists while calling her a "slut." The victim did not defend herself because she had "never been through a situation like this before" and "was too scared to" hit Defendant. For about two hours, Defendant "punched [her] in the nose," "bit [her] ear and bit [her] nose," "kicked [her] in the chest," "head-butted [her] twice," and "strangled [her] until vomiting." The victim was unable to scream for help "[b]ecause at one point in time he had [her] face down with [her] arms behind [her] back."

The sheets to the bed were covered in the victim's blood, and the victim believed Defendant was going to kill her.

Defendant later forced the victim to get into her car. Defendant drove away from the vacation home. While driving, Defendant threw the victim's cell phone out the window and continued to strike her in the head, ultimately rupturing her eardrum. At various times throughout the drive, Defendant pulled off the road, strangled the victim, and threatened to push her out of the car.

Around 3:00 a.m. on July 31, 2016, they arrived at the victim's house in Sims, North Carolina. Defendant continued to threaten the victim and threatened to harm himself. At this time, the victim was in extreme pain as her head and body hurt, her ears were ringing, and her throat was sore.

Around 6:00 a.m. on July 31, 2016, the victim's mother called Defendant's phone. The victim answered and told her mother that she needed help. Her mother then discovered the blood-stained sheets in the vacation home. Soon after, the victim's sister came to the house in Sims, and the victim told her sister about what Defendant had done the night before.

The victim's sister called 911. When EMS arrived, they determined that the victim's nose was broken. She was transported to the emergency room where it was determined that the victim needed surgery to prevent further hearing loss.

The victim's parents arrived at the emergency room and later took her back to Atlantic Beach where she gave a statement to the Atlantic Beach Police Department. As of September 15, 2016, the victim was still "receiving medical care for [her] headaches and dizziness" and was suffering from anxiety and continued ear pain.

On August 1, 2016, Defendant was arrested. On February 5, 2018, Defendant was tried on the following offenses: (1) first degree kidnapping; (2) assault by strangulation; (3) AWDWISI;[1] (4) AWDWISI;[2] (5) assault on a female for kicking the victim in the chest; (6) assault on a female for head-butting the victim in the forehead; and (7) communicating threats. On February 7, 2018, a Carteret County jury found Defendant guilty of kidnapping, two counts of AWDWISI, one count of assault on

1. The alleged deadly weapons for this assault were Defendant's hands and fists.

2. The alleged deadly weapons for this assault were Defendant's hands, fists, and teeth.

a female for head-butting the victim in the forehead, and one count of communicating threats.

On February 8, 2018, Defendant entered written notice of appeal. Defendant argues on appeal that the trial court erred when it (1) denied Defendant's motion to dismiss because the evidence before the trial court established only one assault that resulted in multiple injuries, not multiple assaults; (2) instructed the jury that Defendant's hands, feet, and teeth could be deadly weapons; and (3) failed to conduct a charge conference. We disagree.

Analysis

I. Motion to Dismiss

[1] "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). A motion to dismiss is properly denied if there is substantial evidence of (1) each element of the charged offense, and (2) defendant being the perpetrator of the charged offense. *See State v. Earnhardt*, 307 N.C. 62, 65, 296 S.E.2d 649, 651 (1982). "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) (citation 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).

> 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). Further, "[t]his Court will not consider arguments based upon matters not presented to or adjudicated by the trial court. Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Haselden*, 357 N.C. 1, 10, 577 S.E.2d 594, 600 (2003) (citations and quotation marks omitted).

Here, Defendant argued at the close of the State's evidence:

> And then on the assault with a deadly weapon inflicting serious injury. Again, deadly weapon being the hands. We would argue that the case law seems to look at the size difference between the defendant and the victim, the brutality of the attack, what actually – the injuries that occurred.
>
> The State's evidence was that this was an ongoing assault that lasted for two hours within the trailer and then most of the ride home. And we would contend if those hands were deadly weapons as bad as those pictures are and as bad as her injuries are, that they would be a lot worse based on what the State's evidence has been and we would ask that that be — that the deadly weapon part of those be dismissed at this point.

Defendant then renewed his objection at the close of all of the evidence. Defendant also argued at the close of all of the evidence that "the charging documents all put the date of these incidents as July 31st," but did not include July 30th in the dates of offense.

Defendant's arguments on his motion to dismiss for sufficiency of the evidence were directed only to whether his hands could be considered deadly weapons given what his attorney contended was insignificant evidence of injury, and that the bills of information did not include the correct dates of offense. Defendant did not argue, as he does in this appeal, that the evidence before the trial court established only one assault that resulted in multiple injuries, not multiple assaults. Thus, Defendant has failed to preserve this argument for appellate review. *See State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court]." (citation and quotation marks omitted)).

Even if we assume Defendant preserved his new argument, the State presented sufficient evidence of each assault for which Defendant was convicted. "In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults." *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citation and quotation marks omitted). To establish that multiple assaults occurred, there must be "a distinct interruption in the original assault followed by a second assault[,] so that the subsequent assault may be deemed separate and distinct from the first." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (*purgandum*). To determine whether Defendant's conduct was distinct, we are to consider: (1) whether each action

required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. *State v. Rambert*, 341 N.C. 173, 176-77, 459 S.E.2d 510, 513 (1995).

In *State v. Wilkes*, 225 N.C. App. 233, 736 S.E.2d 582 (2013), the defendant initially punched the victim in the face, breaking her nose, causing bruising to her face, and damaging her teeth. The victim's son entered the room where the incident occurred with a baseball bat and hit the defendant. *Id.* at 235, 736 S.E.2d at 585. The defendant was able to secure the baseball bat from the child, and he began striking the victim with it. *Id.* at 235, 736 S.E.2d at 585. The defendant's actions in the subsequent assault "crushed two of [the victim]'s fingers, broke[] bones in her forearms and her hands, and cracked her skull." *Id.* at 235, 736 S.E.2d at 585.

This Court, citing our Supreme Court in Rambert, determined that there was not a single transaction, but rather "multiple transactions," stating, "[i]f the brief amount of thought required to pull a trigger again constitutes a separate thought process, then surely the amount of thought put into grabbing a bat from a twelve-year-old boy and then turning to use that bat in beating a woman constitutes a separate thought process." *Wilkes*, 225 N.C. App. at 239-40, 736 S.E.2d at 587.

In *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254, 263, *writ denied*, *review denied*, 371 N.C. 450, 817 S.E.2d 205 (2018), this Court again applied the "separate-and-distinct-act analysis" from *Rambert*, and found multiple assaults "based on different conduct." *Id.* at 317, 813 S.E.2d at 263. There, the defendant "grabb[ed the victim] by her hair, toss[ed] her down the rocky embankment, and punch[ed] her face and head multiple times." *Id.* at 317, 813 S.E.2d at 263. The defendant also pinned down the victim and strangled her with his hands. This Court determined that multiple assaults had occurred because the "assaults required different thought processes. Defendant's decisions to grab [the victim]'s hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down [the victim] while she was on the ground and strangle her throat to quiet her screaming." *Id.* at 317-18, 813 S.E.2d at 263. This Court also concluded that the assaults were distinct in time, and that the victim sustained injuries to different parts of her body because "[t]he evidence showed that [the victim] suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation." *Id.* at 318, 813 S.E.2d at 263.

In the present case, Defendant had to employ separate thought processes in his decisions to punch, slap, kick, bite, and head-butt the victim. In addition, the assaults which caused the victim's injuries did not occur simultaneously, with one strike, or in rapid succession. Rather, Defendant's actions were at separate and distinct points in time. Each assault also resulted in different injuries to the victim. The victim suffered a ruptured eardrum from Defendant's strikes on her ear, she suffered a concussion from the Defendant's conduct in head-butting her, she suffered a fractured nose from Defendant striking her nose, and she suffered permanent scarring from Defendant biting her nose and ear.

Even if Defendant preserved his argument, which he did not, the trial court did not err when it denied Defendant's motion to dismiss.

II. Motion to Dismiss AWDWISI

[2] Defendant next argues that the trial court erred in denying Defendant's motion to dismiss AWDWISI because there was insufficient evidence that he used his hands, feet, and teeth as deadly weapons. We disagree.

"The elements of AWDWISI are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death." *State v. Jones*, 353 N.C. 159,164, 538 S.E.2d 917, 922 (2000) (citation omitted). "A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981) (citation omitted).

"An assailant's hands may be considered deadly weapons for the purpose of the crime of assault with a deadly weapon inflicting serious injury depending upon the manner in which they were used and the relative size and condition of the parties." *State v. Allen*, 193 N.C. App. 375, 378, 667 S.E.2d 295, 298 (2008). "Only where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce such results, its allegedly deadly character is one of fact to be determined by the jury." *McCoy*, 174 N.C. App. at 112, 620 S.E.2d at 869 (citation and quotation marks omitted); *see also United States v. Sturgis*, 48 F.3d 784, 788 (4th Cir. 1995) ("The test of whether a particular object was used as a dangerous weapon is not so mechanical that it can be readily reduced to a question of law. Rather, it must be left to the jury to determine whether, under the circumstances of each case, the defendant used some instrumentality, object, or (in some instances) a part of his body to cause death or serious injury. This test clearly invites a functional inquiry into the use of the instrument rather than a metaphysical reflection on its nature.").

In the present case, substantial evidence was presented at trial of Defendant's physical advantages over the victim. Defendant is approximately 5 feet 9 inches tall, while the victim is 5 feet 4 inches tall and weighs 140 pounds. Although there is no evidence in the record of Defendant's weight, Defendant was present at trial and the jury observed Defendant in person, along with photographs of Defendant from the incident that were admitted into evidence. Thus, the jury had the opportunity to observe the relative size differences of Defendant and the victim.

Moreover, on the night of the incident, the victim testified that Defendant had been drinking throughout the evening, that he was drunk, and that he was acting "crazed and possessed." For over two hours, Defendant struck the victim repeatedly with his hands and fists in her ear, nose, and head, which resulted in the victim sustaining two black eyes, a fractured nose, and swelling in her face. The victim believed that she was "going to die" and could not defend herself against Defendant because "he was stronger than her." According to the victim's sister, the victim "was unrecognizable . . . [and] she was a zombie" the next morning. It appeared to the victim's sister that "[h]er eyes were swollen. Her nose was very swollen and it looked like blood had come down to the tip. She had a big old gash up here on her head. Blood was in her hair. I could tell her ears -- there was some blood on her ears."

Furthermore, Defendant bit the victim's nose and ear. The victim testified that the bite to her ear was the most painful part of the attack. The victim's doctors were more concerned about the bite marks on her ear than her ruptured eardrum. At the time of trial, the victim had a visible scar from where Defendant bit her on the nose.

Moreover, the trial court provided the following instruction to the jury that "[i]n determining whether fists, hands, and teeth were a deadly weapon, you should *consider the nature of the fists*, *hands and teeth*, *the manner in which they were used*, and *the size and strength of the defendant as compared to the victim*." (Emphasis added).

Thus, when viewed in a light most favorable to the State, we conclude that the State presented substantial evidence of each element of AWDWISI, and that Defendant's hands, feet, and teeth were deadly weapons for the purposes of AWDWISI. Furthermore, we are reminded that the jury is the best determinant of whether, under the circumstances, Defendant's use of his hands, fists, and teeth were likely to cause death or serious bodily injury. *See State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455-56 (2000) ("When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for

jury consideration, not about the weight of the evidence."). Therefore, the trial court did not err when it denied Defendant's motion to dismiss.

III. Charge Conference

[3] Defendant next argues that the trial court violated N.C. Gen. Stat. § 15A-1231(b) by failing to conduct a charge conference. We disagree.

A charge conference is a recorded conference between the judge and the parties outside the presence of the jury where the judge "must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury" and the judge must also inform the parties of what parts of the parties' tendered instructions will be given to the jury. N.C. Gen. Stat. § 15A-1231(b) (2019). "The purpose of a charge conference is to allow the parties to discuss the proposed jury instructions to insure that the legal issues are appropriately clarified in a manner that assists the jury in understanding the case and reaching the correct verdict." *State v. Houser*, 239 N.C. App. 410, 423, 768 S.E.2d 626, 635 (2015) (*purgandum*).

Mere noncompliance with Section 15A-1231(b) does not automatically entitle Defendant to relief. *State v. Corey*, ___ N.C. ___, ___, 835 S.E.2d 830, 838 (2019) (overruling *State v. Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014)). Rather, a defendant must show that he or she was materially prejudiced by the judge's failure to fully comply with the provisions of Section 15A-1231(b). N.C. Gen. Stat. § 15A-1231(b). A defendant is "materially prejudiced" for purposes of Section 15A-1231(b) "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." N.C. Gen. Stat. § 15A-1443(a) (2019); *Corey*, ___ N.C. at ___, 835 S.E.2d at 834; *State v. Coburn*, ___ N.C. App. ___, ___, 834 S.E.2d 691, 695 (2019) (concluding that the defendant was not materially prejudiced when portions of the charge conference were not recorded, as required by Section 15A-1231, because the trial court summarized, on the record, discussions that were not recorded; the defendant did not object to the trial court's summary of the jury instructions on the record; and the trial court was cognizant of the dangers of discussions held off the record).

The State correctly argues that Defendant could not have been materially prejudiced because a charge conference did *occur* as shown in the record. At the charge conference, the Court asked whether the parties were satisfied with the proposed jury instructions. Defendant

stated that he was satisfied with the instructions to be given to the jury and had the opportunity to draft the proposed jury instructions, as evidence by the following colloquy which occurred outside the presence of the jury:

> THE COURT: All right. Thank you, sir. Give me one minute. I've got to look up an instruction before I bring the jury back in here. Not one you all did. It's one I've got to give before you all get started. (Pause.)
>
> . . .
>
> [THE STATE]: Is Your Honor satisfied with the jury instructions?
>
> THE COURT: I'm satisfied with the jury instructions. I just kind of breezed through them, but I'm satisfied with them if you all are.
>
> [DEFENSE COUNSEL]: *We are*, *Your Honor*.
>
> THE COURT: All right. Now, listen, if I happen to misstate something or misread something, I want you to stop me right then, but I don't want you to -- just stand up and say may I approach the bench and then both of you all step up here and we'll address it.

(Emphasis added). Furthermore, after the trial court instructed the jury, Defendant had a second opportunity to object to the instructions, as evidence by the following discussion:

> THE COURT: All right. For purposes of the record, Madam Court Reporter, both the defendant and the State agreed with the jury charge word-for-word. There's no objection to it.
>
> [DEFENSE COUNSEL]: *No objection to any of it.*

(Emphasis added).

Thus, it is apparent from the record that Defendant participated in a charge conference, and he had multiple opportunities to object. Because the trial court conducted a charge conference, the trial court did not err. Therefore, Defendant cannot show material prejudice, and his argument is without merit.

Conclusion

Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
AARON LEE GORDON

No. COA17-1077-2

Filed 17 March 2020

Satellite-Based Monitoring—lifetime—enrollment upon future release from prison—reasonableness

Reconsidering its prior opinion in light of *State v. Grady*, 372 N.C. 509 (2019), the Court of Appeals once again concluded that the State failed to meet its burden of showing the reasonableness of the imposition of lifetime satellite-based monitoring (SBM) as applied to defendant where defendant would not be subject to SBM until he completed his active sentence of 190-288 months' imprisonment and where the State failed to present sufficient evidence about the scope of the search and the State's legitimate governmental interest at the time of defendant's release.

Judge DIETZ concurring by separate opinion.

Appeal by defendant from order entered 13 February 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Originally heard in the Court of Appeals 22 March 2018, with opinion issued 4 September 2018. On 4 September 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019).

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

ZACHARY, Judge.

Defendant Aaron Lee Gordon timely appealed from the trial court's order requiring him to enroll in lifetime satellite-based monitoring following his eventual release from prison. On 4 September 2018, this Court filed a published opinion vacating the trial court's civil order mandating satellite-based monitoring. *See State v. Gordon*, __ N.C. App. __, 820 S.E.2d 339 (2018). The State subsequently filed a petition for discretionary review with the North Carolina Supreme Court. On 4 September 2019, the Supreme Court allowed the State's petition for discretionary review for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). Upon reconsideration, we reverse the trial court's civil order mandating satellite-based monitoring.

Background

I. Satellite-Based Monitoring

Our General Assembly enacted "a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . designed to monitor" the locations of individuals who have been convicted of certain sex offenses. N.C. Gen. Stat. § 14-208.40(a) (2019). The present satellite-based monitoring program provides "[t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology." *Id.* § 14-208.40(c)(1). The reporting frequency of an offender's location "may range from once a day (passive) to near real-time (active)." *Id.* § 14-208.40(c)(2).

After determining that an individual meets the criteria for one of three categories of offenders subject to the satellite-based monitoring program, *see id.* § 14-208.40(a)(1)-(3), the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the satellite-based monitoring program. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459, 462 (2015) ("*Grady I*"); *State v. Blu*e, 246 N.C. App. 259, 264, 783 S.E.2d 524, 527 (2016). The trial court may order a qualified individual to enroll in the satellite-based monitoring program during the initial sentencing phase pursuant to N.C. Gen. Stat. § 14-208.40A, or, under certain circumstances,

at a later time during a "bring-back" hearing pursuant to N.C. Gen. Stat. § 14-208.40B. For an individual for whom satellite-based monitoring is imposed during the defendant's sentencing hearing pursuant to N.C. Gen. Stat. § 14-208.40A, monitoring shall begin upon the defendant's release from prison.

II. Defendant's Enrollment

In February 2017, Defendant pleaded guilty to statutory rape, second-degree rape, taking indecent liberties with a child, assault by strangulation, and first-degree kidnapping. Defendant was sentenced to 190-288 months' imprisonment and ordered to submit to lifetime sex-offender registration. After determining that Defendant was convicted of an "aggravated offense" under N.C. Gen. Stat. § 14-208.6(1A), the trial court then ordered that Defendant enroll in the satellite-based monitoring program for the remainder of his natural life upon his release from prison.

The State's only witness at Defendant's satellite-based monitoring hearing was Donald Lambert, a probation and parole officer in the Forsyth County sex-offender unit. Lambert explained that the device currently used to monitor offenders enrolled in satellite-based monitoring is "just basically like having a cell phone on your leg." The battery requires two hours of charging each day, which requires that Defendant plug the charging cord into an electric outlet while the device remains attached to his leg. The charging cord is approximately eight to ten feet long. Every 90 days, Defendant must also allow a monitoring officer to enter his home in order to inspect and service the device.

Lambert testified that the device currently in use monitors an offender's location "at all times[.]" Once Defendant is released from prison and enrolled in satellite-based monitoring, "we [will] monitor [him] weekly. . . . [W]e just basically check the system to see his movement to see where he is, where he is going weekly. . . . [W]e review all the particular places daily where he's been." "[T]he report that can be generated from that tracking . . . gives that movement on a minute-by-minute position," as well as "the speed of movement at the time[.]" Under the current statutory regime, a monitoring officer may access an offender's location data at any time without obtaining a search warrant. If Defendant enters a restricted area—for example, if he drives past a school zone—the monitoring system will immediately alert the relevant authorities. Lambert explained that in such an event, monitoring officers typically "contact [the enrollee] by phone immediately after they get the alert, ask where they are."

When asked what would happen if Defendant "had a traveling sales job that covered" a regional territory and required travel to multiple states, Lambert explained that the sheriff's office "would have to approve it." "He would also be monitored through the Raleigh office where the satellite-based monitoring is. He would have to clear that with them as well. And then he would have to notify the state that he's going to if he was going to—and have to decide whether or not he'd have to stay on satellite-based monitoring in another state."

The State introduced Defendant's Static-99 score at his satellite-based monitoring hearing. Lambert explained that Static-99 is "an assessment tool that they've been doing for years on male defendants [convicted of reportable sex offenses] over 18. It's just a way to assess whether or not they'll commit a crime again of this [sexual] sort." Lambert testified that offenders are assigned "points" based on

> whether or not they've committed a violent crime, whether or not there was an unrelated victim, whether or not there was—there's male victims. . . . Other than just the sexual violence, was there another particular part of violence in the crime—in the index crime? Also, [Static-99 assessment] does take their prior sentencing dates into factor too.

Defendant received a "moderate/low" score on his Static-99, which Lambert explained meant there was "a moderate to low [risk] that he would ever commit a crime like this again." Defendant did not have any prior convictions for sex offenses, but he was assessed one point for having prior convictions for violent offenses. Lambert agreed that Defendant's Static-99 score indicated that "it's not likely he's going to [commit a sex offense] again[.]" However, the State failed to present any evidence "as to what the rate of recidivism is during—even during [a] five-year period[.]"

The general purpose of the satellite-based monitoring program is "to monitor subject offenders and correlate their movements to reported crime incidents." N.C. Gen. Stat. § 14-208.40(d). However, Lambert also noted that the satellite-based monitoring program could potentially be beneficial to Defendant. As Lambert explained, "if somebody takes charges out, it will show where [the enrollee was]. So it kind of—it can help them as well, showing that they've been to particular places. If somebody says he was over here doing this at a particular time, . . . it will show, hey, no, he was over here."

After reviewing the evidence presented during the hearing, the trial court announced:

> Let the record reflect we've had this hearing, and the Court is going to find by the preponderance of the evidence that the factors that the State has set forth—his previous assaults, the Static-99 history, the fact that this occurred in an apartment with other children present as well and the relatively minor physical intrusion on [D]efendant to wear the device—it's small. It has to be charged two hours a day. But other than that, it can be used in water and other daily activities—so I am going to find . . . that he should enroll in satellite-based monitoring for his natural life unless terminated.

Defendant timely appealed the trial court's satellite-based monitoring order to this Court. On appeal, Defendant only challenged the constitutionality of the satellite-based monitoring order as applied to him as one convicted of an aggravated offense. He argued that the trial court erred in ordering that he be subjected to lifetime satellite-based monitoring because "[t]he [S]tate failed to meet its burden of proving that imposing [satellite-based monitoring] on [Defendant] is reasonable under the Fourth Amendment."

In a published opinion filed on 4 September 2018, we vacated the trial court's civil order mandating satellite-based monitoring. Relying heavily on *Grady I* and *State v. Grady*, __ N.C. App. __, 817 S.E.2d 18 (2018) ("*Grady II*"), *modified and aff'd*, 372 N.C. 509, 831 S.E.2d 542 (2019), we held that the State had failed to meet its burden of showing that the implementation of satellite-based monitoring of this Defendant will be a reasonable search fifteen to twenty years before its execution. The State subsequently filed a petition for discretionary review with the North Carolina Supreme Court. The Supreme Court issued its opinion in *Grady III* on 16 August 2019. Thereafter, on 4 September 2019, the Supreme Court entered an order allowing the State's petition for discretionary review in the instant case for the limited purpose of remanding to this Court for reconsideration in light of the Supreme Court's decision in *Grady III*.

State v. Grady I

In *Grady I*, the United States Supreme Court made clear that its determination that satellite-based monitoring effects a search was only the first step in analyzing the program's constitutionality. *Grady I*, 575 U.S. at 310, 191 L. Ed. 2d at 462. As the Supreme Court reiterated,

"[t]he Fourth Amendment prohibits only *unreasonable* searches." *Id.* The Supreme Court explained that whether satellite-based monitoring constitutes a reasonable Fourth Amendment search of a particular individual will "depend[ ] on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* (citing *Samson v. California*, 547 U.S. 843, 165 L. Ed. 2d 250 (2006), and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564 (1995)). However, as our state courts had not yet conducted that analysis, the Supreme Court declined to "do so in the first instance." *Id.* Accordingly, after concluding that satellite-based monitoring effects a search implicating the Fourth Amendment, the Supreme Court reversed and remanded for our courts to determine the "ultimate question of the program's constitutionality." *Id.*

On remand from *Grady I*, the trial court held satellite-based monitoring constitutional, both facially and as applied. Upon the defendant's appeal, however, this Court concluded that because "the State failed to present any evidence of its need to monitor [the] defendant, or the procedures actually used to conduct such monitoring[,]" *Grady II*, __ N.C. App. at __, 817 S.E.2d at 28, the State had failed to meet its burden of proving that satellite-based monitoring would constitute a reasonable Fourth Amendment search under the totality of the circumstances. *Id.* at __, 817 S.E.2d at 28. Accordingly, we held that the satellite-based monitoring program was unconstitutional as applied to defendant Grady, and we did not address the facial constitutionality of the satellite-based monitoring program. The State appealed to our Supreme Court.

In *Grady III*, our Supreme Court modified and affirmed this Court's decision in *Grady II*, holding satellite-based monitoring unconstitutional as applied to the defendant and all similarly situated individuals. The Court, in "offer[ing] guidance as to what factors to consider in determining whether [satellite-based monitoring] is reasonable under the totality of the circumstances[,]" determined that the defendant's "privacy interests and the nature of [the] . . . intrusion" must be weighed against the State's interests and the effectiveness of satellite-based monitoring. *State v. Griffin*, No. COA 17-386-2, slip op. at 13-14 (N.C. Ct. App. Feb. 18, 2020). The Court concluded that although recidivists have greatly diminished privacy interests, satellite-based monitoring is nevertheless a substantial intrusion; and that by failing to make "any showing . . . that the [satellite-based monitoring] program furthers [the State's] interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public,"

the State did not meet "its burden of establishing the reasonableness of the [satellite-based monitoring] program under the Fourth Amendment balancing test required for warrantless searches." *Grady III*, 372 N.C. at 544, 831 S.E.2d at 568. Thus, the Court held that the satellite-based monitoring of sex offenders is unconstitutional as applied to defendant Grady as well as any unsupervised person[1] who was ordered to enroll in satellite-based monitoring because he or she is a recidivist. *Id.* at 545, 831 S.E.2d at 568.

Notably, the Supreme Court specifically limited its holding to those unsupervised offenders who are subject to satellite-based monitoring because of their classification as recidivists: "[O]ur decision today does not address whether an individual who is classified as a sexually violent predator, or convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen" may be subject to mandatory lifetime satellite-based monitoring. *Id.* at 550, 831 S.E.2d at 572. In addition, the holding in *Grady III* applies only to unsupervised individuals; thus, supervised offenders—all persons currently subject to a period of State supervision, such as probationers, parolees, and individuals who remain under post-release supervision—remain subject to satellite-based monitoring following *Grady III*. *Id.* at 548, 831 S.E.2d at 572.

Reconsideration of *State v. Gordon*

Upon reconsideration of our original opinion, we again conclude that the State failed to meet its burden of showing that lifetime satellite-based monitoring is a reasonable search of this Defendant. Here, Defendant was ordered to submit to satellite-based monitoring solely due to his conviction of an aggravated offense; however, he will not actually enroll in the program for approximately 15 to 20 years, after he has completed his active prison sentence.

The State filed its satellite-based monitoring application at the time of Defendant's sentencing, in accordance with N.C. Gen. Stat. § 14-208.40A. Because of Defendant's active sentence, the trial court's order granting the State's application will allow the State the authority to search Defendant—i.e., to "physically occup[y] [defendant's person] for the purpose of obtaining information"—upon his release from prison

1. An "unsupervised individual" is a person not on probation, parole, or post-release supervision. *Id.* at 531, 831 S.E.2d at 559.

in approximately 2032.[2] *Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Thus, Defendant has yet to be searched.

In considering the reasonableness of subjecting a defendant to satellite-based monitoring, the court must examine the totality of the circumstances to determine "whether the warrantless, suspicionless search here is reasonable when 'its intrusion on the individual's Fourth Amendment interests' is balanced 'against its promotion of legitimate governmental interests.' " *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 652-53, 132 L. Ed. 2d at 574). In previous cases, we have considered the characteristics of the monitoring device in use at that time; the manner in which the defendant's location monitoring may be conducted, as well as the purpose for which that information was used according to the current statute; and the State's interest in monitoring that particular defendant in light of his "current threat of reoffending[.]" *Grady II*, __ N.C. App. at __, 817 S.E.2d at 25-26.

In the instant case, however, the State's ability to demonstrate reasonableness is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis. For instance, we are unable to consider "the extent to which the search intrudes upon reasonable privacy expectations" because the search will not occur until Defendant has served his active sentence. *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557 (citation omitted). The State makes no attempt to report the level of intrusion as to the information revealed under the satellite-based monitoring program, nor has it established that the nature and extent of the monitoring that is currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison. *Cf. Vernonia Sch. Dist. 47J*, 515 U.S. at 658, 132 L. Ed. 2d at 578 ("[I]t is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. . . . And finally, the results of the tests . . . are not turned over to law enforcement authorities or used for any internal disciplinary function." (citations omitted)).

Rather than addressing these concerns, the State focuses primarily on the "limited impact" of the monitoring device itself. The State, however, provides no indication that the monitoring device currently

2. The trial court sentenced Defendant to 190 to 288 months' imprisonment. Defendant was given credit for 426 days spent in confinement prior to the date judgment was entered against him in February 2017.

in use will be the same as—or even similar to—the device that will be employed approximately two decades from now. *See State v. Spinks*, 256 N.C. App. 596, 613, 808 S.E.2d 350, 361 (2017) (Stroud, J., concurring) ("The United States Supreme Court has recognized in recent cases the need to consider how modern technology works as part of analysis of the reasonableness of searches." (citing *Riley v. California*, 573 U.S. 373, 392, 189 L. Ed. 2d 430, 446-47 (2014))), *disc. review denied*, 370 N.C. 696, 811 S.E.2d 589 (2018).

Nor does the record before this Court reveal whether Defendant will be on supervised or unsupervised release at the time his monitoring is set to begin, affecting Defendant's privacy expectations in the wealth of information currently exposed. *Samson*, 547 U.S. at 850-52, 165 L. Ed. 2d at 258-59; *Grady II*, __ N.C. App. at __, 817 S.E.2d at 24 ("[The] [d]efendant is an unsupervised offender. He is not on probation or supervised release. . . . Solely by virtue of his legal status, then, it would seem that [the] defendant has a greater expectation of privacy than a supervised offender."); *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 654, 132 L. Ed. 2d at 575 ("[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State.").

The State has also failed, at this time, to present evidence adequately estimating the government's need to search—i.e., the other side of the balancing test. *See Grady III*, 372 N.C. at 527, 831 S.E.2d at 557. The State merely asserts that "[i]f, as Defendant acknowledges, the State has 'a substantial interest in preventing sexual assaults,' then the State's evidence amply demonstrated that Defendant warranted such concern in the future despite his Static-99 risk assessment score." However, the State makes no attempt to distinguish this undeniably important interest from the State's "normal need for law enforcement[.]" *State v. Elder*, 368 N.C. 70, 74, 773 S.E.2d 51, 54 (2015) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 717 (1987)); *see also Maryland v. King*, 569 U.S. 435, 481, 186 L. Ed. 2d 1, 41 (2013) (Scalia, J., dissenting) ("Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. *The Fourth Amendment must prevail.*" (emphasis added)).

In addition, to the extent that the current satellite-based monitoring program is justified by the State's interest in deterring future sexual assaults, the State's evidence falls short of demonstrating what Defendant's threat of reoffending will be after having been incarcerated

for roughly fifteen years.[3] *See, e.g.*, *Brown v. Peyton*, 437 F.2d 1228, 1230 (4th Cir. 1971) ("One of the principal purposes of incarceration is rehabilitation . . . ."). The only individualized measure of Defendant's threat of reoffending was the Static-99, which the State's witness characterized as indicating that Defendant was "not likely" to recidivate. Lambert, the State's sole witness, was asked whether there was any evidence, besides Defendant's Static-99 score, "that would indicate the reason that the State of North Carolina would need to search his location or whereabouts on a regular basis[.]" Lambert responded, "I don't have any information on that[.]"

It is manifest that the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion to continuously and perpetually monitor Defendant's location information upon his release from prison. *See Jones*, 565 U.S. at 404, 181 L. Ed. 2d at 918. Authorizing the State to conduct a search of this magnitude approximately fifteen to twenty years in the future based solely upon scant references to present circumstances would obviate the need to evaluate reasonableness under the "totality of the circumstances" altogether. "We therefore hold, consistent with the balancing test employed in *Grady III*, that the imposition of [satellite-based monitoring] . . . as required by the trial court's order is unconstitutional as applied to Defendant and must be reversed." *Griffin*, slip op. at 20.

Accordingly, we necessarily conclude that the State has failed to meet its burden of establishing that lifetime satellite-based monitoring following Defendant's eventual release from prison is a reasonable search in Defendant's case. We therefore reverse the trial court's order.

REVERSED.

Judge BROOK concurs.

Judge DIETZ concurs by separate opinion.

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3. We are cognizant of the fact that Defendant's Static-99 score was partly based upon his age at the likely date of release. However, this factor only accounts for Defendant's age, and not the duration of his active sentence or his potential for rehabilitation while incarcerated.

DIETZ, Judge, concurring in the judgment.

I agree with the outcome of this case because we are bound by this Court's recently re-issued decision in *State v. Griffin*, No. COA17-386-2, __ N.C. App. __, __ S.E.2d __ (2020). I do not join the majority opinion for the reasons discussed in my concurring opinion in *State v. Gordon*, __ N.C. App. __, __, 820 S.E.2d 339, 349–50 (2018), *remanded*, 372 N.C. 722, __ S.E.2d __ (2019).

STATE OF NORTH CAROLINA
v.
JOHN D. GRAHAM

No. COA17-1362

Filed 17 March 2020

1. Evidence—hearsay—child victim's prior statements—corroboration of victim's testimony

In a trial for multiple counts of engaging in a sexual act with a child under thirteen years of age and taking indecent liberties with a minor, the trial court did not abuse its discretion by allowing the admission of the victim's prior statements for the sole purpose of corroboration because the statements indicated a pattern of continuing abuse by defendant and the challenged statements were substantially similar to the victim's testimony at trial. Even assuming error, defendant could not show prejudice where two other witnesses also gave accounts of the victim's prior statements, including a disinterested medical professional.

2. Evidence—detective's testimony—defendant's flight and extradition—Rule 602—sufficient personal knowledge

Where law enforcement was unable to locate defendant for six months after allegations that he engaged in sexual acts with a minor, the trial court did not commit plain error at defendant's trial by allowing a law enforcement officer to testify about defendant's extradition because the officer had sufficient personal knowledge of defendant's extradition from Puerto Rico to testify pursuant to Rule 602 of the Rules of Evidence.

3. Criminal Law—jury instructions—evidence of flight—departure from routine

The trial court did not commit plain error by instructing the jury that defendant's conduct could be considered evidence of flight indicative of guilt where evidence was presented that after he was accused of engaging in sexual acts with a minor he could not be located at his last known addresses and he was apprehended six months later in Puerto Rico, which demonstrated a departure from his usual routine and supported the State's theory that defendant fled to avoid being apprehended.

4. Sentencing—prior record level—calculation—out-of-state conviction—substantial similarity to North Carolina offense

The trial court did not err when it determined defendant's conviction for statutory rape in Georgia involved a substantially similar offense to that found in N.C.G.S. § 14-27.25(a) for purposes of calculating the prior record level during felony sentencing even though the two states' statutes differed in the offender's age requirement, because both states sought to protect individuals under the age of 16 from engaging in sexual activity with older individuals and provided for greater punishment when offenders are significantly older than their victims.

5. Satellite-Based Monitoring—lifetime monitoring—reasonableness—hearing required

During sentencing after defendant's conviction for engaging in a sexual act with a child under thirteen years of age, the trial court erred by summarily finding the imposition of lifetime satellite-based monitoring reasonable without conducting a hearing and allowing the State to meet its burden. Since the State was not given the opportunity to present evidence, the proper remedy was remand for an evidentiary hearing consistent with *State v. Grady*, 372 N.C. 509 (2019).

6. Criminal Law—motion for appropriate relief—recanted testimony—sufficiency of findings of fact

The trial court abused its discretion when it denied defendant's motion for appropriate relief requesting a new trial on the basis of recanted testimony after his conviction for engaging in a sexual act with a minor because the trial court's findings of fact failed to make necessary credibility determinations resolving material conflicts in the evidence which were necessary to support the trial court's ultimate conclusion of law denying the motion. The matter was remanded for entry of a new order with additional findings of fact.

Judge BRYANT concurring in part and dissenting in part.

Appeal by defendant from judgment entered 13 December 2016 by Judge Eric Levinson in Clay County Superior Court and order entered 13 May 2019 by Judge Athena F. Brooks in Clay County Superior Court. Heard in the Court of Appeals 7 January 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin O'Kane Scott and Special Deputy Attorney General Benjamin O. Zellinger, for the State.

Appellant Defender Glenn Gerding, by Assistant Appellate Defender Daniel K. Shatz, for defendant.

ARROWOOD, Judge.

John D. Graham ("defendant") appeals from judgment entered upon his conviction for sexual offense against a child under age thirteen and order denying his Motion for Appropriate Relief ("MAR"). We find no error in the jury trial phase of defendant's trial. However, we vacate the trial court's order imposing lifetime satellite-based monitoring ("SBM") upon defendant, with remand for the trial court to conduct an evidentiary hearing on its appropriateness pursuant to *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015), and its progeny. Furthermore, we agree that the trial court's order denying defendant's MAR is insufficient, and vacate and remand for entry of an order not inconsistent with this opinion.

I. Background

A. Trial

On 11 September 2012, defendant was indicted on four counts each of engaging in a sexual act with a child under thirteen years of age and taking indecent liberties with a child. Defendant's case came on for trial in the criminal session of Clay County Superior Court before the Honorable Eric Levinson on 5 December 2016.

The State's key witness at trial was the alleged victim, A.M.D.[1] A.M.D.'s testimony was to the effect that defendant had touched the outside and inside of her vagina with his fingers on numerous occasions at four separate residences where she lived with her mother, Cassie

1. Initials are used to protect the identity of the victim and for ease of reading.

D., over a period between one and two years. A.M.D. testified in greatest detail regarding defendant's sexual abuse of her at the residence referred to as "the Ruby Falls house." A.M.D. specifically mentioned three instances in which defendant inserted his finger into her vagina at the Ruby Falls house: on the couch in the living room while the family was watching television, on defendant's bed in the basement while her siblings were playing videogames in the same room, and in her own room while defendant read her a book. A.M.D. also mentioned telling her step-grandmother ("Ms. Hester") that defendant hurt her and gesturing toward her genitals when asked where.

The State also presented three witnesses who testified that A.M.D. had made consistent statements to them on prior occasions. John Tucker, P.A., ("Mr. Tucker") testified that, during his medical examination of A.M.D. in 2012, she told him that defendant hurt her and touched or penetrated her vagina "[w]ith his hand" "[m]ore than one time[,]" but did not "stick a stick inside" of her. A.M.D.'s brother T.D. testified that when he asked her if defendant ever molested her, "she said yes but she never gave the details."

Ms. Hester testified that when A.M.D. was visiting her on 30 May 2012, A.M.D. mentioned that defendant was her mother's boyfriend and was living with the family at the Ruby Falls house. A.M.D. told her that defendant "hurts" her, and when asked where, "she pointed to her private parts." Ms. Hester further testified that, around 2014, A.M.D. provided her with additional details on the molestation. Many of these additional details were consistent with A.M.D.'s trial testimony: "at the basement [of the Ruby Falls] house when they were watching TV . . . [defendant] would always touch her private parts and hurt her there[;]" that her "mommy was present" when defendant molested her while watching TV in the basement of the Ruby Falls house; and "that he used his fingers a lot with her private parts, placing them in her private parts."

However, some of A.M.D.'s prior statements offered by Ms. Hester involved matters to which she did not testify, such as that defendant "made he[r] put his private parts in her mouth and that he had choked her[,]" inserted objects into her private parts, and "had hurt her on her back side." Defense counsel objected to the first instance of such additional information. The trial court gave a limiting instruction that the prior statements could only be considered to assess the credibility of A.M.D.'s trial testimony and allowed questioning to proceed.

Detective Tony Ellis of the Clay County Sheriff's Department testified that he responded to the hospital on 2 June 2012 in response to a

report of child molestation involving A.M.D. He set up a forensic interview for A.M.D. with a local child advocacy specialist on 4 June 2012. This interview was recorded and played for the jury. After ascertaining that the "Roger" A.M.D. alleged sexually abused her was defendant, Detective Ellis set about looking for him. Detective Ellis was unable to locate defendant at the residence of Cassie D., nor at any of his known prior addresses in North Carolina and Georgia. Detective Ellis then enlisted the help of the United States Marshals in locating defendant. After refreshing his recollection with the order for defendant's arrest, Detective Ellis testified that the Marshals subsequently returned defendant to the Clay County Sheriff's Department on 14 November 2012 and communicated to Detective Ellis that defendant had been apprehended and extradited from Puerto Rico.

At the close of its evidence, the State dismissed the four indecent liberties charges against defendant. Defendant's only witness was A.M.D.'s maternal aunt, Holly D. Holly D. testified that A.M.D. told her on two occasions that her accusations against defendant were false and that A.M.D. had falsely accused defendant because her stepmother Lora D. had threatened to kill her mother if she did not, and bribed her with a horse and other gifts if she did.

On 9 December 2016, the jury returned a verdict finding defendant guilty of one count of engaging in a sexual act with a child under thirteen years of age and not guilty of the remaining three counts of the same offense. The charge for which defendant was found guilty corresponded to the alleged events at the Ruby Falls house.

B. Sentencing

The trial court sentenced defendant on 13 December 2016. The court first set about calculating defendant's prior record level for the purpose of structured sentencing. The State introduced evidence of defendant's prior convictions from Georgia, including statutory rape and child molestation, thru a copy of his indictment and plea paperwork for the convictions. Though presented by the State and acknowledged by the court, a copy of the Georgia statute under which defendant had been convicted was never placed in the record.

After some discussion with counsel for defendant and the State, the court found that the Georgia statutory rape offense was substantially similar to North Carolina's own statutory rape law, which is a Class B1 felony. Thus, the court treated defendant's prior conviction as a Class B1 felony and assigned him nine prior record points. The court also assigned defendant one point for escaping the Clay County Detention

Center while awaiting his trial, for a total of ten points corresponding to Prior Record Level IV. The court sentenced defendant to 335 to 462 months' imprisonment and ordered him to register as a sex offender upon his release.

Next, the court considered the State's proposed order subjecting defendant to North Carolina's SBM program for life after his release from prison. Counsel for defendant and the State agreed that the court was required to hold an evidentiary hearing, pursuant to *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459, at which the State must prove that it is reasonable to subject defendant to the SBM program for life. The State offered several times to proceed with such a hearing. The trial court ignored the State's offer to proceed introducing evidence in a *Grady* hearing. Rather, after taking notice of the facts adduced at trial, the court summarily gave its reasons for finding lifetime enrollment in the SBM program reasonable for defendant and entered the order. The court found lifetime SBM reasonable because defendant had been convicted of statutory rape of Cassie D. in Georgia, served eight years in prison, immediately absconded from parole upon his release, assumed a false name, and moved in with his former victim and began sexually abusing her daughter. Defendant gave oral notice of appeal.

C. Motion for Appropriate Relief

During the pendency of his appeal, defendant filed a MAR with this Court on 24 August 2018. The motion claimed that A.M.D. had recanted on her trial testimony and included an affidavit to that effect allegedly written by A.M.D. On 15 October 2018, we remanded defendant's motion to the Clay County Superior Court with instructions to conduct an evidentiary hearing on the motion ("the MAR hearing") pursuant to *State v. Britt*, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987), within sixty days.

Due to scheduling conflicts with the prosecuting attorney and the Clay County Superior Court's failure to hold a criminal session of court between the weeks of 3 September 2018 and 17 December 2018, defendant's hearing was not held until 30 April 2019, over eight months after filing his motion with this Court.

The MAR hearing was held before the Honorable Athena F. Brooks from 30 April to 3 May 2019. At the hearing, A.M.D. testified that she fabricated her accusations of sexual abuse against defendant at trial due to bribes and threats from Lora D. Defendant introduced a letter into evidence that was alleged to have been written by A.M.D. and left on her mother's desk in January of 2018, when A.M.D. was living with her father and stepmother. The letter made admissions consistent with A.M.D.'s

hearing testimony. Cassie D. also testified at the hearing that, prior to trial, A.M.D. had also told her that she was falsely accusing defendant due to threats and bribes from Lora D. Cassie D. further testified that she had regained emergency custody of her children after Lora D. allegedly hurt A.M.D. on several occasions.

The State produced and played several recordings of phone calls between Cassie D. and defendant during his incarceration, which took place from July 2017 to March 2019. Many of these conversations, including those prior to the alleged date of A.M.D.'s letter in January 2018, discussed the romance between Cassie D. and defendant and the potential for A.M.D. to provide a recantation to aid in his appeal. A child specialist investigator with the Clay County District Attorney's Office testified that she had been present when A.M.D. had been interviewed prior to trial, and the child never mentioned any concerns about Lora D.

In its order, the court recited the relevant testimony from trial and the hearing, including that: (a) A.M.D. testified at the hearing in much greater detail about the occasions in which she alleged defendant had abused her, including details such as the movie being watched, but denied that any abuse occurred on these occasions as she had stated at trial; (b) A.M.D. testified that she lied at trial because Lora D. threatened and bribed her; and (c) Holly D. gave testimony at trial to the same effect.

The court found that it was suspicious for A.M.D. to recall additional details at the hearing, many years further removed from the events in question. The court further noted that A.M.D.'s mother and defendant engaged in frequent telephone conversations regarding defendant's appeal, including how a recantation from A.M.D. would aid his appeal, both before and after A.M.D. allegedly wrote her mother a letter admitting she fabricated her accusations. The court found that it did not believe A.M.D.'s testimony regarding the notarization of her affidavit because her testimony on this matter changed between the two days of the hearing, after hearing her mother's testimony.

From these findings, the court in turn found that "the child was feeling some form of pressure to make these statements [at the hearing]." The court declined "to speculate as to whether this was self-induced or from an external source." Based upon this determination, the court concluded as a matter of law that it was "not satisfied that the testimony given by [A.M.D.] at the trial on this matter in December 2016 was false[,]" and thus a finding that "false testimony at the trial would [cause] a different result would not have been possible." Accordingly, the court denied defendant's MAR.

II. Discussion

On appeal, defendant argues that the trial court: (a) erred in admitting impermissible hearsay that did not corroborate A.M.D.'s testimony; (b) plainly erred in admitting testimony regarding his extradition from Puerto Rico and instructing the jury that this could be considered as evidence of flight; (c) erred in the calculation of defendant's prior record level; and (d) erred by ordering that defendant be subjected to lifetime SBM at the expiration of his active sentence. Furthermore, defendant argues that the court abused its discretion in its order denying his MAR. We address each argument in turn.

A. Allowing Prior Statement Testimony of Ms. Hester

[1] Defendant first argues that the trial court erred in allowing Ms. Hester to testify to prior statements A.M.D. made to her. Defendant contends that these statements were inadmissible hearsay, rather than admissible prior statements corroborating a witness's trial testimony. We disagree.

"A trial court's determination that evidence is admissible as corroborative evidence is reviewed for abuse of discretion." *State v. Cook*, 195 N.C. App. 230, 243, 672 S.E.2d 25, 33 (2009) (citation omitted). "Prior consistent statements of a witness are admissible as corroborative evidence even when the witness has not been impeached." *State v. Ramey*, 318 N.C. 457, 468, 349 S.E.2d 566, 573 (1986) (citation omitted). In *State v. Johnson*, we summarized the distinction between inadmissible hearsay and admissible prior corroborative statements as follows:

> Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2007). . . .
>
> Statements properly offered to corroborate former statements of a witness are "not offered for their substantive truth and consequently [are] not hearsay." *State v. Levan*, 326 N.C. 155, 167, 388 S.E.2d 429, 435 (1990).

209 N.C. App. 682, 692, 706 S.E.2d 790, 797 (2011) (brackets in original). We also summarized the standard for determining whether a prior statement is corroborative:

> Corroborating statements are those statements that tend to strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence. Nevertheless,

> if the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. . . . Such variations only affect the credibility of the evidence which is always for the jury. . . . [C]orroborative testimony may contain new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates . . . .

Id. (internal quotation marks and citations omitted).

In the instant case, A.M.D. testified at trial that defendant touched the interior and exterior of her vagina with his hands and fingers on numerous occasions at the Ruby Falls house. Three prior statements of A.M.D. were admitted to corroborate her testimony. The prior statements offered by Mr. Tucker and T.D. are unchallenged on appeal.

Defendant only challenges A.M.D.'s prior statement to Ms. Hester. Defendant argues that, even with the limiting instruction, the trial court erred in allowing Ms. Hester's testimony recounting A.M.D.'s prior statements related to fellatio, anal molestation, and the insertion of objects into A.M.D.'s private parts.

During her testimony, A.M.D. did not mention any such acts when asked when, where, and how defendant hurt her. A.M.D. did say that she only saw defendant's penis once when she went into the basement to wake him up, and stated that it did not touch her on that occasion. Thus, A.M.D.'s testimony only indirectly contradicts the challenged prior statement related to fellatio. Her testimony is silent regarding anal molestation and use of objects.

Accordingly, the instant case is different than those in which prior statements were held non-corroborative because they directly contradicted several aspects of a witness's testimony. *See*, *e.g.*, *State v. Frogge*, 345 N.C. 614, 617, 481 S.E.2d 278, 279-80 (1997) (prior statements were not corroborative where: (a) witness testified that defendant procured a knife after victim hit him with metal bar, whereas prior statement indicated witness did not recall whether defendant or victim first wielded weapon; (b) witness testified that defendant went to party after murdering victims and returned to scene of crime and staged robbery, whereas prior statement indicated defendant staged robbery prior to leaving for party; and (c) witness testified that defendant did not tell him why he stabbed victim, whereas prior statement indicated that defendant told witness he stabbed victim because he hated her). Nor is it one in which the challenged prior statement is far removed from its original declarant. *See State v. Stills*, 310 N.C. 410, 416, 312 S.E.2d 443, 447 (1984) (noting

that, where prior statement offered to corroborate another corroborating witness was partially inconsistent with testimony of original declarant, "justify[ing] the admission into evidence of hearsay statements *three* or *four* times removed from the original declarant under the guise of corroborating the corroborative witnesses is unacceptable") (emphasis in original).

Here, A.M.D. did not confirm, deny, or speak of these additional acts in any manner during her testimony. Her testimony that she only saw defendant's penis once and it did not touch her on that occasion indirectly contradicts Ms. Hester's testimony regarding fellatio. However, the vast majority of A.M.D.'s prior statements offered by Ms. Hester conformed with A.M.D.'s testimony that defendant penetrated her vagina with his fingers on numerous occasions at the Ruby Falls house. The excerpts of A.M.D.'s prior statements which do not align with this account of events merely add detail on the differing nature of defendant's abuse of A.M.D.

In *State v. Ramey*, our Supreme Court found that a victim's prior statements were sufficiently similar to his trial testimony to be admitted for corroborative purposes, even though they added more detail to the account of abuse given at trial. 318 N.C. at 470, 349 S.E.2d at 574. The victim testified that the defendant first touched his penis when he was five years old and that defendant had done so more than five times. *Id.* In one of his prior statements, the victim had given this same account of events, but added that the defendant would visit him at his home, buy him ice cream, and tell him not to tell anyone what happened. *Id.* at 469, 349 S.E.2d at 574. In another prior statement, the victim gave a consistent account of events but added that defendant had put both his mouth and hands on his penis. *Id.* at 470, 349 S.E.2d at 574. Our Supreme Court held that:

> [The victim's] testimony clearly indicated a course of continuing sexual abuse by the defendant. The victim's prior oral and written statements . . ., although including additional facts not referred to in his testimony, tended to strengthen and add credibility to his trial testimony. They were, therefore, admissible as corroborative evidence. The jury could not be allowed to consider this evidence for any other purpose, however, and whether it in fact corroborated the victim's testimony was, of course, a jury question.

Id. (internal citations omitted).

Similar to *Ramey*, here A.M.D.'s testimony clearly indicates a pattern of continuing abuse by defendant while her family lived at the Ruby Falls house, consisting of defendant's penetration of A.M.D.'s genitals with his fingers. A.M.D.'s prior statements offered by Ms. Hester substantially conform with A.M.D.'s testimony at trial, save for the addition of other forms of abuse. These statements were sufficiently similar to A.M.D.'s testimony for the trial court to allow the jury to decide their corroborative value for itself, after receiving a limiting instruction to that effect. Therefore, the trial court did not abuse its discretion.

Assuming *arguendo* that the trial court abused its discretion by admitting A.M.D.'s prior statements to Ms. Hester, defendant was not prejudiced thereby. The jury heard two other witnesses give accounts of A.M.D.'s prior statements that conformed with her testimony of abuse given at trial, without providing additional details. Furthermore, one of these witnesses was a disinterested medical professional. *See State v. Smith*, 315 N.C. 76, 99, 337 S.E.2d 833, 848 (1985) (finding corroborative testimony of disinterested rape task force volunteer likely to have greater influence on jury). Defendant has not shown that, without A.M.D.'s prior statements recounted by Ms. Hester, there is a reasonable possibility that the jury would have found A.M.D.'s trial testimony to lack credibility.

The State's brief attempts to further distinguish *Stills* from the instant case by stating that the trial court in *Stills* gave the jury no limiting instruction when it admitted allegedly corroborative, impermissible hearsay over objection. In *Stills*, our Supreme Court did find impermissible some allegedly corroborative statements to which the defendant did not object and the trial court provided no limiting instruction. 310 N.C. at 415, 312 S.E.2d at 446. Our Supreme Court was somewhat ambiguous in identifying the prior statements with which it took issue. However, a careful reading of the case reveals that the Court also found impermissible one allegedly corroborative statement to which the defendant did object, and the trial court provided an adequate limiting instruction. *Id.* at 413, 312 S.E.2d at 445-46.

B. Testimony of Extradition and Instruction on Evidence of Flight

Defendant further argues that the trial court plainly erred by: (1) allowing Detective Ellis to testify regarding defendant's extradition back to North Carolina after his arrest in Puerto Rico, and (2) instructing the jury that this could be considered evidence of flight. Defendant concedes that he failed to preserve these issues at trial, and thus our review is limited to plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrenc*e, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (alteration in original) (internal quotation marks and citations omitted).

1. Testimony of Extradition

[2] Defendant argues that the trial court plainly erred in allowing Detective Ellis to testify regarding defendant's apprehension and extradition from Puerto Rico. Defendant contends that Detective Ellis only learned of his extradition from conversations with the Marshals and the extradition paperwork, and therefore lacked personal knowledge to testify to this matter as required by N.C. Gen. Stat. § 8C-1, Rule 602 (2019). We disagree.

An evidentiary foundation for personal knowledge "may, but need not, consist of the testimony of the witness himself." *Id.* We agree with the State's position that "Detective Ellis's initiation of the involvement of the U.S. Marshals Service and direct oversight of the case as lead detective demonstrate personal knowledge sufficient to satisfy the requirements of . . . Rule 602. Detective Ellis had personal knowledge regarding the inability to locate [d]efendant after visiting all of his known residences since his release from prison in Georgia in 2008. Detective Ellis initiated the conversation with U.S. Marshals regarding assistance [in] locating [d]efendant." This constitutes sufficient personal knowledge to testify concerning defendant's extradition under Rule 602.

Assuming *arguendo* that the trial court erred in allowing this testimony, any such error did not have a probable impact on the jury's verdict. The jury also heard testimony that defendant subsequently escaped from the Clay County Detention Center and was found hiding in the attic of a nearby home. Thus, even without the challenged testimony, the jury heard evidence that defendant attempted to flee before he could be prosecuted for the alleged offenses. Defendant has thus failed to prove that the jury probably would have reached a different verdict without Detective Ellis's testimony on his extradition.

2. Jury Instruction on Flight

[3] Defendant argues that the trial court plainly erred by instructing the jury that his arrest and extradition from Puerto Rico could be considered evidence of flight indicative of guilt. Defendant maintains that the State did not produce evidence that he went to Puerto Rico to avoid apprehension for his crimes. We disagree.

"A trial judge is not required to instruct a jury on defendant's flight unless there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged. Mere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension." *State v. Thompson*, 328 N.C. 477, 489-90, 402 S.E.2d 386, 392 (1991) (internal quotation marks and citations omitted).

Evidence that a defendant departed from his usual routine by subsequently leaving the area and staying in another town, county, or state may support an instruction on flight. *See State v. Allen*, 346 N.C. 731, 740-41, 488 S.E.2d 188, 193 (1997) (holding no plain error where defendant "drove away from the scene of the crime and was not apprehended until later that night in another county"); *State v. Shelly*, 181 N.C. App. 196, 209, 638 S.E.2d 516, 526 (2007) ("Defendant left the scene of the shooting and did not return home. Rather, he spent the night at the home of his cousin's girlfriend, an action that was not part of Defendant's normal pattern of behavior and could be viewed as a step to avoid apprehension. Accordingly, the trial court did not err in instructing the jury on flight.").

Here, the jury heard testimony that defendant's normal routine at the time he learned of A.M.D.'s accusations involved residing in the basement of the Ruby Falls home. Immediately after A.M.D. made her accusations in June of 2012, defendant could be found at neither the Ruby Falls home nor any of his other prior known addresses. Nearly six months later in November of 2012, defendant was found and arrested in Puerto Rico. Defendant was nowhere to be found immediately after A.M.D. accused him of sexual abuse, and was apprehended several months later in a territory outside the continental United States. This evidence reasonably supports the State's theory that defendant fled to avoid apprehension for his crimes against A.M.D. Thus, the trial court did not err in instructing the jury on flight.

C. Sentencing

Next, defendant argues that the trial court erred in sentencing him by improperly calculating his prior record level and imposing lifetime SBM after the expiration of his active term of imprisonment. We address each argument in turn.

1. Prior Record Calculation

[4] Defendant contends that, in its calculation of his prior record level, the trial court erroneously determined that one of his prior convictions in Georgia was substantially similar to a Class B1 felony in North Carolina. We disagree.

a. Standard of Review

By default, prior felony convictions from other jurisdictions are treated as Class I felonies when calculating a defendant's prior record level. N.C. Gen. Stat. § 15A-1340.14(e) (2019). However, the prior felony conviction can be treated as a higher class of felony if the State proves by a preponderance of the evidence that it is "substantially similar" to a North Carolina felony of that class. *Id.* When determining substantial similarity, the trial court is tasked with "comparing the elements of [the] out-of-state and North Carolina offenses." *State v. Sanders*, 367 N.C. 716, 720, 766 S.E.2d 331, 334 (2014) (citations omitted). "[W]hether an out-of-state offense is substantially similar to a North Carolina offense is a question of law" that we review *de novo*. *State v. Hanton*, 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006). In so reviewing, we keep in mind that "the requirement set forth in N.C. Gen. Stat. § 15A-1340.14(e) is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.' " *State v. Sapp*, 190 N.C. App. 698, 713, 661 S.E.2d 304, 312 (2008).

b. Record Sufficient for Review

In the instant case, the State failed to meet its burden of proof. While a copy of the Georgia statute under which defendant had been convicted was given to and reviewed by the trial court in making its determination, it was never introduced into evidence. Nonetheless, the State's failure to meet its evidentiary burden is harmless where the record contains "sufficient information regarding an out-of-state conviction for this Court to determine if it is substantially similar to a North Carolina offense[.]" *State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009).

As defendant concedes, such is the case here. The record evidence before the court during sentencing contained defendant's Georgia

indictment and guilty plea. The relevant counts in the indictment alleged that defendant committed child molestation in violation of Ga. Code Ann. § 16-6-4 (2001) and statutory rape in violation of Ga. Code Ann. § 16-6-3 (2001) between October 1999 and October 2000. Moreover, the court's prior record level worksheet indicates that only the statutory rape offense was used to add nine points to the defendant's prior record level. The transcript reveals that the trial court and counsel for defendant and the State discussed whether the Georgia statute was substantially similar to North Carolina's statutory provision outlawing sexual intercourse with persons under sixteen years of age. Therefore, the record contains enough information for us to review the trial court's determination that the Georgia and North Carolina offenses were substantially similar.

c. Substantial Similarity

The version of the Georgia statute in effect at the time of defendant's prior offense provides that "[a] person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse[.]" Ga. Code Ann. § 16-6-3(a). The court determined this offense was substantially similar to N.C. Gen. Stat. § 14-27.25(a) (2015), which makes it a Class B1 felony "if the defendant engages in vaginal intercourse with another person who is 15 years of age or younger and the defendant is at least 12 years old and at least six years older than the person, except when the defendant is lawfully married to the person." Such conduct constitutes only a Class C felony where the defendant is between four and six years older than the victim. N.C. Gen. Stat. § 14-27.25(b).

1. Victim Age and Scope of Prohibited Conduct

Defendant maintains that the Georgia offense of statutory rape is not "substantially similar" to N.C. Gen. Stat. § 14-27.25(a), because Ga. Code Ann. § 16-6-3(a) "does not require any particular age difference between the two participants. Unlike its North Carolina counterparts, the Georgia statute applies equally to all [victims] under the age of 16 years, instead of drawing distinctions between victims under the age of 13 and 13, 14 and 15 year-old victims."

We find defendant's attempt to distinguish the Georgia offense from that of North Carolina based on distinctions between the ages of victims unpersuasive. Defendant's argument is based upon a prior version of our statutes that made sexual intercourse with minors under age 13 and those 13 to 15 years old distinct offenses, albeit both Class B1 felonies. *See* N.C. Gen. Stat. §§ 14-27.7A, 27.2(a) (2001). At the time of defendant's sentencing, these two offenses had been consolidated into a single offense by N.C. Gen. Stat. § 14-27.25 (2015).

2. Age Requirements for Offenders

However, defendant correctly notes that the North Carolina and Georgia statutes have differing age requirements for offenders. According to defendant, this puts the offenses beyond the ambit of substantial similarity.

In *State v. Bryant*, we held that the South Carolina offense of criminal sexual conduct with minors in the first degree, *see* S.C. Code Ann. § 16-3-655(1) (1996), was not substantially similar to the North Carolina offenses of statutory rape of a child by an adult and statutory sexual offense with a child by an adult, *see* N.C. Gen. Stat. §§ 14-27.23, 27.28 (2015). 255 N.C. App. 93, 100, 804 S.E.2d 563, 567-68 (2017). In reaching this conclusion, we reasoned that:

> these offenses are not substantially similar due to their disparate age requirements. Although both of the North Carolina statutes require that the offender be at least 18 years of age, a person of any age may violate South Carolina's statute. Moreover, North Carolina's statutes apply to victims under the age of 13 years, while South Carolina's statute protects victims who are less than eleven years of age. The North Carolina and South Carolina statutes thus apply to different offenders and different victims. Therefore, the offenses are not substantially similar.

Id. at 100, 804 S.E.2d at 568 (internal quotations marks, citations, and alterations omitted).

In the instant case, the relevant offenses of North Carolina and Georgia have disparate requirements concerning the difference in age between the victim and offender. The North Carolina statute can only be violated by the older of two participants in sexual intercourse, where at least one is below the age of consent. *See* N.C. Gen. Stat. § 14-27.25(a) (stating that a person has committed the Class B1 felony offense only if he "is at least six years older" than a person under 16 years old with whom he engages in vaginal intercourse). The Georgia statute can be violated by both the younger and older parties to sexual intercourse, where both are under the age of 16 and older than 13. *See* Ga. Code Ann. § 16-3-1 (2001) (setting 13 years as age of criminal responsibility).

Depending on the age of the offender and victim, conduct prohibited by the Georgia statute does not necessarily constitute the Class B1 felony offense in North Carolina. *Cf. Sapp*, 190 N.C. App. at 713, 661 S.E.2d at 312 (holding inverse proposition to suffice for finding of

substantial similarity). There are several hypothetical combinations of victim and offender ages for which the same underlying action violates Ga. Code Ann. § 16-6-3 but does not constitute an offense, or only qualifies as a Class C felony, under N.C. Gen. Stat. § 14-27.25. For example, an offender engaging in sexual intercourse with a 13-year-old victim has committed the Georgia offense whether he is 13 or 19 years old, whereas the offender would not have committed the Class B1 felony offense in North Carolina if he was any younger than 19 years old.

Nevertheless, we hold that *Bryant* does not compel a similar result in the instant case for several reasons. As an initial matter, an analysis of our precedent in applying N.C. Gen. Stat. § 15A-1340.14(e) reveals that *Bryant* represents an outlier in our case law on substantial similarity. Most cases in which our courts have found no substantial similarity between two offenses involved situations where one offense contained an additional, more distinct element than merely a differing age requirement. *See*, *e.g.*, *Sanders*, 367 N.C. at 719-21, 766 S.E.2d at 333-34 (holding North Carolina offense of "assault on a female" not substantially similar to Tennessee offense of "domestic assault" because the latter "does not require the victim to be female or the assailant to be male and of a certain age" and, unlike the former, could only occur inside the home); *State v. Foxworth*, No. COA14-693, 2015 WL 660792, at *3 (N.C. Ct. App. Feb. 17, 2015) (holding two attempted murder statutes not substantially similar where North Carolina offense required additional *mens rea* element of premeditation); *State v. Hogan*, 234 N.C. App. 218, 230, 758 S.E.2d 465, 474 (2014) (holding New Jersey offense of third-degree theft not substantially similar to North Carolina offense of misdemeanor larceny because "[t]here are many elements of third degree theft not found in misdemeanor larceny" and "[s]everal of these possible elements, such as theft from a person, would also make the larceny a felony in North Carolina"); *Hanton*, 175 N.C. App. at 258-59, 623 S.E.2d at 606-607 (holding New York offense of second-degree assault not substantially similar to North Carolina offense of assault inflicting serious injury, due to lack of serious physical injury requirement).

Furthermore, we have overlooked differing statutory requirements far greater than age requirements in finding substantial similarity between two offenses. *See*, *e.g.*, *State v. Johnson*, No. COA16-1170, 2017 WL 2437001, at *3 (N.C. Ct. App. June 6, 2017) (holding North Carolina and Tennessee offenses of resisting arrest substantially similar despite Tennessee's additional requirement of "force," indicating it "is more serious than the same offense in North Carolina[.]"); *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (holding Virginia and

North Carolina offenses prohibiting convicted felons' involvement with firearms substantially similar, despite Virginia statute only prohibiting knowing and intentional possession or transport and North Carolina statute's more extensive prohibition on purchase, ownership, possession, or having a firearm in custody, care, or control).

Having noted the aberrant nature of our holding in *Bryant*, we now turn to our chief consideration in holding the offenses substantially similar: "There may be . . . hypothetical scenarios which highlight the more nuanced differences between the two offenses. But the subtle distinctions do not override the almost inescapable conclusion that both offenses criminalize essentially the same conduct . . . ." *State v. Riley*, 253 N.C. App. 819, 827, 802 S.E.2d 494, 500 (2017).

We have previously found an out-of-state felony sexual offense against a minor to be substantially similar to our own, *despite* semantic differences in the age requirements for the offender and victim. *See State v. Corey*, No. COA17-1031, 2018 WL 2642772 (N.C. Ct. App. June 5, 2018), *rev'd in part, vacated in part on other grounds*, 373 N.C. 225, 835 S.E.2d 830 (2019). In *Corey*, we held that two sexual offense statutes prohibiting essentially the same conduct with slightly different age requirements were substantially similar. *Id.* at *4. Michigan's offense of fourth-degree sexual misconduct required an offender at least 18 years old and five years older than a 13-, 14-, or 15-year-old victim. *Id.* at *3-4. The statute prohibited engaging in "sexual contact" between an offender and victim. *Id.* at *4 North Carolina's offense of taking indecent liberties with a child required that the offender be at least 16 years old and five years older than a victim under 18 years old. *Id.* (citing N.C. Gen. Stat. § 14-202.1 (2017)). The statute prohibited the taking of "immoral, improper, or indecent liberties with the child . . . for the purpose of . . . arousing sexual gratification." *Id.*

Despite the hypothetical scenarios in which an offender of a certain age would violate the North Carolina statute and not the Michigan statute, we agreed with the trial court that:

> [T]he statutes at issue are substantially similar because *the elements of the statutes target assailants that engage in similar conduct with similar victims*, i.e., assailants who engage in sexual conduct with children for the purpose of sexual arousal. All child victims who meet the age requirement for the Michigan offense of fourth-degree sexual conduct . . . would meet the age requirement and could be classified as victims under N.C. Gen Stat.

> § 14-202.1 (2017). Moreover, the Michigan statute and case law further defining the offense seeks to prevent actions by defendants against children which lead to or arouse sexual gratification. The same is true of our indecent liberties with a child statute. We therefore conclude that the offenses are substantially similar . . . .

Id. (emphasis added).

Although unpublished, we find our reasoning in *Corey* persuasive in the instant case. Both the North Carolina and Georgia statutes seek to protect persons under the age of 16 from engaging in sexual activity with older individuals. Any victim meeting the age requirement of the Georgia offense would meet the age requirement and could be classified as a victim under N.C. Gen. Stat. § 14-27.25.

Moreover, both statutes opt to levy greater punishment on older offenders with greater age discrepancies from their victims. Although it does so in a manner structurally different from our own, the Georgia statute stratifies the severity of punishment based on the age discrepancy between the offender and the victim. Offenders under 21 years old face a minimum punishment of imprisonment for one year, whereas offenders 21 years of age and older face a minimum punishment of imprisonment for ten years. Ga. Code Ann. § 16-6-3(b). The same conduct is only punishable as a misdemeanor if the offender has an age difference of three years or fewer from a 14- or 15-year-old victim. *Id.*

Additionally, we note that defendant's indictment in the instant case reveals he would have been 36 years old when he committed the conduct underlying his Georgia conviction against a person under 16 years of age. Thus, defendant's conduct would constitute the Class B1 felony offense under N.C. Gen. Stat. § 14-27.25(a). Although not dispositive, we find this fact weighs against the various hypothetical technicalities defendant points to in arguing the offenses are dissimilar.

Both N.C. Gen. Stat. § 14-27.25 and Ga. Code Ann. § 16-6-3 seek to protect persons under age sixteen from those who would engage in sexual intercourse with them, and seek greater deterrence for offenders significantly older than their victims by punishing them more severely. Therefore, we hold that the trial court did not err in finding the two offenses substantially similar. The trial court properly treated defendant's prior conviction of the Georgia offense as a Class B1 felony for the purposes of calculating his prior record level.

2. Lifetime Satellite-Based Monitoring

[5] Finally, defendant argues that the trial court erred by entering an order subjecting defendant to lifetime participation in the State's SBM program. Accepting *arguendo* the State's contention that defendant has failed to preserve this issue on appeal, we invoke N.C.R. App. P. 2 (2020) to assess the merits of defendant's argument, which we find controlling. *See State v. Bursell*, 372 N.C. 196, 200-201, 827 S.E.2d 302, 305-306 (2019) (holding this Court erred in finding that defendant preserved constitutional challenge to lifetime SBM order, but permissively invoked Rule 2 in alternative to address issue).

a. Error

An order requiring a defendant to participate in the State's lifetime SBM program per N.C. Gen. Stat. § 14-208.40A(c) (2019) effects a search triggering the Fourth Amendment's protection from unreasonable searches and seizures. *Grady v. North Carolina*, 575 U.S. at 308-309, 191 L. Ed. 2d at 461. This is a substantial right that warrants our discretionary invocation of Rule 2. *Bursell*, 372 N.C. at 200-201, 827 S.E.2d at 305-306.

We first note that defendant does not fall within the category of persons for whom our Supreme Court has ruled mandatory enrollment in the SBM program facially unconstitutional. *See State v. Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 553 (2019) (limiting holding that program was facially unconstitutional as to "individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined 'recidivist' who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision") (footnote omitted). While defendant does qualify as a recidivist, the trial court's SBM order also makes findings that defendant's convicted offense was sexually violent, committed against a child, involved the physical, mental, or sexual abuse of a minor, and qualified as an aggravated offense under N.C. Gen. Stat. § 14-208.6(1a) (2019). *See* N.C. Gen. Stat. § 14-208.40A (2019) (listing these factors as warranting entry of order enrolling defendant in lifetime SBM program).

Before a trial court may order a defendant to participate in the SBM program for life, the State must prove that the SBM program is reasonable as applied to the defendant, considering the totality of the circumstances, the nature and extent to which it intrudes upon the defendant's reasonable privacy interests, and the extent to which it furthers legitimate governmental interests. *State v. Blue*, 246 N.C. App. 259, 264-65,

783 S.E.2d 524, 527 (2016) (clarifying burden of proof at *Grady* hearing lies with State) (citing *Grady*, 575 U.S. at 310, 191 L. Ed. 2d at 462).

The State concedes that the trial court had insufficient evidence before it to support the SBM order. In particular, the State notes that it presented no evidence on the burdens the program imposes upon participants or any data on the extent to which the program advances legitimate government interests. Rather, after taking notice of the facts and evidence adduced at trial, the trial court ignored the State's offer to proceed introducing evidence in a *Grady* hearing and summarily gave its reasons for finding lifetime enrollment in the SBM program reasonable. *See Blue*, 246 N.C. App. at 264-65, 783 S.E.2d at 527 (finding error where "the trial court simply acknowledged that SBM constitutes a search and summarily concluded it is reasonable, stating that '[b]ased upon [the second-degree rape] conviction, and upon the file as a whole, lifetime satellite-based monitoring is reasonable and necessary and required by the statute.' ") (alterations in original). We agree with defendant and the State. The trial court thus erred by ordering that defendant participate in the SBM program for life.

b. Remedy

Having found for defendant on the issue of error under *Grady* and its progeny, we must now determine the proper remedy.

We disagree with defendant's contention that reversal of the SBM order without remand is appropriate. This would be the proper remedy if the trial court had held a *Grady* hearing, and the State had simply failed to introduce enough evidence to meet its burden. *See*, *e.g.*, *State v. White*, No. COA 18-39, 2018 WL 4200979, at *8 (N.C. Ct. App. Sept. 4, 2018) ("[B]ecause the State presented insufficient evidence to meet its burden, the State is not entitled to a new SBM hearing for the purpose of giving it a 'second bite at the apple.' ") (citation omitted), *remanded*, 372 N.C. 726, 2019 N.C. LEXIS 1175 (2019); *State v. Dravis*, No. COA18-76, 2018 WL 4201041, at *4 (N.C. Ct. App. Sept. 4, 2018), *remanded*, 372 N.C. 721, 2019 N.C. LEXIS 1173 (2019); *State v. Greene*, 255 N.C. App. 780, 783-84, 806 S.E.2d 343, 345 (2017).

Here, the trial court entered a conclusory finding of reasonableness and did not afford the State an opportunity to satisfy its evidentiary burden, despite the State's repeated offers to proceed with a *Grady* hearing and introduce further evidence. Thus, the State has not yet had its "first bite of the apple," and vacatur of the SBM order with remand for an evidentiary hearing consistent with the most recent guidance from our Supreme Court in *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542,

is appropriate. *State v. White*, 261 N.C. App. 506, 513-515, 820 S.E.2d 116, 122-23 (2018).

D. Order Denying Motion for Appropriate Relief

[6] Defendant argues that the trial court abused its discretion in its order denying his MAR requesting a new trial. Specifically, defendant contends that the order's findings of fact, taken as a whole, are insufficient to support the trial court's legal conclusions. We agree, and vacate and remand with instructions to enter an order containing sufficient findings of fact to address the issues raised by the motion and which the trial court believes to support its conclusion of law.

1. Standard of Review

"When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *Frogge*, 359 N.C. at 240, 607 S.E.2d at 634 (internal quotation marks and citation omitted). The trial court's findings of fact are binding on appeal if supported by competent evidence, and conclusions of law are reviewed *de novo*. *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted).

Pursuant to a motion for appropriate relief,

> A defendant may be allowed a new trial on the basis of recanted testimony if:
>
> 1) the court is reasonably well satisfied that the testimony given by a material witness is false, and
>
> 2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

Britt, 320 N.C. at 715, 360 S.E.2d at 665. The defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5) (2019).

2. Application

Defendant challenges several findings of fact, arguing that they merely recite testimony and do not make necessary credibility determinations between conflicting testimony. We agree. Taken as a whole, the order's findings of fact do not resolve factual issues necessary to reach the trial court's conclusion of law.

Finding of fact 3 is, by itself, fatal to the order. This finding recites A.M.D.'s hearing testimony that she lied at trial due to threats and bribes from Lora D. and Holly D.'s trial testimony that A.M.D. made similar statements to her. Defendant argues that this finding is deficient because it merely recites testimony without resolving any of the factual issues raised by this evidence: namely, whether the court believed it to be true. *See In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) ("[V]erbatim recitations of the testimony . . . *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented.") (emphasis in original). We agree.

> A trial court must make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law. Recitation of testimony is insufficient only where a material conflict actually exists on that particular issue, and does not resolve the conflicts in the evidence and actually find facts. A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected.

State v. Cody, No. COA18-503, 2018 WL 6318427, at *8 (N.C. Ct. App. Dec. 4, 2018) (alterations, internal quotation marks, and citations omitted), *disc. rev. dismissed*, *cert. denied*, 372 N.C. 100, 824 S.E.2d 417 (2019).

The testimony at the trial and hearing clearly present a material conflict in the evidence. A.M.D. testified at trial that defendant sexually abused her. Holly D. testified at trial that A.M.D. told her she was lying due to threats and bribes from Lora D. A.M.D. testified at the hearing that defendant did not sexually abuse her, and that she lied at trial due to Lora D.'s threats and bribes.

A determinative finding on whether A.M.D. had indeed lied in her trial testimony due to bribes and threats from Lora D. would cut to the core of the first prong of the *Britt* test. An affirmative finding on this issue would have compelled the court to find that it was reasonably satisfied that the testimony of a material witness was false. Moreover, the primary evidence against defendant consisted of A.M.D.'s testimony and the testimony of other witnesses recalling what she said to them on prior occasions. Thus, without A.M.D.'s trial testimony, the second prong of

Britt would likely be satisfied because there is a strong possibility that defendant could not otherwise have been convicted. "[T]he outcome of the matter to be decided is likely to be affected" by the court's resolution of this conflict in the evidence, *State v. Baker*, 208 N.C. App. 376, 384, 702 S.E.2d 825, 831 (2010), therefore the trial court abused its discretion by failing to expressly find which version of events it believed to be true.

The dissent would find the trial court's order adequate under *Britt*, based on the court's findings noting its suspicion regarding the context in which A.M.D.'s recantation arose. The dissent does not explain how such findings can suffice to support the trial court's *Britt* conclusion without running afoul of our mandate to make findings resolving material conflicts in the evidence: in the present circumstances where "evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter to be decided is likely to be affected[,]" the trial court must make an ultimate determination regarding which version of events raised by the evidence it believes to be true. *Id.* The trial court's findings noting the suspect context in which A.M.D.'s recantation arose, however well-grounded they may be, are no substitute for a finding that directly resolves whether A.M.D. was indeed bribed and threatened to give false testimony at trial. This principle is far from an expansion of our Supreme Court's mandate in *Britt*. Rather, it arises from our general precedent addressing the sufficiency of findings of fact in any order, whether in the MAR context or otherwise.

Furthermore, the trial court's remaining findings of fact, viewed as a whole, do not adequately address other evidentiary issues raised at the MAR hearing. Findings of fact 1, 2, and 4 all contain recitations of A.M.D.'s testimony at the hearing, without expressly determining the veracity of this testimony. The court assesses the credibility of this testimony indirectly in conclusion of law 4, where it makes a finding that it "is convinced that the child was feeling some form of pressure to make these statements[,]" without "speculat[ing] as to whether this was self-induced or from an external source." "Internal pressure" is vague and could equally refer to either A.M.D.'s guilty conscience for falsely testifying at trial, or a desire to make her mother happy after observing her mother's romantic relationship with her incarcerated abuser. The court must make some finding that sets forth its determination, rather than providing a vague reference as detailed above.

A court hearing an MAR must make findings in its order that are unambiguous and assess the credibility of the evidence on key issues presented by the motion. The court failed to do this in the instant case, and therefore abused its discretion in its order denying defendant's

MAR. We therefore vacate the court's order denying defendant's motion and remand with instructions for the court to issue a new order[2] containing findings that resolve the factual issues presented by defendant's motion, the supporting affidavit, and the testimony at the hearing.

III. Conclusion

For the foregoing reasons, we find no error in the evidentiary phase of defendant's trial, and vacate the trial court's orders enrolling defendant in the SBM program and denying defendant's MAR. We remand for entry of a new MAR order consistent with this opinion. If the court's new MAR order does not necessitate a new trial, we direct the court to conduct an evidentiary hearing on the reasonableness of subjecting defendant to the SBM program upon his release.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Chief Judge McGEE concurs.

Judge BRYANT concurs in part and dissents in part in separate opinion.

BRYANT, Judge, concurring in part, dissenting in part.

I fully concur in the majority opinion as it relates to the jury trial and the order on satellite-based monitoring. However, I disagree with the majority's opinion that the lower court abused its discretion by making findings of fact insufficient to support its conclusions of law and denying defendant's motion for appropriate relief (hereinafter "MAR"). Therefore, I respectfully dissent.

Following the evidentiary hearing on defendant's MAR, the lower court entered an order which contained the following:

FINDINGS OF FACT

> 1. On December 5, 2016, a Jury of Clay County found the defendant Guilty of Statutory Sex Offense with a Child. At the trial of the matter [A.M.D.] testified as to various facts and occurrences during a relevant time frame during the year 2012. At the trial, she testified as to basic facts including details of the touching and acts of the

2. We request the court to exercise a degree of expediency not seen in its first treatment of defendant's motion in making these determinations.

defendant which could have constituted the offense. During this hearing on May 1, 2019, [A.M.D.] testified to many more details of the events, including the name of the movie being watched during the "couch" incident (Bobby and the Nutcracker); the book the defendant was reading her during the "bedroom" incident (The Opossum came a Knocking); the video game being played (Halo) during on the basement incidents.

2. During the trial [A.M.D.] testified Roger (the defendant) was play asleep and when she tried to wake him up he pulled his privates out and when she went running upstairs to tell her mom that her mom giggled. During this hearing [A.M.D.] testified she went down and Roger was asleep and he wasn't getting up and [A.M.D.] went and told mom he wasn't waking up but not about privates and she did not remember going to bathroom [sic] to hide or being scared. She testified the defendant didn't show his privates then or any other time. As to the other possible time frames of occurrences which were testified to at the trial, in this hearing [A.M.D.] denied any and all touching. She gave further details as to the names of the movie, book and video game but denials of any touching.

3. When asked why [A.M.D.] lied during the trial she stated she was afraid of her step mother (Lora) as Lora had stated she would hurt or kill [A.M.D.]'s mom. Further the Step mother would get her things she wanted like a horse or get her toys if she testified and said these things. Also [A.M.D.] stated she didn't like liars and hated the lying during the trial. At the trial in December 2016, Holly Dempsey testified to something similar in relating a comment made to her by [A.M.D.] wherein she stated Lora said if she didn't say this she would kill her mom.

4. Defendant's Exhibit 1 is a letter tha[t] [A.M.D.] says she wrote and left for her mother on her desk in January 2018 while [A.M.D.] was living with her dad. [A.M.D.] decided to write the letter because she knows her mom was "torn up" over the truth and not knowing the facts and [A.M.D.] wanted her to be happy again. Also, [A.M.D.] made comments about that's what love is about. This is the letter which led to the affidavit of [A.M.D.]. Upon questioning by both the State and the Defense counsel [A.M.D.] and her

mother, Cassie, stated this letter was written and left in January 2018. Further they both stated it was not discussed between them until March 2018. *However when telephone calls were played by the State which were recorded between the defendant and Cassie reference is made to [A.M.D.] being willing to testify in court and getting an affidavit to send to the lawyer on December 6, 2017. Moreover, the defendant discusses whether [A.M.D.] is willing to testify in court about what she told Cassie. He tells Cassie to tell him about what [A.M.D.] said and to get an affidavit to send to the lawyer to help the appeals case.* He asks when [A.M.D.] is going to be with Cassie and away from Lora and the dad. On December 19, 2017 during another phone call between the defendant and Cassie, the defendant discussed getting [A.M.D.] in touch with a PI to get a statement from her, specifically Teresa Dean, and asks Cassie to look the number up. On January 12, 2018 during a phone call the defendant asks Cassie who else she had told of what [A.M.D.] said.

5. During a phone call on May 7, 2019 [sic] the defendant is told by Cassie that Teresa Dean had been to talk to [A.M.D.]. The Defendant asks what was said and wanted Cassie to ask questions so she could tell him what was said during the interview.

6. During a phone call on May 31, 2018 a voice the Court took to be [A.M.D.] called the defendant Dad to which he responds "aww" when Cassie says [A.M.D.] calls him that. This was overheard on the phone call when there was [sic] several voices clamoring to speak to the defendant on the phone among them Levi (the defendant's son with Cassie) Cassie and [A.M.D.]. There is then a discussion as to how long going to be until get [A.M.D.] gets into court. [sic]

7. During a phone call on June 1, 2018 the defendant and Cassie discuss the MAR. The defendant explains where the testimony from [A.M.D.] comes in and how the MAR is the best chance because then the defendant can talk about the lawyer not doing stuff and [A.M.D.] recanting her testimony.

8. The Affidavit (Defense Exhibit 2) was notarized at a bank in Georgia. During the first testimony of [A.M.D.] at this hearing she stated she signed it and the next day

the lady put the stamp on it. The stamp being the notary seal. Cassie testified [A.M.D.] made some corrections to the affidavit and then they went to the bank and someone notarized it at the bank and then faxed it to the lawyer. When [A.M.D.] testified again two days later, she "remembered" she had signed the affidavit in front of the lady and had shown her an ID, one from her school with her picture on it.

CONCLUSIONS OF LAW

. . . .

3. The Court utilizing the standard as set out in *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987); is charged with deciding the conditions. The first being if the Court is reasonably well satisfied that the testimony given by a material witness if false [sic] and the second being if there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at trial.

4. *The Court is not satisfied that the testimony given by [A.M.D.] at the trial on this matter in December 2016 was false.* The Court concludes that the child gave surprisingly more details at this hearing than at the trial, some five to six years after the offenses. The trial was closer in time to the events and *it is suspicious that more details would be recalled as time elapses*. The Court heard the additional details the child gave during the affidavit and its signature during the course of this hearing between the two days of testimony and after witnessing the testimony of the mother. *The Court is unconvinced this is accurate testimony*. Further the details of the "recantation" and its use by the defendant as additional help for his appeal was discussed repeatedly between the defendant and the mother *prior* to the alleged time the letter (defendant's exhibit 1) was "left" by the child. The Court is convinced that the child was feeling some form of pressure to make these statements. The Court is not going to speculate as to whether this was self-induced or from an external source.

5. *The Court not finding false testimony at the trial would find a different result would not have been possible.*

(emphasis added).

Our standard of review as to rulings on MARs is to determine whether the trial court's findings of fact are supported by the evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order. *See State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005). This was acknowledged by the majority along with the well-known principle that "the trial court's findings of fact are *binding on appeal* if supported and the conclusions of law are reviewed *de novo*. *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (citation omitted)." It is also a well-known principle that "[w]here trial is by judge and not by jury, the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991) (citations omitted).

As noted by the majority, defendant has the burden of proof on an MAR. Defendant may be allowed a new trial on the basis of recanted testimony if:

> 1) the court is reasonably well satisfied that the testimony given by a material witness is false, and
>
> 2) there is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at the trial.

State v. Britt, 320 N.C. 705, 715, 360 S.E.2d 660, 665 (1987).

Here, the lower court made a credibility determination based on testimony presented during the December 2016 trial and testimony presented during the May 2019 MAR hearing. The court determined that it "[was] not satisfied that the testimony given by [A.M.D.] at the trial on this matter in December 2016 was false." Further, the court concluded it was "unconvinced" the testimony at the MAR hearing was accurate.

The evidence presented during defendant's December 2016 trial showed that four years after she was abused at the age of eight, then twelve-year-old A.M.D. testified to acts of sexual abuse for which defendant was convicted. In May 2019, the hearing on defendant's MAR was conducted. Per the MAR court's finding of fact 1, the court noted the extent to which A.M.D. provided details at defendant's trial in 2016 versus the extent to which she provided details in 2019, regarding the circumstances surrounding a sex offense which did not occur. During defendant's 2016 trial, A.M.D. testified to basic facts which could have constituted a statutory sex offense with a child, while during the 2019 MAR hearing A.M.D. testified to the name of the movie that was playing

during the "couch" incident, the book defendant was reading during the "bedroom" incident, and the video game being played during the "basement" incident, again testifying to facts surrounding incidents she later said did not occur.

Per finding of fact 2, A.M.D. recanted the testimony she gave during the 2016 trial—when she testified that defendant had "pulled his privates out" as she tried to wake him—and at the MAR hearing, she denied "any and all touching" by defendant. In finding of fact 8, the court noted discrepancies in A.M.D.'s testimony, as well as that of her mother, Cassie, regarding how and when the affidavit A.M.D. signed in support of defendant's MAR was notarized. A.M.D. testified that the impetus for recanting her testimony, a letter she wrote to her mother—Defendant's Exhibit 1—was written and left for her mother in January 2018. A.M.D. knew "her mom was 'torn up' over the truth and not knowing the facts and [A.M.D.] wanted her [mother] to be happy again." Moreover, A.M.D. testified that she and her mother did not discuss the contents of the letter until March 2018. However, the MAR court found that defendant and A.M.D.'s mother, Cassie, were recorded on 6 December 2017, discussing with defendant A.M.D.'s willingness to testify in court and getting an affidavit to send to a lawyer. "[D]efendant discusse[d] whether [A.M.D.] [wa]s willing to testify in court about what she told Cassie. He t[old] Cassie to tell him about what [A.M.D.] said and to get an affidavit to send to the lawyer to help with the appeals case." On 19 December 2017, defendant and Cassie were recorded discussing getting A.M.D. in touch with a PI in order to get a statement. Again, there were clear discrepancies in the testimony of AMD and Cassie as to how, when, and perhaps where the affidavit of recantation was obtained.

In the court order denying defendant's MAR, the court acknowledged the test to grant defendant a new trial on the basis of recanted testimony as set forth in *Britt*, 320 N.C. 705, 360 S.E.2d 660. Therefore, it is clear the MAR court was aware the *Britt* test determined whether defendant's MAR could be granted.

The majority reverses the lower court order solely on the basis that the MAR court did not specifically state whether it found A.M.D.'s 2019 MAR hearing testimony that she was threatened and bribed to submit false testimony during defendant's 2016 trial to be true or false. The majority states that finding of fact 3 is, by itself, fatal to the order because the "finding recites A.M.D.'s hearing testimony that she lied at trial due to threats and bribes from Lora D." The majority accepts defendant's argument that the MAR court did not resolve the factual issue raised by that evidence. On the other hand, the majority does not accept

that the MAR court did just what *Britt* requires as a first step: determine whether "the court is reasonably well satisfied that the testimony given by a material witness is false[.]" *Britt*, 320 N.C. at 715, 360 S.E.2d at 665.

What the majority is interposing is an expansion of the *Britt* test: a court hearing a MAR "must make findings in its order that are unambiguous and assess the credibility of the evidence on key issues presented by the motion." Here, during the MAR hearing, the witness recanted the bare bones of her trial testimony. But upon hearing the evidence, the lower court clearly had serious concerns regarding the circumstances and sequence of events that gave rise to the recantation by the witness—a minor child—as well as the pressure imposed ("either self-induced or from an external source") upon that recanting witness which may have affected her veracity. As such, the court was "unconvinced" the recanting witness's testimony given during the 2019 MAR hearing was "accurate," and therefore, in accordance with *Britt*, the MAR court "[wa]s not satisfied that the testimony given by [A.M.D.] at trial on this matter in December 2016 was false."

The lower court's order was sufficient to satisfy the *Britt* test and denying defendant's MAR was not an abuse of discretion. Defendant merely failed to meet his burden of proof. It is not this Court's responsibility to use a test created by defendant that would require a lower court to make findings of fact on what defendant considers the critical issue. And I urge the majority not to adopt such an unsupportable position.

I will note that going forward, more specificity in the strength of a trial court's findings of fact and conclusions of law is always appreciated by our appellate courts. However, I disagree that, because we do not have what defendant may consider a more perfect order, the order we do have, which makes appropriate findings of fact and conclusions of law pursuant to the *Britt* rule, should be vacated.

For these reasons, I would uphold the lower court's order denying defendant's MAR.

STATE v. NOVA

[270 N.C. App. 509 (2020)]

STATE OF NORTH CAROLINA
v.
VICTOR MANUEL MEDINA NOVA

No. COA19-462

Filed 17 March 2020

Jury—request for transcript of witness testimony—lack of real-time transcript—trial court's discretion

At a trial for taking indecent liberties with a child, the trial court erred by denying the jury's request for a transcript of witness testimony on grounds that a "real-time" transcript was unavailable and would take too long to prepare; under controlling precedent, this was error because it was unclear whether the trial court understood it had discretion to grant the jury's request and wait for the transcript to be prepared. Moreover, the court's error prejudiced defendant where the case turned on the witnesses' credibility and where the jury requested transcripts of defendant's and the alleged victim's conflicting testimonies.

Appeal by defendant from judgment entered 25 October 2018 by Judge Athena Fox Brooks in Gaston County Superior Court. Heard in the Court of Appeals 14 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Brittany Edwards, for the State.

Joseph P. Lattimore for defendant.

DIETZ, Judge.

It is fairly common for jurors, during deliberations, to ask for a transcript of witness testimony. It happened in this criminal case. The trial court responded as follows: "This is one of those things unlike on TV those are not real-time, those are not made as they are testifying. It would take us a couple of weeks at the fastest to make those. So that's just not able to be done."

Were this a case of first impression, we would hold that the trial court's statement was an appropriate exercise of the court's discretion. But this is not a new issue. In a series of indistinguishable cases, our State's appellate courts have held that trial court statements like the one

quoted above, denying jury requests for transcripts because there is no "real-time" transcript, is error. This is so, these courts reasoned, because it is unclear whether the trial court understood it had discretion to grant the jury's request and wait for the transcript to be prepared.

We are constrained to follow this controlling precedent here and so we must vacate the judgment and remand for a new trial. But we believe the Supreme Court should review this line of cases. Precedent aside, it readily can be inferred from the trial court's statement that the court understood it had discretion to order a transcript but chose not to do so because it was impractical given the length of time necessary to prepare one.

Facts and Procedural History

A grand jury indicted Defendant Victor Manuel Medina Nova for taking indecent liberties with a child. The case went to trial. The alleged juvenile victim testified at the trial, as did Nova.

During deliberations, the jury sent notes to the trial court asking, "can we read transcript of defendant's testimony" and "can we see [the juvenile's] transcript from his testimony." Outside the presence of the jury, the trial court first informed the parties that "we do not have real-time transcripts, so they will be directed to remember their own memory of the testimony." The trial court then brought the jury into the courtroom and instructed them that "[t]his is one of those things unlike on TV those are not real-time, those are not made as they are testifying. It would take us a couple of weeks at the fastest to make those. So that's just not able to be done. You should rely upon your memory of what the testimony was."

The jury convicted Nova of taking indecent liberties with a child. The trial court sentenced Nova to 15 to 27 months in prison and 30 years of sex offender registration. Nova appealed.

Analysis

Nova argues that the trial court committed reversible error because it "failed to exercise the discretion required by statute" in denying the jury's request for a transcript of trial testimony.

Although, for practical reasons, courts rarely order a transcript of trial testimony during jury deliberations, the law permits them to do so. If "the jury after retiring for deliberation requests a review of certain testimony" in a criminal case, the trial court "may direct that requested parts of the testimony be read to the jury." N.C. Gen. Stat. § 15A-1233(a).

Importantly, the statute expressly provides that the decision of whether to read portions of the trial transcript to the jury is one left to the trial court's "discretion." *Id.* This statutory mandate had led our State's appellate courts to vacate many criminal convictions on the ground that the "trial court's statement that it is *unable* to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request." *State v. Starr*, 365 N.C. 314, 318, 718 S.E.2d 362, 365 (2011) (emphasis added). This is so, our appellate courts explained, even if the trial court also stated the *reason* the court was unable to provide the transcript—typically a concern that it would take too long to prepare one.

For example, in *State v. Lang*, after the jury requested a transcript of testimony, the trial court responded that "the transcript is not available to the jury." 301 N.C. 508, 510, 272 S.E.2d 123, 125 (1980). The Supreme Court held that the trial judge's "comment to the jury that the transcript was not available to them was an indication that he did not exercise his discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error." *Id.* at 511, 272 S.E.2d at 125.

Later, in *State v. Ashe*, the jury asked the trial court for a transcript of certain trial testimony. 314 N.C. 28, 33, 331 S.E.2d 652, 656 (1985). The court responded by stating "[t]here is no transcript at this point. You and the other jurors will have to take your recollection of the evidence." *Id.* at 35, 331 S.E.2d at 656–57. The Supreme Court again held that the trial court erred by failing to exercise its discretion because the trial judge's remark that "there is no transcript at this point" indicated that "the trial judge apparently felt that he could not grant the request." *Id.*

Finally, in *State v. Starr*, the trial court responded to a request for a transcript of witness testimony using language nearly identical to the language at issue here: "In North Carolina we *don't have the capability of realtime transcripts* so we cannot provide you with that. You are to rely on your recollection of the evidence that you have heard in your deliberations." 365 N.C. at 317, 718 S.E.2d at 365 (emphasis in original). The Supreme Court held that this was error because the "trial court's statement 'we don't have the capability . . . so we cannot provide you with that' overcomes the presumption the court exercised its discretion." *Id.* at 318, 718 S.E.2d at 365. The Court emphasized that "[a] trial court's statement that it is *unable* to provide the transcript to the jury demonstrates the court's apparent belief that it lacks the discretion to comply with the request." *Id.* (emphasis in original).

This Court, relying on *Starr*, *Ashe*, and *Lang*, similarly has found error in a trial court statement identical to the one at issue here. In *State v. Chapman*, the trial court responded to a jury's request for a transcript of a witness's testimony with the following: "Transcripts aren't automatically generated. That's something that takes several weeks sometimes for a court reporter to do. We can't provide that for you because it is not available at this time." 244 N.C. App. 699, 707, 781 S.E.2d 320, 326 (2016). We held that the trial court's "explanation that it was refusing the jury's request because a transcript was not currently available is indistinguishable from similar responses to jury requests that have been found by our Supreme Court to demonstrate a failure to exercise discretion." *Id*. at 707–08, 781 S.E.2d at 326.

The trial court's statement in this case is substantively identical to those in *Starr* and *Chapman*. Here, the trial court said: "This is one of those things unlike on TV those are not real-time, those are not made as they are testifying. It would take us a couple of weeks at the fastest to make those. So that's just not able to be done." Under *Lang*, *Ashe*, *Starr*, and *Chapman*, we are constrained to hold that the trial court erred.

We note that there is some logical tension in these decisions. When a trial court observes, as was the case here, that it "takes us a couple of weeks at the fastest" to prepare a transcript of witness testimony and thus it is "just not able to be done," this necessarily implies that the trial court understands it has discretion to order a transcript and to then "direct that requested parts of the testimony be read to the jury." N.C. Gen. Stat. § 15A-1233(a). After all, if the court thought it did not have the discretion to order a transcript and have excerpts read to the jury, what difference would it make how long it would take to prepare that transcript? What this language instead implies is that the trial court understands its discretionary authority but is unwilling to delay deliberations for several weeks while waiting for a transcript to be prepared.

As an intermediate appellate court, we can do nothing more than observe this tension. We are bound by both our own precedent and the Supreme Court's, and thus are constrained to find error. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). We therefore turn to whether that error is prejudicial.

A trial court's failure to exercise its discretion in this context "constitutes prejudicial error when the requested testimony (1) is material to the determination of defendant's guilt or innocence; and (2) involves issues of some confusion or contradiction such that the jury would want to review this evidence to fully understand it." *Chapman*, 244 N.C. App. at 708, 781 S.E.2d at 327.

Both this Court and our Supreme Court have found that an error was "so prejudicial as to entitle defendant to a new trial" in sex offense cases where the jury requested "transcripts of the testimony of the victim and defendant," the victim's testimony was "the only evidence directly linking defendant to the alleged crimes," and the testimony of the victim and defendant was contradictory. *State v. Johnson*, 346 N.C. 119, 126, 484 S.E.2d 372, 377 (1997); *State v. Long*, 196 N.C. App. 22, 40–41, 674 S.E.2d 696, 707 (2009). In these particular circumstances, the victim's "credibility was the key to the case" and thus conflicting testimony concerning the victim's account "was material to the determination of defendant's guilt or innocence." *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377.

Here, as in *Johnson* and *Long*, there was no physical evidence linking the defendant to the alleged offense and the State's case relied entirely on witness testimony. *See Johnson*, 346 N.C. at 126, 484 S.E.2d at 377; *Long*, 196 N.C. App. at 23, 674 S.E.2d at 697. To be sure, there was testimony from another witness that, when he was a juvenile, Nova touched him inappropriately as well. But Nova testified that he never touched either juvenile inappropriately and that the allegations were "cooked up" by adults at the juveniles' church who were concerned after learning that Nova had a consensual homosexual relationship with an adult friend.

Because this case turned on the credibility of the defendant and the accusing witnesses, because the key trial testimony—that of Nova and of the alleged juvenile victim—was conflicting, and because the jury asked to review transcripts of that conflicting testimony, there is a reasonable possibility that the trial court's error affected the outcome of the jury's deliberations. *Johnson*, 346 N.C. at 126, 484 S.E.2d at 377; *Chapman*, 244 N.C. App. at 708, 781 S.E.2d at 327. We therefore vacate the trial court's judgment and remand the case for further proceedings. Because we vacate the judgment on this ground, we need not address Nova's remaining arguments, which may be mooted in a new trial. *See State v. Moore*, 362 N.C. 319, 328, 661 S.E.2d 722, 727 (2008).

Conclusion

We vacate the trial court's judgment and remand for further proceedings.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DAVID WARREN TAYLOR, DEFENDANT

No. COA18-810

Filed 17 March 2020

1. Constitutional Law—First Amendment—anti-threat statute —true threat analysis—standard of review

In a case of first impression involving a prosecution under an anti-threat statute (N.C.G.S. § 14-16.7(a)) for threatening to kill a court officer, the Court of Appeals determined that independent whole record review was the appropriate standard of review for analyzing whether the State met its burden of proving that defendant's communication constituted a "true threat" excluded from First Amendment protection.

2. Constitutional Law—First Amendment—anti-threat statute —true threat—elements of offense

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)) must be construed to include as essential elements of the offense any requirements under the First Amendment, including a certain level of intent and proof beyond a reasonable doubt that a communication is a "true threat."

3. Constitutional Law—First Amendment—anti-threat statute —true threat—intent element—general and specific

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)) must be construed to require both a general intent (objective reasonable person standard) regarding whether a communication is a "true threat" and a specific intent to threaten another (subjective standard) as part of the essential elements of the offense.

4. Constitutional Law—First Amendment—anti-threat statute —true threat—question of fact or law

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving violations of criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), analysis of whether a communication constitutes a "true threat" not protected by the First Amendment involves

consideration of constitutional facts that generally must be determined by a jury or the trial court as trier of fact. However, if the State's evidence is insufficient to prove a "true threat" as a matter of law, the charge must be dismissed.

5. Constitutional Law—First Amendment—anti-threat statute —true threat—definition—context

In a case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving criminal anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), jurors must be instructed on the definition of "true threat" as set forth in *Virginia v. Black*, 538 U.S. 343 (2003), how to apply the necessary intent elements for proving a "true threat," and the requirement that they consider the context in which the communication was made.

6. Constitutional Law—First Amendment—anti-threat statute —true threat—jury instructions

In case of first impression involving a threat to kill a court officer, the Court of Appeals determined that in prosecutions involving anti-threat statutes (such as N.C.G.S. § 14-16.7(a)), the issues of whether a communication constitutes a "true threat" unprotected by the First Amendment and whether defendant specifically intended to threaten the recipient must be submitted to the jury as essential elements of the offense.

7. Constitutional Law—First Amendment—anti-threat statute —N.C.G.S. § 14-16.7(a)—as-applied challenge—true threat analysis

The Court of Appeals vacated defendant's conviction for threatening to kill a court officer (N.C.G.S. § 14-16.7(a)) after determining that it was obtained in violation of constitutional First Amendment principles where defendant's social media posts referring to the local district attorney were too vague and nonspecific to rise to the level of a "true threat" as a matter of law. The matter was remanded for entry of a judgment of acquittal.

8. Constitutional Law—First Amendment—threatening to kill court officer—N.C.G.S. § 14-16.7(a)—specific intent—sufficiency of evidence

As an additional basis for vacating defendant's conviction for threatening to kill a court officer, the Court of Appeals held that even if defendant's conviction was obtained in violation of First Amendment principles where his social media posts did not constitute a "true threat" as a matter of law, the State's evidence—including

all the surrounding circumstances in which the posts were made—failed to demonstrate the specific intent requirement that defendant intended for his posts to cause the local district attorney to believe he was going to kill her.

9. Constitutional Law—First Amendment—threatening to kill court officer—true threat—jury instructions

In a prosecution for threatening to kill a court officer (N.C.G.S. § 14-16.7(a)), the trial court's failure to instruct the jury that the State must prove defendant's social media posts constituted a "true threat" along with related intent requirements pursuant to First Amendment principles was prejudicial and not harmless beyond a reasonable doubt where the intent and "true threat" issues were necessary constitutional elements of the offense that needed to be properly submitted to the jury for resolution.

Judge DIETZ concurring in part in a separate opinion.

Appeal by Defendant from judgment entered 23 January 2018 by Judge Gary M. Gavenus in Superior Court, Macon County. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Solicitor General Matthew W. Sawchak and Solicitor General Fellow Matthew C. Burke, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for Defendant.

McGEE, Chief Judge.

David Warren Taylor ("Defendant") was convicted on 23 January 2018, pursuant to N.C.G.S. § 14-16.7(a) (2017) ("N.C.G.S. § 14-16.7(a)" or "the statute"), of "Threatening to Kill a Court Officer," Macon County District Attorney Ashley Welch ("D.A. Welch"). In *Watts v. United States*, the United States Supreme Court held the First Amendment required that, in order to constitutionally convict a defendant pursuant to an anti-threat statute, the government had to prove that the "threat" alleged constituted a "true threat":

> [T]he [anti-threat] statute . . . requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by [the defendant] fits

> within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The language of the political arena . . . is often vituperative, abusive, and inexact.

Watts v. United States, 394 U.S. 705, 708, 22 L. Ed. 2d 664, 667 (1969) (citation omitted).

In this case, the alleged threats were included in several Facebook comments Defendant posted to his personal Facebook page on 24 August 2016, between approximately 5:30 p.m. and 6:30 p.m. These posts were visible to Defendant's Facebook friends for one to two hours until Defendant deleted them. However, one of Defendant's Facebook friends, Detective Amy Stewart ("Detective Stewart") of the Macon County Sheriff's Office, who was also a friend of D.A. Welch, saw Defendant's comments and took screenshots of some of the posts before they were deleted by Defendant. Detective Stewart shared the screenshots with the Macon County Sheriff (the "sheriff") and D.A. Welch. The sheriff contacted the North Carolina State Bureau of Investigation ("SBI") that evening, and the SBI became the investigative body in this matter. Based primarily upon a comment Defendant made in one of his posts that "[i]f our head prosecutor won't do anything then the death to her as well[,]" Defendant was charged with threatening a court officer pursuant to N.C.G.S. § 14-16.7(a). At trial, Defendant requested a jury instruction on the First Amendment requirement, as determined by the Supreme Court in *Watts* and subsequent opinions, that a person cannot be charged or convicted under an anti-threat statute unless the State proves that the alleged threat constituted a "true threat." Defendant's motion was denied, and he was convicted.

Defendant appealed and makes an "as applied" constitutional challenge to N.C.G.S. § 14-16.7(a), alleging "the trial court erred in failing to dismiss the charge" because the State failed to prove the "true threat" element of the statute as required by the First Amendment. In addition, Defendant argues that "the trial court erred in failing to instruct the jury on the definition of a true threat[,]" also in violation of the First Amendment. Because we find that N.C.G.S. § 14-16.7(a) was applied to Defendant in violation of his First Amendment rights, we vacate his conviction.

I. Factual and Procedural Background

Defendant was indicted on 19 September 2016 for violation of the statute, which states in relevant part: "Any person who knowingly and willfully makes any threat . . . to kill any . . . court officer . . . shall be guilty of a felony[.]" N.C.G.S. § 14-16.7(a). The indictment included five quotes from Defendant's Facebook comments:

> [D]efendant . . . did knowingly and willfully make a threat to kill [D.A. Welch], . . . by posting the following on Facebook: "[P]eople question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go. . . . I will give them both the mtn justice they deserve . . . [.] If our head prosecutor won't do anything then the death to her as well. . . . [I]t is up to the people to administer justice! I'm always game to do so. They make new ammo everyday! . . . It is time for old Time mtn justice!"[1]

Defendant was tried on 23 January 2018. Detective Stewart testified at trial that Defendant and D.A. Welch were friendly acquaintances prior to the events of 24 August 2016, which led to Defendant's conviction. Defendant worked for an investment and insurance company in an office next to the Macon County Courthouse. Defendant and D.A. Welch saw each other daily in a common outdoor smoking area shared by employees at Defendant's office building and the courthouse. Detective Stewart also used the same smoking area. Defendant's interactions with both women were always polite, and D.A. Welch testified that Defendant's favorite topic of conversation seemed to be politics. Detective Stewart testified that she and Defendant "had some of the same political beliefs and so we were friends on Facebook." She testified that on the evening of 24 August 2016, between 5:00 p.m. and 6:00 p.m., she signed on to Facebook and noticed some posts by Defendant that troubled her. Detective Stewart testified that Defendant's "initial post was about him being upset about a decision by the D.A.'s office with a case regarding a baby [(the 'child')] that had died. [T]here were no charges being brought [by D.A. Welch] against the parents [(the 'parents')], so he was upset about that."

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1. The Facebook posts contain some common messaging shorthand substitutes for words, as well as loose punctuation and capitalization. We include them as they were written, taken from the State's screenshot exhibits, instead of reproducing them from the transcription of Detective Stewart's testimony. The posts from Defendant's Facebook friends were not read by Detective Stewart, so they are also quoted from the screenshots.

Defendant's first post referenced the fact that the parents were not going to be prosecuted by D.A. Welch, addressed his belief that the "judicial system" was not working, and expressed his frustration that "[w]ith this [decision not to prosecute] people question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go, period and point made." Some of Defendant's Facebook "friends" responded to this post, and a "conversation" between Defendant and these friends ensued, which included disparaging remarks about D.A. Welch, politicians, the local justice system, and law enforcement officers. This Facebook conversation occurred in the time period between 5:30 p.m. and 6:30 p.m. Detective Stewart testified that she saw this conversation no later than 6:00 p.m. and, approximately an hour and a half later, she decided to take screenshots of some of the comments. The screenshots indicate that they were taken at approximately 7:30 p.m. Along with screenshots of some of the exchange between Defendant and his Facebook friends regarding the decision not to prosecute the parents, Detective Stewart also took screenshots of Defendant's Facebook profile, which included a large picture of John Wayne and a quote attributed to John Wayne stating: "Life is hard; it's harder if you're stupid." A smaller picture of Defendant's profile consisted of an American flag background with part of the "Gadsden" flag which includes a coiled snake and the first two words of the "Don't Tread on Me" slogan. Defendant's profile information also indicated that Defendant had attended Franklin High School, and that he was an Army veteran.

Detective Stewart testified that, after taking the screenshots, she called D.A. Welch and the sheriff to inform them about the comments. Detective Stewart also forwarded the screenshots to D.A. Welch and the sheriff. D.A. Welch contacted her office and informed her Chief Assistant D.A. of Detective Stewart's concerns; the matter was referred to the SBI that evening. Detective Stewart went back on Facebook an "hour or two" after capturing the screenshots, and Defendant's posts were no longer there, having been deleted by Defendant.

The following day, at approximately 1:25 p.m., SBI Special Agent Joel Schick ("Agent Schick") and another agent went to Defendant's workplace to interview him about his Facebook posts. Following the interview, Agent Schick left Defendant at Defendant's workplace, then returned to Defendant's office at approximately 3:20 p.m. with a warrant for Defendant's arrest, which stated there was probable cause to believe Defendant "knowingly ma[de] a threat to kill . . . [D.A. Welch], by posting 'If our head prosecutor won't do anything then the death to her as well' " on his Facebook page.

Early in Defendant's trial, Defendant objected as the State was attempting to introduce five of Defendant's Facebook comments through the testimony of Detective Stewart. Detective Stewart and Agent Schick were questioned on *voir dire*, and Defendant argued (1) that none of the Facebook posts should be admitted due to authentication issues and, (2) in the alternative, if any of the posts were admitted, all of the posts should be admitted to provide context. The State argued that only the five posts it had chosen should be admitted, and the rest should be suppressed as hearsay, and because they were "irrelevant" to Defendant's charges. The trial court ruled against Defendant on the authentication argument, and the discussion then centered on whether to admit some or all of the posts captured by Detective Stewart's screenshots. The State argued the additional posts should not be admitted, dismissing Defendant's argument that the alleged threat had to be proven based upon its context: "We believe those are the five relevant texts. It's the State's position that the other texts . . . are not relevant."

> [THE STATE:] I don't think the other conversations are relevant. There's no exception to the statute for communicating threats if you're involved in a conversation with other people that are equally upset. The question is under the elements and under the statute did [D]efendant threaten to kill [D.A. Welch]. The context of that conversation is not relevant[.] And the State would argue that . . . it's not relevant. There is no, like I said, justification for your threat to kill[.]

Defendant responded that the other posts were "clearly relevant to [Defendant's] [free] speech" argument:

> [The additional posts] are relevant on the issue of whether or not this is a true threat under various United States Supreme Court decisions[.] I know the District Attorney characterizes this as a threat, but when you look at all these things, you don't see anything where my client said, "I'm going to kill the District Attorney." So . . . it falls under the definition of a true threat as to whether or not it's even a threat. And when you look at the definition of a true threat, there has to be a communication showing a serious intent to cause harm to [D.A. Welch]. That's the standard. And without seeing what these other posts are saying, there's no way for the jury to get a full view of what's going on here.

At trial, the State had Detective Stewart read the five Facebook posts that it had selected, which were marked as State's Exhibits 1 through 5 ("State's Exhibits 1 – 5"), which Detective Stewart described as "parts of the screen shots that I took with just [Defendant]'s posts and comments without the other people that responded." Two of the five posts introduced by the State did not include any statements contained in Defendant's indictment, and the post including the "old Time mtn justice!" comment was not included in State's Exhibits 1 – 5. From the record and statements of Defendant's attorney, it does not appear that Detective Stewart took screenshots of all the posts and comments from the Facebook discussion relevant to this case. Further, according to *voir dire* testimony, there were seven people, in addition to Defendant, whose comments *were* included in Detective Stewart's screenshots, but the comments of only four of them are included in the record. An eighth person, J. Drake, is identified as having "liked" Defendant's initial post.

At trial, Detective Stewart was asked to read the five selected posts, State's Exhibits 1 – 5, one immediately after the other, without discussing any of the additional comments. On cross-examination, Detective Stewart read at least some of the additional posts contained in Detective Stewart's screenshots. During direct examination, Detective Stewart was asked to read State's Exhibits 4 and 5 out of the chronological order in which they were posted by Defendant. We present State's Exhibits 1 – 5, along with the additional comments captured in Detective Stewart's screenshots, in the proper chronological order of their posting. The comments in State's Exhibits 1 – 5 that were included in Defendant's indictment are underlined. State's Exhibit 1, which was Defendant's initial post, stated:

> So I learned today that the couple Who brought their child Into that er whom had been dead to the point that the er room had to be closed off due to the smell of the dead child Will face no Charges. I regret the day I voted for the new DA with this outcome. This is totally sickening to know that a child, Whether by [D.A.] Ashley Welch's decision or not is not granted this type of Protection in our court system. Im tired of standing back and seeing how our judicial system works. I voted for it to change and apparently it never will. With this <u>people question why a rebellion against our government is coming? I hope those that are friends with her share my posts because she will be the first to go</u>, period and point made

(Emphasis added). This post had six "emoji" responses and thirteen comments at the time Detective Stewart took the screenshot. All of the emoji responses and comments by Defendant's Facebook friends in the record expressed some level of agreement with Defendant's statements. Detective Stewart then testified that Defendant "continued posting about how he was upset about that decision and negative things about" D.A. Welch.

Detective Stewart next read State's Exhibit 2:

> Sick is not the word for it. This folks is how the government and the judicial System works, Now U wonder why I say if I am raided for whatever reason like the guy on smoke rise was. When the deputy ask me is it worth it. I would say with a Shotgun Pointed at him and a ar15 in the other arm was it worth to him? Who cares what happens to the person I meet at the door. I'm sure he won't. I would open every gun I have. I would rather be carried by six than judged by twelve. This folks is how politicians want u to believe is okay. I'm tired of it. What I do Training wise from this point is ur fault. And yes I know I have friends on fb whom see this. I hope they do! Death to our so called judicial system since it only works for those that are guilty! U want me come and take me

This post had two "likes" at the time of the screenshot. Nothing from this post was included in Defendant's indictment. In response to this comment, someone named R. Burch ("Burch") responded "vigilante justice !!!!!!!!!!!!!!!!!!!!!!!![,]" which had one "like." A man identified as D. Sammons commented: "I wouldn't expect that from Franklin but maybe Asheville." Defendant responded: "**D[.] Sammons** she doesn't serve the Asheville city, only west of there. Haywood county to the tn state line. This is how politics works. That's why my harsh words to her and any other that will Listen and share it to her fb page."[2] A woman identified as J. Crossman posted: "Poor little guy, he didn't get any justice. Ashley [(D.A. Welch)] can you give your County Citizens that you represent any answers? Please."[3]

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2. Names included in a post that show up in bold mean that person was "tagged" in the post. When a person is tagged in a post, that person will get a notification informing them of this fact and be provided a link directly to the associated post.

3. Again, these additional posts were not included in State's Exhibits 1 – 5, and the State did not have Detective Stewart read these posts into evidence; Defendant had Detective Stewart read them to the jury on cross-examination.

Immediately following State's Exhibit 2, Detective Stewart read State's Exhibit 3:

> If that what it takes **R[.] Burch**. I will give them both the mtn justice they deserve. Regardless of what the law or courts say. I'm tired of this political bullshit. If our head prosecutor won't do anything then the death to her as well. Yeah, I said it. Now raid my house for communicating threats and see what they meet. After all those that flip Together swim together. Although this isn't a house or pond they want to fish in.

(Emphasis added). This post had one "like." Burch then posted: "I'm still waiting." Detective Stewart next read State's Exhibit 4, even though it was posted after State's Exhibit 5. Therefore, we quote State's Exhibit 5 next:

> For what **R[.] Burch**? Her to reply? She won't because she is being paid a 6 digit income standing Outside the courthouse smoking a cigarette. She won't try a case unless it gets her tv time. Typical politician. Notice that none of them has responded yet? Although I'm sure My house is being Monitored right about now! I really hope They are ready for what meet them at the front door. Something tells Me they aren't!

This post did not include any comments that were in Defendant's indictment. Burch then posted: "I'm waiting on you boys to say it's time to go!!!!!!!!!!!!!!!" This post was followed by a large "laughing" emoji also posted by Burch. These posts were not read by Detective Stewart on direct examination. Detective Stewart read State's Exhibit 4 last, in which Defendant stated:

> It can start at my house. Hell this has to start somewhere. If the courts won't do it as have been proven. Then yes it Is up to the people to administer justice! I'm always game to do so. They make new ammo everyday! Maybe you need to learn what being free is verse being a puppet of the government. If u did u might actually be happy! I think we both know of someone who will like this Comment Or Like this post.

(Emphasis added).

On cross-examination, Defendant asked Detective Stewart to read the posts not introduced in her direct examination, being the non-State's

Exhibit posts included above, as well as the posts that follow. A woman identified as S. Marion commented: "I know people who said the ER room had to be shut down because the smell of the dead kid stunk up the entire ER room. Our DA and police department chose not to press charges. Yea that's the facts. Welcome to America. The once great great nation." Defendant responded to this post with the following two comments:

> Don't get me started on this. The court system and Most importantly western nc justice system is useless. It's all about money to the courts than it is about justice. It is time for old Time mtn justice! Yes **R[.] Burch** I said it. Now let Them knock on my door
>
> **R[.] Burch** don't get me Started about The Tony Curtis killing. Of Course No charges will Be brought against him. He is what the county considers to be a upstanding citizen of the community. Typical politics at its best. What he did was no different to the killing On 411 North over a year ago. What was his name? Fouts?

(Emphasis added). Although this second mention of "mountain justice" is included in the indictment, it was not included in State's Exhibits 1 – 5. Detective Stewart testified that "Tony Curtis" and "Fouts" referenced homicide cases handled by the D.A.'s office. This last post appears to be in response to a comment not included in the record.

Detective Stewart testified she knew Defendant had an office next to the courthouse. She and Defendant would see each other on a regular basis in a common smoking area outside the offices, and that D.A. Welch also frequently smoked in the same area. Detective Stewart never noticed any problems between Defendant and D.A. Welch.

D.A. Welch testified that she saw Defendant "pretty frequently on a daily basis" because they worked in adjacent buildings and both used the smoking area. She testified that Defendant "[n]ever said anything that [she] considered to be threatening" and that he was "always polite with" her. D.A. Welch also stated that Defendant was "real political," so their conversations were "usually political speech." D.A. Welch testified that she did not change her smoking habits or the location of her smoke breaks as a result of Defendant's Facebook posts. She testified that she did request that her real estate agent take down a video tour of her home "so that it wasn't so easy to figure out where I lived." However, she declined the sheriff's offer to have "somebody come out" that night to watch her house, and neither "the Sheriff's Department [n]or the SBI

[] dispatch[ed]" officers "out to [her] house to sit[.]" The next morning, 25 August 2016, D.A. Welch went to the courthouse as usual. She testified the only difference she noticed was more "sheriff officers from civil process" around the courthouse than was normal, so she "apologized to them" and "kept telling them I'm okay, you know, you don't have to –[,]" at which point the State asked a different question. She was unaware of any security provided for her outside the courthouse, and she had not "heard from [D]efendant since that night[.]"

Agent Schick, the first law enforcement officer to contact Defendant about the Facebook posts, arrived at Defendant's office on 25 August 2016 at approximately 1:25 p.m. He testified that Defendant was "polite" and "courteous" and answered all his questions. Defendant told Agent Schick that he started cooking hamburgers for his family around 5:00 p.m.; drank approximately six beers during the evening; made the post about D.A. Welch's decision not to prosecute the parents of the child who had died, and engaged in the resulting Facebook conversation; but that he deleted the posts between 7:00 p.m. and 8:00 p.m. Defendant told Agent Schick that "he could not believe no charges were brought against the parents for neglect and felt this was sickening[,]" and that "[i]f it were me, charges would have been brought against me." Defendant stated that "he would not threaten to kill a public official and knew this was against the law[.]"

Defendant "told [Agent Schick] that he took the Facebook [posts] down because he did not want people to think he was threatening anyone or taking things the wrong way[,]" and he also would not want his posts to somehow get back to the "child's parents." Defendant had deleted his posts within a couple of hours of having posted them. Defendant then told Agent Schick that he would never threaten anyone unless "they threatened my kids or family or trespass on my property." Defendant emphatically stated to Agent Schick that "he knew . . . for sure" that he did not "threaten to kill someone"; "nor did he mean to threaten anyone"; and "that he had no intention of making anyone feel threatened and that was the last thing that he wanted to do[.]" Defendant asked Agent Schick to apologize to D.A. Welch when he next saw her, and to let her know Defendant had not intended to make her feel threatened.

As far as Agent Schick knew, no law enforcement agency was "keeping an eye on [Defendant] because of the[] posts[,]" and no search was ever conducted of Defendant's house, office, or car. Defendant was left unsupervised after Agent Schick questioned him until Agent Schick returned with a warrant for Defendant's arrest at approximately 3:20 p.m., when Defendant was taken into custody without resistance.

There is no record evidence that any attempt was made to confiscate Defendant's firearms during the nearly one-and-a-half-year period between when Defendant posted the above comments and when he was convicted for having done so.

Defendant moved to dismiss at the close of the State's evidence, and Defendant did not present any evidence. Defendant's motion to dismiss was based on the requirement of the First Amendment that an anti-threat statute such as N.C.G.S. § 14-16.7(a) must be read as requiring proof of a "true threat" as defined by the United States Supreme Court. Defendant argued: "When you look at the cases concerning free speech, the test is [considering] the context . . . is this a true threat. The definition of that is, is this a statement in which the defendant means to communicate a serious intention of committing an act of unlawful violence against a particular person[.]" The State contested Defendant's argument that First Amendment "true threat" jurisprudence placed any additional burden on the State, contending: "Your Honor, the elements of the charge . . . [are] did [D]efendant threaten to kill [D.A. Welch]. Is [D.A. Welch] a court official, and did he know she was the District Attorney. The State through its evidence has presented evidence as to all three of those matters." The trial court then ruled: "I have considered the motion and certainly taken in the light most favorable to the State, there's evidence of each and every element of the crime. The motion is denied."

At the charge conference, Defendant requested an instruction on "true threat," arguing that the First Amendment required such an instruction. The State objected to the requested instruction, arguing that the First Amendment did not require any "true threat" or intent elements be added to the plain language of the statute: "The State would object to all these instructions[.] The pattern jury instructions are clear that there are three and only three elements to this charge. Now with regards to the threat, the only element is that the defendant knowingly and willfully made a threat to kill the victim." The State further argued that the First Amendment did not apply to Defendant's case: "I get that the defendant is raising First Amendment objections to that statute as it's written, but I think the proper venue to take that up would be if upon conviction to take that up on appeal." "Therefore, it is the legislature's intent . . . that there be no requirement of proof to show that the threat was made in a manner and under circumstances which would cause a reasonable person to believe it is likely to be carried out." "[M]aking any threats towards . . . court officials . . . is unacceptable to the legislature, regardless of whether they were made in a manner that a reasonable person would believe they would be carried out." The trial court denied Defendant's requested instruction, and Defendant

was found guilty of threatening to kill D.A. Welch pursuant to N.C.G.S. § 14-16.7(a) on 23 January 2018. Defendant was sentenced to six to seventeen months' imprisonment, which was suspended, and Defendant was placed on twenty-four months' supervised probation. Defendant appeals. Additional facts will be included in our analysis.

II. First Amendment

Defendant's arguments are based upon allegations that his conviction was in violation of the First Amendment, which generally "prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 120 L. Ed. 2d 305, 317 (1992) (citations omitted). The Supreme Court's interpretation of the First Amendment "has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *Id.* at 382–83, 120 L. Ed. 2d at 317 (citations omitted). Although the Court has referred to the categories of speech that may be restricted without implicating the First Amendment as constitutionally "unprotected" speech and said that "the 'protection of the First Amendment does not extend' to them," *id.* at 383, 120 L. Ed. 2d at 317 (citations omitted), the Court has clarified

> that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (["true threat,"] obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

Id. at 383–84, 120 L. Ed. 2d at 318 (citations omitted) (emphasis in original). "The government may not regulate use [of traditionally proscribable speech] based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 386, 120 L. Ed. 2d at 320 (citations omitted). There are a limited number of categories of potentially proscribable speech, "[a]mong these categories are advocacy intended, and likely, to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; so-called 'fighting words;' child pornography; fraud;

[and] true threats[.]" *United States v. Alvarez*, 567 U.S. 709, 717–18, 183 L. Ed. 2d 574, 586–87 (2012) (citations omitted); *see also Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 297, 749 S.E.2d 429, 435 (2012). For simplicity, we will refer to these categories of speech as proscribable, or "unprotected" speech, even though that characterization is not entirely accurate. As will be discussed below, "true threats" are a subset of "threats," as defined through First Amendment jurisprudence, which are of such a clearly "threatening" nature that their criminalization is not prohibited by the First Amendment, despite their normally expressive nature. *R.A.V.*, 505 U.S. at 382, 120 L. Ed. 2d at 317.

Defendant argues that in order for him to have been constitutionally prosecuted and convicted pursuant to N.C.G.S. § 14-16.7(a), the State was required to prove his Facebook posts constituted not just "threats," but "true threats." Defendant further argues that the trial court was required to instruct the jury in accordance with First Amendment "true threat" jurisprudence. However, review of Defendant's arguments is difficult because relevant issues regarding "true threats," and appellate review of issues involving "true threats," have yet to be settled by the courts of this State. We have only been able to locate four opinions by North Carolina appellate courts that mention "true threats" in the context of First Amendment protections: *State v. Bishop*, 368 N.C. 869, 787 S.E.2d 814 (2016), *State v. Shackelford*, __ N.C. App. __, __, 825 S.E.2d 689, 703 (2019) (mentioning that "true threats" are one of the recognized "unprotected" categories of speech), *State v. Mylett* __, N.C. App. __ 822 S.E.2d 518 (2018) (currently before our Supreme Court on appeal of right due to dissent),[4] and *State v. Benham*, 222 N.C. App. 635, 731 S.E.2d 275, 2012 WL 3570792 (2012) (unpublished). Therefore, we look first to general First Amendment principles.

A. *As-Applied Challenge and General Principles*

Defendant makes only an as applied constitutional challenge to N.C.G.S. § 14-16.7(a): "An as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015) (citation omitted), *rev'd and remanded on other grounds*, __ U.S. __, 198 L. Ed. 2d 273 (2017). Therefore, we do not address whether N.C.G.S. § 14-16.7(a) is facially constitutional.

4. *Mylett* includes some issues that are related to those currently before this Court.

> The basic distinction is that an as-applied challenge represents a [defendant's] protest against how a statute was applied in the particular context in which [the defendant] acted or proposed to act, while a facial challenge represents a [defendant's] contention that a statute is incapable of constitutional application in any context. . . . Only in as-applied challenges are facts surrounding the [defendant's] particular circumstances relevant.

Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (citations omitted), *aff'd per curiam*, 369 N.C. 722, 799 S.E.2d 611 (2017). In order for the statute to have been constitutionally applied to Defendant, it must have been applied in accordance with the limitations set by the First Amendment, *i.e.*, the trial court must have treated the statute as containing all required constitutional limitations, even if they were not contained in the plain language of the statute. *State v. Summrell*, 282 N.C. 157, 167, 192 S.E.2d 569, 575 (1972), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989) (citations omitted) ("[A] statute which defines proscribed activity so broadly that it encompasses constitutionally protected speech, cannot be upheld in the absence of authoritative judicial limitations."); *see also Stromberg v. California*, 283 U.S. 359, 369, 75 L. Ed. 1117, 1123 (1931).

On appeal, the State acknowledges that in order for N.C.G.S. § 14-16.7(a) to conform to the requirements of the First Amendment, it must be construed as limiting the term "threat" to "true threat."[5] *See United States v. White*, 670 F.3d 498, 507 (4th Cir. 2012) ("*White I*") (citation omitted) ("[B]oth [the defendant] and the government agree that § 875(c) can only be violated if the interstate communication contains a 'true threat' to injure a person."). This is because the statute "restricts speech and not merely conduct." *Bishop*, 368 N.C. at 874, 787 S.E.2d at 818; *see also id.* at 876, 787 S.E.2d at 819 (defining a statute as "content based" if it "criminalizes some messages but not others, and makes it impossible to determine whether the accused has committed a crime without examining the content of his communication").

The freedom of citizens to express dissatisfaction with government action is at the core of the First Amendment. " '[The First] Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless' " his speech crosses over into the realm of "unprotected speech." *Dennis v. United States*,

5. This position is contrary to the State's position at trial.

341 U.S. 494, 508, 95 L. Ed. 1137, 1152 (1951) (alteration in original) (citation omitted). "Government may cut [speech] off only when [the speaker's] views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 395, 94 L. Ed. 925, 942 (1950).

> The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."

Virginia v. Black, 538 U.S. 343, 358, 155 L. Ed. 2d 535, 551 (2003) (citation omitted).

Therefore, courts can, and must, if possible, read constitutional requirements into a statute when they are not expressly included, because " 'impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to *interpret and administer* it uniformly, constitutional requirements are fully met.' " *State v. Strickland*, 27 N.C. App. 40, 42–3, 217 S.E.2d 758, 760 (1975) (emphasis added) (citation omitted). However, in any individual prosecution, if a statute is not interpreted in accordance with constitutional requirements, or is not administered in accordance with those requirements, that statute will be considered unconstitutional as applied to the defendant in that prosecution. *Id.*; *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.22, 80 L. Ed. 2d 772, 785 n.22 (1984) ("The fact that [a law] is capable of valid applications does not necessarily mean that it is valid as applied to [a particular defendant]."). We are guided by the requirement that "First Amendment standards . . . 'must give the benefit of any doubt to protecting rather than stifling speech.' " *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 327, 175 L. Ed. 2d 753, 773 (2010) (citation omitted).

The Supreme Court and North Carolina courts have developed a more comprehensive body of law in relation to other "unprotected" categories of speech than for "true threats." Because the Court regularly borrows from its reasoning and holdings concerning different "unprotected" categories of speech when deciding an issue concerning a particular "unprotected" category of speech, we will do the same. For

example, in *Ashcroft v. Free Speech Coalition*, while reviewing an issue arising from a prosecution under an anti-child pornography statute, the Supreme Court looked to settled law from another "unprotected" category of speech, incitement to violent action:

> First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
>
> To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. *See Bartnicki v[.] Vopper*, [532 U.S. 514, 529, 149 L. Ed. 2d 787, 803 (2001)] ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it[.]"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Ashcroft v. Free Speech Coal., 535 U.S. 234, 253, 152 L. Ed. 2d 403, 423 (2002) (citations omitted); *see also Black*, 538 U.S. at 359–60, 155 L. Ed. 2d at 552 (looking to incitement to violent action jurisprudence in support of the Court's "true threat" determination); *United States v. Bly*, 510 F.3d 453, 457–58 (4th Cir. 2007) (relying on standard of review set by the Supreme Court in a defamation case to determine standard in a "true threat" case).

In addition, the Supreme Court construes statutes that regulate speech narrowly, and proof of some level of intent is required for prosecution pursuant to an anti-threat statute. *Id.* In fact, First Amendment rights are often given *greater* protection than other constitutional rights:

> The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right

> of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech . . . may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639, 87 L. Ed. 1628, 1638 (1943) (citations omitted). Therefore, a statute like N.C.G.S. § 14-16.7(a), "which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind[,]" *Watts*, 394 U.S. at 707, 22 L. Ed. 2d at 667, and "the commands of the First Amendment" are particularly strict. *Id.*; *Barnette*, 319 U.S. at 639, 87 L. Ed. at 1638; *see also United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the . . . test set forth in *Black* must be read into all threat statutes that criminalize pure speech."). If state-law standards conflict with constitutional requirements, the state law must give. The Supreme Court has held: "The standards that set the scope of [First Amendment] principles cannot therefore be such that 'the constitutional limits of free expression in the Nation would vary with state lines.' " *Rosenblatt v. Baer*, 383 U.S. 75, 84, 15 L. Ed. 2d 597, 605 (1966) (citation omitted).

Our Supreme Court also recognizes the principle that statutes which criminalize speech must be construed in accordance with the commands of the First Amendment. *See State v. Brooks*, 287 N.C. 392, 401, 215 S.E.2d 111, 118 (1975) (construing anti-incitement statute to conform to First Amendment requirements by holding that only speech constituting advocacy of "imminent lawless action," as defined in *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 434 (1969), is proscribed by that statute); *see also Lewis v. Rapp*, 220 N.C. App. 299, 302–03, 725 S.E.2d 597, 601 (2012); *Varner v. Bryan*, 113 N.C. App. 697, 703, 440 S.E.2d 295, 299 (1994) (stating rule that the First Amendment requires proof of "actual malice" element in a case of defamation against a public official).

The right of citizens to criticize public officials is at the heart of First Amendment protections: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech." *Citizens United*, 558 U.S. at 349, 175 L. Ed. 2d at 788.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

> *Cohen v. California*, [403 U.S. 15, 24, 29 L. Ed. 2d 284, 293 (1971) (and many additional cases cited)]. . . . Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, [376 U.S. 254, 270, 11 L. Ed. 2d 686, 701 (1964)].

Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95, 33 L. Ed. 2d 212 (1972) (citations omitted). For this reason, review "of content restrictions must begin with a healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights." *Id.*

In addition, the freedom to associate with like-minded people and exchange ideas, as well as the freedom to express unpopular ideas in a public forum, are fundamental rights under the First Amendment:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. U.S. Jaycees, 468 U.S. 609, 622, 82 L. Ed. 2d 462, 474 (1984) (citations omitted); *Packingham v. North Carolina*, 582 U.S. __, __, 198 L. Ed. 2d 273, 279 (2017) ("A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."). Particularly relevant to Defendant's case: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular." *Id.*

In *Alexander v. United States*, the court discussed how *Watts*, the first Supreme Court opinion recognizing the First Amendment's "true threat" requirement for anti-threat statutes, served to limit the expansive reach that federal circuit courts had given to anti-threat statutes:

> *Watts* represented the Supreme Court's first construction of [an anti-threat statute—18 U.S.C. § 871(a)], an endeavor

> in which various other federal courts had engaged. Some of these courts, on whose holdings the majority of [the D.C. Circuit opinion in *Watts*] relied, had expanded the concept of a "threat" so broadly as to include utterances employing violent words intended and understood as mere jokes or political hyperbole. The Supreme Court, however, admonished that "we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " Thus, ruled the Court, to support a conviction under the statute, "the Government [must] prove a true 'threat.' "

Alexander v. United States, 418 F.2d 1203, 1205 (D.C. Cir. 1969) (footnotes omitted). However, although *Watts* mandated than no anti-threat statute could be constitutionally applied unless its proscription of "threats" was limited to only "true threats," the Court left many important questions unanswered. The definition of "true threat" currently in use comes primarily from *Black*:

> Although the State cannot criminalize constitutionally protected speech, the First Amendment does not immunize "true threats." The Court held in [*Black*] that under the First Amendment the State can punish threatening expression, but only if the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

Bagdasarian, 652 F.3d at 1116 (citations omitted). A "true threat" as defined in *Black* must be determined by looking at the context in which the alleged threat was made. *Id.* at 1119 (citation omitted) ("This . . . test requires the fact-finder to 'look[] at the entire factual context of [the] statements including: the surrounding events, the listeners' reaction, and whether the words are conditional.' It is necessary, then, to determine whether [the defendant's] statements, considered in their full context, 'would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm on or to take the life of [the person allegedly threatened].' ").

Finally, it is not the defendant, but the government that bears "the burden of proving that the speech it seeks to prohibit is unprotected."

Illinois ex rel. Madigan v. Telemar. Assoc., Inc., 538 U.S. 600, 620 n.9, 155 L. Ed. 2d 793, 810 n.9 (2003) (citations omitted). "Where the First Amendment is implicated, *the tie goes to the speaker*, not the censor." *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 474, 168 L. Ed. 2d 329, 349 (2007) (emphasis added) (footnote omitted).

B. *Unsettled Issues*

Beyond these general principles, there remain a number of issues relevant to this case that have not yet been decided by North Carolina appellate courts, including the following:[6] **(1) Review:** Does review of a defendant's conviction pursuant to an anti-threat statute require this Court to conduct "independent whole record" review. If yes, what does that review require. **(2) Elements:** Does "true threat" constitute an *element* of a criminal anti-threat statute, by inference if not expressly included, that must be alleged in an indictment, proven beyond a reasonable doubt, and properly instructed to the jury; and is the requisite "intent," discussed below, whether specific, general, or both, also a necessary element of the anti-threat statute. **(3) Intent:** Does the First Amendment require the State to prove "objective intent," *i.e.*, that a defendant's alleged threat would be understood objectively, by a reasonable person familiar with the context, being all the surrounding circumstances, as an expression of the defendant's serious intent to injure or kill and, if so, what is the proper manner by which to make the "general intent" determination; does the First Amendment require proof of a defendant's "subjective intent," *i.e.*, proof that the defendant communicated a "true threat" *for the purpose of* threatening to injure or kill a person or persons;[7] or does the First Amendment require *both* proof that an objective "reasonable person" would understand a defendant's communication in context as a "true threat" to injure or kill, *as well as* proof of the defendant's subjective intent; that the defendant communicated a "true threat" for the purpose of threatening a specific person or group. **(4) Fact or Law:** As argued by the State, does the trial judge decide whether a defendant's conduct rose to the level of a "true threat" as a matter of law; or is that decision generally a question for the jury,

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6. Some of these issues have been decided by the Supreme Court, but whether state courts, or even federal circuit courts, are bound by certain "true threat" related decisions of the Supreme Court is not always clear as application of these principles has not been universal.

7. The Supreme Court has held that proof of a specific intent to *commit* the threatened action is not required: "The speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359–60, 155 L. Ed. 2d at 552.

or the trial court acting as trier of fact, to decide in the first instance. **(5) Proof of a "True Threat":** What is sufficient in order for the State to meet its burden of proving a defendant's communication was a "true threat," including (a.) the definition of "true threat," (b.) the correct "intent" requirement, and (c.) consideration of the context within which the alleged "true threat" was made. **(6) Instructions:** Must the trial court, contrary to the State's position, instruct the jury in accordance with First Amendment "true threat" requirements.

1. Standard of Review

[1] Generally, " '[u]pon 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. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002) (citation omitted). However, " '[t]he standard of review for alleged violations of constitutional rights is *de novo*.' Under the *de novo* standard, this Court 'considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.' " *Shackelford*, __ N.C. App. at __, 825 S.E.2d at 695 (citations omitted). In addition, the Fourth Circuit has stated: "Whether a written communication contains either constitutionally protected 'political hyperbole' or an unprotected 'true threat' is a question of law and fact that we review de novo." *Bly*, 510 F.3d at 457–58 (citing *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. 485, 506–11, 80 L. Ed. 2d 502, 520–24 (1984)); *see also Matter of N.D.A.*, __ N.C. __, __. 833 S.E.2d 768, 772–73 (2019) (citations omitted) ("As the Supreme Court of the United States has stated, an 'ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact' and should 'be distinguished from the findings of primary, evidentiary, or circumstantial facts.' ").

Our review of issues related to jury instructions is also *de novo*:

> A trial court's jury instructions are sufficient if they present the law of the case in such a manner as to leave no reasonable cause for believing that the jury was misled or misinformed. A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. When a defendant requests an instruction which is supported by the evidence and is a correct statement of the law, the trial court must give the instruction, at least in substance. Arguments challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. A trial court's failure

> to submit a requested instruction to the jury is harmless unless defendant can show he was prejudiced thereby.

Desmond v. News & Observer Publ'g Co., __ N.C. App. __, __, 823 S.E.2d 412, 434 (2018) (citation omitted), *disc. review allowed*, __ N.C. __, 824 S.E.2d 400 (2019). "[T]he Supreme Court of the United States [has] held that the trial court's unconstitutional failure to submit an essential element of the crime to the jury was subject to harmless error analysis." *State v. Bunch*, 363 N.C. 841, 844, 689 S.E.2d 866, 868–69 (2010) (citation omitted). However,

> Considering the importance of "safeguarding the jury guarantee," the Supreme Court of the United States requires "a reviewing court [to] conduct a thorough examination of the record" before finding the omission harmless. "If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant [1] contested the omitted element and [2] raised evidence sufficient to support a contrary finding—it should not find the error harmless." Thus, the harmless error analysis . . . is twofold: (1) if the element is uncontested and supported by overwhelming evidence, then the error is harmless, but (2) if the element is contested and the party seeking retrial has raised sufficient evidence to support a contrary finding, the error is not harmless.

Id. at 845, 689 S.E.2d at 869 (citations omitted).

The Supreme Court has "determined that 'in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' " *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17, 111 L. Ed. 2d 1, 17 (1990) (citing *Bose*, 466 U.S. at 499, 80 L. Ed. 2d at 515). "[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact[-]finding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501, 80 L. Ed. 2d at 516–17. In *Watts*, the first "true threats" opinion, the Court conducted an independent review and reversed the jury's determination that the defendant had threatened the President, holding that, when viewed in context, the defendant's comments did not constitute a "true threat" as a matter of law. *Watts*, 394 U.S. at 706–08, 22 L. Ed. 2d at 666–69. This obligation applies to all cases where liability or guilt relies in part on whether the defendant's

speech falls into one of the recognized "unprotected" categories, such as "true threats":

> In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category *and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.*

Bose, 466 U.S. at 505, 80 L. Ed. 2d at 519 (emphasis added); *see also id.* at 505–08, 80 L. Ed. 2d at 521–22; *Miller v. Fenton*, 474 U.S. 104, 114, 88 L. Ed. 2d 405, 413 (1985); *Hurley v. Irish-Am. Gay Grp.*, 515 U.S. 557, 567–68, 132 L. Ed. 2d 487, 499–500 (1995). It is the duty of the reviewing court to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold[.]" *Bose*, 466 U.S. at 511, 80 L. Ed. 2d at 523; *see also id.* at 503–10, 80 L. Ed. 2d 502 at 518–22. Federal circuit courts have generally followed the *Bose* independent review standard:

> Following *Bose*, this court, like other [federal] courts of appeal, has extended the independent review rule well beyond defamation claims. We have stated that "where the trial court is called upon to resolve a number of mixed fact/law matters which implicate core First Amendment concerns, our review, at least on these matters, is plenary."

Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 106–07 (1st Cir. 2000) (citation omitted); *Bly*, 510 F.3d at 457–58 (4th Cir. 2007) (citing *Bose*, 466 U.S. at 506–11, 80 L. Ed. 2d at 520–24) ("Whether a written communication contains either constitutionally protected 'political hyperbole' or an unprotected 'true threat' is a question of law and fact that we review de novo."); *Nor-West Cable Commc'ns v. City of St. Paul*, 924 F.2d 741, 746 (8th Cir. 1991) (citations omitted) ("*Bose* clearly holds that certain first amendment issues in addition to 'actual malice' must be reviewed *de novo* on appeal. *See Bose*, 466 U.S. at 504–08 (requiring independent review as to whether speech falls in [an] 'unprotected category' such as fighting words, incitement of lawless action, obscenity, and child pornography)."); *see also Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 105 L. Ed. 2d 562, 589 (1989); *Edwards v. South Carolina*, 372 U.S. 229, 235, 9 L. Ed. 2d 697, 701–02 (1963).[8]

8. However, despite the seemingly clear language used by the Supreme Court in *Bose* and other opinions, not all federal circuit courts apply independent review to cases involving "true threats" or other categories of "unprotected" speech. *See Wheeler*, 776 F.3d at 742.

This Court has also adopted independent whole record review when reviewing a jury's determination that a defendant's speech fell into one of the "unprotected" categories: defamation. *Desmond*, __ N.C. App. at __, 823 S.E.2d at 422–23. This Court in *Desmond* cited extensively from *Harte-Hanks*:

> [T]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law. This rule is not simply premised on common-law tradition, but on the unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of breathing space so that protected speech is not discouraged. The meaning of terms such as "actual malice"—and, more particularly, "reckless disregard"—however, is not readily captured in one infallible definition. Rather, only through the course of case-by-case adjudication can we give content to these otherwise elusive constitutional standards. Moreover, such elucidation is particularly important in the area of free speech for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords. Most fundamentally, the rule is premised on the recognition that judges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. (quoting *Harte-Hanks*, 491 U.S. at 685–89, 105 L. Ed. 2d at 587–89 (citations, quotation marks, and brackets omitted)). However, "credibility determinations are reviewed under the clearly-erroneous standard, because the trier of fact has had the 'opportunity to observe the demeanor of the witnesses[.]' " *Harte-Hanks*, 491 U.S. at 688, 105 L. Ed. 2d at 589 (citation omitted). Independent review is certainly no less of a necessity for protecting an individual's First Amendment rights in criminal cases than it is in civil cases, and it has been adopted by a number of state appellate courts for review of anti-threat convictions:

> Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. However, . . . a rule of independent appellate review applies in First Amendment speech cases. An appellate court "must 'make an independent examination of the whole record, . . .' so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." . . . Thus, whether a statement constitutes a true threat is a matter subject to independent review.

Washington v. Johnston, 127 P.3d 707, 712–13 (Wash. 2006) (alteration in original) (citations omitted); *see also*, *e.g.*, *Connecticut v. Krijger*, 97 A.3d 946, 955 (Conn. 2014).

In light of the weight of precedent in the federal courts, other state courts, and this Court's opinion in *Desmond*, we hold that this Court should apply independent whole record review, as set forth in *Bose*, *Harte-Hanks*, and *Desmond*, whenever a defendant's conviction is based in part on a determination that the State met its burden of proving the existence of a "true threat."

2. Elements

[2] "Much turns on the determination that a fact is an element of an offense, . . . given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232, 143 L. Ed. 2d 311, 319 (1999) (citations omitted); *see also State v. Guice*, 141 N.C. App. 177, 189, 541 S.E.2d 474, 482 (2000), *modified on reh'g*, 151 N.C. App. 293, 564 S.E.2d 925 (2002). It appears that certain issues are occurring at the trial court level in part because the relevant First Amendment requirements are not treated as *essential elements* of the underlying anti-threat statutes. In this case, the State repeatedly argued that it did not have to prove a "true threat" in order to convict Defendant under N.C.G.S. § 14-16.7(a), and that the trial court should not instruct the jury in accordance with "true threat" jurisprudence. The State argued that N.C.G.S. § 14-16.7(a) contained only three elements: "The pattern jury instructions are clear that there are three and only three elements to this charge. Now with regards to the threat, the only element is that the defendant knowingly and willfully made a threat to kill the victim." The State further argued: "I get that [D]efendant is raising First Amendment objections to that statute as it's written, but I think the proper venue to take that up would be if upon conviction to take that up on appeal." "[I]t is the legislature's intent . . . that there be no requirement of proof to show that the threat was made in a manner and under circumstances which

would cause a reasonable person to believe it is likely to be carried out." "[M]aking any threats towards . . . court officials . . . is unacceptable to the legislature, *regardless of whether they were made in a manner that a reasonable person would believe they would be carried out*." (Emphasis added). The trial court appeared to agree with the State.

It is well established that a defendant cannot receive a fair, *i.e.*, constitutional, trial, unless *all* essential elements of the crime charged are "submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 116, 186 L. Ed. 2d 314, 329 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 476–77, 147 L. Ed. 2d 435, 447 (2000); *State v. Rankin*, __ N.C. __, __, 821 S.E.2d 787, 790 (2018). "The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime." *Alleyne*, 570 U.S. at 104–05, 186 L. Ed. 2d at 322. As noted by the Court in *Alleyne*: "If a fact [is] by law *essential to the penalty*, it [is] an element of the offense." *Id.* at 109, 186 L. Ed. 2d at 325 (emphasis added) (citation omitted). This definition of an "element" was recently reaffirmed by our Supreme Court:

> [There is] well-established binding precedent from this Court holding that the complete and definite description of a crime is one in which each essential element necessary to constitute that crime is included. [*State v. Johnson*, 229 N.C. 701, 706, 51 S.E.2d 186, 190 (1949)] (observing that *the State carries the burden of establishing the "essentials of the legal definition of the offense itself*").

Rankin, __ N.C. at __, 821 S.E.2d at 793 (emphasis added) (citations omitted). On appeal, the State recognizes that Defendant's comments were protected by the First Amendment unless they were "true threats." We agree, and because proof of a "true threat" is essential to prosecution pursuant to N.C.G.S. § 14-16.7(a), "true threat" must be included in the definition of the crime of threatening to kill a court officer. Further, "true threat" must be included as an "essential element" of the statute. *Id.*; *Alleyne*, 570 U.S. at 109, 186 L. Ed. 2d at 325.

We hold that "true threat" must be included as an essential element of the statute based upon the following: N.C.G.S. § 14-16.7(a) criminalizes, in part, the communication of "threats" to kill certain classifications of people. *Id.* The First Amendment requires that an anti-threat statute such as N.C.G.S. § 14-16.7(a) be construed so that the word "threat" is read as "true threat," and that the State prove a "true threat," to the jury or trier of fact, beyond a reasonable doubt. *See Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667; *United States v. Patillo*, 431 F.2d 293, 295 (4th Cir.

1970), *adhered to*, 438 F.2d 13 (4th Cir. 1971). Therefore, "true threat" must be incorporated into the *definition* of N.C.G.S. § 14-16.7(a) if the statute is to be held constitutional. *See Alleyne*, 570 U.S. at 109, 186 L. Ed. 2d at 325; *Rankin*, __ N.C. at __, 821 S.E.2d at 793–94 (emphasizing that the definition of a crime includes descriptions of what constitutes the crime as well as what does not constitute the crime and that, "if . . . words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they" constitute an essential element of the crime).

Although the Supreme Court has not *expressly* stated that "true threat" is an element of anti-threat statutes, it has consistently treated "true threat," and the requisite intent, as essential elements of any *constitutional* anti-threat statute. The Court has required the jury to be instructed on First Amendment elements, implicitly in the case of "true threat," but expressly for other categories of "unprotected" speech. *See Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667 ("[W]hatever the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' "); *see also Elonis v. United States*, 575 U.S. 723, __, 192 L. Ed. 2d 1, 23–4 (2015) (Thomas, J., dissenting) (citations omitted) ("Because § 875(c) criminalizes speech, the First Amendment requires that the term 'threat' be limited to a narrow class of historically unprotected communications called 'true threats.' . . . There is thus no dispute that, at a minimum, § 875(c) requires an objective showing: The communication must be one that 'a reasonable observer would construe as a true threat to another.' "); *Black*, 538 U.S. at 365, 155 L. Ed. 2d at 556 ("As interpreted by the jury instruction, [which did not require the jury to find a true threat,] the [statute] chills constitutionally protected political speech because of the possibility that [the government] will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.").

This is in accord with the Supreme Court's treatment of First Amendment requirements for the other categories of "unprotected speech." *See*, *e.g.*, *Miller v. California*, 413 U.S. 15, 21, 37 L. Ed. 2d 419, 428–29 (1973) (discussing the required elements to prove "obscenity" that falls outside of First Amendment protections); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 11 L. Ed. 2d 686, 706 (1964) (imposing "actual malice" as an element in defamation actions brought by public officials: "The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' "); *Yates v. United States*, 354 U.S.

298, 324–25, 1 L. Ed. 2d 1356, 1378–79 (1957) (holding the defendant's conviction violated his First Amendment rights because "[t]he jury was never told that the Smith Act does not denounce advocacy in the sense of preaching abstractly the forcible overthrow of the Government[,]" and "the urging of action for forcible overthrow [was] a necessary *element* of the proscribed advocacy"), *overruled on other grounds by Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1 (1978); *Bose*, 466 U.S. at 506–07, 80 L. Ed. 2d at 520–21 (citation omitted) (stating, in a prosecution for obscenity, "questions of what appeals to 'prurient interest' and what is 'patently offensive' under the [First Amendment] community standard obscenity test are 'essentially questions of fact' " that must be proven to the jury); *Ginsberg v. New York*, 390 U.S. 629, 643, 20 L. Ed. 2d 195, 206 (1968).

In addition, the Supreme Court has held that placing the burden on a defendant to prove his speech was protected, rather than placing the burden on the government to prove the defendant's speech was "unprotected," is unconstitutional:

> [W]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.

Speiser v. Randall, 357 U.S. 513, 526, 2 L. Ed. 2d 1460, 1473 (1958); *id.* (citation omitted) ("Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden . . . to show that the appellants engaged in criminal speech."); *see also United States v. Turner*, 720 F.3d 411, 419 (2d Cir. 2013) ("the evidence at trial was more than sufficient to permit a reasonable jury to find each of the elements of [the anti-threat statute]—including the requirement of a true threat—beyond a reasonable doubt"); *United States v. Pinson*, 542 F.3d 822, 832 (10th Cir. 2008) ("The burden is on the prosecution to show that the defendant understood and meant his words as a [true] threat, and not as a joke, warning, or hyperbolic political argument."); *United States v. Gilbert*, 813 F.2d 1523, 1530 (9th Cir. 1987) ("The government bears the ultimate burden of proving that [the defendant's] actions were taken with the requisite intent to place them into [the] category [of a 'true threat']."); *United States v. Hoffman*, 806 F.2d 703, 708 (7th Cir. 1986).

Our holding is in line with most jurisdictions; in fact, we are unaware of any jurisdiction that has not treated "true threat" as an essential element of an anti-threat statute. Like every other federal jurisdiction, the Fourth Circuit recognized that in *Black*, the Supreme Court, in defining "true threat," "was defining the necessary *elements* of a threat crime in the context of a criminal statute punishing intimidation." *White I*, 670 F.3d at 509. "In deciding *Watts*, the Court recognized *two major elements* in the offense created by Congress in 18 U.S.C. Section 871(a). The first is that there be proved 'a true "threat," ' and the second is that the threat be made 'knowingly and willfully[.]' " *Patillo*, 431 F.2d at 295 (emphasis added) (citations omitted); *see also*, *e.g.*, *United States v. Houston*, 792 F.3d 663, 668–69 (6th Cir. 2015); *United States v. Lockhart*, 382 F.3d 447, 449–50 (4th Cir. 2004); *United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999).

Further, both Supreme Court and federal circuit court precedent recognizes an *intent* requirement must also be read into an anti-threat statute. *See New York v. Ferber*, 458 U.S. 747, 765, 73 L. Ed. 2d 1113, 1127 (1982) (citations omitted) ("As with obscenity laws, criminal responsibility [for child pornography] may not be imposed without some element of scienter on the part of the defendant."); *Morissette v. United States*, 342 U.S. 246, 263, 96 L. Ed. 288, 300 (1952) (emphasis added) (holding that "mere omission from [the statute] of any mention of intent will not be construed as eliminating that *element* from the crimes denounced"); *Houston*, 792 F.3d at 667; *Bagdasarian*, 652 F.3d at 1118 (emphasis added) (citation omitted) ("*Black* 'affirmed our own dictum—not always adhered to in our cases—that "the *element of intent* [is] the determinative factor separating protected expression from unprotected criminal behavior." ' "); *United States v. Cassel*, 408 F.3d 622, 634 (9th Cir. 2005) (emphasis added) ("Having held that *intent to threaten is a constitutionally necessary element of a statute punishing threats*, we do not hesitate to construe 18 U.S.C. § 1860 to require such intent."); *Francis*, 164 F.3d at 121 ("Although the statute does not mention intent or willfulness, intent is of course an element of the crime.").[9]

When a criminal statute is written without expressly including, as elements, the requirements of the First Amendment, the statute *must be construed and applied* at trial with the First Amendment requirements

9. The "knowingly and willfully" language in N.C.G.S. § 14-16.7(a) imposes an element of intent, but in this case the State and the trial court interpreted "knowingly and willfully" as meaning Defendant understood the words he wrote and intentionally communicated them by posting them on Facebook; and that Defendant knew D.A. Welch was a court officer. Defendant did not object on the basis that the statute itself should be read as requiring that Defendant intended his Facebook posts to threaten anyone.

included as essential elements of the statutory crime. This principle is well established in North Carolina. *See Summrell*, 282 N.C. at 167, 192 S.E.2d at 575 (citation omitted) ("a statute which defines proscribed activity so broadly that it encompasses constitutionally protected speech[] cannot be upheld in the absence of authoritative judicial limitations"). "[I]t is well settled . . . that a statute will not be construed so as to raise a question of its constitutionality 'if a different construction, which will avoid the question of constitutionality, is reasonable.' " *Id.* at 168, 192 S.E.2d at 576 (citation omitted). The trial court may often construe a statute otherwise unconstitutional on its face by instructing the jury on the complete definition of the crime, that is, a definition that includes the statutory elements *as well as* constitutionally required elements. In *Summrell*, the trial court cured the First Amendment issues inherent in the underlying statutes, because it "construed [the statutes] to prohibit only ['fighting words'] and conduct likely to provoke ordinary men to violence. [The trial court] deleted the [unconstitutional language] and left undisturbed the statutes' proscription against acts and language calculated to bring on a breach of the peace." *Id.* at 167–68, 192 S.E.2d at 575–76; *see also State v. Clark*, 22 N.C. App. 81, 87, 206 S.E.2d 252, 256 (1974) (emphasis added) ("Defendant also argues that section (a)(2) of G.S. § 14-288.4, as amended in 1971, is unconstitutionally vague and overbroad. This argument has no application to the present case because *the trial judge restricted the jury's consideration of what constituted disorderly conduct* to sections (a)(3), (a)(4), and (a)(5)b. of G.S. § 14-288.4 (1971). Defendant advances no argument that these sections are unconstitutional."); *State v. Orang*e, 22 N.C. App. 220, 222–23, 206 S.E.2d 377, 379 (1974).

In order to constitutionally determine a communication falls into the "true threat" "unprotected" category of speech, the requirements imposed by the First Amendment must be included as *essential elements* of the underlying crime charged. Further, the "intent" required to prove "true threat" in accordance with the First Amendment is also an *element* of the underlying crime, and must be proven by the State, to the jury, beyond a reasonable doubt. We therefore hold that "true threat," and the proper intent requirements, are essential elements of N.C.G.S. § 14-16.7(a) and must be treated as such by the trial court. We discuss the appropriate intent requirements next.

3. Intent

[3] Congress enacted the anti-threat statute that would become 18 U.S.C. § 871(a) on 14 February 1917. *See Ragansky v. United States*, 253 F. 643, 644 (7th Cir. 1918). 18 U.S.C. § 871(a) states in part:

> Whoever knowingly and willfully deposits for conveyance in the mail . . . any . . . writing . . . containing any threat to take the life of . . . or to inflict bodily harm upon the President of the United States, . . . or knowingly and willfully otherwise makes any such threat against the President, . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 871(a). Shortly thereafter, federal courts began interpreting this statute and the intent requirement for 18 U.S.C. § 871(a) and other anti-threat statutes. The intent requirement for anti-threat statutes was primarily taken from the Seventh Circuit's 1918 opinion in *Ragansky*. The "*Ragansky* test of intention" was adopted by the majority of federal jurisdictions to determine the element of "willfulness" in prosecutions under 18 U.S.C. § 871(a). *United States v. Patillo*, 438 F.2d 13, 14 (4th Cir. 1971) (*Patillo II*). The Supreme Court did not address any of the issues raised by 18 U.S.C. § 871(a) and other anti-threat statutes until *Watts*, where the Court, referencing *Ragansky* specifically, acknowledged that there was disagreement in the lower courts "over whether or not the 'willfullness' requirement of [18 U.S.C. § 871(a)] implied that a defendant must have intended to carry out his 'threat.' " *Watts*, 394 U.S. at 707, 22 L. Ed. 2d at 667. The defendant in *Ragansky* was convicted of "knowingly and willfully making threats to take the life of the President" pursuant to 18 U.S.C. § 871. *Ragansky*, 253 F. at 644. The defendant had made the statements:

> "I can make bombs and I will make bombs and blow up the President"; . . . "We ought to make the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all of the rest of the crooks and blow it up" [and;] "I would like to make a bomb big enough to blow up the Capitol and President and all the Senators and everybody in it."

Id. at 644. The *Ragansky* court stated: "[I]t appears . . . that 'there was a claim by this defendant and testimony in corroboration of his claim that he was joking, that he was not in earnest, that he did not intend to kill him.' " *Id.* The trial court instructed the jury that the defendant's " 'claim that the language was used as a joke, in fun,' is not a defense." *Id.* On appeal, the Seventh Circuit defined "willfully" and "knowingly," and articulated a standard for intent in anti-threat statutes:

> It was not claimed that every one present understood that he was joking, *or that he intended them so to understand*;

[10] the claim appears to have been that defendant had no intention to carry out his threat, and that, therefore, it was a joke; the instruction read in the light of the entire charge must be so construed, and in our judgment it was correct.

A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat.

And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and *intentionally* utters them *as the declaration of an apparent determination to carry them into execution.*

Defendant, while conceding that an intention actually to carry out the threat or the President's knowledge of the threat is not essential, contends that the language must be used with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, "that willfully implies an evil purpose—legal malice."

[The defendant's] present contention cannot be sustained, if by evil purpose or legal malice, more is meant than *an intention to give utterance to words* which, *to defendant's knowledge*, were in form and *would naturally be understood by the hearers as being a threat; that is*, *the expression of a determination*, *whether actual or only pretended*, *to menace the President's safety.*

While under some circumstances, the word "willfully" in penal statutes means not merely voluntarily, but with a bad purpose, nothing in the text, context, or history of this legislation indicates the materiality of the hidden intent or purpose of one who, in the presence of others, voluntarily uses language *known by him to be in form*

10. Even in *Ragansky* the court is considering the defendant's intent, *i.e.*, what *effect* the defendant *intended his statements to have* on his audience. The implication from the inclusion of what the defendant *did not claim* at trial is that, had there been evidence he intended his statements to be understood as a joke, the outcome may have been different.

> *such a threat*, and who thus, to some extent endangers the President's life.

Id. at 644–45 (citations omitted) (emphasis added). *Ragansky* appears to have required not only that a defendant knew the meaning of the words conveyed, and that the defendant willfully conveyed them, but that the words conveyed were "known by him" to be "in form [that] would naturally be understood by the hearers as being a threat; that is, the expression of a determination, whether actual or only pretended, to menace the President's safety." *Id.* at 645.

Despite this apparent requirement in *Ragansky* that a defendant subjectively *know* the alleged threat would "naturally be understood" as a threat, *id.*, the "*Ragansky* test" was interpreted in subsequent opinions by the majority of federal districts to contain no subjective intent requirement, and thus became a pure "general intent" test. *See United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994) (citation omitted) (" '[s]ection 18 U.S.C. § 875(c) does not require specific intent in regard to the threat element of the offense, but only general intent' "). The general intent test requires "only that the defendant knowingly transmitted the . . . communication[,]" *id.* at 1064 (citations omitted), and that " 'there is substantial evidence that tends to show beyond a reasonable doubt that an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury[.]' " *Id.* at 1065 (citation omitted).[11] This is a negligence standard:

> Courts then ask . . . whether a reasonable person equipped with that knowledge, not the actual defendant, would have recognized the harmfulness of his conduct. That is precisely the Government's position here: [The defendant] can be convicted . . . if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

Elonis, 575 U.S. at __, 192 L. Ed. 2d at 15–6. The "general intent" negligence standards applied in federal and state jurisdictions do not include the apparent requirement in *Ragansky* that the defendant must have had "an intention" to communicate "words which, *to defendant's knowledge*,

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11. The Fourth Circuit employs a "reasonable recipient" of the alleged threat "general intent" standard, which is in line with *Ragansky*, but this version of the general intent standard is not universally accepted in the federal circuits. Furthermore, the Fourth Circuit occasionally applies the specific intent standard set forth in *Patillo*, 431 F.2d 293 and *Patillo II*, 438 F.2d 13. *See Lockhart*, 382 F.3d at 449–50.

were in form and would naturally be understood by the hearers as being a threat[.]" *Ragansky*, 253 F. at 645 (emphasis added).[12]

Our reading of *Ragansky* is bolstered by the *Ragansky* court's reliance on *United States v. Stickrath*, 242 F. 151 (S.D. Ohio 1917). The court in *Stickrath* stated: "Doing a thing knowingly and willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it. *Felton v. U.S.*, 96 U.S. 699; *Potter v. U.S.*, 155 U.S. 438, 446." *Stickrath*, 242 F. at 154 (citations omitted). The court further explained:

> As used in the statute [the terms "knowingly" and "willfully"] are intended to signify that the defendant, at the time of making the threat charged against him, *must have known what he was doing*, and, *with such knowledge*, proceeded in violation of law to make [the threat]. They are *used in contradistinction to "ignorantly" and "unintentionally."* The offense denounced by the statute is completed at the instant the unlawful threat is knowingly and willfully made. It is not the execution of such threat, *or* (as claimed by defendant) *a continuing intent to execute it*, that constitutes the offense, *but the making of it knowingly and willfully*. If it be thus made, *the subsequent abandonment of the bad intent with which it was made does not obliterate the crime.*

Id. (emphasis added). Pursuant to the holding in *Stickrath*, a defendant had to "know what he was doing," *i.e.*, making a threat, and "with such knowledge, proceed in violation of law to make it." *Id.* Thus, the holding in *Stickrath* appears to require that the defendant had "the bad intent" to carry out the threat at the time the threat was made, but once the defendant had made the threat with intent to carry it out, the crime was complete, and the defendant's subsequent abandonment of the bad intent to carry out the threat was no defense. *Id.* Therefore, though *Ragansky* cited *Stickrath* in support of its holding, *Ragansky* actually contradicts *Stickrath's* statement that "[d]oing a thing knowingly and willfully implies, not only a knowledge of the thing, but a determination with a bad intent to do it." *Id.* The logical implication from *Stickrath* is that an intent to execute the alleged threat had to exist at the time it was made. *Id. Ragansky* abandoned the *Stickrath* specific intent to carry

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12. Also: "[O]ne who, in the presence of others, voluntarily uses language known by him to be in form . . . a threat[,]" *i.e.*, "the expression of a determination, whether actual or only pretended, to menace the President's safety[,]" may be prosecuted under the statute. *Ragansky*, 253 F. at 645 (citation omitted) (emphasis added).

out the threat element, but maintained a specific intent element requiring proof that a defendant had "an intention to give utterance to words which, to defendant's knowledge, were in form and would naturally be understood by the hearers as being a threat[.]" *Ragansky*, 253 F. at 645.

It was these intent elements that were mentioned in *Watts*. In the case of *Watts*, the defendant was convicted under 18 U.S.C. § 871 of knowingly and willfully making a threat to kill the President. *Watts v. United State*s, 402 F.2d 676, 677 (D.C. Cir. 1968) ("*Watts I*"), *rev'd*, 394 U.S. 705, 22 L. Ed. 2d 664 (1969). The defendant's appeal was rejected by the D.C. Circuit Court of Appeals, which affirmed the following jury instruction: " 'It is the making of the threat, not the intent to carry it out, that violates the law.' " *Id.* at 678. Judge Wright dissented in *Watts I*, thoroughly reviewing the legislative history of the statute and its subsequent treatment by federal courts. *Id.* at 686–91 (Wright, J., dissenting). Judge Wright stated: "Where statutes impinge upon protected speech, statutory provisions governing intent will be read to require specific intent." *Id.* at 691 (citations omitted).

In *Watts*, the Supreme Court reversed the circuit court's *Watts I* opinion and specifically cited Judge Wright's dissent as it seriously questioned the constitutionality of the *Ragansky* test:

> Some early cases [such as *Ragansky*] found the willfullness requirement met if the speaker voluntarily uttered the charged words with "an apparent determination to carry them into execution." The majority below seemed to agree. Perhaps this interpretation is correct, *although we have grave doubts about it. See the dissenting opinion below*, [*Watts I*], 402 F.2d at 686–93 (Wright, J.).

Watts, 394 U.S. at 707–08, 22 L. Ed. 2d at 667 (emphasis added) (some citations omitted).

Despite the Court's apparent agreement, at least in part, with Judge Wright's dissent, and its stated "grave doubts" that the *Ragansky* standard could survive First Amendment analysis, the Court did not answer the question of whether the First Amendment requires a specific, as well as general, intent standard. The Court did, however, make clear that the First Amendment does not permit prosecution of every communication that could be considered threatening: "[A] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *Watts*, 394 U.S. at 707, 22 L. Ed. 2d at 667. The Court held: "[W]hatever

the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by [the defendant] fits within that statutory term." *Id.* at 708, 22 L. Ed. 2d at 667. This holding is the genesis of the "true threat" requirement.

The result of the Court's decision not to decide the intent issue was that most federal circuits maintained the *status quo*. Although most circuits continued to apply a general intent standard after *Watts*, in *United States v. Patillo* the Fourth Circuit responded to *Watts* by essentially adopting the standard set forth in Judge Wright's dissent in *Watts I*: "In deciding *Watts*, the [Supreme] Court recognized two major elements in the offense created by Congress in 18 U.S.C. Section 871(a). The first is that there be proved a true 'threat,' and the second is that the threat be made 'knowingly and willfully[.]' " *Patillo*, 431 F.2d at 295. In *Patillo*, the Fourth Circuit held the defendant's statements were "true threats," then stated: "We must next determine whether the trier of fact properly found that those threats were uttered with the degree of willfulness sufficient for conviction under" the anti-threat statute. *Id.* at 296. The *Patillo* court further stated: "*Watts* [] does not resolve a long term controversy over whether 'willfulness' means 'that a defendant must have intended to carry out his 'threat[,]' " but noted the Supreme Court had "grave doubts" that the statute could be constitutionally applied without a specific intent requirement. *Id.* (citation omitted). The court in *Patillo* determined the First Amendment required a defendant's intent to be something more than that set forth in the *Ragansky* standard:

> We think that many of the courts that construed Section 871(a) prior to *Watts* departed "from the plain meaning of words . . . in search of an intention which the words themselves did not suggest," with pernicious results. . . . The interpretation of "knowingly and willfully" alluded to by the Supreme Court in *Watts* was first stated in [*Ragansky*:]
>
> > A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him. . . . And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.
>
> This language in *Ragansky* was part and parcel of a holding, now discredited by *Watts*, that a statement made in jest falls within the ambit of Section 871(a).

> The *Ragansky* interpretation of "willfully and knowingly" is not in keeping with the meaning traditionally accorded to those words when found in criminal statutes. "The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose. . . ." *Ragansky's* version of the willfulness requirement demands only an "apparent determination," expressed by the words themselves, to perpetrate the act threatened. We believe that a "bad purpose" assumes even more than its usual importance in a criminal prosecution based upon the bare utterance of words. Americans, nurtured upon the concept of free speech, are not accustomed to controlling their tongues to avoid criminal indictment.

Id. at 297 (citations omitted). The court concluded: "We hold that where, as in [this] case, a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made with a *present intention to do injury* to the President." *Id.* at 297–98 (emphasis added) (footnote omitted). The Fourth Circuit reconsidered *Patillo en banc* because: "It [was] urged upon us in the [government's] petition that the Supreme Court's 'grave doubts,' [stated in *Watts*,] as to the *Ragansky* test of intention must now have been dispelled by two recent decisions from the Second and Ninth Circuits." *Patillo II*, 438 F.2d at 14 (citations omitted). *Patillo II* reviewed the "two recent decisions," but reasoned:

> [F]or the reasons stated in the majority opinion of the [*Patillo*] panel, we reject the *Ragansky* test of intention. We think that an *essential element* of guilt is a present intention either to injure the President, or incite others to injure him[.] Much of what we say here is *dicta* justified, we think, by apparent misunderstanding of our prior panel decision.

Id. at 16 (citation omitted). Although the Fourth Circuit now appears to apply a general intent standard when reviewing anti-threat statutes, *see Darby*, 37 F.3d at 1066, *Patillo* and *Patillo II* have been cited by the Fourth Circuit as recently as 2004 and have not been expressly overruled. *See Lockhart*, 382 F.3d at 449–50; *United States v. Cooper*, 865 F.2d 83, 85 (4th Cir. 1989) (specific intent requirement of *Patillo* was met in prosecution under 18 U.S.C. § 878 because evidence sufficient for jury to determine the defendant "had a present intention to shoot Gandhi").

The Supreme Court's next case involving "true threats" was *Rogers v. United States*, 422 U.S. 35, 45 L. Ed. 2d 1 (1975). However, the Court again resolved the case without addressing the issue of intent. *Id.* at 40–41, 45 L. Ed. 2d at 7. Justice Marshall wrote a concurring opinion in *Rogers*, which Justice Douglas joined, stating in part:

> The District Court and the Court of Appeals adopted what has been termed the "objective" construction of the [anti-threat] statute. This interpretation of [section] 871 originated with the early case of *Ragansky*, and it has been adopted by a majority of the Courts of Appeals, even though this Court has expressed "grave doubts" as to its correctness. As applied in *Ragansky* and later cases, this construction would support the conviction of anyone making a statement that would reasonably be understood as a threat, as long as the defendant intended to make the statement and knew the meaning of the words used.

Id. at 43, 45 L. Ed. 2d at 8 (Marshall, J., concurring) (footnotes and citations omitted).[13] Justice Marshall stated: "In my view, this construction of [section] 871 is too broad." *Id.* at 44, 45 L. Ed. 2d at 9. "In *Watts*, [the Court] observed that giving [section] 871 an expansive construction would create a substantial risk that crude, but constitutionally protected, speech might be criminalized." *Id.* Justice Marshall further stated: "Both the legislative history and the purposes of the statute are inconsistent with the 'objective' construction of [section] 871 and suggest that a narrower view of the statute is proper." *Id.* Justice Marshall concluded: "I would therefore interpret [section] 871 to require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out." *Id.* at 48, 45 L. Ed. 2d at 11.

Individual justices have continued to express their beliefs that the First Amendment requires a specific intent as well as a general intent. *See, in chronological order*, *Abrams v. United States*, 250 U.S. 616, 627, 63 L. Ed. 1173, 1179 (1919) (Holmes, J., dissenting) ("[W]hen words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.");

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13. As discussed above, it is not clear that the interpretation of *Ragansky* in subsequent opinions correctly states the standard set forth therein.

Watts, 394 U.S. at 708, 22 L. Ed. 2d at 667 (stating the Court "ha[d] grave doubts" that the general intent standard was constitutionally sufficient to sustain a conviction pursuant to an anti-threat statute); *Elonis*, 575 U.S. at __, 192 L. Ed. 2d at 20–2 (Alito, J., concurring) (arguing that the First Amendment required something more than an objective standard, but that a "recklessness" standard would suffice); *Perez v. Florida*, __ U.S. __, __, 197 L. Ed. 2d 480, 482 (2017) (Sotomayor, J., concurring) ("Together, *Watts* and *Black* make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—some level of intent is required. And these two cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.").

The next Supreme Court opinion involving "true threats" was *Black*, which contained the first definition of a "true threat" by the Court, and seriously called into question the constitutionality of prosecuting someone under an anti-threat statute without any "true threat" specific intent requirement. *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552 (citation omitted) (stating in part that " '[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals"). Thereafter, the Fourth Circuit

> recognize[d] the potential for a conflict between the Supreme Court's definition of a true threat [in *Black*] and an objective analysis of a true threat. At least two Circuit Courts of Appeal have seized upon this potential conflict, and resolved it by concluding that the Supreme Court's definition of a true threat . . . precludes an objective analysis. Other courts have suggested that *Black* be interpreted to require both an objective and subjective inquiry in the analysis of a true threat.

United States v. White, 2010 WL 438088, at *8 (W.D.Va. Feb. 4, 2010), *aff'd in part, vacated in part, and remanded*, 670 F.3d 498 (4th Cir. 2012) (citations omitted). The Fourth Circuit decided to "remain" a general intent jurisdiction despite *Black*.[14] *White I*, 670 F.3d at 509 (citation

14. Except for the uncertain status of *Patillo*, 431 F.2d 293. *See Lockhart*, 382 F.3d at 449–50; *United States v. Spring*, 305 F.3d 276, 280–81 (4th Cir. 2002); *United States v. Maxton*, 940 F.2d 103, 106 (4th Cir. 1991) (citation omitted) ("extrinsic evidence to prove an intent to threaten should only be necessary when the threatening nature of the communication is ambiguous"); *Cooper*, 865 F.2d at 85 (specific intent requirement of *Patillo*

omitted) (emphasis in original) ("[W]hile the speaker need only *intend to communicate* a statement, whether the statement amounts to a true threat is determined by the understanding of a *reasonable recipient familiar with the context* that the statement is a 'serious expression of an intent to do harm' to the recipient. This is and has been the law of this circuit, and nothing in *Black* appears to be in tension with it.").

General intent jurisdictions like the Fourth Circuit have focused on the following language from *Black*: " 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552. These jurisdictions have construed this language as consistent with the general intent standard that evolved from *Ragansky*, *i.e.*, that the defendant understood the meaning of the words in the statement alleged to be a threat; a reasonable person familiar with the context would understand the statement as "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals[,]" *id.*; and the defendant "mean[t] to communicate" the statement. The State need only prove that the defendant intended to communicate the statement, without regard to whether the defendant meant the statement to constitute or contain a threat of any kind, and without regard to whether the defendant had any bad purpose in communicating the statement.

However, this interpretation does not appear to us as being the only logical reading of *Black*, nor even the most obvious. Particularly since we are construing language involving criminal liability, *see Rogers*, 422 U.S. at 47, 45 L. Ed. 2d at 10–1, the interpretation of the *Black* "true threat" definition found in *White I*, 670 F.3d at 509, and opinions from other jurisdictions, leaves us unconvinced. The definition in *Black* can just as readily be read as holding a "true threat" is one where what "the speaker means to communicate" is a "statement" the speaker *intends*

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met because evidence was sufficient for jury to conclude the defendant "had a present intention to shoot Gandhi"); *United States v. McMurtrey*, 826 F.2d 1061, 1987 WL 38495, *2 (4th Cir. 1987) (unpublished) (citing *Patillo*, and holding "a present intent to do injury" is essential element of 18 U.S.C. § 871(a)); *United States v. Maisonet*, 484 F.2d 1356, 1359 (4th Cir. 1973) (finding First Amendment requirements satisfied because the jury was "charged . . . that the government was required to prove . . . that [the defendant] intended [the communication] to be such a threat"); *United States v. Smith*, 448 F.2d 726, 727 (4th Cir. 1971); *United States v. Dutsch*, 357 F.2d 331, 333 (4th Cir. 1966) (citation omitted) ("[A] conviction under 18 U.S.C. § 875(c) requires a showing that a threat was intended[.]"); *but see Darby*, 37 F.3d at 1063–66 (4th Cir.) (holding no specific intent required, partly on the erroneous determination that the relevant language in *Dutsch* was "merely *dictum*," and by dismissing *Patillo* in a footnote without any analysis).

the recipient to understand as "a serious expression of an intent to commit an act of unlawful violence[.]" *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552; *see also*, *generally*, *United States v. X-Citement Video*, *Inc.*, 513 U.S. 64, 68–9, 79, 130 L. Ed. 2d 372, 379, 385 (1994) (holding First Amendment required construction of a statute so that the intent element attaches to all of the additional elements). For example: "John's statement was meant to communicate a serious expression of an intent to kill Ron." The obvious, ordinary, and natural reading of this sentence is that John's purpose, or intent, was to inform the recipient that John *planned to kill Ron*, not that John's intent was simply to communicate *something* to the recipient. Of course, in the example, John *also* intended to communicate the statement to the recipient, but only as a means of delivering the specific message contained therein: a threat.

We agree with the Ninth Circuit, which did not appear to identify any alternate reading in the language from *Black*:

> The Court held in [*Black*] that under the First Amendment the State can punish threatening expression, but only if the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *It is therefore not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.*

Bagdasarian, 652 F.3d at 1116 (emphasis added) (citations omitted). The Ninth Circuit said of the Supreme Court's definition of "true threat" in *Black*:

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that "the speaker means to communicate . . . an intent to commit an act of unlawful violence." A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.

Cassel, 408 F.3d at 631. The court in *Cassel* held that it was "bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Cassel*, 408 F.3d at 633 (footnote omitted). In *Bagdasarian*, the Ninth Circuit held that the constitutionally required elements of "true threat" and "specific intent" were essential elements in addition to the statutory elements:

> *Two elements* must be met for a statement to constitute an offense under [the statute]: objective and subjective. The *first* is that the statement would be understood by people hearing or reading it in context as a serious expression of an intent to kill or injure a major candidate for President. [15] The *second* is that the defendant intended that the statement be understood as a threat. [The defendant's] conviction under [the statute] can be upheld only if both the objective and subjective requirements are met[.]

Bagdasarian, 652 F.3d at 1118 (citations omitted) (emphasis added).

The Tenth Circuit, after a lengthy and thorough analysis, held: "Does the First Amendment, as construed in *Black*, require the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened? We conclude that it does." *United States v. Heineman*, 767 F.3d 970, 975 (10th Cir. 2014). The court contended *Black* had "been misconstrued by some courts that we highly respect" and held that "a careful review of the opinions of the Justices [in *Black*] makes clear that a true threat must be made with the intent to instill fear." *Id.* at 976; *id.* at 978 (alteration in original) (citation omitted) ("When the Court says that the speaker must 'mean[] to communicate a serious expression of an intent,' it is requiring more than a purpose to communicate just the threatening words. It is requiring that the speaker want the recipient to believe that the speaker intends to act violently."). This specific intent requirement is in addition to the "reasonable person" general intent requirement necessary to prove the threat was a "true threat." *Id.* at 972–73 (citations omitted) ("[T]he statement itself must be one that a reasonable person in the circumstances would understand 'as a declaration of intention, purpose, design, goal, or determination to inflict [bodily injury] on another.' And '[i]t is not necessary to show that [the] defendant intended to carry out the threat,' although the threat must be a serious one, 'as distinguished from words as mere political argument, idle talk or jest.' ").

In *Elonis*, the Supreme Court did not answer the issue before it, whether the First Amendment required more than a general intent standard; instead, it reversed the Court of Appeals based solely on federal statutory construction grounds. The Court held: "Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." *Elonis*, 575 U.S. at __, 192 L. Ed. 2d at

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15. In other words, a true threat.

16. "Under [an anti-threat statute], 'wrongdoing must be conscious to be criminal.' " *Id.* "[A] defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like[,]" because " 'wrongdoing must be conscious to be criminal' " and "the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.' " *Id.* at __, 192 L. Ed. 2d at 12–13 (citations omitted). We find the analysis in *Elonis* relevant to our review because long-standing Supreme Court precedent generally requires statutes criminalizing speech to be construed *more narrowly* than criminal statutes not implicating First Amendment protections:

> "[T]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." . . . [T]he question here is as to the validity of this ordinance's elimination of the scienter requirement—an elimination which may tend to work as substantial restriction on the freedom of speech and of the press. Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, *which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.*

Smith v. California, 361 U.S. 147, 150–51, 4 L. Ed. 2d 205, 209–10 (1959) (emphasis added) (citations omitted); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 56 L. Ed. 2d 525, 541 (1978) (citation omitted) ("Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.' ").

Based upon the above analysis, we hold the First Amendment requires that a specific intent element be read into anti-threat statutes. We further agree with the federal districts and hold that proof of a "true threat" requires a general intent test. We believe the general intent test should be from the viewpoint of an objective, reasonable person considering the alleged threat in full context.[16] What is required to prove the "true threat" element and the intent elements will be discussed further below. Therefore, anti-threat statutes must be construed to include,

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16. We do not believe the "reasonable person" should have to attempt to step into the shoes of either the defendant or the person allegedly threatened.

in addition to the statutory elements, the constitutionally required elements of "true threat," as determined through application of the general intent test adopted above to the definition of a "true threat," and a "specific intent" to threaten.

4. Is "True Threat" a Question of Fact or Law

[4] The Supreme Court has recognized "the vexing nature" of "distinguishing law from fact." *Bose*, 466 U.S. at 501, 80 L. Ed. 2d at 517 (citation and quotation marks omitted). The State contends "true threat" is a question of law that only a court can decide. The elements necessary to prove speech falls within a recognized category of "unprotected" speech, such as "actual malice" or "true threat," have been referred to as "questions of fact," "questions of law," "mixed questions of fact and law," "ultimate facts," and "constitutional facts." *See Bose*, 466 U.S. at 498–510, 517, 80 L. Ed. 2d at 510–522, 527–28. The Supreme Court generally refers to these determinations as mixed questions of fact and law or, more specifically, as "constitutional facts." *Id.*; *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002). According to the Ninth Circuit: "Constitutional facts are facts—such as the existence of actual malice or whether a statement is a true threat—that determine the core issue of whether the challenged speech is protected by the First Amendment." *Id.* "[Q]uestions of 'constitutional fact' have been held to require de novo review." *Jacobellis v. Ohio*, 378 U.S. 184, 190 n.6, 12 L. Ed. 2d 793, 799 n.6 (1964) (citations omitted); *Bose*, 466 U.S. at 508 n.27, 80 L. Ed. 2d at 522 n.27. For this reason, appellate courts will conduct *de novo* whole record review in First Amendment cases, even though " 'the jury was properly instructed and there is some evidence to support its findings[.]' " *Id.* at 506–07, 80 L. Ed. 2d at 520-21 (citation omitted).

Therefore, whatever terminology is applied to the issue of whether speech falls within one of the "unprotected" categories, that question is *usually* for the jury to determine in the first instance:

> If it were clear, as a matter of law, that the speech in question was protected, [*i.e.*, not a true threat,] we would be obligated to remand not for a new trial, but for a judgment of acquittal. If, on the other hand, "there were material facts in dispute or it was not clear that [the communications] were protected expression or true threats," it was appropriate to submit the issue, in the first instance, to the jury.

Hanna, 293 F.3d at 1087 (citations omitted); *see also id.* at 1088 n.5.

5. Proving a "True Threat"

a. **Definition**

[5] In order to prove a "true threat," the State and the trial court must first know the proper definition of "true threat." "[T]he First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive. What is offensive to some is passionate to others. The First Amendment . . . requires [the trier of fact] . . . to differentiate between 'true threat[s],' and protected speech." *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (alteration in original) (citation omitted). The Supreme Court in *Watts* did not provide a definition of "true threat," but made clear that speech may not be punished simply because it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"; because it is "vituperative, abusive, and inexact"; or because it constitutes "a kind of very crude offensive method of stating a political opposition to" a public official. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667 (citations omitted). It is clear that "threats" that amount to nothing more than jest, idle talk, or political hyperbole are protected speech. *Id.*; *United States v. Spruill*, 118 F.3d 221, 228 (4th Cir. 1997). "True threats" do not include "the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee." 16A Am. Jur. 2d Constitutional Law § 527 (footnote omitted).

A "true threat" "instills in the addressee a fear of . . . serious personal violence from the speaker, it is unequivocal, and it is objectively likely to be followed by unlawful acts[.]" *Id.* The Second Circuit noted that the purpose of the *Watts* "true threat" requirement was to

> insure that only unequivocal, unconditional and specific expressions of intention . . . to inflict injury may be punished—only such threats, in short, as are of the same nature as those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues.'

United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976) (citation omitted). "To fall outside of the First Amendment's protections, a threat must 'according to its language and context convey[] a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected vehement, caustic, unpleasantly sharp attacks on government and public officials.' " *United States v. Dillard*, 795 F.3d 1191,

1199 (10th Cir. 2015) (alteration in original) (citations and quotation marks omitted).

As noted, *Black* is the source of the definition of "true threats" currently applied in most, if not all, "true threats" cases:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Black, 538 U.S. at 359–60, 155 L. Ed. 2d at 552 (alteration in original) (citations omitted). We construe the definition set forth in *Black* within the context of "true threat" analysis laid out above. A "true threat" is a statement where the speaker intends to communicate, to a particular individual or group of individuals, a threat, being "a serious expression of an intent to commit an act of unlawful violence[.]" *Id.*

b. **Intent**

As held above, we adopt the standard set forth by the Ninth Circuit, which includes both a general intent standard to prove a "true threat," and a specific intent standard to prove a defendant's subjective intent to threaten a person or group of persons by communicating the alleged threat. *Bagdasarian*, 652 F.3d at 1118 (citations omitted) ("Two elements must be met for a statement to constitute an offense under [an anti-threat statute]: objective and subjective.").

c. **Context**

The Supreme Court has long recognized that determination of whether a defendant's "speech" falls into one of the categories of "unprotected" speech, such as "true threats," must be made considering the context in which the communication was made; *i.e.*, all the facts surrounding the communication of the challenged speech. *See*, *e.g.*, *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 750, 57 L. Ed. 2d 1073, 1094 (1978) ("[C]ontext is all-important[;] [t]he concept requires consideration of a

host of variables."); *Denver Area Educ. Tel. v. F.C.C.*, 518 U.S. 727, 752, 135 L. Ed. 2d 888, 908 (1996) (citations omitted) ("[W]hat is 'patently offensive' depends on context[.]"). As with the other "unprotected" categories, the Supreme Court looks to the context of an alleged threat in order to determine whether it constitutes a "true threat." *Watts*, 394 U.S. at 707–08, 22 L. Ed. 2d at 667.

Federal circuit courts have consistently held that determination of whether a "threat" rises to the level of a "true threat" must be determined not only based on the specific language used, or acts undertaken, but also by the context within which the alleged threat was made. "Determining whether a statement amounts to a true threat requires 'a fact-intensive inquiry, in which the language, the context in which the statements are made, as well as the recipients' responses are all relevant.' " *United States v. Wheeler*, 776 F.3d 736, 743 (10th Cir. 2015) (citations omitted). The Ninth Circuit recognized in 2002: "We, and so far as we can tell, other circuits as well, consider the whole factual context and 'all of the circumstances' in order to determine whether a statement is a true threat." *Planned Parenthood v. Amer. Coal. of Life*, 290 F.3d 1058, 1078 (9th Cir. 2002) (citation omitted); *see also id.* at 1078–79 (cases cited therein); *United States v. Khorrami*, 895 F.2d 1186, 1193 (7th Cir. 1990) (citation omitted) ("In *Hoffman* we emphasized the importance of the context of a statement in determining whether it is a true threat or merely political hyperbole."). The Fourth Circuit has also recognized the "*Watts* requirement that the defendant's statement be examined in its full context[.]" *Patillo*, 431 F.2d at 296 (citation omitted); *White II*, 810 F.3d at 220. State courts also require consideration of context. *See*, *e.g.*, *Colorado v. McIntier*, 134 P.3d 467, 472 (Colo. App. 2005) ("The critical inquiry is 'whether the statements, viewed in the context in which they were spoken or written, constitute a "true threat" ' "); *Harrell v. Georgia*,778 S.E.2d 196, 200–01 (Ga. 2015). Therefore, we hold:

> Two elements must be met for a statement to constitute an offense under [an anti-threat statute]: objective and subjective. The first is that the statement would be understood by people hearing or reading it *in context* as a *serious expression of an intent to kill or injure* [the person or persons from an identified group]. The second is that the defendant *intended* that the statement *be understood as a threat*. Because [a defendant's] conviction under [an anti-threat statute] can be upheld only if both the objective and subjective requirements are met, neither standard is the obvious starting point for

> [appellate] analysis, and . . . resolution of either issue may serve as an alternate holding.

Bagdasarian, 652 F.3d at 1118 (emphasis added) (citations omitted).

6. Jury Instructions

[6] As recognized by our Supreme Court, correct and thorough jury instructions are fundamental to a fair and reliable trial:

> "The jury charge is one of the most critical parts of a criminal trial." "The purpose of . . . a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict," including how "the law . . . should be applied to the evidence[.]" As a result, the trial court has a duty "to instruct the jury on all substantial features of a case raised by the evidence." In the event that a "defendant's request for [an] instruction [is] correct in law and supported by the evidence in the case, the trial court [is] required to give the instruction, at least in substance." "[I]n giving jury instructions," however, " '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, 324–25, 807 S.E.2d 528, 537 (2017) (alterations in original) (citations omitted). Complete and proper jury instructions are vital for the "essential feature of a jury[,] . . . [its] interposition between the accused and his accuser." *Williams v. Florida*, 399 U.S. 78, 100, 26 L. Ed. 2d 446, 460 (1970).

"[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime." *Alleyne*, 570 U.S. at 114, 186 L. Ed. 2d at 329. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' . . . of the charged offense." *Id.* at 107, 186 L. Ed. 2d at 324 (citations omitted). " 'The general rule is that what is necessary to be charged as a descriptive part of the offense[, an essential element,] is required to be proved' " by the State beyond a reasonable doubt. *State v. Mather*, 221 N.C. App. 593, 599, 728 S.E.2d 430, 434 (2012) (quoting *State v. Connor*, 14 N.C. 700, 704, 55 S.E. 787, 789 (1906)). "This Court . . . reviews de novo the trial court's jury instructions regarding the elements of the offense at issue." *State v. Watterson*, 198 N.C. App. 500, 503, 679 S.E.2d 897, 899 (2009) (citation omitted).

a. **Requirements**

Failure to submit every essential element of a crime for jury determination violates the defendant's constitutional rights:

> The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. The substance and scope of this right depend upon the proper designation of the facts that are elements of the crime.

Alleyne, 570 U.S. at 104–05, 186 L. Ed. 2d at 322 (citations omitted). As discussed above, a "true threat" is a "constitutional fact" that must be proven by the State beyond a reasonable doubt. Therefore, "true threat" is an *essential element* of N.C.G.S. § 14-16.7(a), and the trial court is constitutionally prohibited from deciding the existence of a "true threat" as a matter of law:[17]

> At stake . . . are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a *jury determination that [he] is guilty of every element of the crime with which he is charged*, beyond a reasonable doubt."

Apprendi, 530 U.S. at 476–77, 147 L. Ed. 2d 435, 447 (emphasis added) (citations omitted); *see also Lockhart*, 382 F.3d at 449–50 (listing "true threat" as an element required by the First Amendment).

Nonetheless, the State argues that the trial court has no obligation to instruct the jury on any aspect of "true threat" jurisprudence in an anti-threat trial. The State relies on the Supreme Court's opinion in *Dennis*, which, according to the State, "held the courts, not juries, decide whether speech is protected by the First Amendment" and, therefore, the trial court, and not the jury, should determine whether a communication is a "true threat." While it is true that the constitutionality of N.C.G.S. § 14-16.7(a), facially or as applied, is ultimately decided by

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17. The trial court can, of course, determine the *non-existence* of a true threat as a matter of law, prior to, during, or following the evidentiary portion of the trial.

"the courts," the State's additional argument that the trial court, not the jury, should determine whether the facts of a case support a finding of a "true threat" in the first instance is counter to relevant Supreme Court precedent and overwhelming consensus found in federal and state court opinions. In fact, we cannot locate a single jurisdiction that does not send to the jury, in the first instance, the question of whether a defendant's "speech," considered in context, falls into one of the established categories of "unprotected" speech.

The Supreme Court has regularly considered whether the *jury* correctly determined that the government, or the plaintiff, proved elements imposed by the First Amendment, even when those elements were not included in the language of the relevant statute. In fact, the Supreme Court's review of the constitutionality of a state statute may be dictated by the interpretation of the statute as stated in the jury instructions: "[T]he gloss which [the State] placed on the ordinance [by the jury instruction] gives it a meaning and application which are conclusive on us. . . . As construed and applied it at least contains parts that are unconstitutional." *Terminiello v. City of Chicago*, 337 U.S. 1, 5, 93 L. Ed. 1131, 1135 (1949); *see also id.* ("The ordinance as construed by the trial court [in its jury instructions] seriously invaded [First Amendment protections]. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest."); *Black*, 538 U.S. at 364–65, 155 L. Ed. 2d at 556 ("As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.").

The Tenth Circuit expressly rejected the State's reading of *Dennis*:

> Citing *Dennis*, [the defendant] also argues the district court should have resolved his First Amendment defense as a matter of law rather than submit the matter to the jury. . . . [In *Dennis*,] [t]he trial court denied defendants' motion to dismiss, which was based on their assertion that the statute was unconstitutional. . . .
>
> *Dennis* is readily distinguishable. Here, [the defendant] is not contesting the [facial] constitutionality of [the anti-threat statute]. Rather, he asserts only that his particular speech was political in nature. We consistently have held that whether a defendant's statement is a true threat or mere political speech is a question for the jury. If there is no question that a defendant's speech is protected by the

> First Amendment, the court may dismiss the charge as a matter of law.

United States v. Viefhaus, 168 F.3d 392, 396–97 (10th Cir. 1999) (citations omitted). The Fourth Circuit has repeatedly acknowledged that " '[g]enerally, what is or is not a true threat is a jury question[.]' " *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 692 (4th Cir. 2018) (citation omitted). The Fourth Circuit has cited *Dennis* for the proposition that a defendant is "entitled to have the issue as to whether his statements constituted a [true] 'threat' properly submitted to the jury." *Alexander*, 418 F.2d at 1206. Every other federal circuit is in agreement. *See, e.g.*, *United States v. Stock*, 728 F.3d 287, 297–98 (3rd Cir. 2013). Courts from other states have also addressed the "true threat" jury instruction issue. *See Johnston*, 127 P.3d at 712 (agreeing with "*Black*, our decisions . . ., and the body of federal case law[,]" which have held anti-threat statutes "must be limited to true threats . . . and the jury must be instructed accordingly"); *see also, e.g.*, *North Dakota v. Brossart*, 858 N.W.2d 275, 284–85 (N.D. 2015).

The United States Constitution demands that the State prove *every* element of a criminal offense beyond a reasonable doubt to a jury, absent proper waiver of a jury trial. Sixth and Fourteenth Amendment "rights indisputably entitle a criminal defendant to 'a *jury determination* that [he] is guilty of *every element of the crime* with which he is charged, beyond a reasonable doubt.' " *Apprendi*, 530 U.S. at 476–77, 147 L. Ed. 2d at 447 (citations omitted) (emphasis added); *see also In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970). We hold that the trial court must properly and fully instruct the jury on all the required elements of anti-threat statutes such as N.C.G.S. § 14-16.7(a), including the element of "true threat," along with its associated intent elements, both general and specific.

Our Supreme Court has recognized that the trial court must instruct the jury in a manner that ensures the defendant's First Amendment rights will not be violated. *State v. Leigh*, 278 N.C. 243, 252, 179 S.E.2d 708, 713 (1971). In *Leigh*, the Court granted the defendant a new trial because "[n]owhere in the charge did the trial judge explain the law or apply the law to the evidence concerning [the] defendant's contention [that his speech was protected by the First Amendment]." *Id.*

In order to obtain a constitutional conviction for threatening a court officer pursuant to N.C.G.S. § 14-16.7(a), the State must prove, beyond a reasonable doubt, that: (1) the defendant; (2) knowingly and willfully; (3) made a threat; (4) constituting a "true threat," meaning a statement "that an ordinary, reasonable [person] who is familiar with the context

in which the statement [wa]s made would interpret as a serious expression of an intent to do harm";[18] (5) to a court official; (6) knowing the court official was a court official; and (7) when the defendant communicated the statement, the defendant specifically intended the statement to be understood by the court officer as a real threat expressing the defendant's intention to carry out the actions threatened. N.C.G.S. § 14-16.7(a); *White II*, 810 F.3d at 221; *Cassel*, 408 F.3d at 632–33.

b. **Prejudice**

Failure to properly instruct a jury on a constitutionally required element of a crime is subject to harmless error review. *See Neder v. United States*, 527 U.S. 1, 11–13, 144 L. Ed. 2d 35, 48–50 (1999). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted).

> [The test] is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *[S]ee Delaware v[.] Van Arsdall*, [475 U.S. 673, 681, 89 L. Ed. 2d 674, 684 (1986)] ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

Neder, 527 U.S. at 15–16, 144 L. Ed. 2d 35 at 51 (citations omitted); *State v. Hammonds*, 370 N.C. 158, 167, 804 S.E.2d 438, 444 (2017) (citing N.C.G.S. § 15A-1443 (2015)) (" 'A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.' ").

III. Defendant's Appeal

A. *As Applied Challenge/Whole Record Review*

[7] Based upon our holdings above, we conduct an independent whole record review to determine whether Defendant's Facebook posts constituted a "true threat" to kill D.A. Welch, and whether Defendant subjectively intended his Facebook posts to reach D.A. Welch for the purpose of causing her to believe that Defendant intended to kill her. *Milkovich*,

18. *White II*, 810 F.3d at 221.

497 U.S. at 17, 111 L. Ed. 2d 17 (citations omitted) (the Supreme Court has "determined that 'in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression" ' "); *Bagdasarian*, 652 F.3d at 1118 (establishing the State must prove a "true threat" pursuant to both a reasonable person general intent standard considering the context, as well as the defendant's specific intent to threaten the alleged victim).

1. Plain Language Review of the Alleged Threats

We first examine each "threat" alleged in the indictment based *solely* upon the plain language; then we examine the alleged threats in context. *See In re White*, 2013 WL 5295652, *44 (E.D.Va. 2013). Defendant's indictment alleged five "threats," and reads in relevant part:

> [D]efendant . . . did knowingly and willfully make a threat to kill Ashley Welch, District Attorney, . . . by posting the following on Facebook: "[P]eople question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go. . . . I will give them both the mtn justice they deserve . . . [I]f our head prosecutor won't do anything then the death to her as well . . . [I]t is up to the people to administer justice! I'm always game to do so. They make new ammo everyday! . . . It is time for old Time mtn justice!"

At trial, the State argued that only five of Defendant's posts, and no posts from Defendant's Facebook friends, should be admitted into evidence, contending: "We believe those are the five relevant texts. It's the State's position that the other texts . . . are not relevant." "The question is under the elements and under the statute did [D]efendant threaten to kill [D.A. Welch]. The context of that conversation is not relevant[.]" Further, the five posts did not fully align with the posts containing the alleged threats in the indictment. The State told the jury in its closing argument: "We had Detective Stewart read you . . . the five posts that the State finds at issue." One of the five posts constituting State's Exhibits 1 – 5 did not include any of Defendant's comments from the indictment, and one of the comments included in Defendant's indictment was not included in any of the posts the State argued were "relevant."

However, on appeal, the State argues context: "[T]he content of [Defendant's] posts and the surrounding context objectively show that

[he] made true threats." "The content of [Defendant's] posts objectively threaten[ed] harm to [D.A.] Welch. [Defendant] posted":

> • "Death to our so called judicial system . . . . If our head prosecutor won't do anything then the death to her as well."[19]
>
> • "[S]he will be the first to go, period and point made."[20]
>
> • "[I]t is up to the people to administer Justice! I'm always game to do so. They make new ammo everyday!"

The State narrows its focus to two of the three alleged threats listed above, stating "[Defendant's] posts, 'death to [her],' and 'she will be the first to go,' speak for themselves. He made true threats to kill [D.A.] Welch." The State does not argue on appeal that the two comments referring to "mountain justice" constituted threats to kill D.A. Welch; these comments are not even referenced in the State's "true threat" argument, and we agree that they are of minimal relevance.

Solely considering the plain language of the "threats" alleged in the indictment, we agree with the State and find only two of the alleged threats merit closer analysis. The following three alleged threats do not contain any language indicating any threat, much less a "true threat," to kill D.A. Welch: (1) "I will give them both the mtn justice they deserve[,]" (2) "it is up to the people to administer justice! I'm always game to do so. They make new ammo everyday![,]" and (3) "It is time for old Time mtn justice!"[21] These comments are vague and do not indicate Defendant had any intention to do anything specific to anyone at any particular time. These comments contain nothing that "an ordinary, reasonable [person] . . . would interpret . . . as a serious expression of an intent to" kill D.A. Welch, *White II*, 810 F.3d at 221 (citation omitted), and nothing in these comments would support a jury finding that by posting them on his Facebook page Defendant had the specific intent to threaten D.A. Welch, *i.e.*, that Defendant *intend*ed D.A. Welch to *believe* he was

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19. These two statements are not contained in the same post. Although the "Death to our so called judicial system" comment is included in one of the posts the State had Detective Stewart read into evidence, nothing in that post was included in the indictment. Considering these two comments together could be appropriate in a contextual analysis, since both use the particular "death to" language. However, it is not appropriate to combine comments from different posts as if they were from the same post.

20. The "period and point made" language was not included in the indictment.

21. This alleged threat from the indictment was not even included in the five posts the State introduced as the five "relevant" posts, State's Exhibits 1 - 5.

actually planning to kill her. *Bagdasarian*, 652 F.3d at 1118. We therefore look to the plain language of the remaining two alleged threats.

First: "[P]eople question why a rebellion against our government is coming? I hope those that are friends with her share my post because she will be the first to go." The meaning of these words is simply too vague to be considered a "true threat." *Yates*, 354 U.S. at 327, 1 L. Ed. 2d at 1380 ("Vague references to 'revolutionary' or 'militant' action of an unspecified character, which are found in the evidence, might in addition be given too great weight by the jury in the absence of more precise instructions."). The first sentence is clearly political hyperbole and protected speech. *Watts*, 394 U.S. at 707–08, 22 L. Ed. 2d at 667. The second sentence includes the words "she will be the first to go[,]" which is an apparent reference to D.A. Welch. However, even on its face this language is not clearly a threat, much less a "true threat." "She will be the first to go" could mean "she will be the first to die"; but even if that were its meaning, there are no specifics that would suggest an actual intent that D.A. Welch be killed, by Defendant or anyone else, and there is nothing in this statement indicating, assuming Defendant actually hoped for D.A. Welch's death, that *he* had any intent to kill her.[22] Further, if D.A. Welch "will be the first to go," it would only occur during a "rebellion against our government[.]" The alleged "threat" is contingent upon an event that no reasonable person would believe was ever likely to occur. *Id.* at 707-08, 22 L. Ed. 2d at 667 (citation omitted) (even the *Ragansky* test required the speaker to have "uttered the charged words with 'an apparent determination to carry them into execution' "). In addition, this alleged "threat" could also refer to a non-violent "rebellion," *e.g.*, mass protests of the people leading to D.A. Welch's resignation, a "rebellion" at the ballot box in the next election, or any number of circumstances that do not include Defendant murdering D.A. Welch.

Second: "[I]f our head prosecutor won't do anything then the death to her as well." This is the only comment in the indictment that includes language associating "death" with D.A. Welch. However, the language of this comment does not evince "a serious expression of [Defendant's]

22. We want to make clear the Supreme Court has held there is no need to prove that Defendant actually intended to carry out any threat to kill D.A. Welch. However, the alleged threat must be such that a reasonable person would understand it as a real threat to kill D.A. Welch in order for it to rise to the level of a "true threat." That is, the content of Defendant's communication must at least *reasonably appear* to express Defendant's intent to carry out the threat; and Defendant must have also intended his communication to be *received* by D.A. Welch as a real threat to kill her, even if Defendant had no intention to actually harm her. *Bagdasarian*, 652 F.3d at 1118.

intent" to kill D.A. Welch. *White II*, 810 F.3d at 221 (citation omitted). It is conditional on its face, even in the truncated form presented in the indictment: "*if* [D.A. Welch] won't do anything *then* the death to her as well." (Emphasis added). Meaning if D.A. Welch did "*something*," there would be no longer be a basis for the "then the death to her as well" sentiment. Nothing in the comment indicated *what* D.A. Welch would have to do, or fail to do, to warrant "the death to her as well" sentiment. Nothing in the comment indicated an actual plan to kill D.A. Welch, even if she failed to "do something" at some undetermined time in the future. Nor does the comment indicate that, if someone were actually going to act on whatever "the death to her as well" comment might suggest, it would be Defendant. Further, there were no specifics such as time, manner, place, ability, preparation, or other facts that might allow a reasonable person to read Defendant's words as a "true threat" to kill D.A. Welch. *See United States v. Roberts*, 915 F.2d 889, 890–91 (4th Cir. 1990). Conducting a plain language review of the "threats" alleged in the indictment, we hold that, standing alone or read together, the plain language of the alleged threats does not constitute "a serious expression of [Defendant's] intent" to kill D.A. Welch. *White II*, 810 F.3d at 221 (citation omitted).

We reach the same conclusion if we expand our review beyond the five comments included in the indictment and include State's Exhibits 1 – 5 in their entirety. These posts also included comments expressing: Defendant's disgust that the parents would not be prosecuted for their child's death; his disdain for "our judicial system"; distrust and disgust associated with "the government and the judicial system" and "politicians," declaring: "Death to our so called judicial system since it only works for those that are guilty!" One comment stated: "I will give them both the mountain justice they deserve[,]" apparently directed toward the parents, then stated: "I'm tired of this political bullshit." Another comment said: "Now U wonder why I say if I am raided for whatever reason like the guy on smoke rise was[, w]hen the deputy ask me is it worth it[,] I would [] say with a Shotgun Pointed at him and a ar15 in the other arm was it worth to him?" This comment suggested Defendant had posted prior, unrelated comments on Facebook indicating he would meet any "raid" of his home with deadly force. Defendant also told his Facebook friends: "What I do Training wise from this point is ur fault[,]" the meaning of which is unclear, and declared: "U want me come and take me[.]" Defendant also invited someone, presumably law enforcement, to "raid my house for communicating threats and see what they meet." Defendant completed this post with an apparent metaphor involving fish and a pond. Defendant replied to one of Burch's

comments by claiming that D.A. Welch would never "reply" to the accusations because she wasted her "6 digit income" smoking outside, and because "[s]he won't try a case unless it gets her tv time. Typical politician." Defendant posted he was "sure my house is being Monitored right about now! I really hope They are ready for what meet them at the front door." He made a comment stating the "coming rebellion" "can start at my house. . . . . If the courts won't do it as have been proven. Then yes it Is up to the people to administer justice!" Defendant stated he was "always game to do so" and "[t]hey make new ammo everyday!" Defendant opined that his Facebook friends might "need to learn what being free is verse being a puppet of the government" because then they "might actually be happy!" Defendant made a vague statement about his Facebook friends all knowing "someone who will like this Comment" or "post." Finally, State's Exhibit 5 included another attack on "the court," and "most importantly [the] western nc justice system," calling it "useless." Defendant declared "[i]t is time for old Time mtn justice!" This post concluded: "Now let Them knock on my door[.]"

These posts were full of hyperbolic rants against the courts, the judicial system, the government and politics in general, as well as a taunt directed toward anyone, presumably law enforcement, who would attempt to "raid" his house or property. Although these posts provided context to the alleged threats which, according to the State at trial, was irrelevant, the statements in these additional comments did not include any "true threats" to do anything to D.A. Welch.

2. Context of Defendant's Facebook Posts

The "language itself" of the alleged threats demonstrated no more than that Defendant was angry about the decision not to prosecute the parents and, in response, he took to Facebook to rant about politicians, local government, the local judicial system, and D.A. Welch. *See Citizens United*, 558 U.S. at 349, 175 L. Ed. 2d at 788. In other words, though the language used was extreme, ugly, and upsetting, it was political hyperbole. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667. Next, we review the whole record to determine whether, considering all the facts surrounding Defendant's posting of these comments, they rise to the level of a "true threat." Defendant's Facebook posts, as well as his "friends' " posts, speak for themselves. Therefore, our review consists of applying the dictates of the First Amendment to the uncontested evidence, a question of law, which we conduct *de novo*. *Shackelford*, __ N.C. App. at __, 825 S.E.2d at 695; *Bly*, 510 F.3d at 457–58.

We first note a fatal error in the State's argument: none of the legal requirements the State argues apply in this matter were conveyed to

the jury, so it could not have conducted the "Fourth Circuit's objective test for true threats" or any other test. Addressing the merits of the State's argument, it contends "proof that [D]efendant ha[d] access to weapons" was context supporting a finding of a "true threat," stating that Defendant "made clear in his posts that he had more than enough firepower to carry out his threats to kill [D.A.] Welch. He explained that he was not afraid to use his firearms: He said he 'would open every gun' that he has." However, the State never proved that Defendant *actually* owned any firearms or ammunition; did not elicit any testimony from D.A. Welch that she knew, or believed, Defendant owned firearms; and did not show that Defendant's alleged firearms elicited fear or concerned her in any way. If law enforcement considered Defendant or his alleged access to "more than enough firepower to carry out his threats to kill [D.A.] Welch" as a realistic threat, presumably they would have investigated further and sought an order to remove any firearms from Defendant's possession if warranted. Further, the comment in which Defendant stated he "would open every gun" *was not directed toward D.A. Welch*; it was directed toward any hypothetical law enforcement officers who attempted to raid his home, "*for whatever reason* like the guy on smoke rise[.]" (Emphasis added).

The State argues on appeal that Defendant "bragged in his posts about the firearms that he could use to shoot [D.A. Welch]." However, Defendant never indicated that he had any intention of shooting D.A. Welch or using any firearms against her in any manner. He only referenced firearms in connection with hypothetical "raids" on his house: "Now U wonder why I say if I am raided for whatever reason like the guy on smoke rise[,]" "[I] would [meet 'the deputy'] with a Shotgun Pointed at him and a ar15 in the other arm[.]" In this comment, Defendant indicated that he had *previously* spoken of his intent to respond to any "raid" of his property with armed resistance, *prior to making any of the allegedly threatening comments about D.A. Welch*. Defendant never indicated any belief that D.A. Welch would "raid" his home.

Next, the State contends "the evidence shows that both [D.A.] Welch and law enforcement responded as if [the alleged] threats were real." Courts consider the "reaction of the audience upon [the] utterance" of the alleged threat and how seriously the threat is received. *In re White*, 2013 WL 5295652 at *45; *see also United States v. Davis*, 876 F.2d 71, 73 (9th Cir. 1989) (considering recipient's state of mind as well as actions taken in response relevant to determination of a true threat). D.A. Welch showed some concern by contacting her office and having her real estate agent remove information about her house from the Internet. However, she also testified that she did *not* feel the need to

have personal protection, she was *not* concerned about returning to work the next day, even knowing that Defendant would likely also be in the adjacent building, and she apologized to officers whom she believed were keeping an eye on her at the courthouse, telling them their extra vigilance was not necessary. D.A. Welch's actions and her testimony demonstrated only a low level of concern in general, and neither her conduct nor her testimony suggested that she believed Defendant's Facebook comments to have been serious expressions of Defendant's intent to kill her, or that she was seriously frightened of Defendant.

"[T]he seriousness with which . . . law enforcement took" the alleged threat is also an important contextual factor. *In re White*, 2013 WL 5295652 at *45 (citing *White I*, 670 F.3d at 512–13); *see also Dinwiddie*, 76 F.3d at 925. Though not on duty at the time, Detective Stewart's concerns are more appropriately considered here. The record evidence indicates that she was the only one of Defendant's Facebook friends who was concerned about Defendant's posts. Detective Stewart did not express any concern directly to Defendant, either on Facebook or by contacting him in person. Instead, she waited over an hour before contacting D.A. Welch and the sheriff. It is also relevant that Detective Stewart had personal relationships with both D.A. Welch and the sheriff due to her job, and that she was a detective. It is more likely that a person will contact someone with whom they have a relationship to convey information that causes them even mild concern, and law enforcement officers are trained to react to things that the general public may ignore. Detective Stewart's reaction should be considered from the viewpoint of a reasonable law enforcement officer and friend of D.A. Welch, not as a general "reasonable person."

The sheriff's response was to *ask* D.A. Welch if she wanted a deputy to come to her house, an offer that was declined. The sheriff apparently did not consider the likelihood of any danger to D.A. Welch to be significant enough to act without her request. The evidence suggests law enforcement did not consider Defendant's comments serious enough to warrant an immediate response, as they did not attempt to locate or contact him that evening, nor the next morning, even though D.A. Welch worked next to Defendant, and they both frequented the shared smoking area. As the State concedes, Defendant "knew exactly where to find [D.A.] Welch" and "would have had easy access to [D.A.] Welch while she was outside and unguarded." Nobody was assigned to keep an eye on Defendant or D.A. Welch to ensure D.A. Welch's security.[23] The SBI

23. D.A. Welch did testify to her belief that officers in the courthouse were staying close to her, presumably as protection.

was the first agency to contact Defendant about the posts, and that was not until the afternoon of 25 August 2016, at Defendant's place of work.

According to the record evidence, law enforcement did not contact Burch. Burch's comments were clearly not "true threats," but if Burch believed that Defendant, by posting his comments, "mean[t] to communicate a serious expression of an intent to" kill D.A. Welch, *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552 (citation omitted), Burch *was* indicating his eagerness to join Defendant in that endeavor. Further, the record suggests that the parents were not contacted, though the "give them both the mtn justice they deserve" comment was likely directed to the parents, not D.A. Welch. If officers suspected that Defendant or Burch, or both, were truly threatening to exact some kind of "vigilante" or "mountain" justice on the parents, it is presumed that they would have taken measures to protect, or at least inform, the parents.

Further, the most overt "threats" were directed at law enforcement officers, including threatening to "open every gun I have" on any law enforcement that came to Defendant's "door." If law enforcement considered Defendant to be serious in his threat to "open every gun [he had,]" logically, they would have investigated Defendant about those comments, and demonstrated greater concern in general. As noted above, law enforcement did not respond in a manner suggesting they believed Defendant's Facebook posts indicated an actual threat to kill D.A. Welch, nor that they were concerned about Defendant potentially possessing an assortment of firearms. Defendant was not charged or investigated in response to his threats toward law enforcement officers. These comments demonstrate that Defendant knew how to speak more directly about killing someone than using comments like "mountain justice," "she will be the first to go," and "the death to her as well." Since it was the State's burden to prove not only a "threat," but a "true threat," this evident lack of concern on the part of authorities weighs against a finding that a reasonable person reading Defendant's posts, understanding the full context surrounding their communication, would believe that Defendant "mean[t] to communicate a serious expression of an intent to" kill D.A. Welch. *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552 (citation omitted).

The relationship between the speaker and the recipient of the alleged threat is highly relevant in "true threat" analysis. *Id.* However, Defendant's posts were not made in the "context of a volatile or hostile relationship[.]" *In re S.W.*, 45 A.3d 151, 157–60 (D.C. 2012). D.A. Welch testified she interacted with Defendant on a daily basis at work and their interactions were never unusual or disconcerting. D.A. Welch testified

she had never prosecuted Defendant or any of his family members; that Defendant had always been polite; and that Defendant had never acted in an inappropriate or threatening manner with her. Detective Stewart also testified that the interactions she had witnessed between Defendant and D.A. Welch were polite and non-threatening, Defendant had even requested a bumper sticker from D.A. Welch in order to support her election bid. Defendant told Agent Schick that he voted for D.A. Welch, and still considered her to be a good district attorney. Courts consider the speaker's history of threatening the recipient, and whether the recipient had reason to believe the speaker was prone to violence. *Id.*, *White I*, 670 F.3d at 513. The record is clear that Defendant had never threatened D.A. Welch, and it contains no suggestion that he had ever threatened anyone else, was prone to violence, or was likely to follow through with any allegedly violent threat.

The State also argues on appeal that Defendant "knew [D.A.] Welch. They worked in the same small town[,]" Defendant "knew where to find [D.A.] Welch, for example, on her smoke breaks and in the courthouse parking lot. He worked in an office near that same courthouse. He would have had easy access to Welch while she was outside and unguarded." The State contends "proof that a defendant knows where to find a person makes the defendant's threats against that person objectively more serious." However, when we consider the fact that Defendant knew where D.A. Welch worked, and where she took her smoke breaks, along with law enforcement's decision not to monitor Defendant or D.A. Welch, the State's argument is undercut. Law enforcement did not act in a manner suggesting Defendant was considered a serious threat to D.A. Welch. Further, since D.A. Welch was the District Attorney, her place of work would have either been known, or easily discoverable, by anyone, making Defendant's knowledge of this fact of little relevance.

The State contends that Defendant "even conceded in his posts that he was 'communicating threats.' " It is true that after making the "then the death to her as well" comment, Defendant stated: "Now raid my house for communicating threats and see what they meet." This kind of language can add to context supporting a finding of a "true threat," but it must also be read in context; it does not *per se* elevate every utterance to a "true threat." Nor do we typically allow defendants to define the crimes for which they are charged. More importantly, because this is the general intent portion of our review, Defendant's actual mindset is just one of many contextual factors that may be useful in determining whether a reasonable person, applying the general intent standard, would objectively determine Defendant's posts contained a "true threat."

Finally, the State contends that Defendant "encouraged those reading his threats to communicate them directly to [D.A.] Welch." The manner of conveying the alleged threat can be very relevant. A statement communicated directly and "privately" to the intended recipient is more suggestive of a serious threat than one made publicly to a group that does not include the "intended recipient." *Id.*; *U.S. v. Syring*, 522 F.Supp.2d 125, 134 (D.D.C. 2007). Defendant never communicated any statement directly to D.A. Welch. He posted the comments while at home making dinner for his family. Defendant made two relevant comments, first: "I have friends on fb whom see this. I hope they do! Death to our so called judicial system since it only works for those that are guilty!" This post is a rant against "the government and the judicial system," and included Defendant's comment that he would respond to any "deputy" sent to "raid" his home with firepower. This post does not mention D.A. Welch, and there is no suggestion that Defendant wanted anyone to share this post with D.A. Welch. The second comment contained no threatening language at all. It was in response to Sammons' comment: "I wouldn't expect that from Franklin but maybe Asheville[.]" Defendant informed Sammons that D.A. Welch's district did not include Asheville and told Sammons: "This is how politics works. That's why my harsh words to her and any other that will Listen and share it to her fb page." Nothing in this post states that Defendant wanted anyone to "share" a threat, much less a "true threat," "to her fb page." That Defendant was not requesting anyone to "share" "true threats" to D.A. Welch's Facebook page is clear because both of these comments were made *before* Defendant's "then the death to her as well" comment and, therefore, could not have been written with any intent to convince anyone to "share" that post with D.A. Welch.

Although the State argued at trial that it did not need to prove any "true threat," and we have addressed all the State's arguments on appeal, we must conduct an independent review of the entire record to determine if the evidence presented at trial, considered in context, could support a finding of a "true threat." *Bose*, 466 U.S. at 505, 511, 80 L. Ed. 2d at 519, 523; *Bagdasarian*, 652 F.3d at 1118. This Court also reviews the record to determine whether the evidence could support a determination that Defendant *intended* the following: his posts would eventually get to D.A. Welch and, upon reading the posts, D.A. Welch would believe Defendant actually intended to kill her. *Bose*, 466 U.S. at 505, 511, 80 L. Ed. 2d at 519, 523.

The forum in which an alleged "true threat" was communicated is a primary contextual factor. *See Watts*, 394 U.S. at 707–08, 22 L. Ed. 2d

at 666–67; *Bly*, 510 F.3d at 459. "This Court long ago recognized that members of the public retain strong free speech rights when they venture into public [spaces], which . . ., time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469, 172 L. Ed. 2d 853, 862 (2009) (quotation marks and citations omitted). "In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such 'traditional public fora.' " *Id.*; *see also Packingham*, 582 U.S. at __, 198 L. Ed. 2d at 279–80. The fact that Defendant's comment was posted on Facebook is of great importance to our "true threat" analysis. The Supreme Court has recognized:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, and social media in particular. Seven in ten American adults use at least one Internet social networking service. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. . . .
>
> Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. . . . In short, social media users employ . . . websites to engage in a wide array of protected First Amendment activity on topics "as diverse as human thought."

Id. at __, 198 L. Ed. 2d at 280 (citations omitted).

Defendant was engaging in a heated discussion, or "debate," about a political concern with his Facebook friends, which was emotionally charged due to the content of the discussion, a dead child, as well as shared feelings, very likely incorrect, that D.A. Welch improperly declined to prosecute the parents. Facebook has the status of a "public square," but can feel like a "safer" place to discuss controversial topics or make inappropriate, hyperbolic, or boastful statements. The audience is generally known to the person posting, and there is often a sense of community and like-mindedness. The record evidence is that every response to Defendant's posts on Facebook was supportive of Defendant's comments. None of the responses on Facebook indicated concern that Defendant might be planning to kill D.A. Welch. By posting

on Facebook, Defendant was expressing his feelings publicly, but selectively, in the "most important place[] . . . for the exchange of views." *Id.*

Courts also consider the "purpose" of the conversation within which an alleged threat was made. *See United States v. Landham*, 251 F.3d 1072, 1083–84 (6th Cir. 2001). One purpose of Defendant's comments was clearly to express his frustration about what he perceived as a great injustice, perhaps fueled in part by the six beers he estimated drinking. The purpose was also to solicit discussion about D.A. Welch's decision not to prosecute the parents, and to complain about local politicians, the lack of "justice" in the area, and the "corruption" of the local "justice system" in general. Protection of the free flow of ideas and opinions of political concern is of particular importance in First Amendment cases, even, or even particularly, when the opinions represent a minority view, or are offensive to many people. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667; *Bly*, 510 F.3d at 459. The "discussion" initiated by Defendant's first post was undoubtedly political speech, even if some of it was ill-advised, vituperative, and irresponsibly hyperbolic.

All of Defendant's comments, even the most disturbing, were directed toward a call for political change, or an expression of disdain for the political system. The alleged threats against D.A. Welch were completely intertwined with Defendant's political rants. It is general knowledge that Facebook, like many other sites on the Internet, often serves as a place where people air their grievances. Further, it is not uncommon for some of the posts on Facebook and other Internet platforms to be "over the top," exaggeratedly offensive, threatening, or irrational. *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (citations omitted) ("[A] court may take judicial notice of a fact which is . . . so notoriously true as not to be the subject of reasonable dispute[.]").

A related consideration is whether the context in which the alleged threat was communicated is traditionally "an area often subject to impassioned language and hyperbole[.]" *Metzinger*, 456 S.W.3d at 97 ("Defendant's tweets facially reveal that they were made in the context of sports rivalry, an area often subject to impassioned language and hyperbole."). Political speech on social media, or on the Internet in general, is undoubtedly one of the "areas" most "often subject to impassioned language and hyperbole[,]" or " 'rhetorical excesses, and impotent expressions of anger or frustration[.]' " *Id.* (citation omitted). Defendant's posts "facially reveal that they were made in the context of [angry political speech], an area often subject to impassioned language and hyperbole." *Id.*

The specificity of the alleged threat is a consideration in "true threat" analysis. *See United States v. Callahan*, 702 F.2d 964, 966 (11th Cir. 1983) (citation omitted) (finding that a letter specifying time, date, and place of threatened assassination constituted a true threat). As well as being conditional and vague, the alleged threat, "If our head prosecutor won't do anything then the death to her as well[,]" lacked any specifics such at time, date, place, method, or other circumstances that would suggest Defendant was actually planning to kill D.A. Welch. The "she will be the first to go" comment was predicated on some future "rebellion against our government[,]" and does not even specify that Defendant personally intended to do *anything* to D.A. Welch if the "rebellion" actually came.

In addition, courts consider the reaction of those *not* the intended recipient who read the alleged threat. *Ross v. City of Jackson*, 897 F.3d 916, 922 n.6 (8th Cir. 2018); *Dinwiddie*, 76 F.3d at 925; *In re White*, 2013 WL 5295652 at *45. There were no comments or posts in response to Defendant's posts that expressed any concern that Defendant was actually threatening to kill D.A. Welch or anyone else. All the online responses expressed support or agreement. Detective Stewart, whose reaction is discussed above, was the sole person concerned enough to take any action in response to Defendant's posts.

Courts also factor the defendant's explanation for having communicated the alleged threat, if any, and the defendant's actions following the posting of the alleged threat. *See Ross*, 897 F.3d at 922 n.6. As testified to by Detective Stewart and Agent Schick, Defendant deleted his posts shortly after making them. This action supports Defendant's statements to Agent Schick that "he wanted to apologize, because the last thing in the world he wanted to do is threaten to kill anybody[,]" that he "did not mean for the posts[,]" especially the "death to her" post, to come across as a threat to D.A. Welch, and that he did not want the posts to somehow reach D.A. Welch or the parents and upset them. Defendant asked Agent Schick "that if [he] saw [D.A. Welch], tell her I'm sorry and I did not mean it that way[.]" A person with an actual intent to threaten to kill someone is unlikely to delete the alleged threats within a couple of hours of posting them, and then politely ask a law enforcement officer to convey his apology to the alleged intended victim. Absent additional facts suggesting otherwise, Defendant's decision to delete the posts shortly after making them greatly diminishes the likelihood that a reasonable person who read the posts on Facebook would construe them to contain any "true threat" to kill D.A. Welch. Defendant's act of deleting the posts is strong evidence that Defendant did not intend his posts to constitute a "true threat" to kill D.A. Welch. Although it was the

State's burden, it presented no alternative theory for Defendant's decision to delete that conversation.

3. The State's Evidence Failed to Prove a "True Threat"

We hold that "[n]othing in Defendant's [posts] credibly suggested, either directly or indirectly, that Defendant was threatening violent acts that *were likely to occur*." *Metzinger*, 456 S.W.3d at 97–98 (emphasis added). The decision to prosecute Defendant may well have been made, at least in part, due to the State's belief that it could constitutionally convict Defendant pursuant to N.C.G.S. § 14-16.7(a) if it simply convinced the jury that the words Defendant wrote, *without considering any context*, could be interpreted as a threat; that Defendant knew the meaning of the words he wrote, and that Defendant willfully clicked the "post" button on his Facebook page. Conducting First Amendment "true threat" review, however, we hold, as a matter of law, that Defendant's Facebook posts did not rise to the level of a "true threat." Therefore, Defendant was unconstitutionally prosecuted pursuant to N.C.G.S. § 14-16.7(a) in this case. We would reach the same conclusion applying regular *de novo* review to answer this constitutional question. *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 110–11 (2018). The statement "[i]f our head prosecutor won't do anything then the death to her as well," considered in context, is simply not a statement that a reasonable person would understand as Defendant expressing a *serious intent to kill* D.A. Welch. Even if this were a close call, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Wis. Right To Life*, 551 U.S. at 474, 168 L. Ed. 2d at 349. We therefore vacate Defendant's conviction and remand to the trial court "for entry of a judgment of acquittal." *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 668; *Hanna*, 293 F.3d at 1087 (citations omitted) ("If it were clear, as a matter of law, that the speech in question was protected, we would be obligated to remand not for a new trial, but for a judgment of acquittal.").

4. The State's Evidence Failed to Prove Intent to Threaten

[8] We further hold that the record evidence could not have supported a finding that Defendant's intent in posting his comments was to cause D.A. Welch to believe Defendant was going to kill her. *Bagdasarian*, 652 F.3d at 1118 ("[A] conviction under [an anti-threat statute] can be upheld only if both the objective and subjective requirements are met, . . . and our resolution of either issue may serve as an alternate holding."). If Defendant intended D.A. Welch to believe he was going to attempt to kill her, there were a number of methods that would have been just as easy, and more effective. The State would have to convince the jury beyond a

reasonable doubt that Defendant, while cooking dinner for his wife and children, posted his Facebook comments with the intent that they would be perceived as a "true threat" to kill D.A. Welch; that Defendant did not care that anyone reading his alleged threats to kill would immediately know his identity; that Defendant assumed at least one of his Facebook friends would share his posts with D.A. Welch so the "true threat" would reach his intended target; and that Defendant was unconcerned that his acts would likely result in his arrest and prosecution.

If Defendant truly desired to convey to D.A. Welch a "true threat" to kill her, and was not concerned about the likely consequences, he could have simply threatened D.A. Welch in person—at work or anywhere else; he could have left a written threat for her at her office, or mailed a threat there; or he could have attempted to send her a threatening message on Facebook directly.[24] The fact that Detective Sampson happened to see Defendant's posts, took screenshots before they were deleted, and alerted D.A. Welch, constituted a series of events unlikely to have been foreseen by Defendant. Further, if Defendant intended to threaten D.A. Welch, it is unlikely that he would have buried his intended threats among long, rambling diatribes against multiple people and government entities. It is also unlikely that language directed at people or groups Defendant did not intend to threaten would be much more direct and violent than the contingent, non-specific, and equivocal language he used for his supposed intended target, D.A. Welch. Further, if Defendant intended D.A. Welch to receive his comments and believe he was planning to kill her, it is unlikely he would have attempted to send her an apology when he was informed his comments had, in fact, reached D.A. Welch. Considering all the attendant circumstances, particularly the alleged threats in the context of the entire Facebook "conversation" on Defendant's personal page, to which D.A. Welch did not have access, we hold that there was insufficient evidence to prove the element of specific intent to threaten as required by the First Amendment. For this reason, as well, we vacate Defendant's conviction and remand to the trial court "for entry of a judgment of acquittal." *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 668; *Hanna*, 293 F.3d at 1087.

5. Jury Instructions

[9] Defendant requested the trial court instruct the jury that the State must prove Defendant communicated a "true threat"; that it instruct the

24. Anyone with a Facebook account can send a personal message to another account holder unless they have been specifically "blocked." Although Defendant and D.A. Welch were not Facebook "friends," she would have had no reason to block Defendant until after she was alerted to his posts.

jury on the definition of "true threat"; and that it instruct the jury on the appropriate standards of intent. The State argued against Defendant's requested instruction on the basis that neither "true threat" nor its intent requirements were elements of N.C.G.S. § 14-16.7(a). The trial court denied Defendant's requested instruction. We have already rejected the State's argument that it was the trial court's duty to make the "true threat" determination in the first instance. Making this determination was the sole province of the jury and, even then, only if Defendant's motions to dismiss had been properly denied; and they were not.

Neither the State nor the trial court demonstrated an understanding that "true threat" was a required element of N.C.G.S. § 14-16.7(a). At the charge conference, Defendant told the trial court: "So I'm asking that you instruct on true threats. I believe it's a correct statement of the law[,]" and stated: "When you look at this case, this is solely about speech[.]" Defendant argued "the only way a jury can render a verdict in this case is if they know what a true threat is and are instructed on it. Otherwise, they don't have the appropriate legal standard." Defendant requested the following instruction:

> In this context, you must find [] Defendant communicated a "true threat." A "[t]rue [t]hreat" is a statement where the speaker ([D]efendant) means to communicate a serious expression of intention to commit an act of unlawful violence to a particular individual (D.A. [Welch]), not merely "political hyperbole," vehement, caustic and sometimes unpleasantly sharp attacks, or vituperative, abusive and inexact statements." The [D]efendant must intend to [have] communicate[d] a "[t]rue [t]hreat" to the D.A.

Defendant's requested instruction was a generally correct statement of the law and it was error for the trial court to refuse to give it, or a differently worded instruction that correctly stated all the elements that the State was required to prove and the jury was required to determine. When asked to respond to Defendant's requested instructions, the State answered: "The State would object to all these instructions[.] The pattern jury instructions are clear that *there are three and only three elements to this charge*. Now *with regards to the threat*, the *only* element is that the defendant knowingly and willfully made a threat to kill the victim." (Emphasis added). The State further argued that the First Amendment did not apply to Defendant's case:

> I get that the defendant is raising First Amendment objections to that statute as it's written, but I think the proper

> venue to take that up would be if upon conviction to take that up on appeal.
>
> What he's asking the Court to do is rewrite the North Carolina statute to comport with his interpretation of the First Amendment requirements.
>
> Under the misdemeanor communicating threats statute, the North Carolina legislature specifically put in an element, "the threat is made in a manner and under circumstances which would cause a reasonable person to believe the threat is likely to be carried out."
>
> The same legislature specifically exempted that element from this crime. Therefore, it is the legislature's intent . . . that there be *no requirement of proof to show that the threat was made in a manner and under circumstances which would cause a reasonable person to believe it is likely to be carried out.*
>
> I think it can be inferred that the legislature felt that *making any threats* towards . . . court officials . . . is unacceptable to the legislature, *regardless of whether they were made in a manner that a reasonable person would believe they would be carried out.* They specifically exempted that element from this statute that exists in the other threat statute, and I think it would be inappropriate to reinsert it back in.

(Emphasis added). Following the State's argument, the trial court ruled against Defendant. The State's argument was in direct conflict with the general intent standards applied by *every* jurisdiction we have found, as well as the specific intent requirement we have adopted in this opinion. *White II*, 810 F.3d at 219 (citation omitted) (under the universally accepted general intent standard, the State had the burden of proving Defendant's posts were such that "a reasonable [person] . . . familiar with the circumstances would interpret [them] as a serious expression of [Defendant's] intent to" kill D.A. Welch).

Compounding the error, the State argued context to demonstrate Defendant's "state of mind," even though it had erroneously informed the jury that the context surrounding Defendant's posting of the comments, as well as Defendant's intent, was irrelevant to the jury's decision. In its closing argument, the State told the jury that under N.C.G.S. § 14-16.7(a), to prove Defendant "willfully made a threat to kill" D.A. Welch, the State

was only required to prove that words included in Defendant's post could interpreted as a "threat," without any definition of what a "threat" entailed; that Defendant understood the meaning of the words;[25] and that Defendant intended to post those words. The State did not believe it was required to prove Defendant communicated any "true threat," and told the jurors they would be acting contrary to the law "if you add [an intent] element in there, if you go back to the room and say well, we're going to give consideration to whether he meant to follow through on it or not[.]" However, not only was the State required to prove the general and specific intent elements required by the First Amendment, a defendant's intent to carry out a threat is also relevant because "[a] person who says he is going to bomb a building is more likely to give the impression he is serious if he actually *is* serious." *United States v. Parr*, 545 F.3d 491, 498 (7th Cir. 2008). The State further argued that it did not matter if Defendant "was venting or not. You cannot threaten court officials[,]" in other words, that Defendant's state of mind was irrelevant. This was a clear misstatement of the law. *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667 ("But whatever the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term."). However, the State then argued the following to the jury, using posts not contained in the indictment in order to demonstrate Defendant's "violent" state of mind:

> "When the deputy asks me if it was worth it, I would say with a shot gun pointed at him and an AR-15 in the other arm was it worth it to him. I would open every gun I had." This shows his frame of mind as he's posting it. *This is not about [D.A. Welch], but he's talking about what he's going to do when law enforcement comes to his house. This shows his frame of mind as he's making these posts.* You saw somebody else named [] Burch then jumped into the conversation, and what [] Burch posted was, "Vigilante justice." And then the defendant comes back and says, "If that's what it takes."

(Emphasis added).

Without instructing the jurors that they were required to consider the alleged threats in context, and that they were required to apply the appropriate intent standards, the jury was free to find Defendant guilty without having made a determination that any of Defendant's posts

25. *I.e.*, that Defendant understood English.

were "true threats." *Id.*; *Harte-Hanks*, 491 U.S. at 668, 105 L. Ed. 2d at 577 (citations omitted) (stating that, for the "actual malice" inquiry, "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry"). The State also argued in its closing:

> Now in *voir dire* and opening arguments [D]efendant talked about the defense was speech. It's our position that this crosses the line. Yes, one of the great hallmarks of this country is our right to free speech. But we all know that free speech crosses a line at some point. And when the free speech crosses the line to *venting your frustration about government*, it crosses the line into *putting her in fear* of her life, that's when the law steps in. And *that's not free speech*. That's when you've gone too far.

(Emphasis added). Assuming the State did not mean to suggest that "venting your frustration about the government" "crosses the line," it still argued erroneous First Amendment law to the jury when it stated that any Facebook post that "put[] [D.A. Welch] in fear of her life" "crossed the line" and rendered Defendant's speech "unprotected" by the First Amendment. No "true threat" standard is met solely by proving the subjective reaction of the intended recipient to the alleged threat.[26] The State told the jurors: "You cannot threaten court officials[,]" and "Did [Defendant] intend on grabbing a gun and getting into his car, driving over to [D.A. Welch's] house that night and shooting her? Doesn't matter. He posted a threat. He knew it was a threat." Both the State and the trial court mistakenly understood N.C.G.S. § 14-16.7(a) to proscribe *any* statement that could be read as a "threat" to kill a court officer. The trial court rejected Defendant's proposed instruction on "true threat," and instead instructed the jury that it only had to find:

> [D]efendant knowingly and willfully made a threat to kill [D.A. Welch]. A person acts "knowingly" when the person is aware or conscious of what he is doing. A person acts "willfully" when the act was done intentionally. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances

26. On appeal, the State acknowledges: "As a constitutional matter, intent for the victim to feel fear is not a necessary ingredient for a true threat." (Citations omitted).

> proven as a reasonably prudent person would ordinarily draw therefrom.[27]

The First Amendment required more. *See*, *e.g.*, *United States v. Gaudin*, 515 U.S. 506, 509–15, 132 L. Ed. 2d 444, 449–53 (1995).

There is no evidence to suggest the requirements of the First Amendment were applied to Defendant's case at any point in the process. In a criminal jury trial, *every element* of the crime *must* be submitted to the jury. *Apprendi*, 530 U.S. at 476–77, 147 L. Ed. 2d at 447. Defendant "cannot stand convicted unless and until a jury *acting under proper instructions* finds from what [Defendant] said that indeed he did make a[] [true] threat." *Alexander*, 418 F.2d at 1207 (emphasis added). The trial was conducted without the understanding that "whatever the 'willfullness' requirement implies, the [anti-threat] statute initially require[d] the [State] to prove a true 'threat[,]' " *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667, and that "all threat statutes[] 'must be interpreted with the commands of the First Amendment clearly in mind.' Thus, such statutes apply only to 'true threat[s]'—i.e., threats outside the protective scope of the First Amendment." *Wheeler*, 776 F.3d at 742–43 (citations omitted). The instruction given did not include the First Amendment requirements that were included in Defendant's requested instruction: (1) that it was the State's burden to prove beyond a reasonable doubt the element that Defendant communicated a "true threat" to kill D.A. Welch; (2) that a "true threat" is a statement "where the speaker [Defendant] means to communicate a serious expression of an intent to commit an act of unlawful violence [murder] to a particular individual [D.A. Welch,]" *Black*, 538 U.S. at 359, 155 L. Ed. 2d at 552, not merely "political hyperbole," "vehement, caustic and sometimes unpleasantly sharp attacks[,]" or "vituperative, abusive and inexact statements," *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 667; (3) that "the prosecution must show that an ordinary, reasonable [person] who is familiar with the context in which the statement [wa]s made would interpret it as a serious expression of an intent to" kill D.A. Welch, *White II*, 810 F.3d at 221; and (4) that "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat[,]" which the State must prove beyond a reasonable doubt, considering the relevant context. *Cassel*, 408 F.3d at 632–33.

The "true threat" inquiry requires " 'delicate assessments of the inferences a "reasonable [decision-maker]" would draw from a given set

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27. This "intent" instruction included in the charge only applied to whether Defendant willfully, *i.e.*, intentionally, posted the words he wrote on Facebook.

of facts and the significance of those inferences to him[,]' " and this decision " '[is] peculiarly on[e] for the trier of fact.' " *Gaudin*, 515 U.S. at 512, 132 L. Ed. 2d at 451 (citations omitted). Because "true threat" is a necessary element of N.C.G.S. § 14-16.7(a), determination of that element by the jury was a *constitutional requirement*, not, as argued by the State, an issue for the trial court to decide. *Apprendi*, 530 U.S. at 476–77, 147 L. Ed. 2d at 447. "[The defendant] was entitled to have the issue as to whether his statements constituted a [true] 'threat' properly submitted to the jury. It follows that if the evidence suggested inquiries for the jury on that issue which the charge erroneously foreclosed, [the defendant] must have a new trial." *Alexander*, 418 F.2d at 1206 (footnote omitted); *see also id.* (emphasis added) ("[T]he charge did not mention *the necessity*, in determining whether a [true] threat was made, *of examining the statement in its full contex*t."). Due to the failure to properly instruct the jury on constitutionally required elements, N.C.G.S. § 14-16.7(a) was unconstitutionally applied to Defendant.

Having found constitutional error in the jury instruction given at Defendant's trial, we must conduct harmless error analysis:

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

State v. Ortiz-Zape, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) (citing N.C.G.S. § 15A-1443(b) (2011)). The State attempts to shift this burden to Defendant and, therefore, does not make any argument that the failure to properly instruct the jury was harmless beyond a reasonable doubt. Because the State does not make the required argument, it has failed in its burden. *Id.*; N.C.G.S. § 15A-1443(b) (2017).

Instead, the State argues: "Even if [Defendant's] posts were protected speech, his conviction would still survive scrutiny under the First Amendment." The State seems to be conflating Defendant's as-applied "true threat" challenge with a facial challenge, arguing: "The State may regulate speech, even through content-discriminatory means, so long as the State's means are narrowly tailored to serve a compelling interest." (Citing *Hest Techs*, 366 N.C. at 298, 749 S.E.2d at 436). However, "[t]he fact that [a law] is capable of valid applications does not necessarily mean that it is valid as applied[.]" *Taxpayers for Vincent*, 466 U.S. at 803 n.22, 80 L. Ed. 2d at 785 n.22. The State requests this Court to apply strict-scrutiny review "to [Defendant's] conduct" and find that his "conviction under the threats statute is narrowly tailored to serve the State's

interest in maintaining a stable government[.]" Because Defendant has not made a facial challenge to N.C.G.S. § 14-16.7(a), we do not consider whether the statute would survive strict scrutiny review. Further, we hold that the State would be unable, on the facts before us, to prove the error harmless beyond a reasonable doubt. *Id.*

IV. Conclusion

We hold, upon *Bose* independent whole record review, that Defendant's conviction was obtained through the unconstitutional application of N.C.G.S. § 14-16.7(a) in his prosecution. Initially, we hold Defendant's posts were not "true threats" as a matter of law and, therefore, the State could not prove any violation of N.C.G.S. § 14-16.7(a). For this reason, we vacate Defendant's conviction and remand to the trial court "for entry of a judgment of acquittal." *Watts*, 394 U.S. at 708, 22 L. Ed. 2d at 668; *Hanna*, 293 F.3d at 1087. As a separate and distinct basis for vacating Defendant's conviction and remanding for entry of a judgment of acquittal, we also hold that the evidence was insufficient to meet the element of specific intent, that when Defendant posted the comments on Facebook his intent was that they would reach D.A. Welch and that she would believe Defendant was actually planning to kill her. *Bagdasarian*, 652 F.3d at 1118. In the event our Supreme Court determines that *Bose* independent whole record review will not be used in North Carolina for First Amendment "true threat" appeals, we also hold that we would reach the same results pursuant to our regular standard of appellate review. Finally, in the event our holdings that Defendant's conviction should be vacated and remanded for entry of a judgment of acquittal are not upheld, we also hold that the trial court's failure to properly instruct the jury on all essential elements of N.C.G.S. § 14-16.7(a), *i.e.*, its failure to instruct the jury on the "true threat" and intent elements required by the First Amendment, constituted prejudicial error requiring reversal of Defendant's conviction and remand for a new trial.

Because we are dealing with issues of first impression in North Carolina, we were required to make additional holdings in order to reach the resolution of this matter. In this opinion, we have held the following concerning application of the First Amendment to anti-threat statutes in North Carolina: (1) The First Amendment requires that "true threat" *must* be included as an *element* of any prosecution based upon an alleged threat. The "true threat" element includes a proper definition of "true threat" and application of the general intent standard set forth above. (2) Whether considered part of the definition of "true threat" or a separate element, the First Amendment requires the State to prove beyond a reasonable doubt that a defendant specifically intended that

his communication would reach the intended target, and that the defendant also intended his target would believe the communication to be a real threat and feel threatened thereby. (3) It is the State's burden to prove a defendant communicated a "true threat" based on the language and nature of the alleged threat itself and all the relevant attendant circumstances, *i.e.*, context. If challenged, it is also the State's duty to prove that an anti-threat statute can be constitutionally applied, based upon the particular facts of each case. (4) Regardless of whether "true threat" is labeled fact, law, or a combination thereof, it is a "constitutional fact," and is generally a question for the jury, or the trial court acting as the trier of fact, to decide in the first instance, unless the State's evidence is insufficient to prove a "true threat" as a matter of law, in which case the trial court should dismiss the charge upon a defendant's motion. (5) Because the jury determines whether the State has proven a communication constitutes a "true threat" in the first instance, the jurors *must be instructed* in such a manner that they understand the definition of "true threat," the correct intent standards and how to apply them, and the requirement that they consider the alleged threat in context, that is, considering all the relevant circumstances surrounding the communication of the alleged threat, including relevant circumstances both preceding and following communication of the alleged threat. (6) We follow the Supreme Court and the majority of federal jurisdictions in holding "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact[-]finding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501, 80 L. Ed. 2d at 516–17; *id.* at 502, 80 L. Ed. 2d at 517. Independent whole record appellate review must ensure that "the speech in question actually falls within the unprotected category and [is] confine[d to] the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505, 80 L. Ed. 2d at 519.

VACATED.

Judge ZACHARY concurs.

Judge DIETZ concurs in part in a separate opinion.

DIETZ, Judge, concurring.

I concur in Part III.A.3 of the majority opinion. After a night of drinking, David Taylor took to Facebook and unleashed his frustration at the

local district attorney, who had declined to bring charges in the death of a toddler.

The only portion of Taylor's rambling series of Facebook posts that plausibly could be considered a threat against the district attorney is his statement that "If our head prosecutor won't do anything, then death to her as well."

Even in isolation, this statement is not necessarily a "true threat." In modern English language, calling for "death to" something quite often is *not* a threat to kill that thing—it often expresses a desire for the downfall or ruin of that thing.

We know this not only for English usage generally, but from Taylor's own usage in this same series of Facebook posts. Shortly before his "death to her as well" comment, Taylor stated, "Death to our so called judicial system since it only works for those that are guilty!"

Moreover, Taylor's statement was conditional, just like the statement by Robert Watts in the landmark case establishing the true threat doctrine. *Watts v. United States.*, 394 U.S. 705, 708 (1969). Watts said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. Likewise, Taylor said *if* the district attorney did not change her charging decision concerning the toddler's death—which Taylor viewed as a political one—then "death to her as well." The conditional nature of this threat reduces the sort of immediacy needed to satisfy the Supreme Court's definition of a true threat.

Finally, we cannot look at Taylor's statement in isolation. It was part of a lengthy invective—some of it crude and offensive, some of it rather poetic—that expressed Taylor's lack of faith in the government and the justice system. He complained that he had "voted for it to change and apparently it never will." He repeatedly questioned whether the government would protect his rights and suggested that he may need to take up arms to defend himself. And he complained specifically about the district attorney, speculating that "She won't try a case unless it gets her tv time. Typical politician."

In this context, Taylor's purported threat was "political hyperbole" expressing his distrust in politicians, the justice system, and the government. *Id.* at 708. Indeed, even his statement following "death to her as well," in which he explained "Yea I said it. Now raid my house for communicating threats and see what they meet," carries this meaning. Taylor had so little faith in his own government that he *expected* to be arrested for criticizing public officials, even though he had a constitutional right to do so.

The advent of social media has given us a window into our fellow citizens' views that we did not have before. Drunken political tirades like Taylor's once were confined to living rooms or pool halls. They now can be seen by everyone, everywhere. The First Amendment protects them either way. Taylor's rant was not a true threat—it was "a kind of very crude offensive method of stating a political opposition to" the district attorney. *Id.* His speech is protected by the First Amendment and cannot be criminalized. I therefore concur in the decision to reverse Taylor's criminal conviction.

STATE OF NORTH CAROLINA
v.
TOBY JAY WILES

No. COA19-381

Filed 17 March 2020

1. Search and Seizure—motion to suppress—sufficiency of findings—traffic stop—validity—based on mistaken belief

In a prosecution for driving while impaired, the trial court properly denied defendant's motion to suppress evidence from a traffic stop where competent evidence supported the court's factual findings, including that an officer stopped defendant's car because he believed someone in the passenger seat was not wearing a seatbelt, the officer smelled a strong odor of alcohol when he approached the car, and the officer decided to give the passenger (who was wearing their seatbelt by the time the officer approached) the benefit of the doubt since both the seatbelt and the passenger's shirt were gray. Moreover, the trial court properly concluded that the stop was valid because the officer's mistaken belief about the passenger's seatbelt still provided a reasonable suspicion to justify the stop.

2. Appeal and Error—preservation of issues—failure to object at trial

In a prosecution for driving while impaired arising from a traffic stop of defendant's car, defendant failed to preserve for appellate review his arguments that an officer unconstitutionally extended the length of the stop and lacked probable cause to arrest him—defendant never raised these arguments at trial.

3. Appeal and Error—abandonment of issues—Rule 28(b)(6)—perfunctory argument

In an appeal from a conviction for driving while impaired, in which defendant's appellate brief included a perfunctory argument—fewer than 100 words consisting of conclusory assertions and lacking citations to the record or to any legal authority—against the trial court's denial of his motions to dismiss, defendant's argument was deemed abandoned for failure to comply with Appellate Rule 28(b)(6).

4. Evidence—driving while impaired—positive alcohol screening tests—prosecutor's statements at closing argument—prejudice

In a prosecution for driving while impaired, the admission of testimony did not violate Evidence Rule 403 where, in accordance with N.C.G.S. § 20-16.3(d), an officer testified to defendant's positive alcohol screening tests from the night of his arrest without revealing defendant's actual blood alcohol concentration (thus, the testimony did not unduly prejudice defendant). Further, the prosecutor's description at closing arguments of alcohol "circulating through defendant's system" did not prejudice defendant because those statements were based on facts in evidence, as well as reasonable inferences drawn from those facts.

5. Evidence—expert witness—qualification—testimony regarding HGN testing—trial for driving while impaired

In a prosecution for driving while impaired, the trial court did not abuse its discretion in qualifying the officer who arrested defendant as an expert on horizontal gaze and nystagmus (HGN) testing and subsequently admitting his testimony regarding HGN testing. The officer had successfully completed HGN training with the State Highway Patrol, and therefore met the requirements of Evidence Rule 702(a1)(1), which permits an expert to testify to the results of an HGN test that is administered by a person with HGN training.

Appeal by defendant from order entered 31 August 2017 by Judge W. Robert Bell, and judgment entered 21 December 2018 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew E. Buckner, for the State.

Arnold & Smith, PLLC, by Paul A. Tharp, for defendant-appellant.

ZACHARY, Judge.

Defendant Toby Jay Wiles appeals from an order denying his motion to suppress and a judgment entered upon a jury's verdict finding him guilty of driving while impaired. After careful review, we affirm the trial court's denial of Defendant's motion to suppress, and conclude that he received a fair trial, free from error.

Background

At around 8:00 p.m. on 23 May 2015, Defendant drove past State Trooper Kelly Stewart, who was parked along the side of the road. Believing that the passenger in the front seat of Defendant's truck was not wearing a seatbelt, Trooper Stewart signaled for Defendant to pull over. As Trooper Stewart approached the passenger's side of Defendant's parked truck, he "[a]lmost instantaneously" noticed an odor of alcohol "coming through th[e] passenger window." Upon reaching the passenger-side window, Trooper Stewart saw the passenger wearing his seatbelt. The passenger stated he had worn his seatbelt the entire time, and Trooper Stewart realized that the gray seatbelt had blended into the passenger's gray shirt. Accordingly, Trooper Stewart decided not to issue a citation to Defendant.

Trooper Stewart explained why he had stopped the vehicle, and the passenger responded that he had been wearing his seatbelt prior to Trooper Stewart's initiation of the stop. Trooper Stewart, noting the strong odor of alcohol emanating from the vehicle, asked whether either man had been drinking. Both answered in the affirmative. Trooper Stewart asked the men to exit the truck, and he observed that Defendant's "eyes were red, glassy and bloodshot." Trooper Stewart administered a roadside Alco-Sensor test to Defendant, which detected the presence of alcohol on Defendant's breath. Trooper Stewart next conducted a horizontal gaze nystagmus ("HGN") test on Defendant, which indicated that Defendant was impaired. Trooper Stewart arrested Defendant and charged him with driving while impaired.

Defendant filed a motion to suppress "all evidence and statements obtained as a result of the stop" by Trooper Stewart, which came on for hearing before the Honorable W. Robert Bell in Catawba County Superior Court on 31 August 2017. Trooper Stewart testified that, but for the seatbelt issue, Defendant appeared to abide by "all the normal rules

of the road." In its order denying Defendant's motion to suppress, the trial court found that Trooper Stewart "[b]eliev[ed] it would be a dereliction of duty to ignore the smell of alcohol coming from the automobile." Thus, the trial court concluded that "[d]uring the 'mission of' the valid traffic stop and prior to the completion of its initial purpose Trooper Stewart obtained information that provided reasonable suspicion of criminal activity to warrant an extension of the initial traffic stop."

On 17 December 2018, Defendant was tried before a jury in Catawba County Superior Court, the Honorable Nathaniel J. Poovey presiding. The jury found Defendant guilty of driving while impaired, and Defendant gave notice of appeal in open court.

Discussion

Defendant raises six issues on appeal: three arising from the hearing on his motion to suppress, and three from his trial. We address each issue in turn.

I. Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress because Trooper Stewart (1) lacked reasonable suspicion to stop Defendant's truck; (2) unconstitutionally extended the length of the stop; and (3) lacked probable cause to arrest Defendant.

A. Standard of Review

It is well settled that

> [t]he standard of review for a motion to suppress is whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law. The court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.

State v. Wainwright, 240 N.C. App. 77, 83-84, 770 S.E.2d 99, 104 (2015) (internal citations and quotation marks omitted). "Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted).

B. The Stop of Defendant's Vehicle[1]

[1] From the order denying his motion to suppress, Defendant challenges findings of fact 6, 7, and 8 as not being supported by competent evidence, as well as conclusion of law 2, which stated that the traffic stop was valid. We address each in turn.

1. *Findings of Fact*

Defendant challenges the following findings:

> 6. [Trooper Stewart] observed the Defendant driving towards his position. There was a passenger in the front passenger seat of the vehicle that Trooper Stewart believed 100% was not wearing a seat belt.
>
> 7. [Trooper] Stewart stopped the truck being driven by the Defendant and approached the passenger side to investigate. Standing at the open passenger side window [Trooper Stewart] smelled a strong odor of alcohol emanating from the passenger compartment of the vehicle. He also noticed that the passenger was wearing a seatbelt.
>
> 8. The passenger stated that he had been wearing a seatbelt the entire time. Despite his certainty that the passenger had not been wearing a seatbelt, Trooper Stewart gave the benefit of the doubt to the passenger since he was wearing a [gray] shirt and the seatbelt was [gray] also.

Defendant offers no particular evidence of the insufficiency of the evidence to support the findings of fact. However, each of these findings is directly traceable to Trooper Stewart's testimony on direct examination at the suppression hearing, during which he recounted the events of the night in question. Trooper Stewart explained that he "did truly, 100 percent believe that [Defendant] wasn't wearing his seat belt." He also said that he "approached the passenger side and . . . . [w]hile [he] was at the vehicle [he] was getting an odor of alcohol from the vehicle." Lastly, he noted that, "If [he is] giving [the passenger] the benefit of the doubt, [he] couldn't say with a gray shirt, gray seat belt, that clear-cut, [he] couldn't have testified 100 percent that [the passenger] wasn't wearing [a seat belt]."

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1. Defendant properly objected to this issue at both the suppression hearing and the subsequent trial.

"The court's findings are conclusive on appeal if supported by competent evidence[.]" *Wainwright*, 240 N.C. App. at 84, 770 S.E.2d at 104. Competent evidence is defined as "evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (citation omitted), *disc. review denied*, 369 N.C. 190, 793 S.E.2d 694 (2016). Because Trooper Stewart's testimony concerning the stop provided "evidence that a reasonable mind might accept as adequate," these findings are supported by competent evidence and are conclusive on appeal. *Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176.

2. *Conclusion of Law*

Defendant also challenges conclusion of law 2, which states:

> Trooper Stewart's view of and belief that the passenger in Defendant's car was not wearing a seatbelt provided him more than an unparticularized suspicion or hunch that a law was being broken and gave him the minimal level of objective justification for making the traffic stop. The traffic stop was valid.

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. As applied through the Fourteenth Amendment, the Fourth Amendment "impose[s] a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions." *Delaware v. Prouse*, 440 U.S. 648, 653-54, 59 L. Ed. 2d 660, 667 (1979) (internal quotation marks omitted). Accordingly, "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250, 114 L. Ed. 2d 297, 302 (1991).

"[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected." *State v. Styles*, 362 N.C. 412, 415, 665 S.E.2d 438, 440 (2008). With regard to an officer's authority to lawfully stop a vehicle, our Supreme Court has held that "[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994). To assess the validity of a stop, "[a] court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion to make an investigatory stop

exists." *Id.* at 441, 446 S.E.2d at 70 (internal quotation marks omitted); *see also State v. Nicholson*, 371 N.C. 284, 290, 813 S.E.2d 840, 844 (2018) ("Assessments of reasonable suspicion are often fact intensive, and courts must always view facts offered to support reasonable suspicion in their totality rather than in isolation.").

Here, Defendant argues that "[a] subjective and admittedly mistaken observation that a passenger is not wearing a seatbelt cannot, logically, serve as the objectively reasonable basis for performing an investigative stop of a vehicle." We disagree.

It is manifest that "[t]he Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes–whether of fact or of law–must be *objectively* reasonable." *State v. Eldridge*, 249 N.C. App. 493, 498, 790 S.E.2d 740, 743 (2016) (citation omitted). The issue in this case is whether Trooper Stewart's mistake of fact—i.e., his mistaken belief that Defendant's passenger was not wearing a seatbelt—could provide reasonable suspicion to justify the stop.

It is well established that a law enforcement officer may stop a vehicle for a seatbelt infraction, and during the mission of the stop determine that probable cause exists to arrest a person for the commission of a separate offense. *See*, *e.g.*, *State v. Salinas*, 214 N.C. App. 408, 409, 715 S.E.2d 262, 263 (2011) (concluding that it was constitutional for police officers to stop the suspect on belief that he was not wearing his seatbelt, and then, "[b]ased upon [the d]efendant's physical appearance, conduct, and a strong odor of burnt marijuana, . . . eventually search[ ] the vehicle and discover[ ] drug paraphernalia"), *aff'd and modified*, 366 N.C. 119, 729 S.E.2d 63 (2012); *State v. Brewington*, 170 N.C. App. 264, 268-69, 612 S.E.2d 648, 651 (affirming a defendant's conviction where the car was stopped due to a seatbelt violation, only to discover drugs on the defendant's person upon reaching the car), *disc. review denied*, 360 N.C. 67, 621 S.E.2d 881 (2005).

Further, it is clear that a law enforcement officer's mistaken belief that a defendant has violated the law may nevertheless provide the reasonable suspicion required for a lawful stop. In *State v. Kincaid*, 147 N.C. App. 94, 96, 555 S.E.2d 294, 297 (2001), the defendant held up his hand to cover his face as he drove by the officer. The officer recognized the defendant, and believed that the defendant's license had been revoked for several years. *Kincaid*, 147 N.C. App. at 96, 555 S.E.2d at 297. Upon stopping the defendant, however, the officer discovered that the driver's license was, in fact, valid. *Id.* Despite his mistake regarding the license, the officer proceeded to ask the defendant whether he could search the car for drugs, because he had previously heard that the defendant was

a drug dealer. *Id.* The defendant consented to the search, which yielded the discovery of marijuana, and the defendant was arrested. *Id.* At a pretrial suppression hearing, the trial court found that "the officer had reasonable suspicion to stop [the] defendant, even though the suspicion proved to be wrong[,]" and concluded that the search was not unreasonable. *Id.* at 97, 555 S.E.2d at 297. On appeal, this Court held that "[a]lthough the officer's suspicion turned out to be incorrect," the officer had reasonable suspicion to stop the defendant in light of the totality of the circumstances. *Id.* at 98, 555 S.E.2d at 298.

In the present case, as in *Kincaid*, Trooper Stewart initially stopped Defendant based on a purported seatbelt infraction, not a reasonable suspicion that Defendant was driving while impaired. Trooper Stewart's mistake—failing to see a gray seatbelt atop a gray shirt—is one a reasonable officer could make. As Trooper Stewart explained:

> [T]he only reason I didn't cite him is not because I still didn't believe my initial suspicion but because I couldn't say 100 percent testifying with my hand on the Bible with him having a gray shirt that it could [sic] have been the other way. But I did truly, 100 percent believe that he wasn't wearing his seat belt.

However, this reasonable mistake of fact did not divest Trooper Stewart of the authority to investigate the source of the odor of alcohol.

Trooper Stewart testified that he smelled alcohol "instantaneously." He explained that while he inquired into the seatbelt issue, he noted the smell of alcohol. Trooper Stewart asked whether Defendant and his passenger had been drinking:

> [i]mmediately following my initial giving the reason for why I stopped and listening to the passenger's articulation about him actually having his seat belt on. I did say, well, I appreciate that; however, right now I'm smelling alcohol coming out of your vehicle. And I said I understand it has nothing to do with your seat belt but I can't just ignore what I'm smelling.

In sum, Trooper Stewart's stop of Defendant's car was constitutional despite his mistake of fact regarding the passenger's seatbelt infraction. Trooper Stewart had a reasonable suspicion to justify his stop based on his "100 percent" belief that the passenger was not wearing a seatbelt. Furthermore, Trooper Stewart's inquiry into whether Defendant had been drinking was appropriate. *See Salinas*, 214 N.C. App. at 409, 715 S.E.2d at 263; *Kincaid*, 147 N.C. App. at 96, 555 S.E.2d at 297.

C. Extension of the Traffic Stop and Probable Cause to Arrest

[2] In his next two arguments, Defendant asserts that (1) Trooper Stewart unconstitutionally extended the traffic stop "in order to smell something"; and (2) there was no probable cause to arrest Defendant. However, because Defendant failed to object to these purported errors at trial, we need not reach the merits of these arguments.

"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). However, an objection during "a trial court's evidentiary ruling on a pretrial motion [to suppress] is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial." *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007).

After careful review of the transcript, we cannot find—and Defendant does not identify—specific objections at trial concerning the issues raised on appeal. Instead, in his brief to this Court, Defendant directs our attention to a short colloquy with the trial court, which occurred at the beginning of the second day of trial:

> [Defense Counsel]: Judge, just for the record, I had just three objections that were just to preserve the record for appellate purposes. I don't know if the Court – I think the Court heard the last one but I don't know. I didn't say them entirely loud because they were just for, you know, for purposes of preserving those issues.
>
> But I would object to the stop at a point that the trooper said he was activating his blue lights to pull over [Defendant].
>
> The Court: I heard that objection. I think I overruled it, but I didn't hear any others.
>
> [Defense Counsel]: And then I objected to the arrest and then just to – out of an abundance of caution objected to the – before the intoxilyzer reading.
>
> The Court: You're saying that – you did object to before the intoxilyzer reading but I don't remember you objecting to the arrest. Your saying it is so now doesn't make it so, so I don't think you objected before the actual arrest.

> [Defense Counsel]: Well, did the Court hear my objection before the intoxilyzer reading?
>
> The Court: I did.

Plainly, Defendant never objected to either (1) the extension of the stop, or (2) whether there was probable cause to arrest Defendant. Because these arguments are constitutional in nature, and because "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal," *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001), we dismiss this portion of Defendant's appeal.[2]

II. Trial

From his jury trial, Defendant argues that the trial court erred in (1) denying his motion to dismiss; (2) admitting into evidence the results of portable breath tests under Evidentiary Rule 403; and (3) qualifying Trooper Stewart as an expert in HGN administration under Evidentiary Rule 702.

A. Denial of Defendant's Motion to Dismiss

[3] Defendant posits that the trial court erred in denying his motions to dismiss at the close of the State's evidence and all evidence. However, in his brief to this Court, Defendant offers a perfunctory argument, fewer than 100 words in length, asking this Court to reach a different outcome from that of the trial court. His argument consists of a few conclusory assertions that the trial court should have granted the motion to dismiss. More importantly, Defendant neglects to include any legal authority or references to the transcript upon which to base these assertions. Our Rules of Appellate Procedure make clear that "[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). Having failed to cite any authority or make a proper argument to this Court, this portion of Defendant's appeal is "taken as abandoned." N.C.R. App. P. 28(b)(6).

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2. In his reply brief to this Court, Defendant requests in the alternative that this Court invoke Appellate Rule 2 so that we may reach the merits of these arguments. Rule 2 provides that, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules[.]" N.C.R. App. P. 2. However, a reply brief should be "limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief," N.C.R. App. P. 28(h)(3), and Defendant may not assert new grounds for appellate review in the reply brief. *See State v. Triplett*, 258 N.C. App. 144, 147, 810 S.E.2d 404, 407 (2018).

B. Admission of Breath Tests

[4] Defendant next argues that the trial court "abused its discretion when it allowed the State to introduce evidence regarding two portable breath tests." Defendant maintains that these "positive test results, as along with the prosecutor's description of alcohol circulating through Defendant's system, unduly prejudiced his defense."

1. *Standard of Review*

Admissions under Rule 403 are reviewed by this Court for an abuse of discretion. *State v. Adams*, 220 N.C. App. 319, 328, 727 S.E.2d 577, 584 (2012). "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 (quotation marks omitted), *cert. denied*, 549 U.S. 1000, 166 L. Ed. 2d 378 (2006).

2. *Evidentiary Rule 403*

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2019). The official comment to Rule 403 provides that "unfair prejudice" is "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* cmt.

Admissibility of evidence in driving-while-impaired cases is covered under Chapter 20 of our General Statutes. Where the suspect has been stopped, "[a] law-enforcement officer may require the driver of a vehicle to submit to an alcohol screening test." *Id.* § 20-16.3(a). "The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result . . . is admissible in a court." *Id.* § 20-16.3(d).

In the present case, Defendant first asserts that "the admission of positive results . . . unduly prejudiced his defense." However, Trooper Stewart only testified to the positive test results, without revealing the actual alcohol concentration. The testimony was therefore in accordance with § 20-16.3(d), and was not erroneously admitted.

Defendant next contends that the State's reference in its closing argument to alcohol "circulating in [Defendant's] system" was prejudicial. A prosecutor is afforded a generous latitude in argument. *State*

v. Covington, 290 N.C. 313, 327, 226 S.E.2d 629, 640 (1976). Counsel "may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case." *Id.* at 327-28, 226 S.E.2d at 640.

Here, the State's closing argument was aptly based on facts in evidence, as well as reasonable inferences drawn from those facts. The State recounted (1) the strong odor of alcohol coming from the car; (2) Defendant's admission to having consumed alcohol; and (3) the positive results from the portable breath tests conducted at the scene of the stop. Taken together, and in light of the wide discretion prosecutors are permitted in closing arguments, we conclude that the trial court did not err in allowing the prosecutor to assert that alcohol was "circulating in [Defendant's] system," and that Defendant did not suffer any resultant prejudice.

C. Trooper Stewart's Qualification as an Expert

[5] Finally, Defendant argues that the trial court "abused its discretion in granting the State's motion to qualify [Trooper Stewart] as an expert, and thereafter admitting testimony regarding HGN testing." We disagree.

1. *Standard of Review*

This Court reviews the admissibility of expert testimony for abuse of discretion. *State v. Barker*, 257 N.C. App. 173, 176, 809 S.E.2d 171, 174 (2017).

2. *HGN Testing*

Evidentiary Rule 702 provides, in pertinent part, that "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion[.]" N.C. Gen. Stat. § 8C-1, Rule 702(a). Expert testimony is appropriate where (1) it is based upon sufficient facts or data, (2) it is based upon reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Id.* Although our General Statutes broadly characterize admissible expert testimony as "scientific, technical or other specialized knowledge," the statute specifically provides that:

> (a1) Notwithstanding any other provision of law, a witness may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
>
> > (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered in accordance

> with the person's training by a person who has successfully completed training in HGN.

Id. § 8C-1, Rule 702(a1)(1).

In the case at bar, Trooper Stewart testified to his successful completion of HGN training with the North Carolina State Highway Patrol, and the State tendered him as an expert in "the administration and interpretation of horizontal gaze and nystagmus testing." Accordingly, pursuant to N.C. Gen. Stat. § 8C-1, Rule 702(a1)(1), the trial court did not err in qualifying Trooper Stewart as an expert based on his training and professional experience administering the test, or in admitting his testimony regarding HGN testing.

Conclusion

We affirm the trial court's denial of Defendant's motion to suppress, and dismiss Defendant's unpreserved arguments found in Parts I(C) and II(A) of this opinion. Our examination of Defendant's remaining arguments and our review of the record lead us to conclude that Defendant received a fair trial, free from error.

AFFIRMED IN PART; DISMISSED IN PART; NO ERROR IN PART.

Judges STROUD and MURPHY concur.

LISA M. TAUBE, Plaintiff

v.

TAMARA "TAMMY" HOOPER, individually, and in her official capacity as Chief of Police for the City of Asheville; and CITY OF ASHEVILLE, Defendants

No. COA19-827

Filed 17 March 2020

1. Libel and Slander—defamation—statements to media—police sergeant's performance—plaintiff not identified

The trial court properly dismissed claims for libel and slander per se brought by a police sergeant (plaintiff) after statements were made to media outlets by the city and police chief regarding an incident involving excessive use of force by a police officer, which referred to an unnamed supervisor who received discipline for unsatisfactory performance in investigating the incident. Although media and the public shortly thereafter learned that plaintiff was the

referenced supervisor, the statements themselves were not defamatory because they did not identify plaintiff.

2. Libel and Slander—defamation—police sergeant—affidavit of separation—truthful statement

The trial court properly dismissed a claim for libel per se brought by a police sergeant (plaintiff) after the chief of police submitted a mandatory affidavit of separation in which a box was checked that the department was aware of a recent investigation of potential misconduct by plaintiff, because plaintiff's own pleadings acknowledged the truth of the statement. Further, the phrase "potential misconduct" was vague enough that it did not tend to impeach plaintiff in her profession as a law enforcement officer and therefore was not actionable per se.

Appeal by plaintiff from order entered 21 May 2019 by Judge W. Erwin Spainhour in Buncombe County Superior Court. Heard in the Court of Appeals 19 February 2020.

John C. Hunter for plaintiff.

McGuire, Wood & Bissette, PA, by Joseph P. McGuire, for defendants.

ARROWOOD, Judge.

Lisa M. Taube ("plaintiff") appeals from the trial court's dismissal of her defamation claims for failure to state a claim upon which relief can be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). For the following reasons, we affirm.

I. Background

This case involves statements by Asheville Police Department Chief Tammy Hooper ("the Department" and "defendant Hooper") and the City of Asheville concerning plaintiff's response to an incident wherein one of the officers she supervised used excessive force to arrest an individual. As a result of these statements, plaintiff filed suit against defendants, asserting claims of defamation and intentional infliction of emotional distress. The allegations in plaintiff's complaint are summarized as follows.

Plaintiff was employed as a Sergeant with the Department from 2005 until her resignation on 31 August 2018. On the night of 24 August 2017,

plaintiff was the supervisor on duty for the Department's Downtown Unit. During her shift, plaintiff was notified that Officer Christopher Hickman, one of her reporting officers, had used physical force incident to the arrest of an individual. Shortly after midnight, plaintiff arrived at the scene and took statements from Officer Hickman and the arrestee. These statements were recorded on her body-worn camera and uploaded to the Department's computer server later that night. Plaintiff also arranged for photographs to be taken of the arrestee to document potential injuries.

Because plaintiff was soon due to depart on a scheduled two-week family vacation to Michigan, which included a wedding at 8:00 p.m. later that day, she concluded her initial investigation and reporting at this point and forwarded the information she had gathered with a reminder of her planned leave to her supervisors and reporting officers. She notified them that she had initiated the process of creating the "Blue Team Report," the reporting procedure for use of force incidents required by Department policy. Defendant then departed on her scheduled vacation.

On 25 August 2017, the Department suspended the Blue Team Report procedure and launched a Professional Standards Section administrative investigation into the arrest, use of force, and Officer Hickman's conduct. This investigation relieved plaintiff of further responsibility in preparing the Blue Team Report.

Months later, Officer Hickman's use of force became the subject of local media attention and public outcry as a perceived instance of police brutality. On 28 February 2018, the Asheville Citizen-Times first brought the incident to the public's attention by acquiring and publishing the bodycam footage of the arrest. This news coverage made the Department, defendant Hooper, and the City of Asheville the subject of considerable public criticism. Other information emerged tending to further subject defendant Hooper to criticism for her months-delayed response to the incident.

As the news story continued to develop, on 5 March 2018 the City of Asheville released a written statement to the public concerning the incident:

> That Supervisor, however, despite being told by Hickman that he had struck [the arrestee] in the head with his Taser, and despite [the arrestee] saying that he was choked, did not immediately forward any information or complete notes of these interviews with Hickman and [the arrestee], and did not review the body camera footage that evening.

> Because of conduct related to this incident, that Supervisor ultimately received discipline for unsatisfactory performance and was ordered to undergo additional training.

Later that day, defendant Hooper gave an interview to a local television station. She made the following statement:

> There were some issues with the Supervisor who showed up to review the incident. Our expectations, our policy is pretty clear about what the Supervisor's responsibilities are, those are laid out pretty clearly in the [written statement] that was issued. All those things didn't happen. And so I think that the intention of the Supervisor was to do a more thorough review later or something to that effect, but that's not acceptable. So the Supervisor dropped the ball on the response to that, and was disciplined in response.

Based on these statements, local journalists and the public soon discovered plaintiff's identity as "the Supervisor." Ever since these statements, plaintiff has been subjected to public scorn and hateful electronic communications.

Plaintiff resigned from the Department on 31 August 2018. Pursuant to her resignation, defendant Hooper submitted a legally mandated "Form F-5, *Affidavit of Separation*" to the North Carolina Criminal Justice Education and Training Standards Commission. On the form, defendant Hooper checked a box indicating that "[the Department] **IS** aware of any investigation(s) in the last 18 months concerning potential criminal action or potential misconduct by this officer." (emphasis in complaint). The Affidavit of Separation form is a document that is customarily viewed by law enforcement entities in determining whether to hire a candidate for a law enforcement position.

On 9 May 2019, defendants moved to dismiss plaintiff's claims pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The trial court granted this motion and dismissed plaintiff's claims. Plaintiff timely appealed.

II. Discussion

Plaintiff argues that the trial court erred in dismissing her claims of libel and slander *per se* pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[1] For the following reasons, we disagree.

1. Plaintiff has abandoned any challenge to the trial court's dismissal of her other claims by failing to argue them in her appellate briefs. N.C.R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

A. Standard of Review

"We review appeals from dismissals under Rule 12(b)(6) de novo." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citation omitted).

> Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint fail[s] to state a claim upon which relief can be granted. [T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted. When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper.

Id. at 448, 781 S.E.2d at 7-8 (internal quotation marks and citations omitted).

B. Claims of Libel *Per Se* and Slander *Per Se*

"In order to recover for defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation." *Tyson v. L'Eggs Prods., Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987) (citing *Hall v. Publishing Co.*, 46 N.C. App. 760, 266 S.E.2d 397 (1980)).

> The term defamation covers two distinct torts, libel and slander. In general, libel is written while slander is oral. Libel *per se* is a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace. Slander *per se* is an oral communication to a third person which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease. When defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel.

Phillips v. Winston-Salem/Forsyth Cty. Bd. of Educ., 117 N.C. App. 274, 277-78, 450 S.E.2d 753, 756 (1994) (internal quotation marks, alterations, and citations omitted).

In reviewing whether a plaintiff has stated a claim of defamation *per se*, the allegedly defamatory statement "alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The [statement] must be defamatory on its face within the four corners thereof." *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 318-19, 312 S.E.2d 405, 409 (internal quotation marks and citation omitted), *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). "The question always is how would ordinary men naturally understand the [statement.]" *Id.* at 318, 312 S.E.2d at 409 (citation omitted).

1. Statements Made to the Press

[1] In the instant case, plaintiff alleges three statements by defendants were defamatory *per se*. The first two statements plaintiff alleges were defamatory *per se* were statements defendants provided to local media outlets. The essence of these statements was that "the Supervisor who showed up to review" Officer Hickman's use of force had failed to follow the department's reporting policy and "that Supervisor ultimately received discipline for unsatisfactory performance and was ordered to undergo additional training."

The trial court did not err in dismissing plaintiff's claims of libel and slander *per se* because these statements do not sufficiently identify plaintiff as their subject, thus lacking the "of or concerning plaintiff" element of a viable defamation claim. "In order for defamatory words to be actionable, they must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them dafamatory [sic]." *Arnold v. Sharpe*, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979) (citation omitted).

We find the facts in the instant case comparable to those of *Chapman v. Byrd*, 124 N.C. App. 13, 475 S.E.2d 734 (1996). In *Chapman*, one of the defendants told his coworkers to avoid dining at a certain restaurant in a shopping center because " '[he] heard someone over there has AIDs [sic].' " *Id.* at 15, 475 S.E.2d at 736. Nine people worked at the shopping center at the time, and the defendant did not further specify which person he believed had AIDS. *Id.* These nine workers sued the defendant for defamation, alleging this statement defamed them each individually. *Id.*

Distinguishing the case from *Carter v. King*, 174 N.C. 590, 592, 94 S.E. 4, 5 (1917) (holding plaintiff juror stated viable defamation claim by alleging defendant stated "there was one man on the jury that was not bribed"), this Court held that the plaintiffs had not stated a viable defamation claim because the statement did not adequately identify them. *Chapman*, 124 N.C. App. at 16-18, 475 S.E.2d at 737-38. We reasoned that "here the statements concern only one person in a group of nine, *i.e.*, the statements referred to 'someone.' Plaintiffs have not cited nor have we found any North Carolina case holding that any one person of a group of nine may bring a defamation action based on statements made about a single unidentified member of the group. . . . Since the alleged statements referred only to 'someone' in a group of nine, they clearly do not refer to some, most or all of the group." *Id.* at 16-17, 475 S.E.2d at 737-38 (citing *Arcand v. Evening Call Publishing Co.*, 567 F.2d 1163, 1165 (1st Cir. 1977) (holding defamatory statement referring to one unspecified police officer in a group of twenty-one was not "of or concerning" each individual officer in group).

In the instant case, the allegedly defamatory statements referred to "the Supervisor who showed up to review the incident." Plaintiff points to the fact that local media outlets and people following the story ascertained that she was the referenced supervisor soon after defendants made the statements. However, we cannot consider this fact in reviewing plaintiff's claims that these statements were defamatory *per se*. We are limited to an interpretation of only the language within the statements' four corners. *Renwick*, 310 N.C. at 318, 312 S.E.2d at 409 (citation omitted). Here, similar to *Chapman*, defendants' statements to the press concern one unidentified supervisor in the Asheville Police Department, of which there are many, that responded to Officer Hickman's use of force incident.

The only case we are able to find in which the surrounding context was remotely considered in reviewing whether an allegedly *per se* defamatory statement was "of or concerning plaintiff" is *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002). In that case, a campaign advertisement accused "Dan Boyce's law firm" of unethical practices. *Id.* at 33, 568 S.E.2d at 900. In holding that each plaintiff lawyer of the firm stated a claim for libel *per se*, we reasoned that the statement "maligned each attorney in the firm, of which there [were] only four. Moreover, . . . identification of the law firm of Boyce & Isley, PLLC was readily ascertainable from the reference to 'Dan Boyce's law firm.' " *Id.*

The instant case is distinguishable from *Boyce & Isley, PLLC*. Defendants' statements do not malign every member of a small group whose members are readily identifiable by the community at large. Rather, the statements refer to the one "supervisor," of which there are many in the Department, that responded to the reported incident of force by a subordinate officer. Unlike "Dan Boyce's law firm," whose named member was a candidate running a statewide campaign for Attorney General, *id.* at 27, 568 S.E.2d at 896-97, we do not believe that an ordinary person hearing defendants' statements about "the supervisor" on duty would be able to readily ascertain plaintiff's identity.

Because these allegedly defamatory statements do not sufficiently identify her as their subject, plaintiff has failed to plead viable claims of libel and slander *per se*. The trial court did not err in dismissing these claims.

2. Statement in Mandatory Affidavit of Separation

[2] The third statement underlying plaintiff's claims of libel *per se* was in the Affidavit of Separation submitted by defendant Hooper to the North Carolina Criminal Justice Education and Training Standards Commission. In this mandatory report detailing the nature of plaintiff's subsequent separation from the Department, defendant Hooper checked a box stating that "[the Department] **IS** aware of any investigation(s) in the last 18 months concerning potential criminal action or potential misconduct by this officer."

As an initial matter, we note that plaintiff's complaint has overcome the hurdle presented by the qualified privilege claimed by defendants at the pleadings phase because she alleges malice in defendant Hooper's publication of the statement. *See Andrews v. Elliot*, 109 N.C. App. 271, 275-76, 426 S.E.2d 430, 433 (1993) (holding defense of qualified privilege in publishing statement does not defeat claim of defamation *per se* at pleadings stage where complaint alleges actual malice in publication).

Plaintiff argues that this statement was libelous *per se* because it tended to impeach her in her profession as a law enforcement officer. We find that the truth of the referenced statement defeats plaintiff's claim. Furthermore, the referenced statement is not *per se* actionable.

Plaintiff's complaint acknowledges that she "had been the subject of an investigation into potential unsatisfactory job performance as stated in the Written Warning she had received." The complaint states that the Department's Professional Standards Section investigated Officer Hickman's use of force and the surrounding circumstances, and that

"[a]s a result of the finding of the investigation, a recommendation was made to sustain an allegation of Unsatisfactory Performance against [plaintiff,]" and plaintiff was subsequently disciplined with a written warning and brief suspension without pay. Thus, the statement that the Department was aware of an investigation into plaintiff's potential misconduct was established as true by the allegations of the complaint. Truth is an absolute defense to an allegation of defamation. *Holleman v. Aiken*, 193 N.C. App. 484, 496-97, 668 S.E.2d 579, 587-88 (2008). Where plaintiff's own pleadings establish the truth of an allegedly defamatory statement, dismissal per Rule 12(b)(6) is proper. *Id.*

Furthermore, a statement that plaintiff had been investigated for "potential misconduct" does not tend to impeach her in her profession as a law enforcement officer as a matter of law. We have previously held more concrete accusations concerning actual, rather than potential, workplace misconduct not actionable *per se*. *See*, *e.g.*, *Pierce v. Atl. Grp., Inc.*, 219 N.C. App. 19, 34, 724 S.E.2d 568, 578-79 (2012) ("We do not believe that Plaintiff's complaint, alleging that Defendant 'falsely contended' that Plaintiff 'falsified his time card,' or reported Plaintiff to the Nuclear Regulatory Commission sets forth a cause of action for libel *per se* sufficient to survive Defendants' Rule 12(b)(6) motion.") (alterations omitted); *Stutts v. Power Co.*, 47 N.C. App. 76, 78, 82, 266 S.E.2d 861, 863, 865 (1980) (holding statement by plaintiff-employee's supervisor that he was "fired . . . for a dishonest act and falsifying the records" by punching time card on day of absence from work not actionable *per se* as professional impeachment). The statement that plaintiff was investigated for "potential misconduct" is far more vague, and does not allege the existence of any actual misconduct in and of itself. Therefore, the trial court did not err in dismissing plaintiff's libel *per se* claims based upon defendant Hooper's statement in the Affidavit of Separation.

III. Conclusion

For the foregoing reasons, we find no error in the trial court's dismissal of plaintiff's claims pursuant to Rule 12(b)(6).

AFFIRMED.

Judges DILLON and BERGER concur.

TOPPING v. MEYERS

[270 N.C. App. 613 (2020)]

RICHARD TOPPING, PLAINTIFF
v.
KURT MEYERS AND MCGUIREWOODS, LLP, DEFENDANTS

No. COA19-618

Filed 17 March 2020

1. Appeal and Error—interlocutory appeal—substantial right—defamation case—denial of Rule 12(b)(6) motion—risk of inconsistent verdicts

After a former executive for a mental health area authority sued an attorney and law firm (defendants) for defamation and negligence, defendants failed to show that an order denying their Rule 12(b)(6) motion to dismiss affected a substantial right, and therefore their interlocutory appeal from that order was dismissed. Although misapplication of the "actual malice standard" for defamation at the summary judgment stage can implicate a substantial right to free speech, the same is not true at the motion to dismiss stage. Further, defendants did not have a substantial right to avoid the risk of inconsistent verdicts between the defamation and negligence claims because the law only recognizes a substantial right to avoid the risk of inconsistent verdicts on the same issues in different trials.

2. Appeal and Error—interlocutory appeal—substantial right—defamation case—absolute privilege—immunity from suit

Where a mental health area authority hired an attorney and law firm (defendants) to investigate misconduct by their former chief executive (plaintiff) and to represent the authority in a lawsuit against the executive based on that investigation, and where defendants revealed their findings to the media at a press conference allowed by the authority, defendants' interlocutory appeal from the denial of their motion to dismiss plaintiff's defamation lawsuit against them did not affect a substantial right to immunity from suit, and was therefore dismissed. Defendants could not claim absolute privilege from suit because their statements were not "made in due course of a judicial proceeding," and any legislative immunity afforded to the authority—flowing from the investigation as a quasi-judicial proceeding—did not extend to defendants' statements.

3. Appeal and Error—petition for certiorari—showing of good cause—defamation case

Where a former executive for a mental health area authority sued an attorney and law firm (defendants) for defamation and negligence, and where defendants failed to show that an interlocutory order denying their Rule 12(b)(6) motion to dismiss affected a substantial right, the Court of Appeals denied defendants' petition for a writ of certiorari because defendants also failed to show "good and sufficient cause" for allowing certiorari as an alternative to interlocutory jurisdiction.

Judge BROOK concurring in part and concurring in the result in part with separate opinion.

Appeal by defendants from order entered 18 March 2019 by Judge Joseph N. Crosswhite in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 February 2020.

Rudolf Widenhouse, by David S. Rudolf, Joseph P. Lattimore, and Sonya Pfeiffer, for plaintiff-appellee.

Mullins Duncan Harrell & Russell PLLC, by Allison O. Mullins and Alan W. Duncan, for defendant-appellants.

TYSON, Judge.

Kurt Meyers and McGuireWoods, LLP ("Defendants") appeal from an order entered 18 March 2019 denying their motion to dismiss Richard Topping's ("Plaintiff") claims against them. We dismiss Defendant's interlocutory appeal and remand.

I. Background

Defendants' client, Cardinal Innovations Healthcare Solutions ("Cardinal") is a Local Management Entity/Managed Care Organization under the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985. N.C. Gen. Stat. § 122C-1 (2019). Cardinal is an "area authority," which is "a local political subdivision of the State." N.C. Gen. Stat. §§ 122C-3(1), 122C-116(a) (2019).

Plaintiff became the Chief Executive Officer ("CEO") of Cardinal 1 July 2015. Following receipt and review of a North Carolina State Auditor's performance audit in May 2017, the Secretary of the North

Carolina Department of Health and Human Services ("DHHS") initiated an investigation into Cardinal's activities.

The subsequent investigatory report "sharply criticized" the severance provisions of Plaintiff's employment contract and several other Cardinal executives, and also Plaintiff's compensation and potential bonus opportunities under his contract. Plaintiff and three other executives resigned from Cardinal in November 2017, after the audit and DHHS report. Plaintiff was paid two years' severance, allegedly worth $1.7 million. DHHS officials took over Cardinal's operations and fired its board members. The new board ("the Board") hired Defendants in January 2018 to conduct an independent internal investigation of Plaintiff's conduct relating to the drafting and approval of the severance agreements, and the November 2017 severance payments made to himself and three other former Cardinal executives, who had also resigned.

Defendant Meyers presented the findings of the investigation to the Board on 23 March 2018. The Board voted to file a lawsuit against Plaintiff, seeking the return of the November 2017 two year's severance payment based upon his alleged misconduct. The Board also authorized a press conference to be held after filing the suit, wherein Defendant Meyers would present the findings and allegations in the complaint to the media.

Cardinal filed suit against Plaintiff at 9:00 a.m. on 26 March 2018. A press conference began at 10:30 a.m., during which Defendant Meyers gave his presentation to the assembled representatives of the media.

Plaintiff filed suit against Defendants on 30 May 2018, alleging libel *per se*, slander *per se*, negligent infliction of emotional distress, negligence, and punitive damages. Defendants moved to dismiss Plaintiff's complaint for failure to state a claim upon which relief could be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2019). Defendants asserted, *inter alia*, Plaintiff's claims are barred by absolute privilege and Plaintiff had improperly recast and re-asserted his defamation claims as negligence claims.

The trial court struck four paragraphs of Plaintiff's complaint for impermissible reliance upon the North Carolina Rules of Professional Conduct to allege a legal duty and standard of care for the negligence claims. The trial court otherwise denied Defendants' motion. Defendants timely filed notice of appeal.

II. Interlocutory Jurisdiction

Defendants argue this Court possesses jurisdiction over this interlocutory appeal pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3) (2019).

> Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. . . . Essentially a two-part test has developed[:] the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.

Goldston v. American Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990) (citations and internal quotation marks omitted).

> Admittedly the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Waters v. Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

On a purported appeal from an interlocutory order without the trial court's Rule 54(b) certification, "the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (citations omitted).

Defendants assert the trial court's order deprived them of substantial rights in two ways: (1) the trial court's failure to dismiss Plaintiff's defamation claims for absolute privilege; and, (2) the trial court's failure to dismiss Plaintiff's negligence claims attacking speech as duplicative of his defamation claims. We address each in turn. Alternatively, Defendants have concurrently filed a petition for a writ of certiorari with this Court.

A. Absolute Privilege

Defendants analogize their claim of absolute privilege to sovereign immunity or public official immunity to assert the trial court's denials

of their motion to dismiss are immediately appealable. *See, e.g.*, *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010) (citations omitted) (the "denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable"); *Summey v. Barker*, 142 N.C. App. 688, 689, 544 S.E.2d 262, 264 (2001) (citation omitted) ("Orders denying dispositive motions based on public official's immunity affect a substantial right and are immediately appealable.").

> The rationale for the exception to the general rule [denying interlocutory appeals] stems from the nature of the immunity defense. A valid claim of immunity is more than a defense in a lawsuit; it is in essence immunity from suit. Were the case to be erroneously permitted to proceed to trial, immunity would be effectively lost.

Clark v. Red Bird Cab Co., 114 N.C. App. 400, 403, 442 S.E.2d 75, 77 (1994) (citations and internal quotation marks omitted).

If an absolute bar to suit extends and applies to Defendants' actions, the trial court's failure to dismiss Plaintiff's claims deprives Defendants of immunity from suit. If applicable, this denial of immunity from suit, as asserted in Defendants' motion, is a substantial right for Defendants, which would be lost, absent interlocutory review. *See Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. In "considering the particular facts . . . and the procedural context" of this case, we conduct a full analysis of the issue of absolute immunity from suit below, to determine whether Defendants have asserted a "substantial right" in this interlocutory appeal. *See Waters*, 294 N.C. at 208, 240 S.E.2d at 343.

B. Negligence Claims

[1] Defendants also assert a substantial right exists for this Court to exercise interlocutory jurisdiction over their appeal of the trial court's denial of their motion to dismiss Plaintiff's negligence-based claims regarding Defendants' speech. Defendants argue the trial court's failure to dismiss Plaintiff's negligence-based claims misapplies defamation standards including the actual malice standard, denies them applicable defenses including the truth, and also presents the danger of inconsistent verdicts.

"An order implicating a party's First Amendment rights affects a substantial right." *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998). Our Courts have recognized, when considering a motion for summary judgment, a misapplication of the actual

malice standard could have a chilling effect on a defendant's right to free speech and implicates a substantial right. *Boyce & Isley, PLLC v. Cooper* (*Boyce II*), 169 N.C. App. 572, 575-76, 611 S.E.2d 175, 177 (2005) (citing *Priest v. Sobeck*, 357 N.C. 159, 579 S.E.2d 250 (2003)). In *Boyce II*, however, this Court held the denial of a Rule 12 motion to dismiss does not implicate a substantial right as could arise by the denial of a motion for summary judgment under Rule 56:

> misapplication of the actual malice standard on summary judgment could lead to some loss or infringement on a substantial right, whereas denial of the 12(c) motion here will not. On a motion for summary judgment the forecast of evidence is set. A court can more adequately determine whether the forecast evidence (affidavits, depositions, exhibits, and the like) presents a factual issue under the correctly applied legal standard for actual malice. In reviewing the allegations of the pleadings as in ruling on a 12(c) motion, the court need only decide if the elements of the claim, perhaps including actual malice, have been alleged, not how to apply that standard. An incorrect application of the actual malice standard to deny summary judgment results in trial, whereas denial of a 12(c) motion results in further discovery and possibly summary judgment or other proceedings. Although we recognize that the First Amendment protects substantial rights, there is nothing here to suggest an immediate loss of these rights. . . . Any defenses or arguments that plaintiffs cannot actually prove their allegations in the complaint due to lack of evidence regarding malice will not be immediately lost if this case proceeds.

Id. at 577-78, 611 S.E.2d at 178.

Although the ruling in *Boyce II* dealt with a Rule 12(c) motion for judgment on the pleadings, a Rule "12(c) motion is more like a [Rule] 12(b)(6) motion than one for summary judgment, because at the time of filing typically no discovery has occurred, no evidence or affidavits are submitted, and a ruling is based on the pleadings themselves—along with any properly submitted exhibits." *Id.* at 576, 611 S.E.2d at 177-78. Where, as here, the interlocutory appeal is asserted on denial of a Rule 12(b)(6) motion, and not under a Rule 12(c) motion for judgment on the pleadings, the reasoning stated in *Boyce II* is stronger.

Alternatively, Defendants argue the risk of inconsistent verdicts on the defamation and negligence claims represents a substantial right.

However, our Courts have only found a substantial right in the risk of inconsistent verdicts between multiple trials on the same issues, not between multiple claims in the same trial. "The avoidance of one trial is not ordinarily a substantial right. . . . [T]he right to avoid the possibility of two trials on the same issues can be a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982) (citations and alterations omitted).

Defendants' second issue is properly dismissed as interlocutory. Defendants have not shown they possess a substantial right which would be jeopardized absent appellate review, at least upon denial of their Rule 12(b)(6) motion to dismiss. We express no opinion on the merits, if any, of Plaintiff's claims or Defendants' arguments and defenses.

III. Issue

In the remaining issue, Defendants argue the trial court erred in denying their motion to dismiss Plaintiff's claims based on the assertion of absolute privilege.

IV. Standard of Review

"We review *de novo* a trial court's ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Watts-Robinson v. Shelton*, 251 N.C. App. 507, 509, 796 S.E.2d 51, 54 (2016).

Generally, immunities from suit and assertions of privileges are strictly construed in North Carolina. *See, e.g.*, *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 37, 125 S.E.2d 326, 330 (1962) (physician-patient privilege); *Scott v. Scott*, 106 N.C. App. 606, 612, 417 S.E.2d 818, 823 (1992) (attorney-client privilege), *aff'd*, 336 N.C. 284, 442 S.E.2d 493 (1994).

"In deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding. These issues are questions of law to be decided by the court." *Harman v. Belk*, 165 N.C. App. 819, 824, 600 S.E.2d 43, 47 (2004) (citations omitted). "The trial court's conclusions of law are reviewed *de novo*." *Shirey v. Shirey*, __ N.C. App. __, __, 833 S.E.2d 820, 825 (2019).

V. Analysis

[2] In North Carolina, absolute privilege or "complete immunity" from suit applies to communications which are:

> so much to the public interest that the defendant should speak out his mind fully and freely, that all actions in

> respect to the words used are absolutely forbidden, even though it be alleged that they were used falsely, knowingly, and with express malice. This complete immunity obtains only *where the public service or the due administration of justice requires it*, *e.g.*, words used in debate in Congress and the State Legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like. In these cases the action is absolutely barred.

Bouligny, Inc. v. Steelworkers, 270 N.C. 160, 170-71, 154 S.E.2d 344, 354 (1967) (emphasis original) (citations omitted).

These communications represent the core of speech protected by absolute privilege. As a claimant of absolute privilege departs from this protected core, the claim to the immunity from suit diminishes.

> [T]he protection from liability to suit attaches by reason of the setting in which the defamatory statement is spoken or published. The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances. The judge, legislator or administrative official, when speaking or writing apart from and independent of the functions of his office, is liable for slanderous or libelous statements upon the same principles applicable to other individuals.

Id. at 171, 154 S.E.2d at 354.

This Court has stated, "an attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." *Jones v. Coward*, 193 N.C. App. 231, 234, 666 S.E.2d 877, 879 (2008) (quoting Restatement (Second) of Torts § 586 (1977)).

"Our courts have held that statements are 'made in due course of a judicial proceeding' if they are submitted to the court presiding over litigation or to the government agency presiding over an administrative hearing and are relevant or pertinent to the litigation or hearing." *Burton v. NCNB*, 85 N.C. App. 702, 705, 355 S.E.2d 800, 802 (1987) (citations omitted).

The trial court ruled Defendants' assertion of absolute privilege over Meyers' statements departs and deviates from the core speech protected by the judicial-proceeding privilege in two significant ways: (1) Defendants were investigatory counsel, and not litigation counsel, for Cardinal in the newly-commenced judicial proceeding; and, (2) Defendants' speech occurred during a press conference to the media and not while in the courtroom. Defendants also argue Cardinal's status as a statutorily-created entity and being a local political subdivision cloaks their investigation and statements as a quasi-judicial or legislative proceeding.

A. Investigatory Counsel

The trial court determined: "Defendant Meyers's statements are not entitled to an absolute privilege [because he] was not counsel for the Board in the judicial proceeding . . . ." The trial court did not provide any precedent or legal basis for distinguishing Meyers' role as counsel retained by the Board to investigate Plaintiff from the status of "counsel for the Board in the judicial proceeding."

The trial court's ruling implies that Cardinal's litigation counsel would be entitled to a greater claim to absolute privilege than Defendants for making the same statements by virtue of their role in this judicial proceeding. We see no basis for the trial court's distinctions between in-house, investigatory, and litigation counsel.

Cardinal hired Defendants to conduct its investigation into Plaintiff's conduct as its CEO and his interactions with other Cardinal senior officers based upon the audit and intervention from DHHS. Defendants' investigation formed the basis for Cardinal's allegations and claims in their civil suit filed against its former CEO. Cardinal had filed a civil proceeding against Plaintiff in the superior court earlier the same day as the press conference was held. The complaint and judicial proceeding were both predicated upon Defendants' investigation and the findings and allegations made about Plaintiff in their report to the Board.

Plaintiff's complaint concedes Defendant Meyers' statements were made in a press conference held at 10:30 a.m. on 26 March 2018, an hour and a half after Cardinal had filed its lawsuit against Plaintiff. Plaintiff alleged Defendant Meyers "knew that [Cardinal's] lawsuit . . . would be based on his investigation," and "agreed to participate in a press conference about [Plaintiff's] alleged misconduct in conjunction with the filing of the lawsuit." Plaintiff further alleged and acknowledged Defendant Meyers' statements "mirrored" the allegations asserted in Cardinal's

complaint, and his PowerPoint repeated "the same misconduct as was alleged in the lawsuit filed by Cardinal earlier that day."

"Where the relation of attorney and client exists, the law of principal and agent is generally applicable." *Bank v. McEwen*, 160 N.C. 414, 420, 76 S.E. 222, 224 (1912). It is undisputed that Defendants' statements at the press conference "mirrored" allegations asserted in Cardinal's complaint. Defendants acted as Cardinal's counsel and agents throughout the investigation and press conference, just as the litigation counsel did when it filed the complaint against Plaintiff on Cardinal's behalf. Defendants' claim to absolute privilege flows through their principal-agent relationship with Cardinal. The immunity from suit protects the principal. If the principal is immune, its agents are as well. *See id.*

We cannot distinguish Defendants' statements based on whether they had been retained by Cardinal as counsel for investigation or litigation. Preparation for litigation is as much the practice of law as is litigating the claims. *See* N.C. Gen. Stat. § 84-2.1(a) (2019). The trial court erred by distinguishing Defendants' role as investigatory versus litigation counsel as a factor in its analysis.

B. Out-of-Court Press Conference

We next analyze the venue or "occasion" where and when the statements were made. *See Bouligny, Inc.*, 270 N.C. at 171, 154 S.E.2d at 354. The trial court concluded Defendants were not entitled to immunity from suit because "the statements were made outside of the proceeding at a press conference attended by members of the media." The trial court denied dismissal and reasoned this privilege "does not apply to statements made outside of the judicial proceeding, particularly when the statements are made to the media," citing *Andrews v. Elliot*, 109 N.C. App. 271, 275, 426 S.E.2d 430, 432-33 (1993).

The trial court's order denying Defendants' motion partially relied upon this Court's decision in *Andrews*, wherein one attorney sued another for mailing a copy of a letter containing allegedly slanderous and libelous statements about him to a newspaper, where it was seen and read by at least three of their employees. *Id.* at 272, 426 S.E.2d at 431. The letter did not concern pending litigation, however; it merely threatened litigation after accusing the other attorney of various criminal and ethical misdeeds. *Id.* at 273, 426 S.E.2d at 431.

Plaintiff cites this Court's earlier decision in *Boston v. Webb* to support the trial court's decision. *Boston v. Webb*, 73 N.C. App. 457, 460, 326 S.E.2d 104, 106 (1985), *disc. rev. denied*, 314 N.C. 114, 332 S.E.2d 479. In *Boston*, a detective sergeant was fired from the city police department.

Id. at 458, 326 S.E.2d at 105. The detective sergeant appealed to the city manager, who upheld the termination. *Id.* After conducting an investigation into the firing and briefing the city council, the city manager wrote and published a press release explaining the termination decision. *Id.* The detective sergeant filed a defamation claim against the city manager. *Id.* at 457, 326 S.E.2d at 104.

This Court held the city manager was not entitled to an absolute privilege for the statements made in his press release. *Id.* at 460, 326 S.E.2d at 106. Both *Boston* and the present case concern statements made to the press following an investigation. Unlike the present case, however, the city manager's press release in *Boston* was independent of any filed or pending lawsuit. The city manager had investigated and ruled upon the detective sergeant's appeal prior to publishing his release and statements to the media. *Id.* at 458, 326 S.E.2d at 105.

Although neither *Andrews* nor *Boston* squarely addresses the denial of absolute privilege for statements made to the media while a judicial proceeding is ongoing, no case Defendants cite demonstrates why the privilege should be extended in this case to carry their burden to overcome the presumption of correctness and reverse the trial court's order.

Defendants cite a series of cases recognizing our courts have defined "the phrase 'judicial proceeding' . . . broadly, encompassing more than just trials in civil actions or criminal prosecutions." *Harris v. NCNB*, 85 N.C. App. 669, 673, 355 S.E.2d 838, 842 (1987) (citation omitted). These cases represent small and incremental steps, extending the absolute privilege of complete immunity from suit beyond the protected core of in-court speech. *See*, *e.g.*, *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954) (privilege extended to statements made in pleadings and other papers filed in a judicial proceeding); *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 880 (privilege extended to counsel's statements or questions to a potential witness in preparation of pending litigation); *Rickenbacker v. Coffey*, 103 N.C. App. 352, 357-58, 405 S.E.2d 585, 588 (1991) (privilege extended to potential witness' statements to counsel at pre-deposition conference); *Burton*, 85 N.C. App. at 707, 355 S.E.2d at 803 (privilege extended to out-of-court statements made between the parties or their attorneys during pending litigation); *Harris*, 85 N.C. App. at 674, 355 S.E.2d at 842 (privilege extends to out-of-court communications between attorneys preliminary to proposed or anticipated litigation).

These cases extend the absolute privilege beyond the core of protected speech in the courtroom during a trial. These extensions are logical and practical, and each protected communication and testimony

furthers the purpose of the privilege. The "public policy underlying this privilege is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits." *Jones*, 193 N.C. App. at 234, 666 S.E.2d at 879 (citation and internal quotation marks omitted).

Defendants have not shown extension of absolute privilege to statements made by counsel during an out-of-court press conference would further this core protected purpose. Our immunity from suit precedents appropriately protect communications made between parties, their counsel, or the court itself, from the fear of defamation suits. A press conference to the media is not communication between the parties, their counsel, nor with or concerning the court.

Absolute privilege appropriately protects statements asserted in a pleading filed with the trial court and invoking judicial process. *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. Statements made outside the proceeding to the public or media representatives at a press conference, even those averments that "mirror" allegations made in a filed complaint, deviate from and stray too far beyond the core and "occasion" of speech to invoke immunity from suit. Such immunity cannot be justified by asserted public interest beyond encouraging frankness and protecting testimony, communications between counsel *inter se* or with the court, and participation within the judicial proceeding. *See id.*

A press conference is neither an inherent nor critical component of a judicial proceeding. To hold otherwise would enable any litigant to file barratrous or sanctionable pleadings containing scurrilous, false, or defamatory language, then immediately convene a press conference outside the courthouse to further disseminate and re-publish those otherwise defamatory statements, while asserting immunity from challenge or to being answerable in court.

This potential conduct ranges too far afield from the core of protected speech subject to absolute privilege. Our Supreme Court noted long ago: "The privilege belongs to the occasion. It does not follow the speaker or publisher into other surroundings and circumstances." *Bouligny, Inc.*, 270 N.C. at 171, 154 S.E.2d at 354.

Construing the immunity of absolute privilege narrowly, as we must, the inverse concern of chilling speech by the threat of defamation suits is not so great as to necessitate absolute immunity from suit for statements made at out-of-court press conferences during pending litigation. *See id.* A litigant, or their counsel, who gives a press conference during

a judicial proceeding is not deprived of defenses nor is necessarily liable for their statements. Neither are they absolutely immune from suit challenging and asserting defamatory conduct.

The venue or "occasion" for Defendants' statements weighs heavily against recognizing absolute privilege in this case, far more so than the distinction between litigation and investigatory counsel. Defendants have not shown that absolute immunity should extend from the courtroom during a judicial proceeding to an extrajudicial press conference, whether the speaker is litigation or investigatory counsel. Defendants' arguments claiming immunity from suit on the basis of the pending litigation are overruled.

C. Quasi-Judicial Investigation

Defendants alternatively assert they are immune from suit for their statements resulting from their investigation of Plaintiff because that investigation was a quasi-judicial proceeding. The phrase "judicial proceeding" in the context of absolute privilege also encompasses quasi-judicial proceedings. *Harris*, 85 N.C. App. at 673, 355 S.E.2d at 842 (citation omitted). "Quasi-judicial" is "a term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Angel v. Ward*, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979) (citation and alterations omitted).

In *Angel*, a partner of a certified public accounting firm telephoned an Internal Revenue Service agent's supervisor to complain about the agent's treatment of his firm's clients. *Id.* at 289, 258 S.E.2d at 789. The agent's supervisor requested the partner file his complaints in a written letter, which he did. *Id.* at 289, 258 S.E.2d at 789-90. The agent was subsequently fired. *Id.* at 289, 258 S.E.2d at 790. She sued the partner and his firm alleging libel *per se* for the remarks made in his letter to her supervisor. *Id.*

This Court held the partner's written remarks were libelous *per se*, as they tended to impeach the agent in her trade or profession. *Id.* at 291, 258 S.E.2d at 791. However, this Court also affirmed the trial court's ruling the CPA's remarks were absolutely privileged in the due course of a quasi-judicial proceeding. *Id.* at 293, 258 S.E.2d at 792. This Court determined the letter was requested by the agent's supervisor in the quasi-judicial process of evaluating the agent in connection with her employment. *Id.*

> Had defendants merely mailed the letter to plaintiff's superiors, the communication would have been entitled to a qualified privilege. However, in the instant case, defendants admittedly submitted their letter upon the request of plaintiff's immediate supervisor, who was putting together an evidentiary file to support his superior's decision to terminate plaintiff's employment with the Internal Revenue Service.

Id. at 293, 258 S.E.2d at 791-92.

Defendants liken their press conference to the letter sent in *Angel*, because it was held at the direction of Cardinal, a local political subdivision. *See* N.C. Gen. Stat. § 122C-116(a). In this argument, the extension of absolute privilege flows not from judicial immunity, but rather from legislative immunity. Defendants do not cite any binding authority from our courts on this extension of legislative immunity to Cardinal, but do cite cases from other states where the absolute privilege has been extended to "lesser legislative bodies," such as local political subdivisions. *See*, *e.g.*, *Sanchez v. Coxon*, 854 P.2d 126, 128 (Ariz. 1993) (privilege extended to town council meeting); *Noble v. Ternyik*, 539 P.2d 658, 660 (Or. 1975) (privilege extended to port commission meeting).

No cases Defendants cite, however, extend the legislative immunity to statements made during a press conference to the media. The only cited case in which immunity from suit was extended beyond a lesser legislative body's official meeting itself, involved statements made by one city council member to other city council members, and also statements potentially overheard by patrons of a deli restaurant "within listening distance." *Issa v. Benson*, 420 S.W.3d 23, 28-29 (Tenn. Ct. App. 2013).

The court in *Issa* held the statements made to other city council members were protected by legislative immunity. *Id.* at 28. The court also held the council member's statements at the deli were in response to a threat of litigation against the city, were "preliminary to proposed litigation," and were protected by judicial immunity. *Id.* at 29.

If legislative immunity applies to Cardinal and its Board, Defendants' argument would only appropriately cover statements made by the Board's members in its meetings, and possibly Defendants' statements to the Board at its behest. Defendants cite no authority, binding or persuasive, to extend the legislative immunity afforded to quasi-judicial, "lesser legislative bodies," to statements made by agents, including

counsel of such a body, to the public or media representatives in a press conference held at the body's request or direction.

This Court declined to hold that statements made by the city manager in the press release in *Boston* was "issued in the course of a judicial *or quasi-judicial* proceeding." *Boston*, 73 N.C. App. at 461, 326 S.E.2d at 106 (emphasis supplied). As discussed above, a press conference ventures too far afield from the core of protected speech to be entitled to absolute immunity from suit under legislative immunity in a quasi-judicial proceeding. *See id.*

Defendants fail to show entitlement to absolute immunity from suit flowing from either Cardinal's pending suit against Plaintiff as a judicial proceeding, or their investigation of Plaintiff as a quasi-judicial proceeding. Defendants' appeal on this issue is properly dismissed as interlocutory.

VI. Petition for Writ of Certiorari

[3] Defendants have also filed with this Court a petition for writ of certiorari as an alternative to their assertion of substantial rights to an interlocutory appeal. "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted). "A petition for the writ must show merit or that error was probably committed below." *Id.* (citation omitted).

As discussed above, Defendants have not shown a substantive right in jeopardy to merit an interlocutory review at the Rule 12 stage in the proceedings. Similarly, we find Defendants have also not shown "good and sufficient cause" for us to allow Defendant's petition and issue our writ of certiorari in this case. In the exercise of our discretion and pursuant to Appellate Rule 21, we decline to issue the writ of certiorari. *See* N.C. R. App. P. 21(a)(1) ("The writ of certiorari *may* be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when . . . no right of appeal from an interlocutory order exists[.]") (emphasis supplied).

VII. Conclusion

Defendants fail to show they possess "a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. Although the trial court's distinction between litigation and investigatory counsel is unpersuasive and without basis, the trial court did not err in declining to extend absolute immunity from suit to Defendants in this case.

Defendants' statements made at the out-of-court press conference during pending litigation are too far afield to be considered "made in due course of a judicial proceeding." *Burton*, 85 N.C. App. at 705, 355 S.E.2d at 802. Defendants' statements made at the out-of-court press conference following their investigation into Plaintiff's conduct on behalf of Cardinal do not fall within the immunity afforded to lesser legislative bodies. *See Boston*, 73 N.C. App. at 461, 326 S.E.2d at 106. Defendants' appeal as to their assertion of absolute privilege is dismissed as interlocutory.

Asserted misapplication of the actual malice standard does not affect a substantial right at the Rule 12 motion to dismiss stage of litigation, as it could at a hearing under Rule 56 for summary judgment. *Boyce II*, 169 N.C. App. at 577-78, 611 S.E.2d at 178.

Defendants have failed to show either a substantial right as a basis for interlocutory appeal or good and sufficient cause as a basis for our discretionary grant of a writ of certiorari. Defendants' appeal on this issue is dismissed as interlocutory and this cause is remanded for further proceedings.

We express no opinion on the validity, if any, of Plaintiff's claims nor Defendant's defenses thereto. *It is so ordered.*

DISMISSED AS INTERLOCUTORY.

Judge BERGER concurs.

Judge BROOK concurs in part and concurs in the result in part with separate opinion.

BROOK, Judge, concurring in part and concurring in the result in part.

I concur in the majority opinion insofar as it holds that we must dismiss this interlocutory appeal because it does not implicate a substantial right and in its denial of Defendant's petition for writ of certiorari. More specifically, I concur in the holding that we must reject the assertion of a substantial right to exercise interlocutory jurisdiction over the trial court's denial of Defendant's motion to dismiss Plaintiff's negligence-based claims. I further concur in the majority's holding that "Defendants have not shown that absolute immunity should extend from the courtroom during a judicial proceeding to an extrajudicial press conference, *whether the speaker is litigation or investigatory counsel*." *Topping*, *supra* at ___ (emphasis added).

I do not join section V.A. of the majority's opinion labelled "Investigatory Counsel." First, this section is not necessary to arrive at the agreed upon dismissal. Further, I disagree with the majority's contention that the trial court's distinction between litigation and investigatory counsel is without basis. In fact, Judge Crosswhite cites *Andrews v. Elliot*, 109 N.C. App. 271, 275, 426 S.E.2d 430, 432-33 (1993), for the proposition that "judicial proceedings privilege . . . does not apply to statements made outside the judicial proceeding" and thus does not shield the statement of Defendant Meyers as he "was not counsel for the Board in [its] judicial proceeding[.]" While we need not decide the merits of this issue, I cannot agree that the trial court's assertion here was baseless.

Accordingly, and with respect, I concur in part and concur in the result in part.

LAURA SUE TUEL, PLAINTIFF
v.
ANTHONY RYAN TUEL, DEFENDANT

No. COA19-691

Filed 17 March 2020

Child Custody and Support—primary physical custody—best interest determination—change in custodial parent's residence

The trial court's order awarding primary physical custody to plaintiff-mother and allowing plaintiff to relocate from North Carolina to Indiana with her children was vacated and remanded because its findings of fact on best interests focused on plaintiff's family support network in Indiana but failed to explain why this support network was better than the current level of support in North Carolina. Further, the best interest findings were inconsistent with other findings and ultimately failed to support the conclusion that allowing relocation was in the children's best interests.

Appeal by defendant from order entered 18 March 2019 by Judge Addie H. Rawls in Johnston County District Court. Heard in the Court of Appeals 5 February 2020.

No appearance for plaintiff.

Tharrington Smith, LLP, by Evan B. Horwitz and Jeffrey R. Russell, for defendant.

ARROWOOD, Judge.

Anthony Ryan Tuel ("defendant") appeals from the trial court's Order for Permanent Child Custody and Temporary Child Support granting primary physical custody to his former wife Laura Sue Tuel ("plaintiff") and permitting her to move with their children to Indiana. For the following reasons, we vacate and remand.

I. Background

Plaintiff and defendant married on 21 December 2002. Two children were born of the marriage on 17 April 2014 and 12 September 2016. The parties and their children resided in Johnston County, North Carolina. On 16 May 2017, plaintiff filed a complaint for child custody. The following day she left the marital residence and moved with the children to her parent's home in Rushville, Indiana.

Plaintiff and the children stayed with her parents in Indiana for three months. With the consent of the parties, on 21 August 2017 the trial court entered a Memorandum of Judgment/Order establishing the parties' temporary child custody rights and obligations. This order provided for the return of plaintiff and the children to North Carolina, pending permanent resolution of the parties' custody dispute.

On 5 July 2018, the trial court held a hearing adjudicating a permanent resolution to the issue of custody of the children. The trial court heard evidence and testimony from both parties. This evidence, in relevant part, tended to show the following facts. The parties experienced marital difficulties predating the birth of their children that were exacerbated by the added responsibilities of parenthood. Plaintiff suffered from mental health issues since adolescence, including two suicide attempts during her college years. The trial court received into evidence numerous journal entries and online forum posts written by plaintiff, as well as records from her therapy sessions, indicating that these issues stemmed from what she characterized as an abusive, disciplinarian upbringing by her religious fundamentalist parents. She underwent mental health therapy from March to June of 2017 and was diagnosed with "adjustment disorder with mixed anxiety and depressed mood[.]"

Plaintiff ceased all contact with her parents shortly after the birth of the parties' first child in 2014. The reason for this estrangement was in part due to plaintiff's resentment about her own upbringing and

concerns with how her parents' religious beliefs would conflict with the worldview under which they planned to raise their own children. Nonetheless, amid increasing marital strife and a desire to separate from defendant, plaintiff reinitiated contact with her family in May of 2017 for support. After a visit from plaintiff's mother that month, plaintiff filed a complaint seeking custody of the children and relocated them to her parents' home in Rushville, Indiana.

After hearing the evidence at trial, the trial court entered an Order for Permanent Child Custody and Temporary Child Support on 18 March 2019. The order granted primary physical custody to plaintiff, permitted plaintiff to move with the children to Rushville, Indiana, and granted defendant secondary physical custody. Defendant appeals from this order.

II. Discussion

On appeal, defendant argues that the trial court abused its discretion in its custody order by concluding as a matter of law that granting plaintiff primary custody would be in the best interests of their children, despite: (a) failing to make adequate findings of fact addressing the factors in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992), relevant to determining custody upon relocation of a parent to a foreign jurisdiction; and (b) otherwise making findings supporting this conclusion that were not supported by competent evidence. We agree with defendant's first contention, and therefore do not reach his second argument.

The trial court failed to make findings on several *Ramirez-Barker* factors relevant to material issues raised by the evidence at the hearing. In addition, many of the findings upon which it did base its conclusion of law are internally inconsistent. Therefore, we vacate and remand for entry of a new custody order not inconsistent with this opinion.

A. Standard of Review

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citation omitted). "Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to that particular party 'will best promote the interest and welfare of the child.' " *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) (quoting N.C. Gen. Stat. § 50-13.2(a) (2019)). We review this conclusion of law *de novo* to determine whether it is adequately supported by the trial court's findings of fact. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904

(2008) (citation omitted). "The findings of fact are conclusive on appeal if there is evidence to support them, even if evidence might sustain findings to the contrary. The evidence upon which the trial court relies must be substantial evidence and be such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Everette*, 176 N.C. App. at 170, 625 S.E.2d at 798 (internal citations omitted).

B. *Ramirez-Barker* Factors

Defendant first argues that the trial court did not make findings necessary to support an order granting primary physical custody to a parent relocating to another jurisdiction. We agree.

> In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent. Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation.

Ramirez-Barker, 107 N.C. App. at 79-80, 418 S.E.2d at 680 (internal citation omitted); *see also Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000) (quoting *Ramirez-Barker*).

We disagree with defendant insofar as he suggests that a relocation custody order is fatally deficient if the trial court fails to make explicit findings addressing each and every *Ramirez-Barker* factor. As we noted in *Frey v. Best*,

> although the trial court may appropriately consider these factors, the court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and

> moral faculties. All other factors, including visitorial [sic] rights of the other applicant, will be deferred or subordinated to these considerations, and if the child's welfare and best interests will be better promoted by granting permission to remove the child from the State, the court should not hesitate to do so. Naturally, no hard and fast rule can be laid down for making this determination, but each case must be determined upon its own peculiar facts and circumstances.

189 N.C. App. 622, 633-34, 659 S.E.2d 60, 69-70 (2008) (internal quotation marks, alteration, emphasis, and citations omitted). Nonetheless, these factors will be highly relevant to the best interest of the child in nearly all of these situations.

In its custody order, the trial court made abundantly clear that its primary consideration in granting plaintiff primary custody and permitting her to move with the children to Rushville, Indiana was based upon its finding that:

> It would be in the best interest of the minor children for them to be able to locate with the plaintiff to Rushville, Indiana given the strong ties of the Plaintiff's family and other support systems that would assist the Plaintiff with the care of the minor children. . . . The plaintiff's parents, her mother in particular, are willing and able to provide the care for the minor children to alleviate the cost and need of outside childcare.

The court found that both plaintiff and defendant would be fit and proper to share custody. It also found the children thrive under the care of each. However, the court gave no explanation why primary custody with plaintiff would be in the children's best interests, other than in reference to plaintiff's family support network in Rushville, Indiana.

Other than the advantage of a family support network for assistance in childcare, which defendant challenges and we discuss *infra*, none of the trial court's findings engage in any comparison between Rushville, Indiana and defendant's home in Johnston County, North Carolina, or each area's relative potential to enrich the children's lives. The court found that Rushville, Indiana is situated in a rural area and has the usual amenities of a mid-sized town. Yet the court failed to make any finding comparing this area to Johnston County, North Carolina, or provide any explanation as to why Indiana would otherwise provide the children with a more enriching environment.

Additionally, the court gives short shrift to several of the other *Ramirez-Barker* factors, reciting them as findings without engaging in any substantive analysis of its conclusions or relating them to the best interests of the children. For example, the trial court found that the distance between Indiana and North Carolina would require modification of the current custody schedule to one in which the children visited defendant during seasonal school breaks and holidays. However, the court omitted any consideration of how such a visitation schedule would preserve and foster the children's relationship with defendant or serve their best interests. The court also found that defendant opposed the relocation of the children. Rather than assessing the integrity of and reasons for his opposition, the trial court instead chose to downplay his opposition by finding that he unreasonably failed to acknowledge his role in the failure of the marriage. A party's fault for the failure of the marriage is not an appropriate consideration in determining whether relocation would be in the best interests of the children. *In re McGraw Children*, 3 N.C. App. 390, 393, 165 S.E.2d 1, 3 (1969) ("In a custody hearing it is the welfare of the children which is the concern of the courts, not the technicality of which parent was at fault in bringing about the state of separation."). In a custody order with 31 findings of fact, the trial court relates the effect of relocation to the best interests of the children only a few times outside the context of plaintiff's family support network.

Given the cursory manner in which the trial court addressed the other *Ramirez-Barker* factors and its failure to otherwise note alternative considerations indicating that relocation of the children to Indiana with plaintiff would be in their best interests, its conclusion of law rests upon its finding of an advantage in the family support network in Indiana. This finding alone cannot carry the weight of the custody order. *See Evans*, 138 N.C. App. at 142, 530 S.E.2d at 580 ("When the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child is subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact.") (internal quotation marks, alteration, and citation omitted); *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013) ("The quality, not the quantity, of findings is determinative. This custody order contains eighty findings of fact, but Plaintiff correctly notes that many of the findings of fact are actually recitations of evidence which do not resolve the disputed issues. The findings also fail to resolve the primary issues raised by the evidence which bear directly upon the child's welfare.")

Assuming *arguendo* its sufficiency to support the order, this finding is undermined by unresolved contradictions with several other findings of fact in the order. The trial court based its finding that plaintiff's family support network in Indiana would serve the children's best interests in part on its finding that "[t]he minor children . . . appear to have long standing relationships with their extended family members, with the exception of a three year period of time that ended a few weeks prior to the parties' separation, during which the plaintiff was estranged from her parents." The court also found that the children were born 17 April 2014 and 12 September 2016, and that plaintiff and defendant separated on 17 May 2017. Thus, the court's findings make clear that the children were four and one years old, respectively, at the time of the hearing on 5 July 2018, and only had contact of any sort with plaintiff's parents for around one year. The court does not explain how such young children could develop "long standing relationships" with plaintiff's family over so short a period. We find no competent evidence which would support this determination.

Furthermore, the trial court makes numerous findings that suggest contact with plaintiff's parents would not be in the children's best interests. The court found that part of the reason for plaintiff's estrangement from her family was attributable to defendant's dislike of them due to "conversations that plaintiff may have had with defendant concerning the plaintiff's relationship with her parents and/or some childhood experiences that plaintiff did not have good feelings about." The court further found that plaintiff had kept a journal and written other materials about her parents in her twenties that "made derogatory statements about the plaintiff's parents, referring to physical abuse and emotional abuse."

Although the court then went on to note that these writings were "her way of venting[,]" occurred over ten years ago, and "are not indicative of the plaintiff's present relationship with her parents[,]" notably absent from the order is any determination as to whether the trial court believed the accounts of abuse. In 2017, the plaintiff also told her therapist that "her parents were physically, verbally, and emotionally abusive as a means of 'discipline[.]' " Other than their availability to provide transportation and supervision of the children if plaintiff secures employment in Indiana, the trial court does not make any countervailing findings indicating that contact with plaintiff's parents would be beneficial to the children. Given its mention of plaintiff's poor relationship with her parents in her youth, this omission is particularly striking.

The trial court may very well have believed plaintiff's prior accounts of her parents' abusive behavior to be mere exaggeration and believed

her parents to be suitable caretakers that would enrich the children's lives. However, because the court's order lacks any such findings, we are unable to ascertain why contact with plaintiff's parents would better serve their interests than the custody arrangement in effect at the time of the hearing. This also renders the custody order's findings of fact facially deficient.

We also note inconsistencies in the trial court's findings addressing plaintiff's mental health issues and their bearing upon her fitness to have primary custody of the children. The court found that plaintiff's mental health issues, including "adjustment disorder with mixed anxiety and depressed mood[,]" "more than likely revolved around issues of being involved in a bad marriage, as well as being the primary caregiver of two minor children. . . . Nothing about the plaintiff's mental health history negatively impacts her fitness as a parent." Thus, the court finds that plaintiff's mental health issues are partially caused by the burden of being the children's primary caregiver, yet fails to explain how these issues would not be exacerbated by awarding her primary custody of the children and placing them in daily contact with her parents, with whom she had a dysfunctional relationship at best.

For the aforementioned reasons, we find that the trial court's findings of fact do not support its conclusion of law that granting plaintiff primary physical custody of the children and permitting their relocation to Indiana would be in their best interests. Therefore, the trial court abused its discretion in so ordering.

C. Evidentiary Support

Defendant also argues that the custody order contains numerous findings of fact that are not supported by competent evidence. Because we have found these findings facially deficient and inadequate to support the trial court's conclusion of law, we need not reach the question of their evidentiary support.

III. Conclusion

"[A]lthough it is not so as a matter of law, it will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody-visitation arrangement in which both parents have substantial contact with the child." *Ramirez-Barker*, 107 N.C. App. at 79, 418 S.E.2d at 680. The glaring deficiencies and contradictions in the trial court's findings of fact render them inadequate to support its conclusion of law and prevent us from determining whether this is such a rare case. We

therefore vacate the custody order and remand for entry of a new order not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 MARCH 2020)

4000 PIEDMONT PARKWAY ASSOCS., LLC v. EASTWOOD CONSTR. CO., INC. No. 19-669	Guilford (19CVS489)	Affirmed
CHEEK v. DANCY No. 19-622	Wilkes (17CVS1049)	Affirmed
HAMRICK v. GASTON CNTY. DEP'T OF SOC. SERVS. No. 19-17	Gaston (18CVS1309)	Dismissed
IN RE B.H. No. 19-411	Wake (18SPC5812)	Affirmed
IN RE C.A.B. No. 19-179	Mecklenburg (16JT456)	Vacated and Remanded
IN RE C.B. No. 19-279	Catawba (17JA13) (17JA50)	Affirmed
IN RE C.R.R. No. 19-156	Caldwell (16J65) (16J92)	Affirmed
IN RE D.S. No. 19-322	Mecklenburg (15JA612)	Affirmed in part, dismissed in part.
IN RE J.C. No. 19-150	Sampson (17JA90) (17JA91) (17JA92) (17JA93)	Affirmed in part; Reversed and Remanded in Part.
IN RE J.C. No. 19-396	Wake (17JA10-15)	Affirmed
IN RE N.J.E. No. 19-34	Nash (16JT14) (16JT15)	Affirmed
IN RE P.N.K. No. 19-208	Guilford (15JT239)	Affirmed
IN RE S.R. No. 19-459	Beaufort (18JA47)	Affirmed

IN RE X.A.R. No. 19-584	Guilford (16JA53)	Affirmed
STATE v. CLARK No. 19-634	Pitt (17CRS50420)	NO ERROR IN PART; DISMISSED IN PART
STATE v. DIXON No. 19-609	Orange (16CRS50771) (18CRS151) (18CRS182)	No Error
STATE v. FIELDS No. 19-822	Mecklenburg (17CRS212000) (17CRS212002-03)	Dismissed
STATE v. FINLEY No. 19-494	Mecklenburg (18CRS202735) (18CRS27340)	No Prejudicial Error
STATE v. HAIRSTON No. 19-650	Forsyth (18CRS54818)	No Error
STATE v. HUGHES No. 19-50	Lincoln (10CRS52580-82) (11CRS852-56)	No Error in Part; Vacated in Part.
STATE v. JERRY No. 19-195	Iredell (17CRS2317) (17CRS56584)	No Error
STATE v. ODEMS No. 19-402	Cleveland (16CRS216) (16CRS51419-20)	NO ERROR IN PART; VACATED IN PART AND REMANDED.
STATE v. RANDALL No. 19-544	Buncombe (08CRS122-124) (08CRS51510-24)	Affirmed
STATE v. RICHARDSON No. 19-410	Wake (14CRS217792-93)	No Error
STATE v. WELLS No. 19-708	Buncombe (15CRS4921) (15CRS91259)	No Error
WALLACE v. MAXWELL No. 19-291	Henderson (15CVS2000)	Affirmed
ZHANG v. RUBIN No. 19-682	Orange (17CVS611)	Affirmed

KAREN BAUMAN, Plaintiff
v.
PASQUOTANK COUNTY ABC BOARD, Defendant

No. COA19-613

Filed 7 April 2020

Adverse Possession—color of title—seven-year period—running against trust beneficiary where it ran against trustee

Where plaintiff filed a quiet title action against defendant over a tract of land held in trust for plaintiff's father, which defendant purchased from the trustee, the trial court properly entered judgment on the pleadings in defendant's favor on grounds that defendant adversely possessed the tract under color of title. Because the trustee sold the tract in her individual capacity rather than as trustee (where in fact, through a series of conveyances, she owned all land in the trust except for that tract), defendant's possession of the tract was adverse to the trust. Thus, the trial court properly applied the general rule that the seven-year period for adverse possession under color of title runs against the trust's beneficiaries whenever it runs against the trustee.

Appeal by Plaintiff from order entered 1 March 2019 by Judge Marvin K. Blount in Pasquotank County Superior Court. Heard in the Court of Appeals 4 February 2020.

Gregory E. Wills for Plaintiff-Appellant.

Roberson Haworth & Reese, PLLC, by Alan B. Powell, Christopher C. Finan, and Andrew D. Irby, for Defendant-Appellee.

INMAN, Judge.

Plaintiff Karen Bauman ("Plaintiff") appeals from an order granting judgment on the pleadings in favor of Defendant Pasquotank County ABC Board (the "Board"). After careful review, we affirm the trial court's order.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

Plaintiff's grandmother, Margaret Fletcher, owned considerable acreage in and around Elizabeth City, North Carolina. Ms. Fletcher

passed away in 1990, and her will provided that her real property holdings be placed in a testamentary trust for the benefit of her son—Plaintiff's father—Charles Fletcher. The will provided that the trust remainder would pass to Plaintiff at her father's death. The will named as trustee Emma Norris ("Emma"), who was not a family member at the time of Ms. Fletcher's death, and delegated to Emma full and sole discretion to sell the corpus for the benefit of Mr. Fletcher and to terminate the trust at any time.

The trustee-beneficiary relationship between Emma and Mr. Fletcher eventually took on a more romantic character and, in 1997, the two were married. On the day the marriage license was issued, Emma, in her capacity as trustee, conveyed the majority of the real property in the trust to Mr. Fletcher individually by general warranty deed. Nine days later, Emma arranged for Mr. Fletcher to execute a deed conveying that same property to her in her individual capacity.

The deeds did not transfer the entirety of the trust's real estate holdings because they failed to describe a .66 acre tract in Elizabeth City (the "Disputed Tract"). Thus, while the vast majority of the trust's corpus now belonged to Emma individually, the Disputed Tract remained within the trust.

Emma executed a deed purporting to transfer the Disputed Tract to the Board in exchange for $165,000 in March of 2000. The deed lists the grantor as Emma "and husband, [Mr.] Fletcher[,]" and both signed the deed individually without reference to the trust. Emma deposited the proceeds from the sale in a personal account under her name only. The Board built and operated an ABC store on the property.

In 2015, Mr. Fletcher and Plaintiff filed suit against Emma for undue influence, fraud, and breach of fiduciary duty in connection with her transfers of the real property out of the trust. Emma and Mr. Fletcher died while the suit was pending, and their respective estates were substituted in as parties. Those claims were ultimately resolved by summary judgment entered in favor of Plaintiff and her father's estate. In 2017, Plaintiff and the new trustee learned that the Disputed Tract had never been conveyed out of the trust and, on 8 January 2018, Plaintiff filed a quiet title action against the Board.

The Board responded to Plaintiff's complaint by asserting counterclaims for adverse possession under color of title and reformation, among others. The Board then moved for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure, while Plaintiff moved for partial summary judgment on all pertinent claims

discussed above. Both motions came on for hearing before the trial court on 20 December 2018.

The trial court requested that counsel first argue the Board's motion for judgment on the pleadings. Following those arguments, the trial court took the matter under advisement and concluded the hearing without proceeding to argument on Plaintiff's motion for summary judgment. And, although it had received evidentiary exhibits pertinent to Plaintiff's motion, the trial court announced that it would not consider those exhibits in deciding the Board's motion. The trial court ultimately entered judgment on the pleadings in favor of the Board. Plaintiff now appeals.

II. ANALYSIS

A. Standard of Review

Judgment on the pleadings is appropriate "where the pleadings fail to reveal any material issue of fact with only questions of law remaining." *Fisher v. Town of Nags Head*, 220 N.C. App. 478, 480, 725 S.E.2d 99, 102 (2012). Granting judgment on the pleadings "is not favored by law and the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmovant." *Carpenter v. Carpenter*, 189 N.C. App. 755, 762, 659 S.E.2d 762, 767 (2008). "This Court reviews *de novo* a trial court's ruling on motions for judgment on the pleadings. Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009) (citations omitted).

B. Adverse Possession Against Trust Beneficiaries

Plaintiff concedes on appeal that the Board "has possessed the land in dispute under a claim of right for 17 years before her lawsuit was filed and that the . . . deed to the [Board] adequately described the property." She thus limits her argument to the "sole contention . . . that th[e] shortened period of adverse possession . . . [of] seven years under 'color of title' cannot be applied [to] the facts presented in this record." More specifically, Plaintiff asserts that the seven-year term for adverse possession under color of title cannot run against the beneficiaries of a trust when the trustee is responsible for creating color of title in the adverse possessor. She relies on our Supreme Court's decisions in *King v. Rhew*, 108 N.C. 696, 13 S.E. 174 (1891), *Deans v. Gay*, 132 N.C. 227, 43 S.E. 643 (1903), and *Cherry v. Power Co.*, 142 N.C. 404, 55 S.E. 287 (1906).

King, like this case, involved the purported transfer of real property held in a testamentary trust. 108 N.C. at 697, 13 S.E. at 174. There, the beneficiary of the trust and her husband—but not the trustee—executed a deed transferring the real property to a third party, and the purported grantee took possession of the land. *Id.* at 698, 13 S.E. at 174. When the beneficiary died, and more than seven years after the grantee took possession, several heirs with contingent remainder interests in the trust sued to recover the real property. *Id.* The Supreme Court held that the seven-year period for adverse possession under color of title had run against the heirs because the trustee of the trust could have brought a legal challenge as the true owner of the property against the grantee on behalf of the trust's beneficiaries. *Id.* at 699, 13 S.E. at 175. In other words, the Supreme Court followed the default rule that if the seven-year period for adverse possession under color of title has run against the trustee, then it has also run against the trust's beneficiaries. *Id.*[1] The Supreme Court, in applying the rule, distinguished a decision from Tennessee, *Parker v. Hall*, 39 Tenn. 641 (1859), that reached a different result under a different set of facts:

> [*Parker*] only decides that the [beneficiaries] are not barred where the trustee estops himself from suing by selling the property, and thus "uniting with the purchaser in a breach of the trust." The wrong, says the court, is to the [beneficiaries] and not to the trustee, and he "could not sue or represent them." It has never been insisted that the bar is effective against the [beneficiaries] except in cases where the trustee could have sued, as in this case, and failed to do so.

King, 108 N.C. at 704, 13 S.E. at 176-77.

The Supreme Court again addressed this general rule in *Deans*, when a testator's will established a testamentary trust for the benefit of her daughter and grandchildren and naming her daughter as trustee. 132 N.C. at 228, 43 S.E. at 644. Per the trust documents, the real property was to be held in the trust "for the benefit of [the daughter] and her children forever." *Id.* The daughter and her husband executed a mortgage deed encumbering the land held by the trust to a third party, who

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1. *King* was not the first decision from our Supreme Court adopting this rule. *See, e.g.*, *Clayton v. Cagle*, 97 N.C. 300, 303, 1 S.E. 523, 525 (1887) ("The interests of the [beneficiaries] are, as to strangers to the deed, under the protection of the trustee, and share the fate that befalls the legal estate by his inaction or indifference." (citations omitted)).

then conveyed that mortgage interest to the defendant. *Id.* The defendant later foreclosed on the property and ultimately purchased it. *Id.* 25 years later, the daughter and her children filed suit against the defendant seeking his removal. *Id.*

In resolving the case, the Supreme Court distinguished *King* and declined to apply the general rule on adverse possession found therein. *Id.* at 231, 43 S.E. at 645. The Supreme Court held that although a mortgage interest was validly conveyed by the trustee, that mortgage interest did not include a power of sale. *Id.* at 232, 43 S.E. at 645. And, seizing on the fact that the daughter had executed the mortgage deed as trustee, the Court held that the defendant's possession could not satisfy an adverse possession claim because the defendant took "possession under, and not adverse to the trustee." *Id.* at 231, 43 S.E. at 645. The Court continued:

> There is no ouster of the trustee; she puts him in. He takes the legal title subject to the trust, the declaration of which is in his chain of title, and therefore his possession cannot become adverse to the [beneficiaries]. In this respect the case is distinguished from the case of *King v. Rhew*[.]

Id.

The final case cited by Plaintiff, *Cherry*, involved a tract of real property held in trust for a woman with her husband acting as trustee. 142 N.C. at 408, 55 S.E. at 288. The wife possessed "an equitable estate for the joint life of her husband and herself and a contingent remainder in fee dependent upon her surviving him, with remainder over to her children dependent upon her predeceasing her husband." *Id.* at 409, 55 S.E. at 288. The trust document provided that the wife could transfer her interest only upon the consent of the trustee, but in any event could not "dispose of a larger estate than that vested in her." *Id.* The husband and wife ultimately conveyed the real property in the trust to a third party in 1868, with the husband executing the deed in his capacity as trustee. *Id.* at 407, 55 S.E. at 288. The property was eventually conveyed to the defendant, who continued possession of the property. *Id.* The wife died in 1885, and the husband died in 1903. *Id.* Their children eventually brought suit in 1906 to recover the property from the defendant. *Id.*

The Supreme Court first addressed what was transferred by the deed, and held that the husband had executed the conveyance in his capacity as trustee; however, it construed the deed as only conveying the wife's interest in the property, *i.e.*, "an equitable estate for the joint life of her husband and herself and a contingent remainder in fee dependent

upon her surviving him[.]" *Id.* at 409, 55 S.E. at 288. Thus, the defendant possessed the property under that equitable interest until her death and, because the trustee had agreed to the transfer of the equitable interest, there was no *adverse* possession during that time such that the rule utilized in *King* did not apply. *Id.* at 410, 55 S.E. at 289. Instead, the Supreme Court held that the period of adverse possession began when the wife predeceased her husband, as the wife's interest under the trust extinguished upon her death and the property should have devolved in fee simple to the children at that time. *Id.* In other words, because the trustee conveyed less than a fee simple interest in the property to the defendant and that conveyance was made under the terms of the trust, the defendant's possession was not adverse until the trust was extinguished and complete title passed to the children. *Id.*

In sum, the above cases stand for the following propositions: (1) if a trustee may sue to eject an adverse possessor, the time for adverse possession under color of title runs against the trust beneficiaries, *King*, 108 N.C. at 699, 13 S.E. at 175; and (2) if the trust possesses rights short of a fee simple interest in real estate and the trustee, acting in that capacity, transfers those rights to a third party, the term of adverse possession does not begin to run until the trust is extinguished and fee simple passes to the beneficiaries. *Deans*, 132 N.C. at 231, 43 S.E. at 645; *Cherry*, 142 N.C. at 410, 55 S.E. at 289.

C. Plaintiff's Appeal

The facts of this case do not lend themselves to a neat application of *King*, *Deans*, and *Cherry* based on the close reading discussed above.

Deans and *Cherry* are distinctly inapposite from this case. As demonstrated by the allegations of the complaint and supporting exhibits,[2] Emma did not convey the Disputed Tract to the Board in her capacity as trustee. Nor did she purport to bind the trust in any way. By contrast,

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2. A trial court may consider documents attached to a complaint in ruling on a motion for judgment on the pleadings without converting it into summary judgment because "documents . . . attached to and incorporated within a complaint . . . become part of the complaint." *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (citation omitted). We also note that a dispositive motion aimed at the pleadings does not become a summary judgment motion where the parties submit extraneous documents so long as it is clear from the record that those materials were not considered by the trial court in reaching its ruling. *See Estate of Belk by and through Belk v. Boise Cascade Wood Products, L.L.C.*, ___ N.C. App. ___, ___, 824 S.E.2d 180, 182-83 (2019) (noting that a motion to dismiss under Rule 12(b)(6) is not converted to a summary judgment motion if the record shows the trial court limited its consideration to the pleadings).

in *Deans* and *Cherry*, the defendants took title from trustees under the terms of the respective trusts, so that possession during the life of each trust was not adverse. Given the unique and distinguishing facts of this case, we hold that the Board took possession of the Disputed Tract adverse to, instead of under, the trust.

The basis for tolling adverse possession against trust beneficiaries announced in *Parker* and echoed in *King* does not apply to this case. Plaintiff argues that the Board had no adverse possession during the term of the trust because Emma was estopped from suing to eject the Board under the theory of estoppel by deed. *See, e.g.*, *Crawley v. Stearns*, 194 N.C. 15, 16, 138 S.E. 403, 403 (1927) ("[A]s to his grantee the maker of a deed will not be heard to contradict it, or to deny its legal effect . . . , or to say that when the deed was made he had no title. As against his grantee he is estopped to assert any right or title in derogation of this deed."). However, estoppel by deed binds "only . . . parties and privies." *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 182, 158 S.E.2d 7, 15 (1967). Plaintiff offers no explanation of how Emma's conveyance *solely in her individual capacity* worked to estop her from challenging the conveyance *as trustee* on behalf of the trust.[3]

Further, and as pointed out by the Board, *Parker* and *King* discuss tolling the term of adverse possession against beneficiaries when the trustee breaches the trust by impermissibly exercising a power of sale and, in doing so, "unit[es] with the purchaser in a breach of the trust." *King*, 108 N.C. at 704, 13 S.E. 174 at 177 (quoting *Parker*, 39 Tenn. at 646). Here, however, Emma possessed the right as trustee to sell trust property in her sole discretion, and the judgment in the constructive

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3. We note that all trustees are empowered to bring suit "to enforce claims *of the trust*[,]" N.C. Gen. Stat. § 36C-8-811 (2019) (emphasis added), and, in light of the complaint's allegations and Plaintiff's insistence on appeal that Emma's conveyance to the Board was purely an individual act that in no way bound the trust, the facts do not compel the legal conclusion that Emma was legally estopped from asserting the trust's claim to oust the Board in her capacity as trustee. *See Hendricks v. Mendenhall*, 4 N.C. 371 (1816) (holding executors' endorsement of a deed in their capacity as executors of an estate did not estop them from challenging the deed in their individual capacities as heirs); *cf. Brooks v. Arthur*, 626 F.3d 194, 201 (4th Cir. 2010) ("The rule of differing capacities is generally understood to mean that defendants in their official and individual capacities are not in privity with one another for the purposes of res judicata."). *But see Dillingham v. Gardner*, 222 N.C. 79, 80, 21 S.E.2d 898, 899 (1942) (holding a party in his individual capacity was equitably estopped from contesting a judgment against him in his capacity as sole trustee when "the plaintiff himself has acted upon the assumption that the interest of the plaintiff in the former case and the interest of the plaintiff in the instant case were identical.").

fraud case against Emma as trustee did not invalidate the conveyance of the Disputed Tract to the Board.[4] Although the complaint contains a conclusory allegation that Emma and the Board "united in a breach of the . . . trust[,]" the complaint's allegations and supporting documents attached to it do not place this case within that language as used in *Parker* and *King*. *See cf.* Restatement 2d of Trusts, § 327, Comment I (1959) ("If the trustee in breach of trust transfers trust property to a third person . . . who *does not knowingly participate in the breach of trust*, and the trustee is barred by the Statute of Limitations or laches from maintaining a suit against the transferee, the beneficiary is also barred, . . . even though the beneficiary does not know of the breach of trust." (emphasis added)).

Given the above distinctions from *King*, *Deans*, and *Cherry*¸ and in light of the particular facts of this case, we hold that the trial court properly granted judgment on the pleadings in favor of the Board. The complaint and its attachments do not demonstrate facts falling within the exception to the general rule that adverse possession under color of title will run against the trust's beneficiaries. In adopting that rule, our Supreme Court believed it "so plain that it was deemed unnecessary to cite authorities, and the Court was content to leave the question on the manifest reason of the thing." *Carswell v. Creswell*, 217 N.C. 40, 46, 7 S.E.2d 58, 61 (1940) (citation and quotation marks omitted). In discussing the equity of its application, our Supreme Court declared:

> If by reason of neglect on the part of the trustees, [beneficiaries] lost the trust fund, their remedy is against the trustees, and if they are irresponsible, it is the misfortune of the [beneficiaries], growing out of the want of forethought on the part of the maker of the trust, under whom they claim.

Id. (citations and quotation marks omitted). In the face of these prevailing principles, the unique facts here do not plainly situate Plaintiff's claim inside the claimed exception to this rule.

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4. The summary judgment order in that case discusses fraud only in the context of Emma's transfers of real estate from the trust to her husband and from her husband to herself. That judgment concerned and voided only those two deeds, and Appellant acknowledges in her brief that "the pleadings and affidavits contained [in that case file] show that the issue of title ownership of the .66 acres in dispute in this case, was never litigated in that case."

III. CONCLUSION

For the foregoing reasons, and in light of the particular facts of this case, we affirm the trial court's order granting judgment on the pleadings in favor of the Board. Because we hold the entry of judgment on the pleadings was proper and it appears from the record that the trial court did not consider evidence outside the pleadings, we do not address Plaintiff's contention that the Board's motion was converted to one for summary judgment.

AFFIRMED.

Judges BRYANT and DILLON concur.

THELMA BONNER BOOTH, Widow and Administratrix of the ESTATE OF HENRY HUNTER BOOTH, JR., Deceased Employee, Plaintiff

v.

HACKNEY ACQUISITION COMPANY, f/k/a HACKNEY & SONS, INC., f/k/a HACKNEY & SONS (EAST), f/k/a J.A. HACKNEY & SONS, Employer, NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION on behalf of AMERICAN MUTUAL LIABILITY INSURANCE, Carrier, and on behalf of THE HOME INSURANCE COMPANY, Carrier, Defendants

No. COA19-602

Filed 7 April 2020

Workers' Compensation—North Carolina Insurance Guaranty Association Act—bar date and statute of repose—claims arising from latent occupational diseases

The Industrial Commission properly dismissed plaintiff's workers' compensation claims against the North Carolina Insurance Guaranty Association (reviewing claims on behalf of an insolvent, liquidated insurer) where those claims were barred under the statutory bar date and five-year statute of repose under the North Carolina Insurance Guaranty Association Act. On appeal, while acknowledging that the Act fails to accommodate claims (such as plaintiff's) arising from occupational diseases that do not manifest until after the bar date or statute of repose expire, the Court of Appeals held that—even under a liberal interpretation—the Act's plain language expressly barred plaintiff's claims and any attempt to ignore the Act's plain meaning would constitute improper judicial legislation.

Appeal by Plaintiff from Opinion and Award entered 30 April 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 December 2019.

Wallace & Graham, by Edward L. Pauley, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by Christopher J. Blake, for defendant-appellee North Carolina Insurance Guaranty Association.

HAMPSON, Judge.

Factual and Procedural Background

Thelma Bonner Booth (Plaintiff) appeals from an Opinion and Award on Remand of the Full Commission of the North Carolina Industrial Commission (Commission) dismissing her claim against Hackney Acquisition Company, f/k/a Hackney & Sons, Inc., f/k/a Hackney & Sons (East), f/k/a J.A. Hackney & Sons, and the North Carolina Insurance Guaranty Association (NCIGA) on behalf of both American Mutual Liability Insurance and the Home Insurance Company (Defendants). Specifically, the Commission granted NCIGA's Motion to Dismiss on behalf of Home Insurance Company on the basis Plaintiff's claim was barred by the North Carolina Insurance Guaranty Association Act's (Guaranty Act) bar date provision and/or statute of repose.[1] N.C. Gen. Stat. §§ 58-48-35(a)(1), -100(a) (2019). The Record reflects the following relevant facts:

Henry Hunter Booth Jr. (Decedent) was employed as a welder by Hackney Acquisition Company (Hackney) from 1967 through 1989. Hackney held workers' compensation insurance through the Home Insurance Company, covering Decedent as an employee from 1988-1990. On 13 June 2003, a New Hampshire court declared Home Insurance Company insolvent in an Order for Liquidation. The New Hampshire court further ordered all claims against the company be filed by 13 June 2004.

1. Plaintiff's claim against NCIGA for coverage provided by the now-allegedly insolvent American Mutual Liability Insurance is not before this Court on appeal. Plaintiff makes no argument as to coverage by NCIGA for claims related to American Mutual Liability Insurance. Indeed, the Record is devoid of any indication of the status of this aspect of Plaintiff's claim. It is Plaintiff's contention, agreed to by NCIGA, the Commission's Opinion and Award is a final adjudication of all of Plaintiff's claims. Thus, it appears—certainly for purposes of this appeal—Plaintiff has abandoned any claim against NCIGA related to coverage provided by American Mutual Liability Insurance.

In June 2008, Decedent was diagnosed with lung cancer, from which he died on 27 April 2009. On 1 December 2009, Plaintiff filed a Form 18 "Notice of Accident to Employer and Claim of Employee, Representative, or Dependent" on behalf of Decedent for worker's compensation benefits with the Commission. Plaintiff's Form 18 was supported by a written opinion letter from Dr. Arthur L. Frank opining to a reasonable degree of medical certainty Decedent's lung cancer was caused by "his exposures to welding fumes in combination with his habit of cigarette smoking."

On 17 June 2013, NCIGA, on behalf of now-insolvent Home Insurance Company, filed a Form 61 "Denial of Workers' Compensation Claims." On 20 October 2015, NCIGA filed a Motion to Dismiss Plaintiff's claims, arguing claims related to Home Insurance Company were barred under the Guaranty Act's bar date provision—N.C. Gen. Stat. § 58-48-35(a)(1)—and the five-year statute of repose—N.C. Gen. Stat. § 58-48-100(a).

A Deputy Commissioner denied NCIGA's Motion on 2 December 2015. On 5 January 2016, NCIGA appealed to the Full Commission. Before the Full Commission, Plaintiff argued that interpreting the Guaranty Act's bar date and statute of repose to deny otherwise valid claims before they existed was a "violation of constitutional due process" under the North Carolina and United States Constitutions. On 7 December 2016, the Full Commission certified to this Court the questions of the constitutionality of the bar date provision and statute of repose under the North Carolina and United States Constitutions.

On 7 November 2017, this Court, in *Booth v. Hackney Acquisition Co.*, held both of these provisions of the Guaranty Act were constitutional under the State and Federal Constitutions and remanded the matter to the Full Commission for further proceedings. *See* 256 N.C. App. 181, 189, 807 S.E.2d 658, 664 (2017), *disc. rev. denied*, 370 N.C. 696, 811 S.E.2d 594 (2018).

On remand from the Court of Appeals, the Full Commission issued its Opinion and Award on 30 April 2019 granting the NCIGA's Motion to Dismiss, concluding Plaintiff's claim was barred by both the Guaranty Act's bar date and the statute of repose. Plaintiff timely appealed from this Opinion and Award.

Issue

The sole issue on appeal is whether this Court may interpret the Guaranty Act to include Plaintiff's claim even though the plain language of the bar date provision and statute of repose exclude coverage.

Analysis

Plaintiff contends strict application of the Guaranty Act's bar date provision and separately the statute of repose "def[y] the nature and purpose[ ]" of the Guaranty Act and the North Carolina Workers' Compensation Act because it bars claims, such as Decedent's, that arise due to occupational diseases discovered after the bar date and statute of repose, respectively, rendering recovery under the Guaranty Act impossible. Accordingly, Plaintiff raises an argument of statutory construction, which we review de novo. *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) ("Issues of statutory construction are questions of law, reviewed de novo on appeal.").

I. The North Carolina Insurance Guaranty Association

NCIGA is a "nonprofit, unincorporated legal entity" created by the General Assembly in the 1971 Guaranty Act to "provide a mechanism for the payment of *covered claims* under certain insurance policies . . . to avoid financial loss to claimants or policyholders because of the insolvency of an insurer . . . ." N.C. Gen. Stat. §§ 58-48-25, -5 (2019) (emphasis added); *An Act to Provide for the Establishment of the North Carolina Insurance Guaranty Association*, 1971 N.C. Sess. Law 670 (N.C. 1971). The Guaranty Act's coverage expanded in 1993 to include workers' compensation claims made against insolvent insurers. *See* 1991 N.C. Sess. Law 802, §§ 1, 13 (N.C. 1991). "Under the Guaranty Act, when an insurer becomes insolvent and is liquidated by the insurance regulator of this or another state, NCIGA becomes 'obligated' to pay for 'covered claims' on behalf of the insolvent insurer in accordance [S]ection 58-48-35." *N.C. Ins. Guar. Ass'n v. Board of Tr. of Guilford Technical Cmty. College*, 364 N.C. 102, 104, 691 S.E.2d 694, 696 (2010).

Here, for NCIGA to incur liability for Plaintiff's claim against the insolvent Home Insurance Company, the claim must be a "covered claim." *See* N.C. Gen. Stat. § 58-48-35(a)(1). A "covered claim" is

> an unpaid claim . . . in excess of fifty dollars ($50.00) and [that] arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event[.]

Id. § 58-48-20(4). A covered claim does "not include any claim filed with [NCIGA] after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer." *Id.* § 58-48-35(a)(1)(b).

Separately, the Guaranty Act's statute of repose provides an otherwise covered claim "not instituted against the insured of an insolvent insurer or [NCIGA], within five years after the date of entry of the order by a court of competent jurisdiction determining the insurer to be insolvent, shall thenceforth be barred forever as a claim against [NCIGA]." *Id.* § 58-48-100(a).

Here, NCIGA contends Plaintiff's claim is barred by the bar date in Section 58-48-35(a)(1), as both parties agree the bar date is 13 June 2004 and Plaintiff did not file her claim until 1 December 2009. Additionally, NCIGA contends even if Plaintiff's claim constitutes a covered claim notwithstanding the bar date, Plaintiff's claim is barred by the five-year statute of repose. Specifically, in order to meet the statute of repose, Plaintiff (or Decedent) would have had to file a claim within five years of the date the New Hampshire court declared Home Insurance Company to be insolvent. *Id.* § 58-48-100(a). Specifically, in this case, this would have required Plaintiff or Decedent to have filed a claim by or before 13 June 2008.

Plaintiff concedes strict application of the bar date and statute of repose would operate to bar her claims. However, Plaintiff argues this result is untenable because Decedent was not diagnosed with Lung Cancer until 23 June 2008 and did not pass away until 2009, rendering Plaintiff's ability to comply with the 13 June 2004 bar date an impossibility. Additionally, Plaintiff contends the five-year statute of repose date (13 June 2008) would also render it impossible for Plaintiff to pursue her claim for death benefits because Decedent did not pass away until 2009. Plaintiff, therefore, requests this Court to construe the bar date provision and statute of repose liberally, arguing this interpretation would be in line with the way our Courts interpret workers' compensation statutes. *See Chaisson v. Simpson*, 195 N.C. App. 463, 469, 673 S.E.2d 149, 155 (2009) (citation and quotation marks omitted) ("Our Supreme Court has repeatedly held that our Workers' Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents[.]").

Acknowledging, the Guaranty Act is not part of the statutory workers' compensation regime found in Chapter 97 of our General Statutes, and indeed covers a broader scope of claims involving insolvent insurance carriers, for purposes of argument we assume Plaintiff's position is the correct framework for our analysis. However, even applying the liberal rules of construction articulated by the North Carolina Supreme Court in interpreting workers' compensation statutes, we cannot reach

Plaintiff's desired result. Our Supreme Court has stated three primary guiding principles for interpreting our workers' compensation statutes.

> First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of judicial legislation. Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced.

Ketchie v. Fieldcrest Cannon, Inc., 243 N.C. App. 324, 326-27, 777 S.E.2d 129, 131 (2015) (quotation marks omitted) (citing *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008)).

Plaintiff argues for a sweeping interpretation of the Guaranty Act, contending "the General Assembly decided to protect all employees and employers against insolvencies when it created the NCIGA." However, NCIGA is not the legal successor to the insolvent insurer. Rather, NCIGA's only obligation is to pay claims falling within the statutory definition of "covered claims." *See City of Greensboro v. Reserve Insurance Co.*, 70 N.C. App. 651, 664, 321 S.E.2d 232, 240 (1984) ("[A] guaranty association is not the legal successor of the insolvent insurer; rather, it is obligated to pay claims only to the extent of covered claims[.]"). Indeed, the plain language of the Guaranty Act expressly limits coverage only to "covered claims." N.C. Gen. Stat. § 58-48-5. Likewise, the five-year statute of repose is couched in equally clear language barring any claims not settled or instituted within five years of the date the insurer is judicially determined insolvent:

> Notwithstanding any other provision of law, a covered claim with respect to which settlement is not effected with the Association, or suit is not instituted against the insured of an insolvent insurer or the Association, within five years after the date of entry of the order by a court of competent jurisdiction determining the insurer to be

> insolvent, shall thenceforth be barred forever as a claim against the Association.

Id. § 58-48-100(a).

Thus, in order to reach the result for which Plaintiff advocates, this Court would be required to ignore the clearly expressed language of the bar date provision and statute of repose. N.C. Gen. Stat. §§ 58-48-35(a)(1)(b), -100(a). This we may not do even applying a liberal construction of the statute.

Plaintiff additionally argues, given the remedial purpose of the Guaranty Act, the General Assembly could not have intended to eliminate an entire class of claimants—those who suffer from a subsequently diagnosed latent occupational disease—from the scope of the Guaranty Act's coverage. Plaintiff reasons in enacting the bar date and statute of repose, the "General Assembly did not consider occupational disease claims where the insolvency can occur years before the diagnosis of the occupational disease." However, "it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation[.]" *Shaw*, 362 N.C. at 463, 665 S.E.2d at 453.

The statute of repose was added to the Guaranty Act in 1985. 1985 N.C. Sess. Law 613, § 9 (N.C. 1985). Four years later, in 1989, the bar date was added. *An Act to Amend the Postassessment Insurance Guaranty Association Act*, 1989 N.C. Sess. 206, § 3 (N.C. 1989). Then, the Guaranty Act was expanded to include coverage for covered workers' compensation claims beginning in 1993. *An Act Concerning the Workers' Compensation Security Funds*, 1991 N.C. Sess. Law 802, § 1 (N.C. 1991). Notably, in expanding the scope of coverage of the Guaranty Act, the General Assembly did not amend the bar date or statute of repose or make any accommodation for their application to workers' compensation claims (whether by injury or occupational disease). Under principles of statutory construction, we must presume the General Assembly was aware of the prior statutes establishing the bar date and statute of repose and elected not to make any alterations. *See Williams v. Alexander County Bd. of Educ.*, 128 N.C. App. 599, 603, 495 S.E.2d 406, 408 (1998) (citation omitted) ("In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.").

Furthermore, by 1991, the Legislature was aware of the history of latent occupational diseases. *See Wilder v. Amatex Corp.*, 314 N.C. 550, 558, 336 S.E.2d 66, 71 (1985) (majority) ("Both the Court and the

legislature have long been cognizant of the difference between diseases on the one hand and other kinds of injury on the other from the standpoint of identifying legally relevant time periods. This is demonstrated by examination of some of the workers' compensation statutes and this Court's decisions interpreting them."); *Id.* at 563, 336 S.E.2d at 74 (Meyer, J., dissenting) ("I cannot concur in Part II of the majority opinion which concludes that our legislature did not intend that occupational disease cases . . . should be covered by the statute of repose . . . . With regard to legislative intent, the majority seems to ascribe to the members of the General Assembly an unawareness of developments in the legal arena in the early 1970s, when that statute was enacted, that I find naive. At that point in time, delayed manifestation injuries, together with the time-delayed product injuries, constituted a giant wave that was breaking upon the courts.").

Nevertheless, Plaintiff points to instances in which our Courts have avoided strict application of statutes time-barring workers' compensation claims—including for example applying equitable principles of estoppel[2]—and, indeed, points to *Wilder* in particular as a judicially created exception to a statute of repose. *Wilder*, 314 N.C. at 562, 336 S.E.2d at 73. In *Wilder*, our Supreme Court held a now-repealed workers' compensation statute of repose in question did not apply to occupational disease claims. *Id.* However, in *Wilder*, the Court specifically concluded "the legislature intended the statute to have no application to claims arising from disease." *Id.* The Court, looking at the bill's legislative history, identified a "deliberate omission of reference to disease as this statute made its way through the legislative process[.]" *Id.* Indeed, the Court tracked the language of the statute through the legislative process and noted "[a]s finally enacted the statute omitted all references to claims arising out of disease." *Id.*

Here, the Guaranty Act's bar date and statute of repose do not distinguish between types of claims. To the contrary, the triggering dates for purposes of both are established not by the occurrence of injury or disease but are tied solely to the insolvency of the insurance carrier. Without evidence of legislative intent otherwise, the case *sub judice* is not analogous to *Wilder*, and accordingly, "the judiciary should avoid ingrafting upon a law something that has been omitted which it believes ought to have been embraced." *Shaw*, 362 N.C. at 463, 665 S.E.2d at 453 (citations and quotation marks omitted).

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2. There is no argument in this case NCIGA should be estopped from asserting either the bar date or statute of repose.

Here, we agree with Plaintiff the statutory regime of the Guaranty Act as it currently exists fails to provide accommodation for latent occupational disease claims that may not manifest until expiration of the bar date and/or the statute of repose. However, Plaintiff's requested "remedy lies with the Legislature and not with the Court, whose business it is to administer and expound the law, not to make it." *Hawkins v. County of Randolph*, 5 N.C. 118, 121 (1806). Even attempting to construe the Guaranty Act liberally, as Plaintiff requests, "our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of 'judicial legislation.' " *Shaw*, 362 N.C. at 463, 665 S.E.2d at 453 (citation and quotation marks omitted). We are constrained by the plain language of the Guaranty Act and "should avoid ingrafting upon a law something that has been omitted[.] *Id.* Therefore, we decline to adopt Plaintiff's proffered reading of the Guaranty Act. The Commission, thus, correctly determined Plaintiff's claim against NCIGA arising from the insolvency of Home Insurance Company is barred under either the statutory bar date and/or the statute of repose.

Conclusion

Accordingly, for the foregoing reasons, the Order of the Full Commission is affirmed.

AFFIRMED.

Judges BRYANT and COLLINS concur.

CURLEE v. JOHNSON

[270 N.C. App. 657 (2020)]

RICKY CURLEE, A MINOR BY AND THROUGH HIS GUARDIAN AD LITEM
KARINA BECERRA, INDIVIDUALLY, PLAINTIFF
v.
JOHN C. JOHNSON, III, STACEY TALADO AND RAYMOND CRAVEN, DEFENDANTS

No. COA19-701

Filed 7 April 2020

Animals—dog attack—negligence—landlord—prior knowledge of dangerous nature—summary judgment

In a negligence action asserted against a landlord whose tenants' dog attacked a child, the trial court properly granted summary judgment for the landlord where there was no admissible evidence showing the existence of a genuine issue of material fact that the landlord had prior knowledge of the dog's propensity for viciousness. Although a discovery request raised the question of whether the landlord was informed of a prior incident in which a different child was nicked by the dog, requiring medical attention, the tenants' unsworn answer in the affirmative and non-response, respectively, were not binding on the landlord, and the discovery responses were refuted by the tenants at deposition who specifically denied ever informing the landlord of the earlier incident.

Judge BROOK dissenting.

Appeal by plaintiffs from order entered 10 April 2019 by Judge Stephan R. Futrell in Johnston County Superior Court. Heard in the Court of Appeals 5 February 2020.

Law Office of Michael D. Maurer, P.A., by Michael D. Maurer, and Burton Law Firm, PLLC, by Jason M. Burton, for plaintiff-appellants.

Simpson Law, PLLC, by George Simpson, for defendant-appellee John C. Johnson.

TYSON, Judge.

Ricky Curlee and his mother, Karina Becerra, ("Plaintiffs") appeal from an order entered granting summary judgment in favor of John C. Johnson, III. We affirm.

I. Background

In 2000, Johnson leased a single-family residential property located at 132 Gower Circle ("the Property") in Garner to Raymond Craven and Stacie Talado. Following the expiration of the initial one-year lease term, Craven and Talado remained Johnson's tenants on a month-to-month basis. At the time of trial, Craven and Talado continued to maintain their tenancy at the Property with their minor children. Johnson collects the rental payment at the end of the driveway at the Property or at the Wal-Mart store where Talado acquires cashier's checks to pay the rent.

A. Johnny

Craven and Talado owned a dog they had named "Johnny." Johnny was given to them as a puppy by a friend. Craven believed Johnny's sire was a black lab and his dam was "like a collie-looking kind of dog."

B. 13 October 2014 Incident

Talado and Craven's children were playing with a neighbor's minor child, P.K. who is wholly unrelated to Plaintiffs, on 13 October 2014, when an incident occurred. P.K.'s mother had told her son not to play rough with Johnny, but she continued to allow P.K. and his sister to go over to and visit Craven and Talado's home with Johnny being present.

Talado described the incident: "[P.K.] was just playing with the dog, kind of wrestling with him, and [Johnny] nicked the top of his head." The "nick" occurred when P.K raised his head up while wrestling with Johnny. Talado described the "nick" as "about the size of my pinkie nail."

Chad Massengill, Johnston County's Animal Services ("JCAS") Director, affirmed the hospital did not document the incident in a report and the "nick" was minor. When investigating the October 2014 incident, Director Massengill classified Johnny's breed as a "Retriever, Labrador/Terrier, American Pit Bull." Director Massengill based this classification upon his visual identification.

Johnny was quarantined for ten days following the 13 October 2014 incident. JCAS determined Johnny did not satisfy the statutory definition of either a dangerous dog or even a potentially dangerous dog. No preventative measures of the Johnston County Ordinances relating to keeping animals were required of Talado and Craven. Johnny was returned to Talado and Craven following the expiration of the ten-day quarantine.

Director Massengill advised Talado and Craven of voluntary steps they could take to minimize the risks of keeping Johnny, including placing "Beware of Dog" signs on the property and keeping Johnny on a

leash anytime children were around. Nothing in the record shows JCAS notified Johnson of this 2014 incident, as the owner of the property.

C. 17 March 2015 Incident

Over six months later, seven-year-old Curlee visited the Property to play with Craven and Talado's children. Curlee lived on Gower Circle with his parents, Becerra and Ricky Curlee, Sr. During his visit, Talado and Craven had restrained Johnny with a leash on the Property.

Curlee walked within the radius of the leash restraining Johnny while walking home. While inside the radius, Curlee pointed a toy gun at Johnny's head. Johnny bit Curlee on his cheek and tore the tissue off. Plaintiff's complaint alleges Curlee suffered severe and permanent facial disfigurement and psychological injuries as a result of the incident. JCAS responded to the incident, took possession of Johnny, and followed Craven and Talado's instructions to euthanize the dog.

D. Procedural History

Plaintiffs initially sued Johnson only, and alleged negligence and strict liability on 5 July 2016. Following discovery, Johnson filed a Rule 56 motion for summary judgment under North Carolina Rules of Civil Procedure. Before this motion was heard, Plaintiffs voluntarily dismissed their complaint.

Ten days before the third anniversary of the incident, Plaintiffs re-filed their claims against Johnson and added Craven and Talado as co-defendants on 6 March 2018. Craven and Talado proceeded *pro se* and did not file answers to the complaint. Plaintiffs moved for and were granted an entry of default on 17 July 2018 solely against Craven and Talado.

Johnson denied liability, timely filed, and served his answer. Following discovery, Johnson filed his motion for summary judgment, which was granted by the trial court. Plaintiffs timely filed a notice of appeal.

II. Jurisdiction

Plaintiffs concede their appeal is interlocutory, but assert without immediate appeal their substantial rights will be impacted. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). "Entry of judgment for fewer than all the defendants is not a final judgment and may not be appealed in the absence of certification pursuant to Rule 54(b) unless the entry of summary judgment affects a substantial right." *Camp v. Leonard*, 133 N.C. App. 554, 557, 515 S.E.2d 909, 912 (1999) (citations omitted).

> Our Supreme Court has held that a grant of summary judgment as to fewer than all of the defendants affects a substantial right when there is the possibility of inconsistent verdicts, stating that it is the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries.

Id. (citations and internal quotation marks omitted).

This Court has held a substantial right is affected when "(1) the same factual issues would be present in both trials and (2) the possibility of inconsistent verdicts on those issues exists." *N.C. Dep't of Transportation v. Page*, 119 N.C. App. 730, 736, 460 S.E.2d 332, 335 (1995) (citations omitted). Here, the same factual issues apply to all claims against the property owner and the tenants. Two trials may bring about inconsistent verdicts relating to Plaintiff's damages. We conclude Plaintiffs assert a substantial right to have the liability of all defendants be determined in one proceeding. *Id.*

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). We address the merits of Plaintiff's interlocutory appeal.

III. Issue

Plaintiffs argue the trial court erred in granting summary judgment for Johnson.

IV. Summary Judgment

A. Standard of Review

"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citation and internal quotation marks omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

On Defendant's motion for summary judgment in a negligence action:

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary

> judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.
>
> Once the party seeking summary judgment makes the required showing, *the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.*

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citations and quotation marks omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004) (emphasis supplied).

B. Analysis

This Court recently stated: "Summary judgment is seldom appropriate in a negligence action. A trial court should only grant such a motion where the plaintiff's forecast of evidence fails to support an essential element of the claim." *Hamby v. Thurman Timber Company, LLC*, __ N.C. App. __, __, 818 S.E.2d 318, 323 (2018) (citation omitted). However, this "forecast of evidence" must still demonstrate "specific facts, as opposed to allegations, showing [Plaintiff] can at least establish a *prima facie* case at trial." *Id.*; *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735.

In order to hold a landlord liable for injuries caused by a tenant's dog to a visitor, "a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party." *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014) (citations omitted).

The crux of this case is whether Johnson had prior knowledge Johnny posed a danger. Specifically, within this context, "posed a danger" is not a generalized or amorphous standard, but ties directly back to our common-law standard for liability in dog-attack cases: "that the landlord had knowledge of the dogs' previous attacks and dangerous propensities." *Id.*

This standard is consistent with the common-law standard applicable to the owner or keeper of the animal requiring prior knowledge of the animal's vicious propensity as an essential element in dog-bite cases to establish liability. "[T]he gravamen of the cause of action is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness." *Holcomb v. Colonial Assoc., L.L.C.*, 358 N.C. 501, 511, 597 S.E.2d 710, 717 (2004) (alterations, citations, and quotation marks omitted).

Plaintiff argues the trial court erred in granting Johnson's motion for summary judgment, citing *Holcomb*, *supra* and *Stephens*, *supra*.

1. Holcomb v. Colonial Associates

In *Holcomb*, our Supreme Court examined "whether a landlord can be held liable for negligence when his tenant's dogs injure a third party." *Holcomb*, 358 N.C. at 503, 597 S.E.2d at 712. The landlord in *Holcomb*, was aware of two prior incidents involving the tenant's Rottweiler breed dogs, yet continued to allow the tenants to keep the dogs on the property. *Id.* at 504, 597 S.E.2d at 712-13.

A lease provision allowed the landlord to have the tenant "remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable." *Id.* at 503, S.E.2d at 712. Our Supreme Court stated the landlord with prior knowledge of multiple past attacks could be held liable because the express "lease provision [above] granted [the landlord] sufficient control to remove the danger posed by [the tenant]'s dogs." *Id.* at 508-09, 597 S.E.2d at 715.

2. Stephens v. Covington

In *Stephens v. Covington*, this Court applied rationale from *Holcomb* to a premises liability factual pattern that is analogous to the present case. *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255. The landlord lived in the same neighborhood as the property and knew the tenants owned a Rottweiler dog. *Id.* at 498, 754 S.E.2d at 254. The landlord and the tenants spoke with animal control officers regarding safety measures for keeping a Rottweiler. *Id.*

The tenants created a fenced-in gate and posted "No Trespassing" and "Beware of Dog" signs on the property. *Id.* The incident occurred within the dog's fenced-in pen. *Id.* Even with the multiple signs posted, and the breed of the dog, this Court held the evidence failed to show the defendant knew or should have known the Rottweiler had a dangerous propensity prior to the attack on the plaintiff. *Id.* at 501, 754 S.E.2d at 256. Johnson, unlike the defendant in *Stephens*, was not involved with the placing of the signs nor in arranging safety measures for Johnny.

3. Plaintiffs' Proffer of Forecasted Evidence

Plaintiffs contend direct and circumstantial evidence tends to show Johnson had prior knowledge of Johnny's alleged dangerous propensities. Plaintiff sent requests for admission of their prior knowledge of the dog's propensities to Talado, Craven, and Johnson. Craven failed

to respond to the requests for admission. The items contained in the request for admission sent to Craven are admitted as against him by operation of law. *See* N.C. R. Civ. P. 36(a).

Talado responded *pro se* to Plaintiffs' request for admission, but not under oath or before a notary. Request for admission twelve provides: "Please admit that you informed your landlord, John Johnson III ("landlord"), of the attack, shortly after the attack." Talado responded with a handwritten "yes."

Plaintiffs contend their proffered evidence creates a genuine issue of fact of whether Johnson knew or should have known of this prior 2014 incident. Plaintiffs contend their proffer shows, at a minimum, a disputed issue of fact exists of whether Talado personally informed Johnson of the incident. Additionally, Plaintiffs claim their proffered expert testimony established, even if Johnson had not been informed of the incident, the appearance of the "Beware of the Dog" signs constituted "a flashing red light to the landlord that they've got a potential problem there." Plaintiffs assert this imposed a duty upon Johnson to further investigate and inspect the premises to determine whether the dog posed a danger and take appropriate steps.

Taken in the light most favorable to the Plaintiffs and accepting the proffer as true, Plaintiffs' proffer fails to establish a genuine issue of material fact exists of whether Johnson knew or should have reasonably known of the October 2014 incident.

Plaintiffs' characterization of the prior October 2014 incident as an "attack" is not supported by the evidence in the record. To the contrary, the only evidence in the record is that the October 2014 incident occurred when another child was playing with the dog, and during the course of that play, the child picked his head up hitting the dog's mouth causing a "nick" on the child's head, resulting in a trip to the emergency room and a stitch. That incident does not raise a genuine issue of material fact of a "dog bite" to charge Johnson with prior notice.

Plaintiffs point to the JCAS case report that indicates it was for a "bite/exposure investigation" and the deposition testimony of Director Massengill, who had no independent recollection of the October 2014 incident, that the incident involved a "minor bite" because of the lack of any documentation concerning its severity.

From this, Plaintiffs contend a genuine issue of material fact exists of whether the prior incident should be classified as a dog-bite and/or attack sufficient to survive summary judgment. That characterization

conflicts with the first-hand evidence of the October 2014 incident, and Plaintiffs offer no evidence to the contrary. JCAS investigated the incident and determined the dog was not dangerous or potentially dangerous.

To reach the conclusion advocated by Plaintiffs—that the October 2014 incident was "an attack" such that knowledge of it would have put Johnson on notice of the dog's dangerous propensity—would require speculation or conjecture that the October 2014 incident was not as described in the uncontradicted evidence. Such speculation or conjecture is insufficient as a matter of law to withstand summary judgment. *See Estate of Tipton v. Delta Sigma Phi*, ___ N.C. App. ___, ___ 826 S.E.2d 226, 233, *disc. rev. denied*, 372 N.C. 703, 831 S.E.2d 76 (2019) ("[I]t is well established that 'a plaintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, summary judgment is proper.' " (*citing Hamby*, ___ N.C. App. at ___, 818 S.E.2d at 323 (internal citation and internal quotation marks omitted)). Plaintiffs failed to forecast evidence that Johnson knew or should have known the dog posed a danger prior to the March 2015 incident.

Plaintiffs assert Talado's *pro se* unsworn answer to an ambiguous question of an "attack" imputes Johnson's prior knowledge of the 13 October 2014 incident. This admittingly "ambiguous" interrogatory where Talado entered a hand written "yes" does not differentiate between the 13 October 2014 or the 17 March 2015 incidents. This notion is contrary to law.

A co-defendant's nonresponses or admissions are not binding upon another co-defendant, even at the summary judgment stage. *Barclays American v. Haywood*, 65 N.C. App. 387, 389, 308 S.E.2d 921, 923 (1983) ("Facts admitted by one defendant are not binding on a co-defendant."). The language of *Barclays* applies not only to purported admissions of liability, but also to facts. *Id.* "Admissions in the answer of one defendant are not competent evidence against a [co-defendant]." *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 418, 670 S.E.2d 290, 299 (2008). During Talado and Craven's sworn depositions, both specifically denied informing Johnson of the earlier 13 October 2014 incident involving P.K.

Consistent with *Draughon*, this Court properly held: "If the moving party makes out a *prima facie* case that would entitle him to a directed verdict at trial, summary judgment will be granted unless the opposing party presents some competent evidence *that would be admissible at trial* and that shows that there is a genuine issue as to a material fact."

Insurance Co. v. Bank, 36 N.C. App. 18, 26, 244 S.E.2d 264, 268-69 (1978) (emphasis supplied) (citations omitted).

Under our precedents, a *pro se* and unsworn answer by a co-defendant to an ambiguous question in discovery, refuted at the sworn deposition, is not "competent evidence . . . [to show] . . . a genuine issue as to a material fact" of Johnson's prior knowledge. *Id.* The dissenting opinion purports to bolster the unsworn answer, as creating a factual issue, but fails to address its competency and admissibility under N.C. Gen. Stat. § 1A-1, Rule 56. "[M]aterial offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment." *Strickland v. Doe*, 156 N.C. App. 292, 295, 577 S.E.2d 124, 128 (2003) (citations omitted).

Additionally, the dissenting opinion improperly places the burden on the Defendants. *See Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735 ("the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial" (citation omitted)). Once Johnson showed Plaintiffs cannot introduce evidence of an essential element of their claim, Johnson's prior knowledge, the burden shifts to Plaintiffs to make a forecast of *prima facie* evidence, which shifts and relieves Defendant of any burden of production. *Id.*

Plaintiffs have not presented a genuine issue of material fact admissible at trial to satisfy the first prong of *Stephens* to prove "the landlord had knowledge that a tenant's dog posed a danger." *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255. A review of the admissible evidence presented at the motion hearing and before this Court points merely to Johnson's knowledge that his tenants owned a dog, while they were staying on the Property. A refuted, unsworn, *pro se* and inadmissible statement does not create a genuine issue of material fact. Plaintiffs' argument is overruled.

The cases of *Barclays* and *Volkman* provide no support for one defendant's inadmissible assertion against another defendant to create any genuine issue of material fact. *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923; *Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980). This assertion not only misinterprets the controlling bright line principle articulated in *Barclays*, but also ignores the posture of *Volkman*. *Barclays* holds "[f]acts admitted by one defendant are not binding on a co-defendant." *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923.

The facts in *Volkman* involved interrogatories sent to a plaintiff by a defendant and the defendant's subsequent answers being used to support a defendant's motion for summary judgment. *Volkman*, 48 N.C. App. at 155-56, 268 S.E.2d at 266. Alternative theories for establishing a partnership, overlooked by the trial court in the summary judgment award, provided a justification to reverse and remand that case on appeal. *Id.* at 157, 268 S.E.2d at 267.

The instant case involves unsworn and *pro se* answers by co-defendants triggering the rule from *Barclays*. Ignoring or overlooking this distinction and disregarding the legitimate use and admissibility of discovery, does not create genuine issues of material fact, nor compel a contrary result.

The bright-line rule from *Draughon*, *Barclays*, and *Insurance Co.* shows the correctness of the trial court's judgment. No case is cited to support the admission of this unsworn and refuted answer into evidence or to allow this Court to deviate from *Barclays* and these precedents to reverse and remand.

Plaintiffs have not satisfied the first prong of *Stephens*. Plaintiffs' "forecast of evidence fails to support an essential element of the claim." *Hamby*, __ N.C. App. at __, 88 S.E.2d at 323. Summary judgment is proper. We do not need to address the remaining prong of *Stephens* or Plaintiffs' arguments of alleged "willful or wanton" conduct to award punitive damages.

V. Conclusion

Plaintiffs' "forecast of evidence" does not establish a genuine issue of material fact exists of their alleged negligence claims against Johnson or present a *prima facie* case. *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. The trial court's summary judgment order is affirmed. *It is so ordered.*

AFFIRMED.

Judge HAMPSON concurs.

Judge BROOK dissents with separate opinion.

BROOK, Judge, dissenting.

I respectfully dissent.

The question raised on this appeal is not whether Plaintiffs proved that Defendant John Johnson ("Johnson") knew that Stacie Talada ("Talada") and Raymond Craven's ("Craven") dog posed a danger; Plaintiffs will bear that burden at trial. The question is whether, viewing the facts in the light most favorable to Plaintiffs, Johnson carried his burden of showing there was no genuine issue of material fact as to whether he knew the dog posed a danger. I would hold he has not and, as such, would reverse the trial court's entry of summary judgment for Johnson.

I. Governing Law

A party moving for summary judgment has a hill to climb. First, summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . 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); *see also Volkman v. DP Associates*, 48 N.C. App. 155, 157, 268 S.E.2d 265, 267 (1980) (noting summary judgment improper where "[t]he answers to the [written discovery] indicate that there is at least a question as to" a disputed material fact). In evaluating such a motion, the evidence must be "viewed in the light most favorable to the non-moving party"—here, Plaintiffs. *Hardin v. KCS Int'l., Inc.*, 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009). Indeed, "[e]ven the slightest doubt should be resolved in favor of the nonmovant." *Volkman*, 48 N.C. App. at 157, 268 S.E.2d at 267.[1]

Beyond these generally applicable rules, the hill becomes steeper in circumstances such as these. "Summary judgment is seldom appropriate in a negligence action." *Hamby v. Thurman Timber Co., LLC*, ___ N.C. App. ___, ___, 818 S.E.2d 318, 323 (2018) (internal marks and citation omitted). Additionally, "[s]ummary judgment is rarely proper when

1. The majority opinion notes that if the moving party shows entitlement to summary judgment, it "will be granted unless the opposing party presents some competent evidence that would be admissible at trial and that shows that there is a genuine issue as to a material fact." *Old S. Life Ins. Co. v. Bank of N.C., N.A.*, 36 N.C. App. 18, 26, 244 S.E.2d 264, 268-69 (1978). The next sentence in *Old* is equally pertinent here, however: "In addition, as is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection." *Id.*

a state of mind such as intent or knowledge is at issue." *Valdese Gen. Hosp., Inc. v. Burns*, 79 N.C. App. 163, 165, 339 S.E.2d 23, 25 (1986).

As articulated by the majority opinion, to succeed in a suit against a landlord for injuries caused by a tenant's dog to a third party, "a plaintiff must specifically establish both (1) that the landlord had knowledge that a tenant's dog posed a danger; and (2) that the landlord had control over the dangerous dog's presence on the property in order to be held liable for the dog attacking a third party." *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014). Again, Plaintiffs need not have proved each of these elements at this summary judgment stage—instead, Johnson must establish that they have not forecast evidence sufficient to create a genuine issue of material fact with regard to each element of the claim. Addressing each element pursuant to the applicable de novo standard of review, I would hold that Johnson has not met his burden of establishing there is no genuine issue of material fact.

II. Application

A. Knowledge of Dog's Dangerousness

Plaintiffs have not only alleged but presented evidence, through requests for admission and deposition testimony, that places Johnson's knowledge in dispute. I briefly review this evidence below.

Plaintiffs submitted requests for admissions to Talada and Craven. In response to these requests, Talada made certain handwritten admissions as follows:

> 9. Please admit that you owned a pit bull mix named Johnny which you kept on the property you leased . . .
>
> RESPONSE: never owned a pit bull
>
> 10. Please admit that this pit bull attacked ("the attack") and injured a child ("the child") on or about October 13, 2014 on the property.
>
> RESPONSE: never owned a pit bull
>
> 11. Please admit that the child bitten on your property required medical treatment following the attack.
>
> RESPONSE: yes
>
> 12. Please admit that you informed your landlord, John Johnson III ("landlord"), of the attack, shortly after the attack.

RESPONSE: yes

(Emphasis added.) Craven did not respond; he is therefore deemed to have admitted each request by operation of law. *See* N.C. Gen. Stat. § 1A-1, Rule 36(a) (2019) ("The matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection[.]"). Talada and Craven, in short, both admitted that they informed Johnson of the 13 October 2014 incident shortly after it occurred.

In addition to these admissions, Talada testified that Johnson would come to her house once a month to collect rent. Johnny would be in the yard during some of these visits. Both Craven and Talada testified at their depositions that they posted at least four "Beware of Dog" signs around their property after the October incident. Chad Massengill, Director of Johnston County Animal Services, testified at his deposition that such signs can be helpful in informing the public that a dog could be potentially dangerous. Plaintiffs' expert witness, Certified Property Manager Daryl Greenberg, testified that the appearance of such signs "is a flashing red light to the landlord that they've got a potential problem there . . . and that they have a duty to inspect and take additional steps under the area of safety." Johnson also admitted that he saw the signs and that he did not ask why they were posted when they had not been posted previously.

Considered as a whole and in the light most favorable to Plaintiffs, this evidence places Johnson's knowledge of the danger the dog posed at issue and meets the low bar of establishing a genuine issue of material fact. The narrative is easy enough to discern: Talada and Craven told Johnson about the 13 October 2014 incident involving Johnny biting another child, requiring that child to receive medical care; they further put up "Beware of Dog" signs on the property in response to this incident, a "flashing red light to the landlord that [he had] a potential problem"; Johnson saw these signs; and, in response to these developments, Johnson did nothing. Taken in the light most favorable to Plaintiffs, these facts are cleanly distinguishable from instances where our Court has found no genuine issue of material fact in this context and, as such, are sufficient to survive a motion for summary judgment. *See Stephens*, 232 N.C. App. at 501, 754 S.E.2d at 256 ("Defendant [landlord] could not have known that Rocky [the dog] was dangerous[.]").

The majority's response is to shade both the facts and law in favor of Defendant, which is inappropriate here given that he moved for summary judgment. I discuss three instances of such shading below.

First, the majority resolves ambiguities pertaining to the 13 October 2014 incident in favor of Defendant. Talada in her deposition testimony stated that the October incident between her dog and another child resulted in the child receiving "one or two stitches" from emergency medical personnel. Furthermore, the hospital reported the incident as a "minor bite" to Johnston County Animal Services. In contrast, the majority opinion characterizes the record as follows: "the only evidence . . . is that the October 2014 incident occurred when another child was playing with the dog, and during the course of that play, the child picked his head up hitting the dog's mouth causing a 'nick' on the child's head, resulting in a trip to the emergency room and a stitch." *Curlee*, *supra* at ___. This interpretation of the record evidence resolves ambiguities in a manner helpful to Defendant. But, at this point in the proceeding, our mandate is clear: to view the record evidence in the light most favorable to the Plaintiffs as they seek to establish notice of dangerousness.[2]

Second, the majority interprets ostensibly ambiguous requests for admission in a manner disadvantageous to Plaintiffs.

As an initial matter, the majority is incorrect that Plaintiffs' requests for admission do not distinguish between the 13 October 2014 and the 17 March 2015 incidents. In fact, the requests for admission are not ambiguous in the least. The requests at issue, as noted above, proceed as follows:

> 10. Please admit that this pit bull attacked (***"the attack"***) and injured a child ("the child") ***on or about October 13, 2014*** on the property.
>
> RESPONSE: never owned a pit bull
>
> 11. Please admit that the child bitten on your property required medical treatment following ***the attack***.
>
> RESPONSE: yes
>
> 12. Please admit that you informed your landlord, John Johnson III ("landlord"), of ***the attack***, shortly after the attack.

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2. The majority opinion further notes Johnston County Animal Services "determined Johnny did not satisfy the statutory definition of either a dangerous dog or even a potentially dangerous dog." *Curlee*, *supra* at ___. Left unsaid is that these statutory definitions did not factor into the inquiry in *Holcomb* or *Stephens* and that the definitions are quite exclusive, including only dogs who have killed or inflicted severe injury without provocation, "[i]nflicted a bite on a person that resulted in broken bones or disfiguring lacerations[,]" and the like. N.C. Gen. Stat. § 67-4.1 (2019).

RESPONSE: yes

(Emphasis added.) The requests plainly utilize the parenthetical to define the 13 October 2014 incident as "the attack" and then refer back to that incident using that same language in the requests for admission that immediately follow. Even without guidance from the parenthetical, the most straightforward reading of the above is that requests 11 and 12 are referring to the event introduced in request 10. This straightforward interpretation is reinforced when reviewing the requests for admission as a whole. The 17 March 2015 "attack" is the only other "attack" referenced therein, and it is not introduced until request 17. And, when it is referenced, it is defined parenthetically as the "second attack[.]" Hence, it is clear that the "attack" referenced in requests 11 and 12 is that of 13 October 2014.

But even accepting request 12 as ambiguous does not support the grant of summary judgment. At this stage in the proceedings, "[e]ven the slightest doubt should be resolved in favor of the nonmovant." *Volkman*, 48 N.C. App. at 157, 268 S.E.2d at 267; *see also Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 164, 336 S.E.2d 699, 700 (1985) ("If different material conclusions can be drawn from the evidence, then summary judgment should be denied."). Accordingly, the affirmative responses from Talada and Craven to request 12 here must be interpreted as evidence that Johnson knew of the 13 October 2014 incident shortly after it occurred.

Finally, Johnson and the majority opinion also suggest that the admissions from Talada and Craven cannot raise a genuine issue of material fact. But the rules are clear: summary judgment is only appropriate where "pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

The majority opinion cites *Cambridge Homes of N.C. Ltd. P'ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 670 S.E.2d 290 (2008), and *Barclays American Financial, Inc. v. Haywood*, 65 N.C. App. 387, 308 S.E.2d 921 (1983), as dooming Plaintiffs' appeal; however, a brief review indicates this is not so.[3] Both cases are cited, at bottom, for the proposition that "[f]acts admitted by one defendant are not binding on a

3. In addition to the below reason that these cases do not stand for the proposition asserted, *Cambridg*e is inapposite here as it deals with a far different circumstance: whether to reverse the denial of a motion to dismiss for lack of personal jurisdiction. 194 N.C. App. at 419, 670 S.E.2d at 299.

co-defendant." *Cambridge*, 194 N.C. App. at 418, 670 S.E.2d at 299 (quoting *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923). *Barclays* illustrates this central point well. There, the trial court granted plaintiff summary judgment against one defendant based on another defendant's admission via failure to respond to requests for admission. *Barclays*, 65 N.C. App. at 389, 308 S.E.2d at 923. While this admission made summary judgment proper against the defendant who failed to respond, our court reversed the entry of summary judgment against the other defendant the plaintiff sought to bind. *Id.*

But just because one defendant's admission is not all powerful with the effect of resolving all issues as to another defendant does not mean it is inert. As in *Barclays* and *Volkman*, in the current controversy, "[t]he answers to the [written discovery] indicate[d] that there [wa]s at least a question as to" the key issue. 48 N.C. App. at 157, 268 S.E.2d at 267. And, here, as there, summary judgment is thus inappropriate.[4]

B. Control Over Dog's Presence on the Property

I turn briefly to the second element Plaintiffs must ultimately prove: "that [Johnson] had control over the dangerous dog's presence on the property[.]" *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255.

Our Supreme Court in *Holcomb v. Colonial Assocs.*, 358 N.C. 501, 597 S.E.2d 710 (2004), articulated the relevant inquiry as whether the landlord had "sufficient control to remove the danger posed by" a tenant's dog. *Id.* at 508-09, 597 S.E.2d at 715. The *Holcomb* Court found that the tenants' lease clearly granted the landlord the right to remove any pet undesirable to the landlord. *Id.* at 508-09, 597 S.E.2d at 715. The Supreme Court cited several cases from other jurisdictions for the proposition that a written lease provision does not provide the only manner by which a landlord can exercise control over a tenant's dog. *Id.* (*Uccello v. Laudenslayer*, 44 Cal. App.3d 504, 514, 118 Cal. Rptr. 741, 747 (1975) (holding the landowner had control via the power "to order his tenant to cease harboring the dog under pain of having the tenancy terminated");

4. The majority also argues these admissions were not properly considered at summary judgment because they were unsworn, an argument not made by Johnson at the trial court or before our Court. This argument has been waived because it was not raised below and, as such, is not properly before us. *See Thelen v. Thelen*, 53 N.C. App. 684, 689, 281 S.E.2d 737, 740 (1981). Further, assuming arguendo that the majority opinion is correct as to admissibility, "as is true of other material introduced on a summary judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection." *Old S. Life Ins. Co.*, 36 N.C. App. at 26, 244 S.E.2d at 269.

Shields v. Wagman, 350 Md. 666, 684, 714 A.2d 881, 889-90 (1998) (holding the landowner could exercise control over his tenant's dog by refusing to renew a month-to-month lease agreement)).

Here, Johnson's deposition testimony indicated the following regarding the control he retains over his tenants' dogs:

> [JOHNSON]: My policy is if, it can't be a nuisance to any of the tenants or property owners, it can't destroy my property of course and be, you know, dangerous to anybody else in the area. What I do is if someone, if I get a phone call, generally it's from an adjoining one or someone close by saying hey, I have got a problem with so and so and so and so, this is the problem. I go to that tenant and I say okay, I have been notified there is a problem, this is what they have said. Let's just use an example of a nuisance, a dog, barking dog. ***If they can't stop the dog from barking, they're going to have to move or get rid of the dog and I have had many people move***.
>
> Q: Because of a barking dog?
>
> [JOHNSON]: Because they can't figure it out. You figure it out. If you don't figure it out, I'll figure it out.
>
> Q: So, you have the power to kick them out of there if they don't stick to your policy even with a barking dog?
>
> [JOHNSON]: If that dog is a nuisance to other tenants and property owners, sure. Sure.

(Emphasis added.) He further testified that he has before exercised control over tenants' dogs by evicting tenants over an issue with an animal and that he has required tenants to get rid of dogs.

Accordingly, Johnson has not met his burden of establishing that no genuine issue of material fact exists regarding his control over Talada and Craven's dog.

III. Conclusion

Were I a juror and defense counsel made the majority's arguments, I might well be persuaded. But we are not there yet. At this stage in the proceedings, the majority opinion steps beyond our limited role in a fashion at odds with our precedent's teaching that "[s]ummary judgment is an extremely drastic remedy that should be awarded only where the truth is quite clear." *Volkman*, 48 N.C. App. at 157, 268 S.E.2d at 267.

Taking the facts in the light most favorable to Plaintiffs, as is our duty here, there is no such clarity as to the matter at issue: whether Johnson knew the dog posed a danger. I respectfully dissent and would reverse the entry of summary judgment.

WANDA GRAHAM AND GEORGE L. GRAHAM, PLAINTIFFS
v.
STEPHANIE JONES, DEFENDANT

No. COA19-511

Filed 7 April 2020

1. Appeal and Error—appellate jurisdiction—custody action—permanent versus temporary custody order

An order granting a mother full physical and legal custody of her minor child while granting visitation to the child's grandparents was immediately appealable as a final order—even though the order resulted from a temporary custody hearing—because it permanently adjudicated the parties' custody rights (thus, it was not entered "without prejudice to either party"), did not state a reconvening time, and determined all issues in the custody action. At any rate, interlocutory jurisdiction would have also been appropriate because the order implicated a substantial right: the mother's constitutionally protected interest in the custody, care, and control of her child.

2. Child Custody and Support—custody action—between mother and grandparents—"best interests of the child" analysis—improper

In a custody dispute between a mother and her minor child's grandparents, where the mother's natural and legal right to custody as the child's only living parent remained intact when the grandparents filed the action, and where the trial court determined that the mother was a fit parent and had not acted inconsistently with her constitutionally protected status as a parent, the trial court erred in applying the "best interests of the child" standard to award the grandparents visitation with the child after awarding full custody to the mother. In doing so, the trial court violated the Due Process Clause of the Fourteenth Amendment of the Constitution, which protects parents' fundamental right to make decisions regarding their children's association with third parties.

GRAHAM v. JONES

[270 N.C. App. 674 (2020)]

Appeal by Defendant from order entered 16 November 2018 by Judge Larry D. Brown, Jr., in Alamance County District Court. Heard in the Court of Appeals 4 December 2019.

Fairman Family Law, by Kelly Fairman, for Plaintiffs-Appellees.

North Carolina Central University School of Law Clinical Legal Education Program, by Nakia C. Davis, Esq., for Defendant- Appellant.

COLLINS, Judge.

Defendant appeals a custody order granting her full physical and legal custody, care, and control of her minor child but granting the minor child's grandparents visitation. Defendant argues that the trial court erred by proceeding with a best interest of the child analysis after granting Defendant full physical and legal custody, care, and control of the child and, based on this analysis, erred by granting Plaintiffs visitation with the child. For the reasons stated below, we reverse the trial court's order and dismiss the custody action.

I. Factual Background

Wanda Graham and George L. Graham ("Plaintiffs") are the paternal grandparents[1] of Abby.[2] Abby was born on 8 February 2018 to Plaintiffs' son, Christopher Tice Butler, Jr. ("Christopher"), and Stephanie Jones ("Defendant"). Christopher, Defendant, and Abby lived with Plaintiffs in Snow Camp, North Carolina from the date of Abby's birth until July 2018. In July and August 2018, Christopher, Defendant, and Abby lived together in a rental apartment in North Carolina with Defendant's two other minor children.

By Domestic Violence Protective Order ("DVPO") entered 13 August 2018, Defendant was found to have attempted to cause Christopher bodily injury on 6 August 2018 by slapping him while he was holding Abby. The DVPO prohibited Defendant from having contact with Christopher, granted Christopher temporary custody of Abby, and granted Defendant visitation with Abby for one hour per week. The DVPO was to expire by its terms on 13 August 2019. Christopher and Abby moved back into

1. George L. Graham is Abby's paternal step-grandfather.

2. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 3.1(b).

the Plaintiffs' home. Defendant moved to Texas and did not exercise her visitation with Abby.

On 30 September 2018, Christopher passed away in an automobile accident. Abby remained in Plaintiffs' home. On 2 October 2018, Plaintiffs filed a complaint pursuant to N.C. Gen. Stat. § 50-13.1(a) seeking "full legal custody of the minor child" and "primary physical custody of the minor child on an emergency, temporary, and permanent basis." Plaintiffs alleged, inter alia, "Defendant stated she will be in the jurisdiction on Thursday, October 4, 2018, to retrieve the child and remove her from the jurisdiction"; "Defendant abandoned the minor child and moved to Floresville, TX in August 2018 with no notice and has had minimal contact with Plaintiff[s] regarding the welfare of the minor child"; "Defendant suffers from severe depression and bi-polar disorder, for which she does not take her prescribed medication"; "Defendant also cuts herself as a side effect of her mental disorders"; "Defendant has been hospitalized in the psychiatric unit at Alamance Regional Medical Center due to her mental disorders"; and "Defendant has acted inconsistently with her constitutionally-protected status and custody should be granted to the Plaintiffs." On 3 October 2018, the trial court entered an Ex Parte Order granting Plaintiffs custody of Abby, prohibiting Defendant from removing Abby from Plaintiffs' custody, and setting a temporary custody hearing for 24 October 2018. On 15 October 2018, Defendant filed an answer to the complaint.

On 24 October 2018, the parties appeared for the temporary custody hearing in Alamance County District Court. After the hearing, the trial court took the matter under advisement. On 26 October 2018, the trial court gave an oral ruling from the bench. The oral ruling was reduced to writing and entered on 16 November 2018 ("Custody Order"). In the Custody Order, the trial court made sixty-three findings of fact and, based upon those findings, concluded, inter alia:

> 6. That the court is not considering the best interest of the minor child standard at this posture of the case.
>
> 7. Defendant is not an unfit parent.
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> 8. Defendant has not abandoned her daughter.
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> 9. That the minor child has not been neglected by Defendant.
>
> 10. That Defendant has not acted in a manner inconsistent with her constitutionally protected right as a parent.

11. That Defendant is a fit and proper person to have full physical and legal custody of the minor child.

12. That it is in the best interest of the minor child to place full physical and legal custody with Defendant, Stephanie Jones.

13. That Plaintiffs are fit and proper person[s] to have reasonable visitation with the minor child.

14. That the Court has the authority to grant Plaintiffs reasonable visitation.

15. That it is in the best interest of the minor child to have reasonable visitation with Plaintiffs, Wanda Graham and George Graham.

The trial court thus ordered that Defendant have "full physical, legal, custody care and control" of Abby, but that Plaintiffs should have visitation with Abby, who was approximately nine months old at the time, as follows: (a) On the third weekend of every month Plaintiffs have unsupervised visitation from Friday at 6 a.m. to Monday at 6 a.m. The parties shall exchange the child at a neutral location half–way between Plaintiffs' home in North Carolina and Defendant's home, which was in Texas at that time; (b) Plaintiffs are permitted to video chat with Abby four times per week, every Monday, Thursday, Friday, and Sunday, from 6:00 p.m. to 7:00 p.m.; and (c) Plaintiffs have unsupervised visitation with Abby for a period of two uninterrupted weeks during the summer. "The weeks shall be defined as 6:00[]a.m. on Monday to 6:00[]a.m. on Monday (14 days)."

On 13 December 2018, Defendant filed notice of appeal.

II. Discussion

Defendant argues on appeal that the Custody Order is immediately appealable as it is a permanent order. In the alternative, Defendant argues that the Custody Order is immediately appealable as it affects a substantial right. Defendant further argues that the trial court erred by proceeding with a best interest analysis after granting Defendant full physical and legal custody, care, and control of Abby, and erred by granting Plaintiffs visitation with Abby.

A. Immediate Appellate Review

[1] We first determine whether this appeal is properly before us. Defendant argues that the Custody Order is immediately appealable

because it (1) is a permanent custody order and (2) affects a substantial right.

1. Permanent Custody Order

A party is generally not entitled to appeal from a temporary custody order while a permanent custody order is immediately appealable. *Brown v. Swarn*, 257 N.C. App. 418, 422-23, 810 S.E.2d 237, 240 (2018) (citation omitted). "[A] temporary or interlocutory custody order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." *Smith v. Barbour*, 195 N.C. App. 244, 250, 671 S.E.2d 578, 583 (2009) (internal quotation marks and citation omitted). "[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Id.* at 249, 671 S.E.2d at 582 (citation omitted).

A "temporary custody order[] establish[es] a party's right to custody of a child pending the resolution of a claim for permanent custody—that is, pending the issuance of a permanent custody order." *Regan v. Smith*, 131 N.C. App. 851, 852–53, 509 S.E.2d 452, 454 (1998) (citations omitted). In contrast, "[a] permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely. . . ." *Id.* "Generally, a child custody order is temporary if . . . '(1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings [is] reasonably brief[,] or (3) the order does not determine all the issues.' " *Kanellos v. Kanellos*, 251 N.C. App. 149, 153, 795 S.E.2d 225, 229 (2016) (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)). If the order "does not meet any of these criteria, it is permanent." *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (citation omitted). "Further, it is the satisfaction of these criteria, or lack thereof, and not any designation by a district court of an order as temporary or permanent which controls." *Kanellos*, 251 N.C. App. at 153, 795 S.E.2d at 229 (citations omitted).

a. Prejudice

"An order is without prejudice if it is entered without loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party." *Marsh v. Marsh*, 816 S.E.2d 529, 532 (N.C. Ct. App. 2018) (quotation marks, brackets, and citation omitted). The Custody Order before us "granted full physical, legal, custody care and control" of Abby to Defendant, with visitation to Plaintiffs. Unlike the Ex Parte Order entered in this case which expressly stated, "This is a temporary order and not prejudicial to either party[,]"the Custody Order does not

contain express language indicating that it was entered without prejudice to either party. *See*, *i.e.*, *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (holding the custody order was entered "without prejudice" because it contained express language stating as such). Moreover, it is not clear from the plain language of the Custody Order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party. *See Marsh*, 816 S.E.2d at 532 ("Even though the trial court did not include express language in the order stating it was entered 'without prejudice,' it is clear from the plain language of the order that it was entered without the loss of rights, or otherwise prejudicial to the legal rights of either party."). To the contrary, the plain language of the Custody Order indicates it was permanently adjudicating the parties' rights with respect to Abby's custody.

b. Reconvening Time

The Custody Order does not state a reconvening time. *Kanellos*, 251 N.C. App. at 153, 795 S.E.2d at 229. Moreover, no language in the Custody Order indicates that any further reconvening time is contemplated. The Custody Order grants "full physical, legal, custody care and control" of Abby to Defendant and sets forth a visitation schedule for Plaintiffs for the indefinite future. Furthermore, the Custody Order encompasses future conduct, including "[t]hat the parties may mutually agree to additional visitation[,]" and that Defendant shall continue her mental health treatment and prescription medications.

c. Determination of Issues

As the trial court found in the Custody Order, "the question in this matter is a question of whether the parent [Defendant] is unfit or acted in a manner that is inconsistent with her constitutionally protected right as a parent." The trial court made extensive findings of fact, addressing, inter alia, Defendant's mental health, drug addiction, ability to provide financial support for Abby, the nature of Abby's relationship with Plaintiffs, and whether Defendant was a fit and proper parent who had acted consistently with her constitutionally protected right as a parent.

Based upon these findings, the trial court concluded, inter alia:

> 7. Defendant is not an unfit parent.
>
> 8. Defendant has not abandoned her daughter.
>
> 9. That the minor child has not been neglected by Defendant.

> 10. That Defendant has not acted in a manner inconsistent with her constitutionally protected right as a parent.
>
> 11. That Defendant is a fit and proper person to have full physical and legal custody of the minor child.
>
> 12. That it is in the best interest of the minor child to place full physical and legal custody with Defendant, Stephanie Jones.

The trial court accordingly ordered that Defendant "be granted full physical, legal, custody care and control" of Abby. Thus, the Custody Order "determine[d] all the issues." *Kanellos*, 251 N.C. App. at 149, 795 S.E.2d at 229.

Plaintiffs argue that the Custody Order is temporary because, as in *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012), it fails to determine a holiday visitation schedule for Abby. In *Sood*, the trial court's custody order granted joint legal custody of the minor child to both biological parents and specified a custodial schedule for the upcoming Christmas holiday and spring break, but did not resolve the holiday custodial schedule for the indefinite future. *Id*. at 809, 732 S.E.2d at 606. Based in part on the lack of a future holiday custodial schedule, this Court concluded the order was temporary.

In the present case, the Custody Order concluded that Defendant, Abby's biological mother, "has not acted in a manner inconsistent with her constitutionally protected right as a parent" and granted Defendant "full physical, legal, custody care and control" of Abby. Thus, unlike the order in *Sood*, the Custody Order here granted Defendant full custody of Abby at all times, resolving the holiday custodial schedule for the indefinite future. The visitation schedule set forth in the Custody Order comprised the complete grant of visitation to Plaintiffs, Abby's grandparents, for the indefinite future.

Plaintiffs further argue that the Custody Order is temporary because it failed to analyze whether Plaintiffs had standing to bring this custody action. "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Estate of Apple v. Commercial Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). Here, the trial court specifically concluded, "That this Court has subject matter jurisdiction to hear this

matter." This conclusion necessarily encompasses the trial court's conclusion that Plaintiffs had standing to bring this custody action.[3]

We acknowledge that the Custody Order was issued as a result of a temporary custody hearing, and that the trial court decreed in the Ex Parte Order that a temporary order would be entered as a result of the temporary hearing. However, "[a] trial court's label of a custody order as 'temporary' is not dispositive[,]" *Sood*, 222 N.C. App. at 809, 732 S.E.2d at 606 (citation omitted), and precedent dictates that an order that does not meet any of the *Kanellos* criteria is permanent. *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734. As the Custody Order was not entered without prejudice to the parties, does not set a reconvening time for a subsequent hearing, and determines all of the issues before the trial court, the Custody Order is a final order. Defendant's appeal is therefore properly before this Court. N.C. Gen. Stat. § 7A-27(b)(2) (2019).

2. Substantial Right

In addition to the Custody Order being permanent, the Custody Order affects a substantial right and is thus immediately appealable.

> An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits.

High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 204 N.C. App. 55, 61, 693 S.E.2d 361, 366 (2010) (citation omitted). In the present case, the Custody Order was not certified by the trial court pursuant to Rule 54(b). However, citing *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), and *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), Defendant asserts that the trial court's order awarding visitation rights to Plaintiffs implicated Defendant's constitutionally protected interest in the custody, care, and control of Abby.

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3. Had the trial court concluded that Plaintiffs lacked standing to bring this custody action, the trial court would have been required to dismiss the action. *See Chavez v. Wadlington*, 821 S.E.2d 289, 291 (N.C. Ct. App. 2018) (affirming the trial court's order dismissing plaintiff's complaint for lack of subject matter jurisdiction where plaintiff lacked standing as an "other person" pursuant to N.C. Gen. Stat. § 50-13.1(a) to seek custody of the minor children at issue).

In *Petersen*, our Supreme Court explicitly recognized "the strength of the right of natural parents as against others[.]" *Petersen*, 337 N.C. at 403, 445 S.E.2d at 904. *Petersen* also adopted precedent of this Court holding that "parents' paramount right to custody includes the right to control their children's associations[.]" *Id.* at 403, 445 S.E.2d at 904-05 (*quoting Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716 (1977) ("So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate.")). Our Supreme Court reiterated these principles in *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003), in which it

> [n]ote[d] that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. This parental liberty interest is perhaps the oldest of the fundamental liberty interests the United States Supreme Court has recognized. This interest includes the right of parents to establish a home and to direct the upbringing and education of their children. Indeed, the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment. . . . The protected liberty interest . . . is based on a presumption that [parents] will act in the best interest of the child.

Id. at 144-45, 579 S.E.2d at 266 (internal quotation marks and citations omitted); *see also Troxel v. Granville*, 530 U.S. 57 (2000).

In *In re Adoption of Shuler*, 162 N.C. App. 328, 590 S.E.2d 458 (2004), the biological father of a minor child appealed the trial court's denial of his motion to dismiss a third-party petition to adopt the child. This Court held that, although the father's appeal was interlocutory, the trial court's order affected a substantial right because it "eliminate[d] the [father's] fundamental right . . . , as a parent, to make decisions concerning the care, custody, and control of [the child][.]" *Id.* at 330, 590 S.E.2d at 460 (internal quotation marks and citation omitted).

In the present case, we similarly conclude that the trial court's order directing Defendant to allow Plaintiffs access to and visitation with Abby affected Defendant's fundamental right to make decisions concerning the care, custody, and control of her child, including the child's association with third parties. Notwithstanding statutory provisions that permit grandparents to seek visitation rights in limited circumstances, this Court has explicitly held that "[a] grandparent is a third party to the

parent-child relationship. Accordingly, the grandparent's rights to the care, custody[,] and control of the child are not constitutionally protected while the parent's rights are protected." *Eakett v. Eakett*, 157 N.C. App. 550, 554, 579 S.E.2d 486, 489 (2003). In this case, Defendant "enjoys a constitutional right to the care, custody, and control of [her] child that [sprung] upon the death of [Christopher,] the custodial parent[,] to the exclusion of and superior to any interest held by a grandparent." *Rivera v. Matthews*, 824 S.E.2d 164, 169 (N.C. Ct. App. 2019). The trial court's order granting visitation to Plaintiffs therefore affected a substantial right, and Defendant's appeal is properly before us.

B. Custody

[2] Defendant next argues that the trial court erred by engaging in a best interest analysis after granting Defendant full physical and legal custody, care, and control of Abby and by granting Plaintiffs visitation with Abby.

Four statutes address grandparent custody and visitation in North Carolina. Under N.C. Gen. Stat. § 50-13.1(a),

> Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided. . . . Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

N.C. Gen. Stat. § 50-13.1(a) (2019). While "[i]n certain contexts 'custody' and 'visitation' are synonymous[,] . . . it is clear that in the context of grandparents' rights to visitation, the two words do not mean the same thing." *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995). Thus, "[a]lthough this broad statute describes general standing to seek custody or visitation, our Supreme Court has applied canons of statutory construction to determine the statute only grants grandparents standing for custody, not visitation." *Wellons v. White*, 229 N.C. App. 164, 174, 748 S.E.2d 709, 717 (2013) (citing *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750) (other citation omitted). A grandparent initiating a proceeding for custody under N.C. Gen. Stat. § 50-13.1(a) must allege that the parent is unfit or has acted in a manner inconsistent with her parental status. *See Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 489 (citations omitted); *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 744 (2009).

The following three statutes ("grandparent visitation statutes") "provide grandparents with the right to seek 'visitation' only in certain clearly

specified situations[,]" *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 749-50: (1) N.C. Gen. Stat. § 50-13.2(b1) allows grandparents to be granted visitation as part of an ongoing custody dispute, although it does not allow grandparents to initiate an independent action for visitation. *See Moore v. Moore*, 89 N.C. App. 351, 353, 365 S.E.2d 662, 663 (1988); (2) N.C. Gen. Stat. § 50-13.2A permits a biological grandparent to request visitation with the grandchild if the grandchild is adopted by a stepparent or relative of the child, provided the child and grandparent have a substantial relationship; and (3) N.C. Gen. Stat. § 50-13.5(j) allows grandparents to seek visitation by intervening in an existing custody case and alleging facts sufficient to support a showing of a substantial change of circumstances affecting the welfare of the child since the original order was entered and that modification is in the best interest of the child. "Th[ese] situations do not include that of initiating suit against parents whose family is intact and where no custody proceeding is ongoing." *McIntyre*, 341 N.C. at 635, 461 S.E.2d at 750. Thus, under the grandparent visitation statutes, "a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative." *Id.* at 634, 461 S.E.2d at 749.

"[W]here one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children." *McDuffie v. Mitchell*, 155 N.C. App. 587, 589, 573 S.E.2d 606, 607-08 (2002) (citation omitted). "That maxim was no less true when the sole surviving parent was the non-custodial parent of the children[.]" *Rivera*, 824 S.E.2d at 168-69.

Here, when Plaintiffs filed their complaint, there was no ongoing custody proceeding as Defendant had a natural and legal right to custody and control of Abby upon Christopher's death, *see McDuffie*, 155 N.C. App. at 589, 573 S.E.2d at 607-08, and Abby had not been adopted by a stepparent or relative. Thus, Plaintiffs lacked standing to bring a claim for visitation under any of the grandparent visitation statutes. However, as Plaintiffs stress in their brief, whether there was an ongoing custody proceeding or whether Abby "was living in an intact family when this action was filed" are "irrelevant" considerations as Plaintiffs were not seeking visitation under any of the grandparent visitation statutes, but instead brought their action for custody under N.C. Gen. Stat. § 50-13.1(a).

In their complaint, Plaintiffs alleged that Defendant was unfit and had acted inconsistently with her parental status. Plaintiffs thus had standing to bring this custody action pursuant to N.C. Gen. Stat. § 50-13.1(a). *See Eakett* at 553, 579 S.E.2d at 489; *Rodriguez v. Rodriguez*,

211 N.C. App. 267, 274, 710 S.E.2d 235, 240 (2011). Nevertheless, even when grandparents have standing to bring a custody action, to gain custody they must still overcome a parent's "constitutionally-protected paramount right . . . to custody, care, and control of [the child.]" *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905. "While the best interest of the child standard would apply in custody disputes between two parents, in a dispute between parents and grandparents there must first be a finding that the parent is unfit." *Sharp v. Sharp*, 124 N.C. App. 357, 361, 477 S.E.2d 258, 260 (1996) (citation omitted).

"If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. Accordingly, only after the trial court has determined that the parent has acted in a manner inconsistent with his or her protected status may the trial court apply the best interest of the child test to determine custody. *Seyboth v. Seyboth*, 147 N.C. App. 63, 67, 554 S.E.2d 378, 381 (2001). If, however, the grandparent is not able to show that the parent has lost his or her protected status, the custody claim against the parent must be dismissed. *See Owenby*, 357 N.C. at 148, 579 S.E.2d at 268 (reinstating the trial court's order dismissing grandparent's custody action where grandparent "failed to carry her burden of demonstrating that defendant forfeited his protected status").

In this case, based upon its extensive findings of fact, the trial court concluded, in relevant part:

> 7. Defendant is not an unfit parent.
>
> 8. Defendant has not abandoned her daughter.
>
> 9. That the minor child has not been neglected by Defendant.
>
> 10. That Defendant has not acted in a manner inconsistent with her constitutionally protected right as a parent.
>
> 11. That Defendant is a fit and proper person to have full physical and legal custody of the minor child.

Although the trial court initially concluded, "6. That the court is not considering the best interest of the minor child standard at this posture of the case[,]" the trial court's following conclusions plainly indicate otherwise:

> 12. That it is in the best interest of the minor child to place full physical and legal custody with Defendant, Stephanie Jones.
>
> 13. That Plaintiffs are fit and proper person[s] to have reasonable visitation with the minor child.
>
> 14. That the Court has the authority to grant Plaintiffs reasonable visitation.
>
> 15. That it is in the best interest of the minor child to have reasonable visitation with Plaintiffs, Wanda Graham and George Graham.

As Defendant remained entitled to constitutional protection of her parental status upon Christopher's death, *Rivera*, 824 S.E.2d at 168-69, and the trial court found that Defendant was not an unfit parent and had not acted inconsistently with her constitutionally-protected status as a parent, the trial court's application of the "best interest of the child" standard before concluding that Plaintiff was entitled to full legal and physical custody of Abby "offend[s] the Due Process Clause." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. Moreover, as the trial court found that Defendant was not an unfit parent and had not acted inconsistently with her constitutionally protected status as a parent, the trial court's "inquiry into [Plaintiffs'] fitness for purposes of custody was irrelevant[,]" *Petersen*, 337 N.C. at 404, 445 S.E.2d at 905; the trial court erred in concluding that it had the authority to grant Plaintiffs visitation; and the trial court's application of the "best interest of the child" standard to grant Plaintiffs visitation again "offend[s] the Due Process Clause." *Id.*

As the trial court found that Defendant was not an unfit parent and had not acted inconsistently with her constitutionally protected status as a parent, there was no basis for the trial court to grant visitation to the Plaintiffs. *See Rodriguez*, 211 N.C. App. at 279, 710 S.E.2d at 244 (in a custody action brought by grandparents pursuant to N.C. Gen. Stat. § 50-13.1, "there was no basis for the trial court to grant visitation to the [grandparents]" where "defendant did not act inconsistently with her status as a parent, and the trial court did not make a finding that defendant was unfit").

III. Conclusion

For the reasons articulated above, we reverse the Custody Order and remand the case to the trial court with instructions to dismiss Plaintiffs' action and dissolve the Ex Parte Order and the Custody Order. *See Owenby*, 357 N.C. at 148, 579 S.E.2d at 268 (reinstating trial court's

order dismissing plaintiff's custody action and dissolving all orders previously entered).

REVERSED AND REMANDED.

Judges BRYANT and HAMPSON concur.

LAI YING TAM HARDY, PLAINTIFF
v.
MICHAEL FRANKLIN HARDY, DEFENDANT

No. COA19-441

Filed 7 April 2020

Appeal and Error—appeal from order denying contempt—Appellate Rules violations—substantial—subject to dismissal

Plaintiff's appeal from an order denying her motion for contempt (alleging defendant willfully failed to pay child support) was dismissed for a substantial violation of the Rules of Appellate Procedure where plaintiff failed to state a basis for appellate review. Since plaintiff's motion referenced both civil and criminal contempt and it was unclear which one formed the basis for the trial court's denial, plaintiff's failure to establish any ground for appellate jurisdiction impeded review.

Appeal by Plaintiff from Order entered 21 December 2018 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 29 October 2019.

Moen Legal Counsel, by Lynna P. Moen, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

HAMPSON, Judge.

Lai Ying Tam Hardy (Plaintiff) appeals from an Order on Contempt concluding Michael Franklin Hardy (Defendant) was in criminal contempt for failure to pay spousal support but not in contempt for failure to pay child support. We dismiss this appeal because Plaintiff fails to establish this Court has jurisdiction, thus precluding appellate review.

Factual and Procedural Background

Plaintiff and Defendant were granted a Judgment of Dissolution in California on 2 November 2007 (California Order). As part of the California Order, Defendant was required, starting in November 2007, to pay Plaintiff $750.00 per month in spousal support for three years and $1,065.00 per month in child support. Until approximately 2015, Plaintiff never sought, and Defendant never paid, any payments under the terms of the California Order.

On 5 November 2015, Plaintiff filed a petition for registration of the California Order in Mecklenburg County District Court. On 15 February 2018, Plaintiff filed a notice of registration of the California Order for enforcement purposes only in Mecklenburg County District Court. Thereafter, Plaintiff filed a Motion for Contempt with the Mecklenburg County District Court on 23 February 2018. In her Motion for Contempt, Plaintiff alleged "[Defendant] has willfully failed and refused to abide" by the California Order through his failure to pay either child or spousal support. Therefore, Plaintiff requested the trial court issue an "Order requiring [Defendant] to appear and show cause, if any he has, why he should not be held in contempt and punished for civil and/or criminal contempt." Plaintiff further prayed "[Defendant] be found in civil or criminal contempt for failure to comply with the [California Order]."

On 28 February 2018, the trial court entered an Order to Show Cause and Appear stating "it further appearing to the Court that there is probable cause to believe that contempt exists on the part of Defendant" and ordering Defendant "to appear and show cause, if any there be, why he should not be adjudged in willful contempt of Court." Prior to a hearing on this Order, the trial court entered a Consent Order for Permanent Child Custody and Visitation (Consent Order) on 12 April 2018, which provided in relevant part—"The entry of this Consent Order resolves issues of child custody, child support, and attorney's fees, currently existing between [Plaintiff] and [Defendant] herein regarding the best interests, parenting time and general welfare of the parties' minor child."

On 12 October 2018, Plaintiff filed an Amended Notice of Hearing notifying Defendant "that the pending claim of Motion for Contempt and Motion to Establish Child Support Arrearage Schedule in the above-referenced matter is now set for trial for the 19th day of November, 2018[.]" On 16 October 2018, the trial court issued an Amended Order to Show Cause and Appear, which is identical to the 28 February 2018 Order to Show Cause and Appear except for changing the appearance date to 19 November 2018.

On 19 November 2018, Plaintiff and Defendant, both represented by counsel, appeared before the trial court for a contempt hearing. At no point during the hearing did either party or the trial court clarify whether the proceeding was for criminal or civil contempt. On 21 December 2018, the trial court entered its Order on Contempt. The Order begins by noting the 19 November 2018 hearing came on for hearing "upon Plaintiff's Motion for Contempt" but does not mention its own Amended Order to Show Cause and Appear. The Order on Contempt found the "Consent Order was entered that resolved the issues of permanent child custody and child support, but did not address spousal support"; "[Plaintiff's] basis for contempt upon the issues of child support and attorney's fees was negated by the Consent Order . . . , which resolved issues of child support then existing between the parties, including then-pending Motion for Contempt"; and "[Defendant] has failed to pay spousal support per the stipulations of the California Order [and Defendant] is in willful violation of the [California Order]."

Based on these Findings, the trial court concluded "there is no basis for a finding of contempt against [Defendant] regarding the issue of child support" and that "[Defendant] is in criminal [contempt] for failing to comply with the [California] Order on spousal support." Accordingly, the Decretal Section of the Order on Contempt stated in relevant part:

> 1. [Plaintiff's] motion for contempt regarding child support is denied.
>
> 2. [Plaintiff's] motion for contempt regarding spousal support is granted.
>
> 3. [Defendant] is in criminal contempt for failure to pay spousal support.
>
> 4. [Defendant] is sentenced to fifteen (15) days incarceration. The foregoing sentence is suspended and [Defendant] shall be on unsupervised probation for six months under the following terms and conditions:
>
>   a. [Defendant] shall pay to [Plaintiff] $168.75 per month beginning January 15, 2019.
>
> 5. Each party shall bear their own costs for this action. [Plaintiff's] claim for attorney's fees is denied as attorney's fees are not recoverable upon a finding of criminal contempt.

On 18 February 2019, Plaintiff filed Notice of Appeal to this Court from the Order on Contempt.

Failure to Establish Grounds for Appellate Jurisdiction

"It is well established that the appellant bears the burden of showing to this Court that the appeal is proper." *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338, *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005). "Where the appellant fails to carry the burden of making such a showing to the court, the appeal will be dismissed." *Id.* (citation omitted).

Here, Plaintiff's statement of grounds for appellate review states: "This appeal is from a final judgment of a district court in a civil action; thus appeal lies of right directly to this Court. N.C. Gen. Stat. § 7A-27(c) (2012)." Plaintiff cites a repealed version of Section 7A-27, which is now found at Section 7A-27(b)(2). S*ee* 2013 N.C. Sess. Law 411, § 1 (N.C. 2013); *see also* N.C. Gen. Stat. § 7A-27(b)(2) (2019). More significantly though, Plaintiff fails to acknowledge Chapter 5A of our General Statutes governs both civil and criminal contempt proceedings, including specifically the right to appeal. Moreover, Plaintiff fails to articulate any basis for appealing from an order *denying* her contempt motion and, in particular, fails to distinguish whether the trial court's denial was grounded in civil or criminal contempt.

The distinction between civil and criminal contempt is important.

> At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.
>
> A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. *The importance in distinguishing between criminal and civil contempt lies in the difference in procedure, punishment, and right of review.*

O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (emphasis added) (citations omitted); *see also Hancock v. Hancock*, 122 N.C. App. 518, 522, 471 S.E.2d 415, 418 (1996) (explaining "the character of the relief is dispositive of the distinction between criminal and civil contempt, and where the relief is imprisonment, but the contemnor may avoid or terminate imprisonment by performing an act required by the court, then the contempt is civil in nature" (citation omitted)).

Willful noncompliance with a court order may constitute either criminal or civil contempt. *See* N.C. Gen. Stat. §§ 5A-11(a)(3); -21(a) (2019). The process for instituting either a civil or criminal contempt proceeding is set by statute. *See id.* §§ 5A-14, -15; -23 (2019) (summary proceeding for criminal, plenary proceeding for criminal, and civil, respectively). Pursuant to Section 5A-15, a judicial official may institute plenary criminal contempt proceedings[1] "by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court." *Id.* § 5A-15(a). Whereas, civil contempt proceedings may be initiated:

> (1) by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt; (2) by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt; or (3) by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt.

Cumberland Cty. v. Manning, ___ N.C. App. ___, ___, 822 S.E.2d 305, 308 (2018) (citations and quotation marks omitted).

In civil contempt, "[a]n alleged contemnor has the burden of proof under the first two methods used to initiate a show cause proceeding." *Cumberland Cty. ex rel. Lee v. Lee*, ___ N.C. App. ___, ___, 828 S.E.2d 548, 551 (citation omitted), *disc. rev. denied*, 372 N.C. 708, 830 S.E.2d 836 (2019). "However, if an aggrieved party initiates a show cause proceeding instead of a judicial official, the burden of proof is on the aggrieved party instead, because there has not been a judicial finding of probable cause." *Id.* (citation and quotation marks omitted). On the other hand, in a show-cause proceeding for *criminal* contempt, the contemnor does

1. A trial court may also institute summary criminal contempt proceedings for *direct* criminal contempt under Section 5A-14. *See id.* § 5A-14(a).

not have the burden of proof; rather, the "trial court must find facts supporting . . . contempt, and the facts must be established beyond a reasonable doubt." *State v. Phillips*, 230 N.C. App. 382, 385, 750 S.E.2d 43, 45 (2013) (alterations, citation, and quotation marks omitted).

Importantly, the appeal process differs markedly between civil and criminal contempt orders entered in district court. Section 5A-17(a) provides—"A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, *except appeal from a finding of contempt by a judicial officer inferior to a superior court judge is by hearing de novo before a superior court judge*." N.C. Gen. Stat. § 5A-17(a) (2019) (emphasis added). Whereas, Section 5A-24 provides—"A person found in civil contempt may appeal in the manner provided for appeals in civil actions." *Id.* § 5A-24 (2019). Further, as a general principle, "[o]ur statutes make no provision for appeal when a person is found not in contempt." *Patterson v. Phillips*, 56 N.C. App. 454, 454, 289 S.E.2d 48, 49 (1982). Thus, there is no individual right to appeal a trial court's decision not to hold an alleged contemnor in criminal contempt. *See id.* at 456, 289 S.E.2d at 50 ("The government, the courts and the people have an interest in the prosecution of criminal contempt charges; however, the plaintiff individually has no substantial right to the relief requested."). In the civil contempt context, however, our Court has recognized a right to appeal the dismissal of a civil contempt charge so long as "the order affects a substantial right claimed by the appellant." *Equipment Co. v. Weant*, 30 N.C. App. 191, 194, 226 S.E.2d 688, 690 (1976) (citation omitted).

Here, it is not entirely clear Plaintiff has *any* right to appeal the Order on Contempt.[2] Although the trial court expressly found Defendant

2. Neither the process employed by the parties and the trial court nor the trial court's Order on Contempt is a model of clarity. For instance, Plaintiff in her Motion for Contempt requested the trial court issue a show-cause order ordering Defendant to show cause "why he should not be held in contempt and punished for civil and/or criminal contempt." The trial court's Order to Show Cause and Appear states only "it further appearing to the Court that there is probable cause to believe that contempt exists on the part of Defendant[.]" At the contempt hearing, neither the trial court nor the parties clarified whether the proceeding was for civil contempt, criminal contempt, or both. When rendering its ruling on criminal contempt for failure to pay spousal support, the trial court based its ruling in part on Defendant's "failure to meet his burden that he was not in willful noncompliance" with the California Order; however, Defendant does not bear the burden in criminal contempt proceedings. *See Phillips*, 230 N.C. App. at 385, 750 S.E.2d at 45 (citation omitted). Indeed, the trial court failed to provide Defendant with the protections afforded an alleged contemnor in criminal contempt, including the right against self-incrimination. *See Bishop v. Bishop*, 90 N.C. App. 499, 505-06, 369 S.E.2d 106, 109-10 (1988) (citation omitted). Although the trial court expressly found Defendant in *criminal* contempt for failing to pay spousal support in its Order on Contempt, the trial court failed to designate whether its finding of no contempt regarding child support was based on civil or criminal contempt.

in criminal contempt for failure to pay spousal support, the Order on Contempt only states Plaintiff's "motion for contempt regarding child support is denied." Plaintiff cites no specific authority allowing for appellate review of this Order. If this conclusion by the trial court relates to *criminal* contempt, then Plaintiff has no right to appeal the Order. *See Patterson*, 56 N.C. App. at 454-56, 289 S.E.2d at 49-50 (citations omitted). Further, even assuming the trial court's conclusion Defendant was not in contempt regarding child support relates to *civil* contempt, Plaintiff's brief still fails to articulate why or how this appeal is proper. As discussed *supra*, the right to appeal the dismissal of a civil contempt charge only exists if "the order affects a substantial right claimed by the appellant." *Weant*, 30 N.C. App. at 194, 226 S.E.2d at 690 (citation omitted). Plaintiff, however, makes no argument a substantial right of Plaintiff's will be affected absent review by this Court of the Order on Contempt. Although such an argument could potentially be made, "[i]t is not the role of the appellate courts . . . 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). Plaintiff's failure to present any adequate basis upon which we can determine whether this Court has jurisdiction to review her appeal precludes our ability to substantively review this case and constitutes a failure to meet her burden to establish this Court's jurisdiction. *See Johnson*, 168 N.C. App. at 518, 608 S.E.2d at 338 (citation omitted).

Indeed, Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure specifically requires an appellant's brief to include a statement of the grounds for appellate review, which "*shall include citation of the statute or statutes permitting appellate review*." N.C.R. App. P. 28(b)(4) (emphasis added). It is unclear whether the trial court's denial of contempt was grounded in civil or criminal contempt, and Plaintiff fails to establish any ground, statutory or otherwise, for appealing the portion of the trial court's Order denying contempt. This constitutes a substantial violation of the appellate rules, impairing our review. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008) (citations omitted). Therefore, we must dismiss this appeal.

Conclusion

Accordingly, for the foregoing reasons, we dismiss Plaintiff's appeal.

APPEAL DISMISSED.

Judges INMAN and BERGER concur.

JAMES C. McGUINE, Employee Plaintiff
v.
NATIONAL COPIER LOGISTICS, LLC, Employer, and TRAVELERS INSURANCE COMPANY OF ILLINOIS, Carrier and/or NCL TRANSPORTATION, LLC, Employer, NON-INSURED, Defendants

AND

THE NORTH CAROLINA INDUSTRIAL COMMISSION
v.
NCL TRANSPORTATION, LLC, Non-Insured Employer, and THOMAS E. PRINCE, Individually, Defendants

No. COA19-735

Filed 7 April 2020

Workers' Compensation—liability for claim—proof of employer-employee relationship—joint employment doctrine—lent employee doctrine

Where a truck driver (plaintiff) brought a workers' compensation claim against a North Carolina shipping company and an Ohio company that handled the shipping company's payroll, the Industrial Commission erred by concluding that only the Ohio company was plaintiff's employer at the time of plaintiff's work-related injury and that, therefore, the shipping company was not liable for the workers' compensation claim. Plaintiff sufficiently established an employer-employee relationship between himself and the shipping company under both the joint employment doctrine and the lent employee doctrine, where he showed that they had an implied employment contract (the shipping company hired, trained, and supervised plaintiff while indirectly paying him through the Ohio company), the shipping company controlled the details of plaintiff's work, and plaintiff performed the same work for both companies.

Judge TYSON dissenting.

Appeal by Plaintiff from opinion and award entered 25 April 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 February 2020.

Jay Gervasi, P.A., by Jay Gervasi, and Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart, for the Plaintiff.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Neil P. Andrews, for the Defendant.

BROOK, Judge.

James C. McGuine ("Plaintiff") appeals from an opinion and award entered 25 April 2019 by the North Carolina Industrial Commission ("Commission" or "Full Commission") in which the Commission concluded as a matter of law that Defendant NCL Transportation, LLC ("NCL"), and not National Copier Logistics, LLC ("National Copier"), was Plaintiff's employer at the time of his injury. Plaintiff contends that the Commission erred by concluding that Plaintiff was employed solely by NCL, not by National Copier or jointly employed by both. For the reasons discussed below, we reverse and remand.

I. Background

A. Facts

Defendant Thomas E. Prince ("Prince") started shipping contractor National Copier on 17 January 2007. National Copier contracted with equipment dealers to move office equipment to and from clients.

Prince then established NCL in Ohio in January of 2007 and was its sole manager and member. According to Prince and National Copier Accounting Manager Susan German ("German"), the footprint and purpose of NCL was limited. No employees worked at the NCL location in Ohio; Prince testified that "it was a hub where drivers would pick up equipment, put equipment in, take equipment out[.]" German testified that the "hub" was essentially a warehouse. Both Prince and German testified NCL handled payroll for National Copier truck drivers. German testified further that the "sole purpose for NCL Transportation" was to be the company "that the [truck] drivers are basically paid out of . . . as well as getting the Workman's Compensation in Ohio." Prince testified along the same lines, stating that he formed NCL for two reasons: to limit National Copier's liability and to decrease National Copier's workers' compensation insurance costs.

Sometime in the summer of 2013—before the first hearing on this matter—NCL ceased operations. At that time, Prince cancelled NCL's payroll account and began to pay the truck drivers through National Copier's account; nothing else changed regarding National Copier's day-to-day operations or the truck drivers' day-to-day work.

Plaintiff, a commercial truck driver from Greensboro, North Carolina, applied to work with National Copier in Charlotte in December 2012. The application for employment that National Copier provided him listed "National Copier Logistics" as the prospective employer. German oversaw Plaintiff's application process, interview, and hiring. Plaintiff was hired as a truck driver on 11 December 2012. German provided him with a company credit card that listed National Copier's name to use to fuel the truck. The truck Plaintiff drove bore National Copier's name and displayed National Copier's US Department of Transportation ("DOT") number.[1] Throughout Plaintiff's employment, instructions regarding his routes and deliveries came directly from Prince or from Jake,[2] National Copier's dispatcher, who was "not considered part of" NCL, and who "made the routes [and] kind of oversaw what the drivers did day to day." Plaintiff testified that he considered himself to be an employee of National Copier because he spoke only with Prince, German, and Jake, he was hired in Charlotte, and he never met anyone who identified themselves as being part of NCL. Plaintiff's W-2, pay statements, and employment verification form I-9, however, listed his employer as NCL.

On 15 February 2013, Plaintiff was injured when several sheets of plywood fell from a truck, striking Plaintiff on the head, back, neck, and left shoulder. Plaintiff was diagnosed with left shoulder acromioclavicular strain and a possible rotator cuff tear consistent with the mechanism of injury.

B. Procedural History

Plaintiff reported his injury to German, who provided him with the workers' compensation form necessary to bring a claim against NCL in Ohio. The Ohio Workers' Compensation Bureau first denied Plaintiff's claim, but, following Plaintiff's appeal, it allowed Plaintiff's claim against NCL, concluding that Prince and NCL employed Plaintiff. At the time of the first hearing on this matter, Plaintiff's Ohio claim was under appeal from his initial denial.

Plaintiff's North Carolina workers' compensation case first went before Deputy Commissioner Myra L. Griffin in Charlotte on 19 February 2014. Deputy Commissioner Griffin entered an order on 25 February 2014 noting that "a substantial conflict of interest between Defendant-Carrier, Travelers Insurance Company of Illinois and Defendant, National Copier Logistics, LLC" could exist.

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1. NCL did have a US DOT number, but the number was never used.

2. Jake's last name is absent from the record.

The Commission then set the matter for a de novo hearing before Deputy Commissioner Adrian Phillips. The parties stipulated to the prior hearing transcript and presented additional testimony. Deputy Commissioner Phillips entered an opinion and award on 9 June 2015 and then entered an amended opinion and award on 22 June 2015. Deputy Commissioner Phillips concluded as a matter of law that Plaintiff suffered a compensable injury on 15 February 2014. She concluded that both National Copier and NCL employed Plaintiff at the time he sustained his injury and ordered both Defendants to pay all costs for Plaintiff's medical treatment. Defendant National Copier noticed appeal to the Full Commission on 25 June 2015.

The Full Commission heard the matter on 30 November 2015, reviewing the prior opinion and award based upon the records of the proceedings before Deputy Commissioners Griffin and Phillips and considering the briefs and arguments of the parties. The Commission issued an interlocutory opinion and award on 23 January 2017. The Commission made the following conclusions of law:

> 1. Under the Workers' Compensation Act, "[t]he term 'employee' means every person engaged in an employment under an appointment or contract of hire or apprenticeship, express or implied, oral or written . . ." N.C. Gen. Stat. § 97-2(2). Plaintiff bears the burden of proving that an employer-employee relationship existed at the time an injury by accident occurred. *Hughart v. Dasco Transp., Inc.*, 167 N.C. App. 685, 689, 696 S.E.2d 379, 382 (2005).
>
> . . .
>
> 4. In the instant matter, Plaintiff has failed to prove by a preponderance of the evidence that he was an employee of National Copier. Plaintiff failed to prove that he entered into an express or implied contract of hire with National Copier, that he was performing the work of National Copier, that National Copier had the right to control the details of his work, that he was under the simultaneous control of and simultaneously performing services for both NCL and National Copier, or that the services for each employer were closely related to that of the other. *Collins* 459, 204 S.E. 2d at 876, *Anderson* at 636, 351 S.E.2d at 110. Accordingly, the Full Commission concludes that Plaintiff was an employee of NCL at the time of the injury by accident that is the subject of this claim. N.C. Gen. Stat. § 97-2(2).

. . .

> 7. In the instant case, the preponderance of the evidence of record shows that Plaintiff's contract of employment with NCL was made in North Carolina, that North Carolina was NCL's principal place of business, and that North Carolina was Plaintiff's principal place of employment. *Id.* As such, the Full Commission concludes as a matter of law that the Industrial Commission has jurisdiction over Plaintiff's claim. *Id.*
>
> . . .
>
> 9. On 15 February 2013, Plaintiff sustained a compensable injury by accident to his left shoulder arising out of and in the course of his employment with Defendant-Employer NCL. N.C. Gen. Stat. § 97-2(6).
>
> . . .
>
> 22. The Full Commission is unable to determine from the evidence of record whether Defendant-Employer NCL was insured under the *North Carolina Workers' Compensation Act* as of 15 February 2013. As such, there is good ground to reopen the record in this matter to receive further evidence regarding Defendant-Employer NCL's Ohio workers' compensation insurance policy for the coverage period including 15 February 2013.

(Alterations in original.) The Commission awarded Plaintiff "payment of any remaining past medical expenses and all future medical expenses incurred or to be incurred as a result of Plaintiff's compensable left shoulder condition" and remanded the matter to the Chief Deputy Commissioner to determine whether NCL was insured under the North Carolina Workers' Compensation Act on the date of Plaintiff's injury.

Plaintiff appealed the opinion and award on 30 January 2017. This Court granted Defendant-Appellee National Copier and Travelers' motion to dismiss Plaintiff's appeal as interlocutory on 28 September 2017.

Deputy Commissioner Phillips then issued a discovery order consistent with the Full Commission's directives on remand on 11 June 2018. The parties jointly submitted additional evidence pursuant to the discovery order. The Full Commission then entered a final opinion and award on 25 April 2019, incorporating by reference the findings

and conclusions of the 23 January 2017 opinion and award. The Full Commission made the following additional findings:

> 7. As of 15 February 2013, Ohio's workers' compensation law did not have any provisions granting the Bureau the authority to contract with an insurer licensed in other states to provide coverage to eligible Ohio employers. Thus, the coverage NCL obtained through the Bureau did not extend to provide coverage for claims filed in other jurisdictions.
>
> . . .
>
> 10. As of 15 February 2013, National Copier had a worker's compensation policy providing coverage in North Carolina through Travelers Insurance Company of Illinois. The policy did not cover employees of NCL.
>
> 11. In July or August 2013, Mr. Prince made the decision to transfer the payroll of truck drivers employed by NCL to National Copier's payroll, re-classified the truck drivers as employees of National Copier, and obtained a North Carolina workers' compensation policy to cover the truck drivers. The truck drivers remained so covered as of the 19 February 2014 evidentiary hearing.
>
> 12. By July or August 2013, NCL was no longer in operation.
>
> . . .
>
> 14. The Full Commission finds that on 15 February 2013 NCL did not have workers' compensation insurance as required by N.C. Gen. Stat. § 97-93.

In addition to the incorporated conclusions of law from the 23 January 2017 opinion and award, the Full Commission concluded that "Defendant-Employer NCL Transportation, LLC was uninsured for workers' compensation purposes on 15 February 2013."

Plaintiff appealed on 6 May 2019.

II. Jurisdiction

The Commission's 25 April 2019 opinion and award, incorporating in its entirety its previous 23 January 2017 opinion and award, is now a final judgment, and jurisdiction is proper with this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

III. Analysis

Plaintiff contends that the Full Commission committed reversible error by concluding that Plaintiff was employed solely by NCL. Plaintiff contends that National Copier was in fact Plaintiff's joint employer. In the alternative, Plaintiff argues that the Commission erred in concluding that National Copier is not liable as a primary contractor pursuant to N.C. Gen. Stat. § 97-19. We hold that Plaintiff was employed both by NCL and National Copier and that both are therefore liable for Plaintiff's workers' compensation; we therefore need not reach Plaintiff's second argument.

A. Standard of Review

"The question of whether [an employer–employee] relationship existed at the time of the claimant's injury is jurisdictional," *Hicks v. Guilford Cty.*, 267 N.C. 364, 365, 148 S.E.2d 240, 242 (1966), and is reviewed by our Court de novo, *Whicker v. Compass Grp. USA, Inc.*, 246 N.C. App. 791, 795, 784 S.E.2d 564, 568 (2016). Further, the Commission's "findings of jurisdictional fact are *not* conclusive on appeal, even if supported by competent evidence. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C. 634, 637, 528 S.E.2d 902, 903-04 (2000) (internal marks and citation omitted). In making findings of jurisdictional facts, this Court must "assess the credibility of the witnesses" and weigh the evidence, "using the same tests as would be employed by any fact-finder in a judicial or quasi-judicial proceeding." *Morales-Rodriguez v. Carolina Quality Exteriors, Inc.*, 205 N.C. App. 712, 715, 698 S.E.2d 91, 94 (2010).[3]

B. Employer–Employee Relationship

An employee can, under some circumstances, operate as an employee of two employers at the same time, in which case both employers can be liable for workers' compensation. *See Leggette v. McCotter, Inc.*, 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965). "Plaintiff may rely upon two doctrines to prove [he] is an employee of two different employers at the same time: the joint employment doctrine and the lent employee doctrine." *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569. "Joint employment occurs when a single employee, under contract

3. Despite agreement between the parties that we must apply this standard of review for such jurisdictional questions, the dissent applies the standard of review for non-jurisdictional questions without explaining its basis for doing so.

with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other." *Id.* (internal marks and citation omitted). The quite similar lent employee doctrine can be summarized as follows:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.

Id. (internal marks and citation omitted).

We thus structure our analysis around whether Plaintiff has established the requisite contract, control, and work overlap to show he was employed by National Copier and NCL such that both employers are liable for his workers' compensation claim.

i. Employment Contract

As noted above, both joint employment and lent employee "doctrines require an employment contract to exist between" the plaintiff and the defendant. *Id.* at 798, 784 S.E.2d at 569. Employment contracts can be express or implied; implied contracts can be "inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Id.*, 784 S.E.2d at 570 (internal marks and citation omitted).

Absent an express contract (which the parties agree did not exist here between Plaintiff and National Copier), we determine whether an implied contract existed by considering who "hired, paid, trained, and supervised" the plaintiff. *Id.* at 799, 784 S.E.2d at 570. *Henderson v. Manpower of Guilford Cty., Inc.*, 70 N.C. App. 408, 319 S.E.2d 690 (1984), illustrates how this inquiry operates. In *Henderson*, Manpower of Guilford County, Inc., a company supplying temporary workers to employers, placed the plaintiff with Benner & Fields, a construction company, for whom he cut trees and cleared land. 70 N.C. App. at 409, 319 S.E.2d at 691. As part of that arrangement, Benner & Fields paid Manpower $6.25 per hour that the plaintiff worked, $4 per hour of which Manpower then passed along to the plaintiff. *Id.* After the

plaintiff was injured when a tree felled by another employee struck him, the Industrial Commission concluded that he was an employee solely of Manpower. *Id.* at 409-10, 319 S.E.2d at 691. This Court reversed, concluding that, "[a]lthough no express contract existed between plaintiff and Benner & Fields, an implied contract manifestly did, since they accepted plaintiff's work and were obligated to pay Manpower for it, and Manpower was obligated in turn to pay plaintiff[.]" *Id.* at 414, 319 S.E.2d at 694.

Here, the record evinces an implied contract between Plaintiff and National Copier. First, the evidence shows that National Copier hired Plaintiff. *See Whicker*, 246 N.C. at 799, 784 S.E.2d at 570. Plaintiff traveled to National Copier's office in Charlotte to apply for work, National Copier Accounting Manager German informed Plaintiff he would be working for National Copier, and the preprinted application listed National Copier as the prospective employer. German testified that she had "no role" at NCL; she is an employee only of National Copier, and she hired and fired drivers at Prince's direction. Second, the evidence shows that National Copier trained and supervised Plaintiff. *See id.* Jake, National Copier's dispatcher, gave the drivers route directions, and Prince testified that National Copier controlled where the drivers went on their routes. German testified that Jake—who was not "considered part of [] NCL"—"made the routes [and] kind of oversaw what the drivers did day to day."

The Industrial Commission based its conclusion that Plaintiff was employed solely by NCL on the facts that Plaintiff's W-2 tax form, pay statements, employment verification form I-9, and payroll authorization for automatic deposit list NCL as the employer. This evidence tends to suggest that NCL, not National Copier, paid Plaintiff, a fact relevant to the implied contract inquiry. *See id.* (considering who "hired, paid, trained, and supervised" in determining whether an implied employment contract existed). But even these facts favorable to Defendant are far more nuanced than is reflected in the Full Commission's opinion and award. German explained at the first hearing how the companies interacted regarding paying the truck drivers:

> [GERMAN]: [A]ll that we were running out of NCL Transportation was the payroll . . . It was not created for any other purpose but to employ[] drivers to work for National Copier Logistics. . . . really all that was run out of that, NCL Transportation, financially was payroll. And because that was a subcontractor expense to National Copier Logistics, ***National Copier Logistics would***

fund the payroll to the NCL Transportation bank account as an expense and then the payroll run (sic) through NCL Transportation's bank account.

(Emphasis added.) In short, National Copier paid NCL, which, in turn, paid the truck drivers for the work they completed for the benefit of National Copier. The payor name on a paystub and the like is not determinative; our Court has found an implied contract in such instances between the worker and the company paying the company nominally paying the employee. *See Henderson*, 70 N.C. App. at 414, 319 S.E.2d at 694 (finding an implied contract between the plaintiff and Benner & Fields where Benner & Fields "accepted plaintiff's work and were obligated to pay Manpower for it, and Manpower was obligated in turn to pay plaintiff[.]"). Because the evidence tends to show that National Copier hired, trained, supervised, and functionally paid Plaintiff, we conclude that an implied contract existed between Plaintiff and National Copier.

ii. Control

A finding of joint employment also requires that a plaintiff be "under the simultaneous control of both" employers. *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569 (citation omitted). Similarly, special employment requires that "the special employer ha[ve] the right to control the details of the work." *Id.* (citation omitted).

Henderson again articulates the factors we consider in assessing whether the requisite control exists to support finding an employment relationship. Concluding that Benner & Fields had sufficient control over the plaintiff's work, our Court focused on the facts that Benner & Fields supplied all of the "materials or tools" for the plaintiff's work; supervised temporary employees "one hundred percent"; retained discretion to terminate any temporary employees; assigned duties to temporary employees; and controlled "the manner and method in which [temporary employees] carried out [their] duties." 70 N.C. App. at 410-11, 319 S.E.2d at 692. Manpower, on the other hand, had no control over the "tree cutting work and those that did it." *Id.* at 413, 319 S.E.2d at 693. These facts led our Court to conclude that "Benner & Fields had the right to and did control the details of that work." *Id.* at 414, 319 S.E.2d at 694.

Applying this framework to the case at hand, we conclude that National Copier controlled the details of Plaintiff's work. National Copier supplied Plaintiff's "materials [and] tools" in that the truck Plaintiff drove bore National Copier's name, logo, and US DOT number. Plaintiff delivered equipment for National Copier's customers. Only

Jake, the dispatcher, assigned duties to truck drivers; Jake was solely an employee of National Copier. German hired and terminated drivers for National Copier at Prince's direction. German testified that the "sole purpose for NCL Transportation" was to pay drivers out of NCL, "as well as getting the Workman's Compensation in Ohio." Indeed, when Prince moved six truck drivers from NCL's payroll to National Copier's, nothing changed about those drivers' work; their duties, instructions, materials, and continued employment all continued to flow from National Copier. Upon an examination of the record, we must conclude that National Copier controlled the details of Plaintiff's work.

iii. Work Overlap

The third factor necessary to find either joint or special employment is whether the work the employee does at the relevant time is essentially the same for both employers. *Whicker*, 246 N.C. App. at 797, 784 S.E.2d at 569. The plaintiff's injury in *Henderson*, for example, involved the work of Benner & Fields, namely "[c]utting trees and clearing land," supporting the conclusion that there was an employment relationship between plaintiff and Benner & Fields. 70 N.C. App. at 412, 319 S.E.2d at 693.

Here, Plaintiff's work responsibilities were driving trucks labeled "National Copier Logistics" to deliver equipment for customers and contractees of National Copier. Plaintiff never performed work for NCL that was not also the work of National Copier; as noted above, NCL merely was a payroll service for National Copier's truck drivers. We conclude that Plaintiff has met this factor because there was no clean partition between the work of National Copier and NCL and, as such, he "was doing [National Copier's] work when injured[.]" *Id.* at 414, 319 S.E.2d at 694.

* * * * *

In short, Plaintiff has established an implied contract between National Copier and himself and, further, that National Copier controlled his work, which, at bottom, was that of National Copier's.[4]

4. The dissent contends Plaintiff's claim is barred by the doctrine of judicial estoppel. Specifically, the dissent states "Plaintiff first asserted his sole employment was with NCL when he applied for Ohio workers' compensation benefits." *McGuine, infra* at 707 (Tyson, J., dissenting). This assertion is belied by the evidence. Put simply, Plaintiff's seeking recovery as an employee of NCL in Ohio is not "clearly inconsistent" with his argument before our Court that he was a joint employee of NCL and National Copier. *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 29, 591 S.E.2d 870, 888 (2004). This is another argument the Defendants have not made.

IV. Conclusion

Thorough consideration of the facts, law, and the parties' arguments therefrom makes plain Plaintiff was jointly employed by NCL and National Copier. We therefore do not reach Plaintiff's argument in the alternative that National Copier and NCL had a contractor–subcontractor relationship because we conclude they were joint employers.

The award of the Industrial Commission is reversed and the matter remanded for the entry of an award in favor of the appellant in accord with this opinion.

REVERSED AND REMANDED.

Judge HAMPSON concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion misapplies the standard of appellate review and reweighs the evidence to substitute and imply its preferred, but wholly unsupported, outcome to reverse the Commission's opinion and award. I respectfully dissent.

I. Background

Thomas Prince contracted with equipment dealers and sellers to transport their office equipment to buyers. He chartered and formed National Copier Logistics, LLC ("Defendant") as a North Carolina Limited Liability Company with the North Carolina Secretary of State's Office in 2007.

Four years later, Prince formed NCL Transportation, LLC ("NCL") as an Ohio Limited Liability Company and chartered under the laws of the State of Ohio to employ truck drivers. NCL complied with all state and federal governmental regulations as a separate entity and obtained Ohio workers' compensation insurance coverage for all of NCL's employees.

James C. McGuine ("Plaintiff") was hired by NCL on or around 11 December 2012. Plaintiff's tax withholding forms, Form I-9, and pay stubs identified and designated NCL as his employer. Plaintiff represented NCL as his employer on authorization forms for direct deposit of his NCL salary into his bank account. Plaintiff never asserted or filed anything claiming Defendant was his employer from his employment date with NCL until this action was commenced.

Plaintiff was injured while at work for NCL in Ohio. Plaintiff asserted a claim against NCL as his employer under the Ohio workers' compensation policy. Plaintiff represented himself as an employee of NCL and received workers' compensation benefits due under the Ohio policy.

The action before us commenced when Plaintiff filed the present claim before the Commission and asserted he was not employed solely by NCL. Plaintiff also claimed to be either solely an employee of Defendant or jointly an employee of both NCL and Defendant.

Competent evidence in the record supports the Commission's finding and conclusion that:

> Plaintiff has failed to prove by a preponderance of the evidence that he was an employee of National Copier. Plaintiff failed to prove that he entered into an express or implied contract of hire with National Copier, that he was performing the work of National Copier, that National Copier had the right to control the details of his work, that he was under the simultaneous control of and simultaneously performing services for both NCL and National Copier, or that the services for each employer were closely related to that of the other.

The Commission concluded, "Plaintiff was an employee of NCL at the time of the injury by accident that is the subject of this claim. N.C. Gen. Stat. § 97-2(2)." Plaintiff appealed.

II. Standard of Review

"Plaintiff bears the burden of proving the existence of an employer-employee relationship at the time of the injury by accident." *Whicker v. Compass Grp. USA, Inc.*, 246 N.C. App. 791, 797, 784 S.E.2d 564, 569 (2016) (citation omitted). The Commission's findings and conclusions are presumed to be correct unless Plaintiff carries his burden to prove otherwise. *See id.*

III. Employment Status

Plaintiff argues he was employed solely by Defendant or, alternatively, jointly by Defendant and NCL.

A. Sole Employment

Plaintiff made inconsistent assertions before the Ohio Workers' Compensation Bureau and before the Commission. He is judicially estopped from asserting any claim of sole employment by Defendant.

Our Supreme Court has held three factors inform the decision whether to apply the doctrine of judicial estoppel in a particular case:

> First, a party's subsequent position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position . . . . Third, courts consider whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 29, 591 S.E.2d 870, 888-89 (2004) (citations, footnote, and internal quotation marks omitted). As noted above, there is a presumption of correctness of the Commission's order and award that is Plaintiff's burden to overcome. This Court is not bound solely to appellee's arguments and authorities to affirm the order appealed from. *See State v. Hester*, 254 N.C. App. 506, 516, 803 S.E.2d 8, 16 (2017) (citations omitted).

Applying this analysis, Plaintiff first asserted his sole employment was with NCL when he applied for Ohio workers' compensation benefits. This claim is inconsistent with his current claim of being solely employed by Defendant. Secondly, the Ohio Workers' Compensation Bureau and the Commission both concluded Plaintiff was an employee of NCL. Finally, Plaintiff actually received benefits in Ohio for an injury that occurred in Ohio as an employee of NCL, and he now seeks to receive additional benefits from Defendant, which would "impose an unfair detriment" upon Defendant. *See Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 888-89. Plaintiff is judicially estopped from asserting Defendant was his sole employer. *See id.* His argument of sole employment with Defendant is without merit.

B. Joint Employment

Plaintiff also asserts Defendant was his joint employer. As the Commission properly found and concluded, joint employment only exists when a single employee, under contract with two employers, and under the simultaneous control of both, performs services for both employers at the same time, and where the service for each employer is the same as, or is closely related to, that for the other. *Henderson v. Manpower*, 70 N.C. App. 408, 413-14, 319 S.E.2d 690, 693 (1984).

The majority's opinion purports to find Plaintiff's joint employment with Defendant through an implied in fact employment contract

between Plaintiff and Defendant. It does so by disregarding the facts as found by the Commission and re-weighing the evidence to assert and imply its notion of Plaintiff's simultaneous employment by NCL and Defendant. No evidence in the record during the period relevant to the Commission's inquiry supports Plaintiff's burden to show joint employment under any theory of implied contract. *See id.*

1. Employment Contract

The employer-employee relationship is contractual in nature and determined by governing contractual rules. *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934) (citations omitted). An employee's right to demand pay from his employer is "essential to his right to receive compensation under the Workmen's Compensation Act." *Id.* at 210, 173 S.E. at 605 (citations omitted).

"An implied [employment] contract refers to an actual contract inferred from the circumstances, conduct, acts or relations of the parties, showing a tacit understanding." *Whicker*, 246 N.C. App. at 798, 784 S.E.2d at 570 (citation omitted). To support a finding of joint employment, Plaintiff must produce evidence of a contract of employment, express or implied, with each employer. *See Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 607, 525 S.E.2d 471, 475 (2000).

The majority's opinion correctly notes the parties stipulated that no express contract of employment existed between Plaintiff and Defendant. The only basis for finding joint employment under these facts would be an implied in fact contract between the parties.

The Commission based its conclusion that Plaintiff was employed solely by NCL on the objective facts that Plaintiff's signed tax withholding forms, pay statements, employment verification form I-9, and payroll authorization for automatic deposit all list NCL as the employer, and he was solely paid by NCL. The majority opinion's analysis of whether an implied contract existed between Plaintiff and Defendant is based on who "hired, paid, trained, and supervised" Plaintiff. *Whicker*, 246 N.C. App. at 799, 784 S.E.2d at 570.

This undisputed evidence shows NCL, not Defendant, employed, paid, and supervised Plaintiff'. *See id.* (considering who "hired, paid, trained, and supervised" in determining whether an implied employment contract existed). Plaintiff stipulated and submitted that he was NCL's employee in Ohio to secure Ohio Workers' Compensation benefits from an injury that occurred in Ohio, while he was working in that state for an Ohio-chartered and based entity. Plaintiff never asserted any

claim of employment or entitlement to benefits against Defendant until this action.

It is absolutely irrelevant to the Commission's or this Court's analysis or decision that Prince formed either or both Defendant or NCL to reduce liability and costs. These reasons are the normal and legitimate bases to form all corporations, limited liability companies, limited partnerships, or other entities. *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 636, 652 S.E.2d 231, 235 (2007) (explaining the limited liability of the entity's owners is a "crucial characteristic" of LLCs); *see also* N.C. Gen. Stat. § 57D-2-03 (2019) ("an LLC has the same powers as an individual or a domestic corporation to do all things necessary or convenient to carry out its business").

Neither Prince's, Defendant's, nor NCL's use of these normal and legitimate uses of the corporate form supports the majority opinion's conclusion otherwise. Plaintiff failed to produce any evidence to show or support an implied contract of employment with Defendant. *See Whicker*, 246 N.C. App. at 798, 784 S.E.2d at 570. The Commission's conclusion is properly affirmed.

2. Control

Evidence to support a finding and conclusion of joint employment requires a plaintiff to prove that he or she was under simultaneous control of both employers. *Id.* at 797, 784 S.E.2d at 569. The majority's opinion purports to apply the framework in *Henderson v. Manpower* to conclude Defendant controlled the details of Plaintiff's work. *See Henderson*, 70 N.C. App. at 412-13, 319 S.E.2d at 693. Under these facts, or the lack thereof, the majority's implying a contract to impose liability on Defendant is unsupported and misapplies the analysis in *Henderson*. *See id.*

Manpower's business model in *Henderson* was significantly different from that of Defendant and NCL. Defendant and NCL were formed and chartered in different states and were maintained for distinct and admittedly lawful purposes. Defendant and its employees provided office equipment transportation and delivery services. NCL employees were truck drivers. It is wholly irrelevant to the proper disposition of this appeal whether the principal shareholder or member of Defendant also wholly owned NCL, or whether NCL was a purported subsidiary of Defendant.

NCL's drivers' use of Defendant's trucks or fuel cards does not give Defendant control over NCL's drivers. Defendant's dispatcher schedules

all of its deliveries, whether to NCL or others. These facts, even if true, are wholly immaterial to this analysis.

In *Henderson*, "the work that injured [the employee], was entirely the work of [the employer], who not only controlled the details of that work, but had the right to discharge plaintiff from *that* work at will." *Henderson* at 412, 319 S.E.2d at 693 (emphasis in original). In this case, Defendant's purported control over Plaintiff did not approach the level of control in *Henderson*. Plaintiff was injured while working in his capacity as a driver for NCL. Defendant did not have the authority to fire Plaintiff. Because of the separate and distinct business functions of NCL and Defendant, the majority's opinion errs in misapplying *Henderson*'s framework to the facts of this case.

As the Commission properly found and concluded, Plaintiff failed to show by a preponderance of the evidence that Defendant exercised any control over the details of Plaintiff's express and admitted employment by NCL or that Plaintiff was jointly employed by Defendant. The Commission's opinion and award are properly affirmed.

3. Work Overlap

The final factor required for Plaintiff to prove joint employment exists is to show the work the employee does is the same for both employers. *Whicker*, 246 N.C. App. at 797-98, 784 S.E.2d at 569. Again, the majority's opinion cites *Henderson* to illustrate its implication of Plaintiff's joint employment with both Defendant and NCL.

The example cited in the majority's opinion does not show Plaintiff carried his burden to prove an overlap in responsibilities between NCL and Defendant as was shown between Manpower and the employer in *Henderson*. Their example goes more to the control the employer in that case had over that plaintiff.

This Court's analysis in *Whicker* is consistent with the present facts. This Court reasoned the type of services offered between purported joint employers were distinct in *Whicker*, and therefore no work overlap existed. *Id.* at 800, 784 S.E.2d at 571.

Here, the undisputed evidence shows Defendant provides trucks, fuel, and schedules delivery endpoints. NCL provides the drivers. NCL does not assert responsibility of providing trucks, fuel, or when, where, or which products are picked up or delivered. Alternatively, Defendant did not carry the responsibility of employing, training, paying, insuring, or ensuring regulatory compliance of NCL's commercial truck drivers.

While both companies did business together and provided related or even integrated services within the same industry, Plaintiff's driving services were provided solely for NCL, an admitted separate and distinct company that hired truck drivers. No evidence supports Plaintiff carrying his burden before the Commission to prove or imply any employment, joint or otherwise, by Defendant. The Commission's order and award is properly affirmed.

IV. N.C. Gen. Stat. § 97-19

The majority's opinion reverses the Commission on Plaintiff's first issue, due to its prohibited fact finding and substituted conclusion on appellate review to imply joint employment between Plaintiff and Defendant. The majority's opinion fails to address the second issue: whether Defendant and NCL had a contractor-subcontractor relationship. The Commission held Defendant was not a statutory employer under N.C. Gen. Stat. § 97-19. A contractor-subcontractor relationship did not exist between Defendant and NCL. N.C. Gen. Stat. § 97-19 does not apply.

"Any principal contractor . . . who shall sublet any contract for the performance of any work" shall not be held liable to any employee of such subcontractor if the subcontractor has a workers' compensation policy in compliance with N.C. Gen. Stat. § 97-93 in effect on the date of the injury. N.C. Gen. Stat. § 97-19 (2019).

Prior precedents hold N.C. Gen. Stat. § 97-19 "cannot apply unless there is first a contract for the performance of work which is then sublet." *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 310, 392 S.E.2d 758, 760 (1990). N.C. Gen. Stat. § 97-19 does not apply to a relationship between a principal and independent contractor. *Id.* Plaintiff failed to prove Defendant was a contractor in the case at bar.

No evidence in the record shows NCL received portions of the contract price agreed upon by Defendant and its clients. NCL was a separate company and Defendant used NCL's employees' services to assist them in the performance of their contracts. N.C. Gen. Stat. § 97-19 is not triggered. Additionally, NCL had purchased and maintained a valid Ohio workers' compensation policy in place during all times of Plaintiff's employment in Ohio and at the time of Plaintiff's injury in Ohio.

The Ohio Workers' Compensation Bureau concluded Plaintiff had asserted a compensable claim and NCL was liable for Plaintiff's injuries. The stated legislative purpose of N.C. Gen. Stat. § 97-19 is to protect workers from "financially irresponsible sub-contractors who do

not carry workmen's compensation insurance." *Cook*, 99 N.C. App. at 310, 392 S.E.2d at 759 (citations omitted). That text and purpose is not at issue here. NCL maintained workers' compensation coverage for its employees, as Defendant did for its employees.

The Commission's conclusion is supported by its findings of fact, which are based upon competent evidence in the whole record. *See Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006). For these reasons, I vote to affirm the Commission's opinion and award.

V. Conclusion

Plaintiff has produced no evidence to carry his burden or to show any bad faith or fraud to disregard NCL's Ohio-chartered entity or to pierce its corporate veil as an alter ego or disregarded entity to Defendant. NCL observed all required corporate formalities and filings to maintain its separate legal existence. NCL also met all responsibilities to its employees to provide agreed-upon employment and required workers' compensation benefits, of which Plaintiff availed himself.

Prince, Defendant, and NCL complied with all laws in both Ohio and North Carolina. They are entitled to the protections and benefits of lawfully arranging their business transaction in both North Carolina and Ohio under these facts, as the Commission properly found upon the uncontested facts before it. *Hamby*, 361 N.C. at 636, 652 S.E.2d at 235. NCL alone "hired, paid, trained, and supervised" Plaintiff. *Whicker*, 246 N.C. App. at 799, 784 S.E.2d at 570.

Plaintiff has failed to produce evidence or carry his burden to show entitlement to any compensation due from Defendant in North Carolina. Having admitted he was NCL's employee in Ohio to apply for and receive benefits from an accident in Ohio, Plaintiff is judicially estopped from asserting he was solely Defendant's employee in North Carolina. *Whitacre P'ship*, 358 N.C. at 29, 591 S.E.2d at 889. Plaintiff has not produced any evidence to show or imply joint employment under any implied contract with Defendant. *See Henderson*, 70 N.C. App. at 413-14, 319 S.E.2d at 693.

Finally, no evidence of a contractor-subcontractor relationship is shown to have existed, nor is there evidence that either Defendant or NCL failed to maintain workers' compensation coverage for their respective employees. I vote to affirm the Commission's conclusion that N.C. Gen. Stat. § 97-19 does not apply.

The Commission's opinion and award is properly affirmed. I respectfully dissent.

JERRY McSWAIN, Employee, Plaintiff
v.
INDUSTRIAL COMMERCIAL SALES & SERVICE, LLC, Employer,
AIG/CHARTIS CLAIMS, INC., Carrier, Defendants

No. COA19-740

Filed 7 April 2020

1. Workers' Compensation—compensable injury—traveling employee—personal errand—not arising out of employment

An employee's injury sustained after slipping and falling in a hotel lobby while on an out-of-state work trip was not compensable by the employer because there was no indication the employee's personal errand to retrieve his laundry was in furtherance of the employer's business, whether directly or indirectly.

2. Workers' Compensation—evidence—exclusion of medical records—prejudice analysis

Where the Industrial Commission properly concluded a traveling employee's fall in a hotel lobby did not involve a compensable injury, the exclusion of the employee's medical records by the Full Commission, even if an abuse of discretion, was not prejudicial.

3. Appeal and Error—mootness—cross-appeal—alternate theories in a workers' compensation case

Where the Court of Appeals upheld the Industrial Commission's determination that a traveling employee's injury from falling in a hotel lobby was not compensable, the issues raised in the employer's cross-appeal involving alternate theories of noncompensability were moot.

Appeal by Plaintiff from Order & Award entered 27 February 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 February 2020.

McSwain Law Firm, LLC, by Gayla S.L. McSwain, pro hac vice, and The Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for Plaintiff-Appellant.

McAngus, Goudelock & Courie, PLLC, by Derek R. Wagner, for Defendants-Appellees.

DILLON, Judge.

Plaintiff Jerry McSwain appeals from an Order and Award entered by the Full Commission denying him workers' compensation payment after he fell while traveling for work for his employer, Defendants Industrial Commission Sales & Services, LLC and AIG/Chartis Claims, Inc. (altogether "Defendant").

I. Background

Plaintiff was employed by Defendant. Plaintiff claims he is due workers' compensation for injuries he sustained when he slipped and fell in the hotel he was staying at while out of town working on a project for his employer. Plaintiff fell as he walked through the lobby of the hotel to retrieve his laundry from the hotel laundry room. The facts, more particularly, are as follows:

On 12 November 2013, Plaintiff was part of a work crew who flew to California to work on a project for Defendant. The crew was scheduled to complete the job on 19 November and return on 20 November. However, they finished the project a day early, on 18 November. But changing the crew's return flights from 20 November to 19 November would have cost Defendant $2,400.00. Therefore, Defendant told the crew to keep their original schedule, giving the employees a free day in California.

During this free day, on 19 November, Plaintiff started a load of laundry in the hotel. While waiting for his laundry to finish, Plaintiff visited with other coworkers on the hotel patio consuming alcohol. When Plaintiff later walked back inside to retrieve his laundry, he slipped and fell on a wet spot in the hotel lobby.

Plaintiff filed a claim for workers' compensation for the injuries he allegedly sustained in the fall. His claim was denied by both a deputy commissioner and by the Full Commission. Plaintiff timely appealed.[1]

II. Analysis

The Full Commission denied coverage essentially because "Plaintiff has failed to prove a causal relationship between walking through the hotel to check on his laundry and his employment."

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1. We note that there have been many motions filed with our Court from both parties. Plaintiff's Petition for Writ of Certiorari and Amended Petition for Writ of Certiorari are both denied, as they wish to admit for our consideration evidence that was not considered by the deputy commissioner or the Full Commission. Defendant's motions are dismissed as moot. *See infra*.

Plaintiff argues that the Full Commission (1) failed to conclude that his fall did not arise out of his employment and (2) abused its discretion by refusing to consider certain medical evidence.

Defendant cross-appeals, contending that there were other grounds upon which the Commission could have also based its denial, which it failed to do.

For the reasons stated below, we conclude that the Full Commission's determination that Plaintiff's fall was not compensable was supported by the findings; that any error by the Commission in failing to consider other medical evidence that Plaintiff sought to offer was harmless; and that Defendant's arguments on cross-appeal are, therefore, moot.

A. Standard of Review

The standard of review for opinions and awards from the North Carolina Industrial Commission is "limited to [a] review[] [of] whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Intern. Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

B. Compensability of Plaintiff's Fall

[1] To qualify for benefits under the Workers' Compensation Act (the "Act"), an injury which occurs by accident must occur in the course of employment *and* arise out of employment. *See* N.C. Gen. Stat. § 97-2(6) (2019). As explained below, an employee is deemed to be "in the course of" his employment when he is on the job, that is, doing something which directly or indirectly benefits his employer. And an injury which occurs in the course of employment is deemed to "arise out of" his employment if his employment exposed him to an increased risk of injury.

Our Supreme Court has stated that traveling employees – that is, employees whose job requires them to stay overnight away from home – are considered acting "in the course of" their employment "during the trip, *except when a distinct departure on a personal errand is shown*." *Brewer v. Powers Trucking*, 256 N.C. 175, 178, 123 S.E.2d 608, 610 (1962) (emphasis added) (internal quotation marks and citations omitted). While a traveling employee on a business trip is generally deemed acting "in the course" of employment during the entire trip, the employee must still establish that the injury "arose out of" employment. *Bartlett v. Duke U.*, 284 N.C. 230, 235-36, 200 S.E.2d 193, 196 (1973) (no coverage where, even conceding that the traveling employee died in the course of his employment, he had not established that his death arose out of his employment).

Whether an injury sustained by a traveling employee "arises out of" his employment depends on the facts. *See Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996) ("The determination of whether an accident arises out of . . . employment is a mixed question of law and fact[.]"). Our Supreme Court has instructed that an injury arises out of employment when the injury "is a natural and probable consequence or incident of the employment and a natural result of one of its risks[.]" *Perry v. American Bakeries Co.*, 262 N.C. 272, 274, 136 S.E.2d 643, 645 (1964). And "[t]he causative danger . . . must be incidental to the character of the business and not independent of the [employment relationship]. *Bartlett*, 284 N.C. at 233, 200 S.E.2d at 195. However, for an injury to be covered, the risk "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment[.]" *Id.* at 233, 200 S.E.2d at 195.

Here, the Commission determined that the injury sustained by Plaintiff, working as a traveling employee, was non-compensable.

The line between compensability and non-compensability is nuanced, but is sufficiently defined to resolve this case, as illustrated by the cases below.

Our Court has stated that when an off-duty, traveling employee is injured while traveling to a restaurant from the hotel to eat a meal, that injury generally is compensable. *Martin v. Georgia-Pacific Corp.*, 5 N.C. App. 37, 42, 167 S.E.2d 790, 793 (1969). This is because the risk was from traveling to eat, a risk that arose from being away from home. *Id.*

However, our Supreme Court has held that injury to an off-duty, traveling employee who chokes on food while eating that restaurant meal is generally not compensable. *Bartlett*, 284 N.C. at 234-35, 200 S.E.2d at 195-96. This is because eating at a restaurant away from home did not increase the risk that the employee would choke on his meal. *Id.* at 234-35, 200 S.E.2d at 195-96.

Our Court has held that injuries sustained by an off-duty, traveling employee who was robbed while getting ice from the hotel ice machine *to make lunch* for the next day generally is compensable. *Ramsey v. N.C. Indus.*, 178 N.C. App. 25, 630 S.E.2d 681 (2006). This is because the hotel created an "increased risk" of robbery that the employee would not have faced had he been in his own kitchen preparing his lunch for the next day. *Id.* at 38-39, 630 S.E.2d at 690 (identifying the issue of "whether the risk of assault at the motel was a hazard of the journey [that is,] a risk peculiar to traveling").

However, our Supreme Court has held that injuries sustained by an off-duty, traveling employee in a traffic accident while returning to the hotel from purchasing soft drinks and beer (but not a meal) is not compensable. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E.2d 218 (1962). This is because the trip, unlike traveling to get a meal, was deemed a personal errand that did not "directly or indirectly [further] his master's business." *Id.* at 198, 128 S.E.2d at 221.

And our Supreme Court has held that an injury sustained by a traveling employee while using the hotel's pool is generally not compensable. *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964). The Court reasoned that

> [t]he fact that plaintiff was required to be temporarily in a distant city with expenses paid by his employer is not a controlling factor [but rather] whether his use of the pool was an authorized activity calculated to further, directly or indirectly, his employer's business [or whether] the accident resulted from the risk involved in the employment.

Id. at 274, 136 S.E.2d at 646.

Plaintiff points to some cases which are instructive. For example, Plaintiff cites *Martin*, *supra*, in which we held that an off-duty, traveling employee who goes on a personal errand to sightsee but then was injured when he began walking to a restaurant to eat a meal was covered, concluding that he "had abandoned this personal sight-seeing mission" and was back within the scope of his employment when he went to get a meal. *Martin*, 5 N.C. App. at 43, 167 S.E.2d at 794.

Plaintiff also points to a case in which our Court held that an off-duty, traveling employee is injured within the confines of the employer's road project and while returning to his sleeping quarters is covered, even though he was traveling back from a softball game involving the employees. *See Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 281 S.E.2d 718 (1981) (employee injured while traveling from a meal back to the hotel, but detouring to set up a softball game).

And Plaintiff cites to a case in which we held that an off-duty, traveling employee who is injured while returning to his hotel from an evening meal is still covered, even though he stayed at the restaurant past his meal to drink alcohol and watch a ballgame (where there was no allegation that the injury was due to intoxication). *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 529-30, 477 S.E.2d 678, 680 (1996).

Though not a case involving a traveling employee, we note our Supreme Court's decision in which that Court held that a night watchman who is injured while washing his own car while on the job on his employer's worksite was not covered. *Bell v. Dewey Bros., Inc.*, 236 N.C. 280, 283, 72 S.E.2d 680, 682 (1952). The Court reasoned that the employee "was engaged in an act in no way connected with the work he was employed to perform, and there appears no causal relationship between his employment as a watchman and the injury he sustained." *Id.* at 283, 72 S.E.2d at 682.

Here, the Commission found that Plaintiff was injured while retrieving his laundry that he was washing. Based on the findings made by the Commission and based on our jurisprudence, we must affirm the Commission's determination.

The fact that Plaintiff fell on the hotel premises does not, in and of itself, necessitate reversal. Indeed, our Supreme Court held that the employee in *Perry*, *supra*, who was injured in the hotel's swimming pool was not covered, as his swimming was not "calculated to further, directly or indirectly, the employer's business." *Perry*, 262 N.C. at 274, 136 S.E.2d at 645.

As illustrated above, a traveling employee while going to and from a restaurant to eat or to his hotel room to sleep is generally covered, because an employee has to eat meals and sleep in order to function for his employer on the trip. *See Martin*, 5 N.C. App. at 42, 167 S.E.2d at 793 (stating that traveling employees are covered where the injury "has its origin in a risk created by the necessity of sleeping and eating away from home").

Unlike eating and sleeping, washing laundry is not always necessary for an off duty, traveling employee. For this reason, Plaintiff's claim here is distinguishable from *Ramsey*, in which the claimant had to prepare and pack his lunch for the following workday, and similar cases. Unlike the claimant in *Ramsey*, Plaintiff was not injured while attending to personal needs that *had to be met* (e.g., eating a meal) before his traveling duties for his employer were completed. The Commission made no finding to suggest that the act by Plaintiff of doing his laundry was necessary to further, directly or indirectly, the business of his employer. There was no finding, much less evidence to support a finding, that Plaintiff had run out of clean clothes to necessitate a need to laundry to provide clean clothes during the remainder of the business trip. Accordingly, we conclude that the findings made by the Commission are more in line with those in *Perry*, where the employee was swimming in the hotel

pool, and *Bell*, where the night watchman was injured on the worksite while washing his own car. In each of those cases, our Supreme Court held that there was no coverage because there was no showing that the employee was engaged in an act calculated to further, directly or indirectly, his employer's business.

C. New Evidence

[2] Plaintiff claims that the Full Commission abused its discretion when it excluded certain medical records concerning his injuries and treatment, evidence that he did not offer in the hearing before the deputy commissioner.

Whether the Commission considers new evidence is a matter within its sound discretion. *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 577-78, 139 S.E.2d 857, 862-63 (1965).

The statute governing new evidence to be heard by the Full Commission states: "the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representative, and if proper, amend the award[.]" N.C. Gen. Stat. § 97-85. However, it has been held that "the duty to receive further evidence, in addition to reviewing the award, applies only if good ground therefor be shown." *Tindall v. American Furniture Co.*, 216 N.C. 306, 311, 4 S.E.2d 894, 897 (1939).

The Commission found that Plaintiff made no effort to have these documents admitted to the record before the Deputy Commissioner and that "Plaintiff did not produce any reason for not producing the evidence while the matter was before the Deputy Commissioner."

Assuming there was an abuse of discretion, we see no prejudice in the exclusion of the medical records, based on our determination that the accident which caused Plaintiff's injuries is not covered under the Act.

D. Defendant's Cross-Appeal

[3] Defendant argues that the Commission erred by not ruling on whether Plaintiff's claim was barred on an alternate theory, namely due to his intoxication causing the fall. "No compensation shall be payable if the injury or death to the employee was proximately caused by: (1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee." N.C. Gen. Stat. § 97-12.

Defendants also argue that the Commission erred as a matter of fact and law in failing to find that Plaintiff did not carry his burden of proving a causal link between his fall and his injury.

Based on our conclusion that Plaintiff's fall did not occur within the scope of his employment, these additional issues raised by Defendant are moot. Defendant's cross-appeal is, therefore, dismissed.

III. Conclusion

The Commission did not err by concluding that Plaintiff's injuries are not compensable under the Act. The Commission did not abuse its discretion in excluding evidence that was not admitted or introduced in the hearing with the Deputy Commissioner. We dismiss Defendant's cross-appeal as moot.

AFFIRMED.

Judges BRYANT and INMAN concur.

MOLLY SCHWARZ, PLAINTIFF
v.
ST. JUDE MEDICAL, INC., ST. JUDE MEDICAL, S.C., INC., DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEM, INC., ERIC DELISSIO AND TED COLE, DEFENDANTS

No. COA19-395

Filed 7 April 2020

1. Civil Procedure—motion hearing—Rule 56—mandatory notice period

In an employment dispute, plaintiff-employee was given adequate notice of defendant-employer's motion for summary judgment where defendant complied with the Rules of Civil Procedure (Rules 5 and 56(c)) by serving plaintiff with the motion by fax ten days in advance of the hearing.

2. Civil Procedure—motion hearing—continuance—Rule 56(f)—trial court's discretion

The trial court did not abuse its discretion by denying plaintiff-employee's motion for a continuance of a summary judgment hearing in an employment dispute after considering arguments from both parties where its discretionary decision was well-reasoned and non-arbitrary.

3. Employer and Employee—wrongful discharge—retaliation—public policy considerations—summary judgment

In an employment dispute in which plaintiff-employee claimed she was wrongfully discharged in violation of public policy as retaliation for reporting to her employer that one of her coworkers committed adultery, the trial court properly granted summary judgment for defendant-employer because plaintiff failed to show not only that adultery was criminal conduct by statute, but also that reporting a consensual and private affair to her employer contravened public policy.

4. Employer and Employee—wrongful discharge—sex and age discrimination—legitimate reason for dismissal—summary judgment

In an employment dispute in which plaintiff-employee (a clinical specialist for a medical device company) claimed she was wrongfully discharged due to sex and age discrimination based on being replaced by a younger male employee, the trial court properly granted summary judgment for defendant-employer where the record established a legitimate and nondiscriminatory reason for plaintiff's discharge—numerous and consistent complaints about her job performance from doctors and patients—and where plaintiff failed to offer any evidence that this reason was merely a pretext for firing her due to sex or age.

5. Libel and Slander—per se libel—employee performance—healthcare field—patient care—qualified privilege

In an employment dispute in which plaintiff-employee (a clinical specialist for a medical device company) asserted her coworkers committed libel per se by forwarding an email that contained a patient complaint about her to upper management, the trial court properly granted summary judgment for defendant-coworkers based on qualified privilege because the internal reporting of a healthcare worker's performance related to patient care is protected from libel claims.

6. Wrongful Interference—employment contract—legitimate business interest—evidentiary support

In an employment dispute in which plaintiff-employee (a clinical specialist for a medical device company) asserted claims of tortious interference with her employment contract after she was fired, plaintiff's claims failed as a matter of law against (1) two coworkers who, by reporting and investigating patient complaints about

plaintiff's care, were engaged in legitimate business interests of the company and (2) a university health system that requested it no longer wanted to work with plaintiff based on complaints of her performance because there was no evidence that it sought to have plaintiff fired after she reported an affair by one of its doctors.

Appeal by plaintiff from orders entered 10 January 2019 by Judge Karen Eady-Williams and 17 January 2019 by Judge R. Kent Harrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 November 2019.

Kennedy, Kennedy, Kennedy and Kennedy, LLP, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Keith M. Weddington, and Seyfarth Shaw LLP, by Nancy E. Rafuse and J. Stanton Hill, for defendants-appellees St. Jude Medical, Inc., St. Jude Medical S.C., Inc., Eric Delissio, and Ted Cole.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Robert A. Sar and Andrew C. Avram, for defendants-appellees Duke University and Duke University Health System.

DIETZ, Judge.

Plaintiff Molly Schwarz worked for St. Jude Medical, a medical device company. In her position, Schwarz visited doctor's offices and hospitals and interacted with physicians and patients.

Over several years, St. Jude received multiple complaints from doctors and patients about Schwarz's unprofessional or inappropriate behavior. Ultimately, St. Jude fired Schwarz.

Schwarz then sued St. Jude, one of her co-workers, her direct supervisor, and Duke University Health System, one of St. Jude's larger customers in the region. She asserted claims for retaliatory discharge, sex and age discrimination, libel, and tortious interference with her employment contract.

The trial court granted summary judgment for Defendants and against Schwarz on all claims. On appeal, Schwarz asserts a series of procedural arguments about the timing of one of the two summary judgment hearings and argues that her claims should have been sent for trial. We disagree.

As explained below, the trial court was well within its sound discretion to conduct the summary judgment hearing when it did, rather than continue it, and Schwarz's evidence was insufficient to create a genuine issue of material fact on any of her claims. Accordingly, the trial court properly entered judgment in Defendants' favor as a matter of law.

Facts and Procedural History

In 2012, Defendant St. Jude Medical, a medical device company, hired Plaintiff Molly Schwarz to work as a Clinical Specialist. As part of her duties, Schwarz had to conduct "patient checks" in doctor's offices and hospitals to assess and assist with the adjustment of implanted medical devices. Schwarz also had to field calls and answer questions about the devices and provide information at conferences within a defined territory. During this period, Schwarz worked with Defendant Ted Cole, the Territory Manager for St. Jude in the Raleigh area. Both Schwarz and Cole were supervised by Defendant Eric Delissio, St. Jude's Regional Sales Director.

Beginning in 2014, St. Jude received several complaints from physicians and patients about Schwarz, including some complaints so serious that physicians prohibited St. Jude from sending Schwarz to work with them. For example, in June 2014, a physician banned Schwarz from working with him because Schwarz gave the doctor an expired medical device to implant. Schwarz received a written warning from Delissio for this incident. Later, in September 2014, St. Jude received a complaint from another hospital that Schwarz was "like a bull in a China shop" and agitated a patient when servicing the patient's medical device. Then, in January 2015, a physician in Schwarz's assigned territory prohibited Schwarz from coming to his office unless absolutely necessary because he claimed Schwarz had challenged his medical judgment in front of a patient.

In February 2015, St. Jude's human resources department suggested to Schwarz's supervisors that she be placed on a performance improvement plan based upon her "pattern of behavior that needed to be addressed with [Schwarz] from a customer standpoint." One week later, Schwarz's supervisors received a verbal complaint from a patient who alleged that Schwarz was unprofessional, lacked compassion, and appeared to lack knowledge of how St. Jude's medical devices functioned. The patient refused future care from Schwarz.

Finally, in late February 2015, another patient complained that Schwarz exposed the patient to unnecessary radiation, was argumentative, refused to listen, and "kept referring to the [x-ray] films backwards."

Cole received a copy of the email containing these claims and he forwarded the email to Delissio, who in turn forwarded it to high-level managers at St. Jude.

After considering other, less drastic disciplinary measures, St. Jude ultimately decided to terminate Schwarz's employment based on the pattern of behavior revealed by the repeated physician and patient complaints. In March 2015, St. Jude notified Schwarz that her employment was terminated. Schwarz then filed this lawsuit, asserting claims for wrongful termination, defamation, and tortious interference with contract.

Schwarz does not dispute the existence of the long series of physician and patient complaints against her. But she insists that these complaints were used as a pretext to fire her.

She contends that the real reason she was fired was because she informed her supervisors that a physician at Duke University Health System, with whom St. Jude worked, was engaged in an extra-marital affair with one of Schwarz's co-workers at St. Jude. Schwarz asserted claims for wrongful discharge based on public policy, sex discrimination, and age discrimination against St. Jude; libel claims against Cole and Delissio, the co-workers who forwarded certain patient complaints to superiors within the company; and tortious interference claims against Cole and Delissio, as well as against Duke University and Duke University Health System, the employer of the physician who allegedly had an extra-marital affair with Schwarz's co-worker.

After full discovery, Defendants moved for summary judgment. The trial court entered summary judgment for Defendants and against Schwarz on all claims. Schwarz timely appealed.

Analysis

I. Notice of the St. Jude summary judgment hearing

[1] Schwarz first argues that the trial court improperly ruled on the St. Jude defendants' summary judgment motion because Schwarz did not receive adequate notice of the hearing on that motion.[1] We reject this argument.

Under Rule 56(c), the party seeking summary judgment must serve the motion on the adverse party "at least 10 days before the time fixed for the hearing." N.C. R. Civ. P. 56(c). "Although Rule 56 makes no direct

1. We refer to the St. Jude Medical companies and the two St. Jude employees, Cole and Delissio, collectively as "St. Jude."

reference to notice of hearing, this Court has held that such notice also must be given at least ten (10) days prior to the hearing." *Wilson v. Wilson*, 191 N.C. App. 789, 791, 666 S.E.2d 653, 654 (2008). "Failure to comply with this mandatory 10 day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule." *Zimmerman's Dep't Store, Inc. v. Shipper's Freight Lines, Inc.*, 67 N.C. App. 556, 557–58, 313 S.E.2d 252, 253 (1984).

Here, St. Jude complied with this 10-day notice rule. St. Jude served the motion by fax on 27 December 2018, ten days before the 7 January 2019 hearing on the motion. This service by fax is permitted by Rule 5 of the Rules of Civil Procedure. N.C. R. Civ. P. 5(b)(1)(a). Thus, St. Jude notified Schwarz of the summary judgment hearing at least ten days in advance.

But Schwarz argues that she was entitled to *thirteen* days advance notice, not ten. This is so, she reasons, because St. Jude also served its notice by mail. Under the "mail rule" for service contained in Rule 6(e), Schwarz argues, "three days shall be added to the prescribed period" of notice, thus meaning she was entitled to a 13-day notice period rather than a 10-day one. *See* N.C. R. Civ. P. 6(e); *see also Planters Nat'l Bank and Tr. Co. v. Rush*, 17 N.C. App. 564, 566, 195 S.E.2d 96, 97 (1973).

We reject this argument. The purpose of the 10-day mandatory notice requirement in Rule 56(c) is to ensure that the non-moving party is aware of the upcoming hearing at least ten days in advance. That occurred here because St. Jude faxed the notice ten days before the hearing in conformity with the procedural requirements of both Rule 5 and Rule 56(c).

II. Motion for continuance

[2] Next, Schwarz contends that the trial court erred by denying her motion to continue the 7 January 2019 summary judgment hearing. Again, we reject this argument.

"Rule 56(f) allows the trial court to deny a motion for summary judgment or order a continuance to permit additional discovery, if the party opposing the motion cannot present facts essential to justify his opposition." *Fla. Nat'l Bank v. Satterfield*, 90 N.C. App. 105, 109, 367 S.E.2d 358, 361 (1988). "The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice." *Bowers v. Olf*, 122 N.C. App. 421, 426, 470 S.E.2d 346, 350 (1996). The decision of whether to grant a request for a continuance under Rule 56(f) is left to the sound discretion of the

trial court. *Fla. Nat'l Bank*, 90 N.C. App. at 109, 367 S.E.2d at 361. This Court cannot override that determination unless the trial court abused its discretion through a ruling "so arbitrary that it could not have been the result of a reasoned decision." *Manning v. Anagnost*, 225 N.C. App. 576, 579, 739 S.E.2d 859, 861 (2013).

Here, Schwarz argues that the trial court should have granted a continuance because her attorneys "were on vacation during the Christmas holidays," giving them little time to prepare for the hearing. She also contends that St. Jude's motion relied on witnesses that St. Jude failed to disclose during the discovery period. Thus, she contends, the interests of justice required the trial court to continue the hearing to provide Schwarz and her counsel with additional time to prepare.

The trial court's analysis of this question is a paradigmatic example of a discretionary decision to which this Court must defer. Schwarz argued the continuance was necessary in the interests of justice. St. Jude disagreed. Both sides offered reasonable arguments for their positions. The trial court considered the parties' arguments and elected, in its discretion, to proceed with the hearing. Although the trial court properly could have granted a continuance, the court's decision not to do so was a reasoned, non-arbitrary one and thus was well within the trial court's sound discretion. *Fla. Nat'l Bank*, 90 N.C. App. at 109, 367 S.E.2d at 361.

III. Wrongful discharge – retaliation

[3] Schwarz next argues that the trial court erred by granting summary judgment in favor of St. Jude on her wrongful discharge claim based on unlawful retaliation. Schwarz contends that her termination was retaliation for her report of adultery by a co-worker and that this retaliation violates North Carolina public policy. We reject this argument.

Schwarz was an at-will employee. "Although at-will employment may be terminated for no reason, or for an arbitrary or irrational reason," the employer cannot terminate an employee for a "reason or purpose that contravenes public policy." *Imes v. City of Asheville*, 163 N.C. App. 668, 670, 594 S.E.2d 397, 398 (2004). Put another way, employers generally are free to "retaliate" against their at-will employees by firing them for conduct of which they disapprove. But they cannot fire an at-will employee for a reason that contravenes North Carolina public policy.

"Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 670, 594 S.E.2d at 399. Public policy is violated "when an employee is fired in contravention

of express policy declarations contained in the North Carolina General Statutes." *Id.*

Here, Schwarz contends that she engaged in conduct protected by North Carolina public policy because she "reported adultery" by one of her co-workers. Adultery, Schwarz contends, is an illegal act and a report of this illegal activity to the employer is a protected act under North Carolina public policy.

There are several flaws in this argument. First, it is far from clear that adultery is a criminal act in North Carolina. To be sure, there is an aging statute titled "Fornication and Adultery" which provides that "[i]f any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-184. But this Court has examined this statute and observed that "the State has chosen not to use it, at least in modern times." *Malecek v. Williams*, 255 N.C. App. 300, 305 n.2, 804 S.E.2d 592, 597 n.2 (2017). Indeed, in 2006, a trial court declared Section 14-184 facially unconstitutional. The court entered a permanent injunction providing that the State was "hereby permanently enjoined from enforcing N.C.G.S. § 14-184 in any manner." *Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Aug. 25, 2006) (unpublished). The State did not appeal that permanent injunction and it appears to be in effect today. Thus, Schwarz has not identified any currently applicable statutory basis for asserting that adultery is a criminal act.

In any event, we find no support in either the General Statutes or our case law for the principle that reporting to one's *employer* the private sexual activity of a co-worker is protected by any "express policy declarations contained in the North Carolina General Statutes." *Imes*, 163 N.C. App. at 670, 594 S.E.2d at 399. The alleged consensual affair between Schwarz's co-worker and a married physician is simply not conduct so "injurious to the public or against the public good" that reporting it to Schwarz's employer could be considered a part of the core public policy of our State. *Id.* The trial court therefore properly concluded that Schwarz's wrongful discharge claim based on public policy grounds failed as a matter of law.

IV. Wrongful discharge - sex and age discrimination

[4] Schwarz next argues that St. Jude committed sex and age discrimination by firing her and hiring a male employee who was 39 years old. This wrongful discharge argument, like Schwarz's previous one, is fatally flawed.

North Carolina has adopted the legal standard for sex and age discrimination that was developed through federal employment discrimination doctrine. *Johnson v. Crossroads Ford, Inc.*, 230 N.C. App. 103, 111, 749 S.E.2d 102, 108 (2013). Under this standard, the claimant must first establish a prima facie case of disparate treatment by showing that: (1) she is a member of a protected class; (2) she was qualified for her job and her performance was satisfactory; (3) she suffered an adverse employment action; and (4) other similarly situated employees who are not members of the protected class did not suffer the same adverse employment action. *Head v. Adams Farm Living, Inc.*, 242 N.C. App. 546, 555, 775 S.E.2d 904, 910 (2015).

Once the claimant meets this standard, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *North Carolina Dep't of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 82 (1983). Then, the burden shifts back to the employee to show that the proffered reason for the adverse employment action was merely a pretext for discrimination. *Id.*

Here, even assuming Schwarz's evidence satisfied her initial burden to show a prima facie case of sex and age discrimination, her claim fails because the record contains evidence of a legitimate, nondiscriminatory reason for Schwarz's termination—repeated, consistent complaints from physicians and patients about Schwarz's inappropriate or unprofessional conduct. Indeed, even a core part of Schwarz's retaliatory discharge claim—that she revealed an extra-marital affair between a co-worker and a customer—demonstrates that St. Jude's reason for terminating Schwarz concerned her conduct toward the patients and physicians on whom St. Jude depends for its business.

In response, Schwarz did not offer any evidence that these reasons for her termination were merely a pretext and that St. Jude's real reason for her termination was her sex or age. *Hodge v. North Carolina Dep't of Transp.*, 246 N.C. App. 455, 474, 784 S.E.2d 594, 607 (2016); *Head*, 242 N.C. App. at 561, 775 S.E.2d at 914. Without that evidence, Schwarz cannot survive a motion for summary judgment. Accordingly, the trial court properly entered judgment on this claim as a matter of law.

V. Libel claim

[5] Schwarz next argues that the trial court improperly entered summary judgment on her libel claim. Schwarz contends that Defendants Ted Cole and Eric Delissio committed libel *per se* by forwarding an email up the chain of command at St. Jude. The email alleged that Schwarz mistreated a patient by misreading an x-ray and exposing a patient to unnecessary radiation. We reject Schwarz's argument.

"[L]ibel *per se* is a publication by writing, printing, signs or pictures which, when considered alone without innuendo, colloquium, or explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 317, 312 S.E.2d 405, 408–09 (1984).

Although this claim can arise in a workplace setting, there are special rules for libel and defamation claims that occur within a healthcare institution. Healthcare professionals generally have a qualified privilege to report to management any employee work performance issues that implicate patient care. *Troxler v. Carter Mandala Ctr., Inc.*, 89 N.C. App. 268, 272, 365 S.E.2d 665, 668 (1988). This privilege exists because the "health care industry plays a vital and important role in our society" and encouraging employees to share concerns about healthcare services ensures the "quality and trustworthiness of the care which the medical community provides." *Id.*

Here, even taking all the evidence in the light most favorable to Schwarz, her libel allegations fall squarely within the qualified privilege for healthcare professionals. Cole and Delissio received an email indicating that Schwarz provided improper care to a patient. Cole forwarded the email to Delissio, his supervisor, and Delissio forwarded it to higher-ranking employees at St. Jude. Neither defendant sent the email to anyone outside this chain of command within St. Jude. This sort of internal reporting of an allegation of improper patient care is protected from libel claims by the qualified privilege applicable in the healthcare field. Accordingly, the trial court properly entered summary judgment on Schwarz's libel claims.

VI. Tortious interference

[6] Finally, Schwarz argues that Defendants Cole, Delissio, and Duke University Health System tortiously interfered with her employment contract by inducing St. Jude to terminate her employment. Again, this argument is meritless.

To establish a claim for tortious interference with contract, there must be "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to

plaintiff." *Brodkin v. Novant Health, Inc.*, __ N.C. App. __, __, 824 S.E.2d 868, 874 (2019).

We begin with Schwarz's claim against Cole and Delissio, her two co-employees at St. Jude. When a tortious interference claim based on an employment contract is brought against the plaintiff's co-employees, "the plaintiff must show that the alleged interference was unrelated to a 'legitimate business interest' of the employee." *Id.*

Here, unrebutted evidence in the record indicates that the alleged interference—that is, these two employees' involvement in St. Jude's decision to terminate Schwarz—was related to their legitimate business interests. Cole was one of Schwarz's co-workers and interacted with the same clients and patients as Schwarz. Delissio is the mutual supervisor for both Cole and Schwarz.

Cole reported to Delissio that a number of clients and patient had complaints and other concerns about Schwarz's work. Delissio then investigated those concerns and ultimately provided disciplinary recommendations to St. Jude that included possible termination.

Reporting and investigating repeated complaints by patients and healthcare professionals about a co-employee's work performance is a legitimate business interest. *Id.* Accordingly, the trial court properly concluded that undisputed evidence in the record defeated Schwarz's tortious interference claim against her two co-employees at St. Jude as a matter of law.

Schwarz next contends that Duke University Health System tortiously induced St. Jude to fire Schwarz because she reported a sexual relationship between a co-worker and a Duke employee. But this claim fails because, even taking all evidence in the light most favorable to Schwarz, she has not forecast any evidence that Duke sought her termination from St. Jude. *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 745, 641 S.E.2d 695, 697 (2007).

Duke was, in effect, a customer of St. Jude. One of Duke's physicians refused to work with Schwarz. At most, Duke requested that St. Jude not send Schwarz to work with them, and to use other St. Jude employees instead. There is no evidence that Duke "intentionally induced" St. Jude to terminate its employment contract with Schwarz. *Brodkin*, __ N.C. App. at __, 824 S.E.2d at 874. Indeed, there is no evidence that Duke had any interest at all in whether Schwarz remained employed at St. Jude. Even taking all inferences in Schwarz's favor, Duke, at most, requested not to work with Schwarz anymore. There is no evidence that this would

have forced St. Jude to end its employment contract with Schwarz, nor any evidence that Duke believed this to be true. This, in turn, means Schwarz failed to forecast any evidence that "the defendant intentionally induce[d] the third person not to perform the contract." *Id.* Accordingly, the trial court properly determined that Schwarz's tortious interference claim failed as a matter of law.

Conclusion

For the reasons stated above, we affirm the trial court's orders granting summary judgment in favor of Defendants.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DONALD EUGENE BLANKENSHIP

No. COA19-678

Filed 7 April 2020

1. Satellite-Based Monitoring—period of years—basis—multiple victims—position of trust

After being convicted of five counts of taking indecent liberties with a child, defendant did not have to be assessed as high risk by the Department of Corrections (DOC) before the trial court could impose satellite-based monitoring. The court's imposition of a ten-year period upon defendant's release from prison was adequately supported by defendant's stipulation to the factual basis for his guilty plea, the DOC's determination that defendant was of average risk, and findings that defendant abused multiple children of different ages, both male and female, and that he took advantage of a position of trust by using as a pretext the provision of a safe environment in order to commit his assaults.

2. Appeal and Error—preservation of issues—satellite-based monitoring—reasonableness

In a prosecution for five counts of taking indecent liberties with a child, defendant failed to preserve for appellate review any

challenge to the reasonableness of the imposition of satellite-based monitoring (for a period of ten years upon his release from incarceration) where he raised no objections or constitutional arguments before the trial court.

3. Constitutional Law—effective assistance of counsel—satellite-based monitoring—civil proceeding

Defendant's claim that his counsel provided ineffective assistance of counsel (IAC) for failing to raise a constitutional challenge at his satellite-based monitoring (SBM) hearing was dismissed because IAC claims do not apply to civil proceedings such as a hearing on SBM eligibility.

Appeal by defendant from judgments entered 6 December 2017 by Judge Julia Lynn Gullett in Catawba County Superior Court. Heard in the Court of Appeals 3 March 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew DeSimone, for defendant-appellant.

TYSON, Judge.

Donald Eugene Blankenship ("Defendant") appeals from judgments entered upon his guilty plea to five counts of indecent liberties with minor children. We affirm the trial court's order imposing ten years of satellite-based monitoring ("SBM").

We dismiss Defendant's unpreserved constitutional challenge to the reasonableness of the trial court's order on SBM. We also dismiss Defendant's ineffective assistance of counsel ("IAC") claim.

I. Background

Federal law enforcement officers located in Joplin, Missouri were investigating David Lee Perkins for filming and distributing child pornography. Perkins distributed child pornography to Defendant and corresponded via email with him concerning the minor victim depicted in the pornography. The Federal Bureau of Investigation executed a search warrant on Defendant at home and confiscated his computer. During Defendant's interview, he admitted to receiving, having, and sharing child pornography on his computer and to fondling several victims.

Defendant was indicted for five counts of taking indecent liberties with children on 1 May 2017. He pleaded guilty to those charges on 6 December 2017. The State presented a factual basis for Defendant's plea, asserting three of the sexual assault victims, both male and female children, were between the ages of six to fourteen years old. The State also identified two additional minor victims and child pornography crimes, for which Defendant was not indicted.

T.S. was six or seven years old between 1 July 2010 and 31 August 2010. T.S.' parents were friends with Defendant, and they had left T.S. alone with him on several occasions. Defendant fondled and assaulted T.S. two times by touching T.S.' penis and buttocks and had T.S. touch Defendant's penis.

V.G. was fourteen years old between 1 June 2012 and 30 June 2012. V.G. was friends with Defendant's daughter and had stayed overnight at Defendant's house. While V.G. was staying at Defendant's house, he tried to touch "her breasts and her vaginal area."

The third victim, M.B., was eleven years old between 1 June 2012 and 30 September 2012. M.B. was also friends with Defendant's daughter and visited Defendant's house. On "numerous occasions" at Defendant's house he tried to touch M.B.'s breasts and vagina. Once M.B. had to "put[] a pillow over her [body] trying to protect herself" from Defendant's assaults.

As a part of Defendant's plea agreement on the five indecent liberties charges, the State agreed not to proceed on any charges related to the child pornography Defendant possessed or concerning assaults on the two other unindicted victims.

The State requested to be heard on the imposition of SBM. Prosecutors argued and the trial court found Defendant had committed sexually violent offenses under N.C. Gen. Stat. § 14-208.65. The State used the factual basis for the plea and the findings of the STATIC-99R, an actuarial assessment instrument, as the basis for requesting the imposition of SBM on Defendant for ten years. The STATIC-99R concluded Defendant had one point from the individual risk factors, and the Department of Corrections characterized his risk as "Average Risk."

On 6 December 2017, Judge Gullett sentenced Defendant to an active term of five consecutive sentences of 16 to 29 months. Defendant was ordered to register as a sex-offender for thirty years, and to be subject to SBM for a period of ten years following his release from incarceration. On 5 December 2018, Judge Nathaniel J. Poovey entered an

amended judgment *nunc pro tunc* modifying Defendant's sentence to five consecutive active terms of 16 to 20 months each.

Defendant petitioned for writ of certiorari. This Court allowed Defendant's petition "for the purpose of granting defendant a belated appeal from the 'Judicial Findings and Order for Sex Offenders' and criminal judgments" dated 6 December 2017. This Court's order also expressly limited the scope of Defendant's appeal from the criminal judgments "to those issues the defendant could have raised on direct appeal pursuant to N.C. Gen. Stat. [§] 15A-1444 (2017)."

II. Jurisdiction

A defendant entering a guilty plea has no statutory right to appeal the trial court's judgment. *See* N.C. Gen. Stat. § 15A-1444(e) (2019). This Court discretionarily reviews Defendant's "Judicial Findings and Order for Sex Offenders" and criminal judgments under the terms of the writ of certiorari granted on 12 February 2019 pursuant to N.C. Gen. Stat. § 15A-1444(g).

III. Issues

Defendant argues the trial court erred by requiring him to enroll in SBM when the Department of Corrections ("DOC") characterized his risk at the lowest level of the "Average Risk" category on the STATIC-99R form. Defendant also asserts the State had failed to establish his enrollment in SBM constituted a reasonable search under the Fourth Amendment as required by *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019). Defendant further argues he received ineffective assistance of counsel upon his trial counsel's failure to argue the constitutionality of the SBM program being applied to him.

IV. SBM Determination

A. Standard of Review

> [W]e review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we 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. We [then] review the trial court's order to ensure that the determination that defendant requires the highest possible level of supervision and monitoring reflects a correct application of law to the facts found.

State v. Kilby, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citations, quotation marks and brackets in original omitted).

B. Analysis

[1] Defendant argues the trial court erred by requiring him to enroll in the SBM program for a period of ten years. Defendant contends the trial court's four additional findings, the DOC's "Average Risk" assessment, and the basis for the plea do not adequately support the legal conclusion requiring Defendant to enroll in SBM for ten years.

An offender may be required to enroll in SBM without a finding of a high risk by the DOC. *See State v. Morrow*, 200 N.C. App. 123, 132, 683 S.E.2d 754, 761 (2009) (declining "to adopt . . . construction of the statute that would require a DOC rating of high risk as a necessary requisite to SBM").

"[A] trial court's determination that the defendant requires the highest possible level of supervision may be adequately supported where the trial court makes additional findings regarding the need for the highest possible level of supervision and where there is competent record evidence to support those additional findings." *State v. Green*, 211 N.C. App. 599, 601, 710 S.E.2d 292, 294 (2011) (internal quotation marks omitted). In *Green*, this Court held a "trial court may properly consider evidence of the factual context of a defendant's conviction when making additional findings as to the level of supervision required of a defendant convicted of an offense involving the physical, mental, or sexual abuse of a minor." *Id.* at 603, 710 S.E.2d at 295.

Before we consider whether the trial court properly concluded Defendant requires the highest possible level of supervision, we must first determine whether the challenged additional findings are supported by competent evidence. The trial court made the following additional findings of fact: (1) Defendant "sexually assaulted multiple child victims;" (2) Defendant "sexually assaulted both male and female child victims;" (3) "the children ranged in ages from 6 to 14;" and, (4) Defendant "took advantage of a position of trust to sexually assault his victims."

"The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (citation omitted). Prior to the start of the SBM hearing, the trial court engaged in a plea colloquy with Defendant, in which Defendant stipulated to the State's factual basis for the plea.

In offering the factual basis to support the plea, the State provided the details of Defendant's assault on three minor victims between the ages of six to fourteen years old. The victims were both male and female.

Defendant's victims were either guests in his home to visit his daughter or T.S., a six-year-old male child, whose parents had asked Defendant to care for and protect him. The unobjected to evidence, that Defendant admitted as a part of his plea bargain, provides competent evidence to support the trial court's additional findings. Defendant's pretext of providing childcare for T.S. to accommodate T.S.' parents and affording a purported safe place for female minors to visit his daughter and then committing these assaults is especially egregious.

As we have concluded the trial court's additional findings of fact one, two, three, and four are supported by competent evidence, we must next determine whether these findings, along with the "Average Risk" STATIC-99R assessment, support the trial court's determination that Defendant "requires the highest possible level of supervision and monitoring." This Court's review of the trial court's determination is to ensure it "reflect[s] a correct application of law to the facts found." *Kilby*, 198 N.C. App. at 367, 679 S.E.2d at 432.

Relating to additional finding one, that Defendant "sexually assaulted multiple child victims," Defendant argues this finding of fact merely shows the way or manner of how he committed the offense and did not support its conclusion that Defendant posed a high risk of re-offending. Defendant argues this issue is governed by *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011). Defendant asserts the "evidence offered very little in the way of predicative statements concerning [the] [d]efendant's likelihood of recidivism." *Id.* at 382, 712 S.E.2d at 193.

The holding in *Pell* is inapposite to the present facts. In *Pell*, the defendant was sentenced to register as a sex offender, in part, on the trial court's finding that he was a "danger to the community." *Id.* at 377, 712 S.E.2d at 190. The Court recognized that the "legislative intent reveals that 'danger to the community' only refers to those defendants who pose a risk of engaging in sex offenses following their release from incarceration." *Id.* at 381, 712 S.E.2d at 192. This Court held the State's expert witness' testimony that defendant was at a low risk of offending and the victim's impact statements addressing the impact defendant's actions had on their lives, were insufficient evidence to support a conclusion that the defendant "represented a 'danger to the community.' " *Id.* at 381-82, 712 S.E.2d at 193.

Unlike in *Pell*, the trial court here found Defendant had "sexually assaulted multiple child victims." This finding does not merely relate to the manner of the commission of the offenses. It shows Defendant's multiple actions on multiple minor victims at multiple times rather than

a single or isolated incident. The court's additional finding corresponds to and is exactly a "predictive statement concerning Defendant's likelihood of recidivism." *Id.* at 382, 712 S.E.2d at 193.

As previously discussed, the trial court may consider the context under which the crimes occurred, revealed in the factual basis for Defendant's guilty plea, when making additional findings "as to the level of supervision required of a defendant convicted of an offense involving the physical, mental, or sexual abuse of a minor." *Green*, 211 N.C. App. at 603, 710 S.E.2d at 295. Defendant stipulated to the factual basis for his plea. Defendant's crimes of sexually abusing multiple minor victims, on multiple occasions within the pretext of providing a safe environment to gain access to them supports the imposition of SBM.

Turning to additional finding two, Defendant "sexually assaulted both male and female child victims." Defendant argues this additional finding is contained in the STATIC-99R assessment and cannot also be considered as an additional finding. In support of this assertion, Defendant cites *State v. Thomas*, wherein this Court overturned an order of SBM because "additional findings cannot be based upon factors explicitly considered in the STATIC-99 assessment." *State v. Thomas*, 225 N.C. App. 631, 634, 741 S.E.2d 384, 387 (2013).

The STATIC-99 assessment in *Thomas* included a prior conviction. *Id.* at 632, 741 S.E.2d at 386. This prior conviction was also listed as an "additional finding." *Id.* However, the finding number two in the present case is distinct from *Thomas*. The entire factor was not "explicitly considered" in Defendant's STATIC-99R. The challenged finding before us incorporates both male and female victims in Defendant's home, while only the male victims were included in the STATIC-99R's assessment. In *Thomas*, both the trial court's "additional findings" were overruled by this Court leaving no additional findings to support the SBM order. *Id.* at 635, 741 S.E.2d at 387-88. Here, additional factors to support the order of SBM are not duplicative and remain.

Defendant argues additional finding three, "[t]he children range in ages from 6 to 14" does not support a conclusion that Defendant required the highest possible level of supervision and monitoring. Again, Defendant cites *Green*, where neither of the victims were "able to advocate" for themselves. *Green*, 211 N.C. App. at 601, 710 S.E.2d at 294. However, the statement in *Green* has been read more expansively than being limited to victims so young they cannot speak. The finding goes to the general ability of the victims to advocate and report incidents and abuses. A child, who can speak, may also not have the will, courage, or

maturity to report what has happened to them. *See State v. Smith*, 240 N.C. App. 73, 76, 769 S.E.2d 838, 841 (2015) (upholding the SBM in part based upon the fact victims were very young females).

Defendant argues additional finding four, "[t]he defendant took advantage of a position of trust to sexually assault his victims" does not support the conclusion that he posed a high risk of re-offending. Defendant cites *State v. Blakeman*, wherein this Court overruled a determination to impose SBM because insufficient evidence supported the sentencing factor that the defendant was in a position of trust over the assault victim. *State v. Blakeman*, 202 N.C. App. 259, 272, 688 S.E.2d 525, 533 (2010).

In *Blakeman*, no evidence showed the victim's "mother had arranged for [the defendant] to care for [the victim] on a regular basis, or that [the defendant] had any role in [the victim's] life other than being her friend's stepfather." *Id.* at 270, 688 S.E.2d at 532.

Here, some of Defendant's minor victims were placed in Defendant's care to be watched and kept safe under the direction of the minor's parents, or were children visiting Defendant's daughter in his home. T.S. is distinguishable from the victim in *Blakeman*. The parents of T.S. had left the six-year-old child with Defendant to care for and monitor the child when he took advantage of a position of trust to assault T.S. Defendant's arguments are overruled.

V. Reasonableness of Ten Year SBM

[2] Defendant argues the State failed to establish his enrollment in SBM constituted a reasonable search under the Fourth Amendment as required by *Grady*, 372 N.C. 509, 831 S.E.2d 542. "[T]he State shall bear the burden of proving that the SBM program is reasonable." *State v. Blue*, 246 N.C. App. 259, 264, 783 S.E.2d 524, 527 (2016).

The transcript of Defendant's SBM hearing shows:

> [The State]: Your Honor, that would be the general presentation of the State for the factual basis and the findings that the State would like the Court to find regarding the Static-99 and the additional findings, and in particular the State would like the Court to, of course, based on the findings that it's required to regarding on the 615 Form is that this is a . . . sexually violent offense under GS 14-208.65. I don't think there's any objection to that.
>
> . . . .

> Number 2, the [D]efendant has not been classified as a sexually violent predator.
>
> Number 3, the [D]efendant is not a recidivist.
>
> Number 4, this conviction is not for an aggravated offense. But we do believe that under 5B, this did involve the physical, mental or sexual abuse of a minor.
>
> I think [Defendant's counsel] will probably stipulate to that.
>
> . . . .
>
> And our recommendation to the Court is based on what you heard and the nature and what the systematic desire for child pornography, to exploit children, that this [D]efendant should be subjected to [SBM] for ten years after he is let out of incarceration.

Defendant's counsel raised no objections or constitutional challenge in response to the State's showing and argument. Defendant further raised no objections or constitutional challenge at any point during this hearing. Defendant's counsel filed no motion, objection, or asserted any argument the SBM imposed upon Defendant was an unreasonable search.

This case mirrors *State v. Bishop*, wherein the defendant was convicted of taking indecent liberties with a child and the trial court sentenced him to SBM for a term of thirty years. *State v. Bishop*, 255 N.C. App. 767, 768, 805 S.E.2d 367, 368 (2017). The defendant did not raise any constitutional issue before the trial court, cannot raise it for the first time on appeal, and has waived this argument on appeal. *Id.* at 770, 805 S.E.2d at 370. The writ that brought this case before us for review is expressly limited "to those issues the defendant could have raised on direct appeal pursuant to N.C. Gen. Stat. 15A-1444 (2017)."

The defendant in *Bishop* requested the Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to hear his arguments and review his constitutional challenge. *Id.* This Court held the defendant was "no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step." *Id.*

Here, in the exercise of our discretion, we decline to invoke Rule 2 to issue a further writ of certiorari to review Defendant's unasserted

and unpreserved argument on appeal. Defendant's unpreserved constitutional argument challenging his enrollment in SBM is dismissed. *See State v. Spinks*, 256 N.C. App. 596, 611, 808 S.E.2d 350, 360 (2017).

VI. Ineffective Assistance of Counsel

[3] Defendant argues his counsel's failure to argue the constitutionality of the SBM program before the trial court consisted ineffective assistance of counsel. Our Court has held "hearings on SBM eligibility are civil proceedings." *State v. Miller*, 209 N.C. App. 466, 469, 706 S.E.2d 260, 262 (2011). This Court also held: "IAC claims are not available in civil appeals such as that form an SBM eligibility hearing." *Id.* An order for enrollment in SBM is a civil penalty. *See State v. Brooks*, 204 N.C. App. 193, 194-95, 693 S.E.2d 204, 206 (2010). Defendant's argument is dismissed.

VII. Conclusion

Defendant's argument that the trial court had no factual basis for requiring the highest level of monitoring based upon the DOC's finding of "Average Risk" is without merit. The conclusion that he requires the highest possible level of supervision is supported by the factual basis for his plea, the State's decision not to pursue further charges, the risks identified by the STATIC-99R, and the four additional findings of fact. The trial court properly found and determined SBM could be lawfully imposed upon Defendant.

Defendant failed to assert at trial and has waived direct appellate review of any Fourth Amendment challenge to the order requiring him to enroll in the SBM program for ten years. His argument is dismissed. We also dismiss Defendant's IAC claim on this civil issue.

We affirm the judgments entered upon Defendant's guilty plea. Defendant's unpreserved constitutional and his IAC claims are dismissed. *It is so ordered.*

AFFIRMED IN PART, DISMISSED IN PART.

Chief Judge McGEE and Judge YOUNG concur.

STATE OF NORTH CAROLINA
v.
MARQUES RAMAN BROWN

No. COA19-403

Filed 7 April 2020

Homicide—second-degree murder—jury instructions—self-defense—sufficiency of evidence

In a trial for the murder of an off-duty police officer, defendant was not entitled to have the jury instructed on self-defense and on the lesser-included offense of voluntary manslaughter based on imperfect self-defense where the evidence was insufficient to support a reasonable belief that deadly force was necessary to protect defendant from death or great bodily harm. Although defendant testified that he saw a man approach him who looked at him "real mean" and he saw a gun, the evidence also showed that the time from when the officer stepped out of his car to when he was shot and killed was only seven seconds, during which the officer did not say anything to defendant, did not point a gun at defendant, and had no physical interaction with defendant.

Appeal by defendant from judgments entered 5 March 2018 by Judge Robert F. Floyd in Robeson County Superior Court. Heard in the Court of Appeals 3 December 2019.

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

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

DIETZ, Judge.

Defendant Marques Brown shot and killed an off-duty police officer who was approaching Brown's car to arrest him on several active warrants. At the time, Brown was on edge because there had been several attempts on his own life by individuals who believed Brown had murdered a man named "Fat Boy."

In the several seconds after the officer pulled up in his car and got out, wearing ordinary civilian clothes, Brown glimpsed a handgun on the officer, although Brown admitted that the officer never pointed the weapon at Brown or motioned as if he intended to use it. Brown then

grabbed his own gun, pointed it out his car window, and killed the officer. Brown later explained that he feared for his life because "any time I ever seen somebody coming at me with a gun, it was shot."

Brown appeals his conviction for second degree murder on the ground that the trial court wrongly refused his request for instructions related to self-defense. We reject this argument. Viewing the evidence in the light most favorable to Brown, and considering the mind of a person of ordinary firmness, it was not reasonable for Brown to believe that it was necessary to shoot and kill the approaching officer to avoid serious bodily injury or death. Accordingly, the trial court properly declined to instruct the jury on these self-defense issues and we find no error in the trial court's judgments.

Facts and Procedural History

On the morning of 17 July 2012, Officer Jeremiah Goodson was off duty and running errands with his wife when he stopped at a gas station. At the gas station, Officer Goodson told his wife that he saw someone inside the store who had active warrants and that he needed to drop her off somewhere safe. Goodson took his wife to a nearby strip mall.

Officer Goodson then contacted his supervisor, Lieutenant Monteiro, to report that he located a subject with active warrants, Defendant Marques Brown. Goodson described Brown's clothing and vehicle and reported that Brown was with a woman and a small child. Lieutenant Monteiro immediately instructed an on-duty officer, Officer Hayes, to respond to the gas station to assist in serving the warrants and making the arrest. Monteiro told Goodson to remain on the line and to keep sight of Brown in case he changed locations.

Officer Goodson reported that Brown's car moved to a nearby gas station parking lot. Officer Hayes testified that when he arrived at the parking lot, he blocked Brown's car with his patrol vehicle, while Goodson simultaneously pulled his personal vehicle beside Brown's car. Hayes saw Goodson step out of his car and take a single step towards the store before being struck by multiple gunshots. A cashier working at the gas station witnessed the incident and testified that she saw Goodson exit his car in the parking lot, that Goodson was "looking in the store like he's looking for somebody," and then "his shirt starts to change colors and he hits the ground." A customer at the gas station testified that he heard multiple shots and saw a hand holding a gun out the window of Brown's vehicle.

Immediately after the shooting occurred, Officer Hayes drew his weapon and approached Brown's vehicle where Brown was sitting in the

passenger seat. The front and back passenger windows were partially rolled down. Hayes opened the door of Brown's vehicle and ordered Brown to get out. Hayes saw a gun lying in the front passenger seat. The gun had a ten-round capacity with six bullets remaining.

Captain Johnny Coleman arrived on the scene after learning that an officer was down and observed Goodson lying face down between his vehicle and Brown's vehicle. Goodson was dressed in plain clothes and his head was facing towards the store. When they rolled Goodson over, there was a gun lying underneath him.

Brown told the officers that he was not aware the man he shot was a police officer. He explained that Officer Goodson "had a gun in his hand," although he also asserted, conflictingly, that he "didn't see the gun." When asked about the gun, Brown also told the officers that Goodson didn't "raise it and point it at me or nothing."

On 3 August 2012, Brown was indicted for first degree murder of Officer Goodson, possession of a firearm by a felon, and possession with intent to sell or deliver marijuana. The case went to trial on 19 February 2018.

At trial, Dr. Richard Johnson testified that he performed the autopsy on Officer Goodson and found four gunshot wounds: two in the chest, one in the left side of the face, and one in the back of the head. Goodson's cause of death was one of the gunshot wounds to the chest that was fired from close range and hit the heart.

The State presented surveillance footage of the gas station parking lot while a detective described what was shown in the video. At 11:00:00, Goodson's car comes into view and approaches the passenger side of Brown's vehicle while Hayes's marked patrol car approaches the rear of Brown's vehicle. At 11:00:03, Goodson's car comes to a stop and the driver's side of Goodson's car begins to open. At 11:00:05, Goodson starts to step out of his car. At 11:00:06, Goodson is out of his car and standing, and the door of his car starts to close. At 11:00:07, Goodson's head starts to drop, he starts to fall forward, and then is down on the ground. At the same time, the patrol car door opens and Hayes rushes out.

The entire incident, from Goodson's approach in his car to his collapse to the ground, took approximately seven seconds. Goodson was out of his car for only two seconds. The State also presented dashcam footage of the shooting from Hayes's patrol car showing the same timeline of events.

Brown testified that he had a difficult childhood due to his mother's drug addiction and witnessing multiple violent incidents as a child.

He also explained that there were attempts on his own life by people who believed that Brown was involved in the murder of a man named "Fat Boy."

Brown testified that when he saw Goodson's car pull up beside him, he grabbed his gun and took the safety off while the car was still pulling up. Then he saw a man "looking at me like real mean, like with hate . . . sliding out the car . . . like with a gun." Brown then shot at Goodson through the back passenger window because Brown believed he had a clearer shot through that rolled down window. Brown only recalled firing three shots.

Brown testified that his actions were "like a reflex." He explained that he saw a "glimpse of a gun" as Goodson got out of his car but conceded that Goodson never pointed a gun at him or motioned as if he intended to fire a gun. Brown fired his own gun because, having seen a glimpse of a gun on Goodson, he believed Goodson intended to kill him. Brown explained that "any time I ever seen somebody coming at me with a gun, it was shot. And this is close contact . . . it was too intense."

Brown presented expert testimony from Dr. George Corvin that Brown has a "mild intellectual disability" with an IQ of 69 and that Brown suffers from PTSD, which "impaired" his ability to "perceive what is going on" and "to react to stress appropriately." Dr. Corvin testified that, in his opinion, Brown shot Goodson because he believed Goodson "was going to kill him, was going to shoot him, or at least try to."

During the charge conference, Brown requested instructions on self-defense and on the lesser-included offense of voluntary manslaughter based on imperfect self-defense. The trial court denied Brown's requests, explaining "it doesn't rise to self-defense, because there's no threat of deadly force been presented against him of this defendant at all. The evidence would show now the defendant jumped the gun, and speculated, and he could have speculated that anybody getting out of the car. He made his mind up, he testified when the car drove up quickly . . . . [A]s soon as the victim, Officer Goodson, cleared the vehicle, within three seconds he was dead on the ground, or he was on the ground. Never saw a gun drawn on him, assumed there was a gun drawn on him."

On 5 March 2018, the jury convicted Brown of second degree murder, possession of a firearm by a felon, and possession with intent to sell or deliver marijuana. The trial court sentenced Brown to 258 to 322 months in prison for second degree murder and a consolidated sentence of 21 to 35 months in prison on the remaining charges. Brown appealed.

Analysis

Brown argues that the trial court erred by denying his request for a jury instruction on self-defense. He contends that the evidence, taken in the light most favorable to him, required the trial court to include that instruction. Brown also argues that the trial court erred by denying his request for an instruction on the lesser-included offense of voluntary manslaughter based on imperfect self-defense. We reject these arguments.

"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). For this reason, "where competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986). In other words, when the evidence, viewed in the light most favorable to the defendant, discloses facts that are "legally sufficient" to warrant an instruction on self-defense, the trial court must give that instruction to the jury. *State v. Everett*, 163 N.C. App. 95, 100, 592 S.E.2d 582, 586 (2004).

Competent evidence of self-defense is evidence that it "was necessary or reasonably appeared to be necessary" for the defendant "to kill his adversary in order to protect himself from death or great bodily harm." *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). "[B]efore the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?" *Id.* Importantly, our Supreme Court has held that a defendant's belief is reasonable only if "the circumstances as they appeared to him at the time were sufficient to create such a belief *in the mind of a person of ordinary firmness*." *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572 (1981) (emphasis added).

Brown argues that, applying this precedent, the trial court should have given a self-defense instruction because there was competent evidence that Officer Goodson "came toward him with his gun drawn." This, Brown contends, led him to believe that he was "about to be killed by a man he did not recognize."

The trial evidence does not support Brown's argument. Brown's testimony—viewed in the light most favorable to him—was that Officer Goodson pulled his car beside Brown's and that Brown saw "a glimpse of a gun" when Goodson "slid out the car." Brown also testified that

Officer Goodson "didn't say nothing" but was "looking at me like real mean, like with hate." Brown further testified that the gun he glimpsed "wasn't pointed at me." Still, Brown believed that Officer Goodson was attempting to kill him because "any time I ever seen somebody coming at me with a gun, it was shot."

Brown's trial testimony was corroborated by his statement to investigators following his arrest, which was admitted at trial. In that statement, Brown conflictingly asserted both that he saw a gun and that he "didn't see the gun." Regardless, when discussing Officer Goodson's gun, Brown explained that Goodson did not "raise it and point it at me or nothing."

Brown also presented expert testimony from Dr. Corvin, who explained that Brown "either saw the gun, or saw him getting the gun, or in one way, shape, form or fashion came to the conclusion that the individual getting out of the car was getting a gun or had a gun in his hand, was looking at him mean, had approached him in an unusually aggressive manner by speeding up and jumping out of the car." Thus, Dr. Corvin explained, Brown's "perception of the events quickly sort of with combined influences of post traumatic stress and his limited intellect is what he saw in his mind. . . . He interpreted that what was occurring was dangerous to him. He then impulsively says he took the gun."

The trial court properly concluded that this evidence was insufficient to create a *reasonable* belief that it was necessary for Brown to use deadly force to protect himself from death or great bodily harm. Specifically, whatever Brown may have *believed*—because he was on edge from an earlier attempt on his life, or because he was suffering from some form of post-traumatic stress, or for any other idiosyncratic reason—the evidence demonstrated that "in the mind of a person of ordinary firmness" there was no basis to use deadly force. *Norris*, 303 N.C. at 530, 279 S.E.2d at 572.

Uncontradicted witness testimony and video evidence presented at trial showed that Officer Goodson did not say anything to Brown, did not point a gun at Brown, and did not have any physical interaction with Brown. The entire incident lasted only seven seconds. During the first three seconds, Goodson pulled his car into the parking spot next to Brown's car and opened the car door. In the next two seconds, Goodson got out of his car and stood up. Then, less than two seconds later, Brown pointed a gun out his car window and shot and killed Officer Goodson.

Critically important, even Brown's own testimony acknowledges that Officer Goodson—at most—had a gun visible either on his body or in his hand. But the uncontroverted evidence, including Brown's own

testimony, is that Officer Goodson was not pointing the gun at Brown or taking any action that indicated he was attempting to shoot Brown. The evidence, even in the light most favorable to Brown, is that a car pulled up quickly near Brown's own car, that an unknown man stepped out of the car in possession of a handgun, and that the man looked at Brown in a manner that was "real mean" or full of "hate."

The trial court properly concluded that these facts are insufficient to permit a self-defense instruction. In the mind of a person of ordinary firmness, this evidence would not permit the use of deadly force on a complete stranger getting out of a nearby car. Accordingly, the trial court properly declined to give the requested instruction on self-defense. *See id.*; *Bush*, 307 N.C. at 160–61, 297 S.E.2d at 569.

Brown also argues that the trial court erred in denying his request for an instruction on the lesser-included offense of voluntary manslaughter on the basis that the jury could have found Brown used excessive force in imperfect self-defense. *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002). Because, as explained above, the trial court properly concluded that there was insufficient evidence to support either perfect or imperfect self-defense as a matter of law, the trial court properly declined this request for an instruction as well. *State v. Owens*, 65 N.C. App. 107, 109, 308 S.E.2d 494, 497 (1983); *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989). Accordingly, we find no error in the trial court's decisions to reject Brown's request for instructions on self-defense and the lesser-included offense of voluntary manslaughter.

Conclusion

We find no error in the trial court's judgments.

NO ERROR.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
FABIOLA ROSALES CHAVEZ

No. COA19-400

Filed 7 April 2020

1. Appeal and Error—preservation of issues—conspiracy to commit murder—no motion to dismiss

Where defendant failed to move to dismiss a charge of conspiracy to commit first-degree murder at the close of the State's evidence, she failed to preserve for appellate review her argument that the trial court should have dismissed that charge. The Court of Appeals declined to exercise its discretion to invoke Appellate Rule 2 in the absence of exceptional circumstances.

2. Constitutional Law—effective assistance of counsel—failure to move for dismissal—substantial evidence

Defendant's attorney was not ineffective for failing to move to dismiss a charge of conspiracy to commit first-degree murder because the transcript showed that substantial evidence was presented from which a jury could find that defendant conspired with others to attempt to kill the victim through a simultaneous, coordinated attack, and as a result, defendant could not demonstrate he was prejudiced by the failure.

3. Appeal and Error—standard of review—challenge to jury instructions—no objection—plain error

Defendant's argument that the trial court erred by instructing the jury on conspiracy to commit first-degree murder without limiting the jury's consideration to the lone co-conspirator named in the indictment was reviewed for plain error where defendant failed to lodge any objection to the instructions as given. Although defendant consented to the conspiracy instruction, she did not request it and therefore did not invite any error with regard to it.

4. Conspiracy—jury instructions—inconsistent with indictment—one named co-conspirator in indictment—evidence of two co-conspirators at trial

The trial court committed plain error by instructing the jury it could convict defendant of conspiracy to commit first-degree murder if it found that defendant conspired with "at least one other person" where the indictment listed only one co-conspirator by name,

while the State presented evidence of two co-conspirators at trial. The instruction as given was prejudicial because it allowed the jury to convict defendant on a theory not legally available to the State and denied defendant's constitutional right to be properly informed of the accusations against him. Defendant's conspiracy conviction was vacated and the matter remanded for a new trial on that charge.

5. Evidence—hearsay—testimonial—plain error analysis

At defendant's trial for conspiracy to commit first-degree murder, no plain error occurred from the admission of testimony from a law enforcement officer who stated that she did not receive any conflicting information between three witnesses she interviewed with regard to defendant's participation in attacking the victim, because the officer did not relate any of the witnesses' statements and her testimony was not used to prove the truth of any matter asserted, including the identity of the defendant. Assuming any error, substantial evidence of defendant's guilt negated any prejudicial effect.

Judge TYSON concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 29 November 2018 by Judge Joseph N. Crosswhite in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Asher Spiller, for the State-Appellee.

Marilyn G. Ozer for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts of guilty of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant argues that the trial court: (1) erred by denying Defendant's motions to dismiss the conspiracy charge; (2) committed plain error in the delivery of jury instructions; and (3) plainly erred by admitting hearsay evidence that violated Defendant's right to confrontation. As the trial court incorrectly instructed the jury on the law of conspiracy to commit first-degree murder, we discern plain error and award a new trial on the conspiracy conviction. However, as to the issues concerning the denial of Defendant's motions to dismiss and the admission of hearsay evidence, we discern no error.

I. Procedural and Factual Background

On 3 October 2016, Defendant Fabiola Rosales Chavez was indicted on two counts of attempted first-degree murder, one count of conspiracy to commit first degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of first-degree burglary. The conspiracy indictment stated, "[t]he jurors for the State upon their oath present that on or about the 21st day of September, 2016, in Mecklenburg County, Fabiola Rosales Chavez did unlawfully, willfully, and feloniously conspire with Carlos Roberto Manzanares to commit the felony of First Degree Murder[.]" Orders for Defendant's arrest were issued on 6 October 2016.

On 26 November 2018, the State dismissed one count of attempted first-degree murder, one count of assault with a deadly weapon with intent to kill inflicting serious injury, and the single count of first-degree burglary. That same day, Defendant's case came on for trial.

The evidence at trial tended to show: On 21 September 2016, Defendant, along with Carlos Manzanares ("Carlos") and a second, unidentified male, entered the home of Roberto Hugo Martinez ("Roberto"). Defendant and the two men were armed with a machete and a hammer. Roberto was asleep in bed with his girlfriend, Maria Navarro ("Maria"), and Maria's 16-month-old infant. Roberto and Maria were awakened when the bedroom lights flashed on, and Maria observed Defendant and the two men enter the room. Maria testified that she heard Defendant say, "nobody laughs at me. Nobody makes fun of me, and I'm here to kill you." Maria witnessed Defendant throw the machete at Roberto, and then watched Carlos and the unidentified male strike and kick Roberto repeatedly. One of the men took the machete and hit Roberto in the head with it. After Roberto fell to the ground, "[t]hey hit him. They kicked him. They hit him in the head with the machete and with the hammer."

Carlos and the unidentified male beat Roberto until he was unconscious, and then Carlos told Maria to flee because, "[i]f you stay here [Defendant] will kill you." Maria grabbed her baby, ran from the apartment, and began knocking on doors in search of help. Maria also called 911 and reported that someone was trying to kill her. Defendant and Carlos pursued Maria outside and caught up to her in a parking lot, where Defendant told Carlos to kill Maria because she had called the police. Carlos refused Defendant's directive to kill Maria, and Defendant fled the parking lot. Carlos remained in the parking lot with Maria until law enforcement arrived.

On 29 November 2018, the jury found Defendant guilty on all charges. The trial court sentenced Defendant to 132-171 months' imprisonment for the attempted first-degree murder conviction; 132-171 months' imprisonment for the conspiracy to commit first-degree murder conviction, to be served consecutively to the first sentence; and 72-99 months' imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury conviction, to be served consecutively to the second sentence. From entry of judgment, Defendant gave proper notice of appeal.

II. Discussion

Defendant argues on appeal that the trial court (1) erred by denying Defendant's motion to dismiss the conspiracy charge; (2) plainly erred by instructing the jury, and accepting its verdict of guilty, on the offense of conspiracy to commit first-degree murder; and (3) plainly erred by admitting hearsay evidence that violated Defendant's right to confrontation.

1. Motion to Dismiss Conspiracy Charge

[1] Defendant first argues that the trial court erred by denying her motion to dismiss for insufficient evidence the charge of conspiracy to commit first-degree murder.

It is apparent from the record that Defendant did not move to dismiss the conspiracy charge at the close of all evidence but, instead, explicitly stated "that [the conspiracy] count should be allowed to go forward" because "conspiracy is very easy for the State to prove[.]" Because Defendant failed to move to dismiss the conspiracy to commit first-degree murder charge, Defendant has failed to preserve this argument for our review. N.C. R. App. P. 10(a)(3) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion [and] . . . obtain a ruling upon the party's request, objection, or motion.").

In the alternative, Defendant requests that we invoke Rule 2 and determine whether there was sufficient evidence to support the conspiracy charge. 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." *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015) (internal quotation marks, citations, and

ellipsis omitted). This case does not involve exceptional circumstances, and we, in our discretion, decline to invoke Rule 2.

[2] Also in the alternative, Defendant argues that her trial counsel rendered ineffective assistance of counsel ("IAC") by failing to move to dismiss the charge of conspiracy to commit first-degree murder.

Claims of IAC 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 . . . ."). "On direct appeal, [this Court] . . . limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." *Id*. at 166, 557 S.E.2d at 524-25 (quotation marks and citation omitted).

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)).

An attorney's failure to move to dismiss a charge is not ineffective assistance of counsel when the evidence is sufficient to defeat the motion. *State v. Gayton-Barbosa*, 197 N.C. App. 129, 141, 676 S.E.2d 586, 594 (2009). "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. "[I]f a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 249 (1985).

A conspiracy is an "agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Gibbs*, 335 N.C. 1, 47, 436 S.E.2d 321, 347 (1993) (citations omitted). An agreement must be shown to prove a conspiracy, but the agreement may be an implied agreement "generally inferred from . . . the surrounding facts and circumstances, rather than established by direct proof." *State v. Fleming*, 247 N.C. App. 812, 819, 786 S.E.2d 760, 766 (2016) (citing *State v. Whiteside*, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933)). Direct proof of a conspiracy is "not essential, as such is rarely obtainable." *State v. Winkler*, 368 N.C. 572, 576, 780 S.E.2d 824, 827 (2015) (citation omitted). Thus, circumstantial evidence is permitted to find a conspiracy. *Id.*

Moreover, our Courts have determined that a simultaneous attack on a victim or attacking a victim in a coordinated manner is sufficient to present the charge of conspiracy to the jury. *See State v. Lamb*, 342 N.C. 151, 156, 463 S.E.2d 189, 191 (1995) (determining "substantial evidence from which the jury could find the robbery was carried out pursuant to a common plan" to support the finding of guilty of conspiracy where the defendant and two other men drove to a victim's home, robbed and shot the victim, and there was no other evidence of discussion or planning of the crime between the men); *see also State v. Reid*, 175 N.C. App. 613, 622-23, 625 S.E.2d 575, 584 (2006) (finding substantial evidence of conspiracy where the defendant and two other men dragged the victim from his home, shot the victim in the back, and left the home together after finding no money or drugs in the victim's home).

Here, there was substantial evidence of a conspiracy between Defendant and Carlos to commit murder of Roberto. Maria testified that Defendant and two other men, one of whom was Carlos, came into Roberto's bedroom and attacked them. Maria testified that Defendant and the two men were armed with a machete and a hammer, that "the other two men came in and started hitting [Roberto], kicking him[,]" and that "[o]ne of them took [the machete] from [Defendant] to hit Roberto in the head with it." "[The guys] hit him. They kicked him. They hit him in the head with the machete and with the hammer." Maria then positively identified a photo of Carlos, explaining that "[h]e's one of the guys who attacked Roberto."

Maria further testified,

> [Defendant] grabbed me by the hair and she was pulling me up. . . . [A]nd she said, I'm going to kill you. And that's when [Carlos] interfered and [Carlos] said, no you're not

> going to -- you -- I'm -- you're not going to do that because you told me here, we were here for something different, and I'm not going to mess with a mother and a child.

This testimonial evidence supports that Defendant and Carlos entered into an agreement to commit murder of Roberto. *Whiteside*, 204 N.C. at 712-13, 169 S.E. at 712. Maria's testimony also shows a simultaneous, coordinated attack on Roberto and Maria, which provides circumstantial evidence of an agreement to commit murder between Defendant and Carlos. *Lamb*, 342 N.C. at 155-56, 463 S.E.2d at 191. Taken together, these facts and circumstances are substantial evidence showing an agreement to commit murder between Defendant and Carlos. *Whiteside*, 204 N.C. at 712-13, 169 S.E. at 712; *Gibbs*, 335 N.C. at 47, 436 S.E.2d at 347.

As there was substantial evidence to support the conspiracy charge, Defendant was not prejudiced by his attorney's failure to make a motion to dismiss the charge of conspiracy to commit first-degree murder. *Gayton-Barbosa*, 197 N.C. App. at 141, 676 S.E.2d at 594. Because Defendant has shown "no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different," Defendant's argument is without merit. *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

2. Jury Instruction

Defendant next argues that the trial court erred in its instruction to the jury on the charge of conspiracy to commit first-degree murder. Defendant specifically argues that the trial court plainly erred by instructing the jury, and accepting its verdict of guilty, on the offense of conspiracy to commit first-degree murder when only one co-conspirator was named in the conspiracy indictment, the State presented evidence of two co-conspirators, and the jury instruction failed to limit the jury's consideration to the co-conspirator named in the indictment.

Standard of Review

[3] The parties dispute the appropriate standard of review. Defendant argues that, due to her failure to object to the jury instructions when presented at trial, the proper standard of review on appeal is plain error. The State argues that because Defendant did not object to the jury instructions and instead "indicat[ed] to the Court that [s]he was satisfied with the instructions[,]" Defendant invited the error and cannot complain about the instructions on appeal.

The same argument the State makes here has been soundly rejected by both of our appellate courts. In *State v. Harding*, 258 N.C. App. 306,

813 S.E.2d 254 (2018), "[t]he State argue[d] that defendant [wa]s precluded from plain error review in part under the invited-error doctrine because he failed to object, actively participated in crafting the challenged instruction, and affirmed it was 'fine.' " *Id.* at 311, 813 S.E.2d at 259. Concluding that defendant's argument was reviewable for plain error, this Court stated,

> Even where the "trial court gave [a] defendant numerous opportunities to object to the jury instructions outside the presence of the jury, and each time [the] defendant indicated his satisfaction with the trial court's instructions," our Supreme Court has not found the defendant invited his alleged instructional error but applied plain error review.

Id. (*citing State v. Hooks*, 353 N.C. 629, 633, 548 S.E.2d 501, 505 (2001) (alterations in original).

Similarly, in *State v. Hardy*, 353 N.C. 122, 131, 540 S.E.2d 334, 342 (2000), our North Carolina Supreme Court explained that defendant

> had ample opportunity to object to the instruction outside the presence of the jury. After excusing the jury to the deliberation room, the trial court asked, "Prior to sending back the verdict sheets does the State wish to point out any errors or omissions from the charge?" The trial court then asked the same of defendant, and defendant responded with respect to other issues but did not object to the instruction in question. . . . As defendant failed to preserve this issue by objecting during trial, we will review the record to determine if the instruction constituted plain error.

Id. (*citing State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 75 (1990); *State v. Morgan*, 315 N.C. 626, 644, 340 S.E.2d 84, 95 (1986)).

Here, Defendant stated, "And Your Honor, I believe under conspiracy there's mere presence. I want that to be read as well." Defendant explained that the instruction on mere presence "should be under conspiracy. If you read the conspiracy charge, there's a set that says that, however mere presence at the crime scene, even with knowledge of the crime – I have it. I'll bring it after lunch." The Court gave both parties a final list of the instructions, which included acting in concert and conspiracy. The trial court gave copies of the instructions to the State and Defendant, and instructed both parties "to look at it, make sure you're satisfied with it . . . . Make sure you're okay with that." The trial court

again instructed both parties "to look through those charges and make sure you're satisfied, okay?"

As in *Harding* and *Hardy*, Defendant had the opportunity to object to the jury instructions outside the presence of the jury but failed to do so. Thus, as in *Harding* and *Hardy*, we review the record to determine if the instruction constituted plain error.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

Moreover, Defendant's request that the trial court give the "mere presence" footnote from N.C.P.I.—202.10,[1] the Acting in Concert jury instruction, did not constitute invited error which waived any right to appellate review of the conspiracy to commit first-degree murder jury instruction, including plain error review.

In *State v. Wilkinson*, 344 N.C. 198, 474 S.E.2d 375 (1996), "defendant requested that the trial court instruct the jury on depravity of mind, and the trial court did so in conjunction with the pattern jury instruction for the (e)(9) 'especially heinous, atrocious or cruel' aggravating circumstance." *Id.* at 212, 474 S.E.2d at 382 (citation omitted). Defendant "submitted a proposed instruction in writing which referred

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1. This footnote states as follows: "7. This paragraph should be given only where there is support in the evidence for a finding that defendant was present at the scene of the crime. *S. v. Beach*, 283 N.C. 261, 267-268 (1973), states that there is an exception to the rule that mere presence does not make one an accessory: " ' " . . .when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement, and in contemplation of the law this was aiding and abetting." ' " *See S. v. Walden*, 306 N.C. 466 (1982)."

to 'a circumstance which makes a murder *unusually* heinous, atrocious, or cruel.' " *Id.* at 213, 474 S.E.2d at 383. "The trial court substituted the word 'especially' for 'unusually' to ensure that the 'heinous, atrocious, or cruel' aggravating circumstance was labeled as provided in [N.C. Gen. Stat.] § 15A-2000(e)(9)." *Id.* "Defendant stated that he had no objection to this change." *Id.*

On appeal, however, defendant argued that the trial court's modification of his proposed instruction was an erroneous statement of the law. *Id.* Our Supreme Court explained that while Defendant's failure to challenge the instruction at trial would generally require him to show plain error on appeal, "this Court has consistently denied appellate review to defendants who have attempted to assign error to the granting of their own requests." *Id.* "A criminal defendant will not be heard to complain of a jury instruction given in response to his own request." *Id.* (quoting *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991) (other citations omitted)).

The Supreme Court concluded, "[h]ere, defendant requested an instruction on depravity and agreed to the substitution of the word 'especially' for the word 'unusually.' Since [defendant] asked for the exact instruction that he now contends was prejudicial, any error was invited error. Therefore, this assignment is without merit and is overruled." *Id.* at 214, 474 S.E.2d at 383 (quoting *McPhail*, 329 N.C. at 644, 406 S.E.2d at 596-97) (internal quotation marks omitted); *see also State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998) (explaining that the defendant "will not be heard to complain on appeal" when the defendant requested a specific jury instruction, "did not object when given the opportunity either at the charge conference or after the charge had been given[,]" and, in fact, "affirmatively approved the instructions during the charge conference") (citing *Wilkinson*, 344 N.C. at 213, 474 S.E.2d at 396).

The present case is materially distinguishable from *Wilkinson* and *White* and compels the opposite result. Here, Defendant requested, and received, a "mere presence" instruction as part of the acting in concert instruction, which was given with the jury instruction on first-degree murder. Defendant does not challenge the "mere presence" instruction, or the first-degree murder instruction for that matter, but instead challenges the conspiracy to commit murder instruction, which was given according to the pattern instruction. As Defendant did not request the conspiracy instruction, but merely consented to it, Defendant did not invite error like the defendant in *Wilkinson*, and is entitled to plain error review like the defendants in *Harding* and *Hardy*.

Analysis

[4] The North Carolina Constitution provides that "[i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation" against him. N.C. Const. Art. I, sec. 23. In *State v. Mickey*, 207 N.C. 608, 178 S.E. 220 (1935), our Supreme Court held that the trial court's jury instruction on conspiracy violated the defendant's constitutional right to be informed of the accusation against him, that the instruction "virtually put[] the defendant upon trial for an additional offense to that named in the bill," and ordered a new trial. *Id.* at 609, 178 S.E. at 221. In *Mickey*, the defendant was indicted for conspiracy to commit murder, and the indictment included two named coconspirators, Griffin and Murphy. In its charge, the trial court instructed the jury that it could find the defendant guilty if it found that he "agree[d] together with Griffin or Murphy, or both of them, or others to do an unlawful thing . . . ." *Id.* Our Supreme Court held that the instruction was error because the bill of indictment "nowhere contains the words 'others' or 'another,' or any other word or phrase indicating a charge against the defendant of conspiring with any other person or persons than Murphy and Griffin." *Id.*

Similarly, in *State v. Minter*, 111 N.C. App. 40, 432 S.E.2d 146 (1993), this Court determined that the trial court "erred in instructing the jury that they could find the defendant guilty of conspiracy without limiting the conspiracy to one with the co-conspirator [] named in the indictment . . . ." *Id.* at 42, 432 S.E.2d at 148. In *Minter*, the defendant was indicted for conspiracy and the indictment named his co conspirator, Branch. At trial, the evidence tended to show that the defendant may have conspired with multiple people, not just Branch, to commit an unlawful act. The trial court instructed the jury that it could find the defendant guilty if it found that the defendant "agreed with at least *one other person* . . . to commit the offense and that the defendant and at least *one other person* intended" to carry out the agreement. *Id.* (brackets omitted). On appeal, this Court determined that the charge violated Art. I, sec. 23 of the state Constitution because it "put the defendant on trial for an offense additional to that named in the bill of indictment" and ordered a new trial. *Id.* at 43, 432 S.E.2d at 148; *see also State v. Turner*, 98 N.C. App. 442, 448, 391 S.E.2d 524, 527 (1990) (explaining that while the State's evidence of conspiracy supported "the trial court's instruction . . . the indictment does not[,]" and, as a result, "award[ing] defendant a new trial on the conspiracy charge.").

Recently, this Court in *State v. Pringle*, 204 N.C. App. 562, 694 S.E.2d 505 (2010) explained,

> "[i]t is well established that where an indictment charging a defendant with conspiracy names specific individuals with whom the defendant is alleged to have conspired and the evidence at trial shows the defendant may have conspired with persons other than those named in the indictment, it is error for the trial court to instruct the jury that it may find the defendant guilty of conspiracy based upon an agreement with persons not named in the indictment."

Id. at 566, 694 S.E.2d at 507 (citing to *Mickey*, 207 N.C. at 610-11, 178 S.E. at 221-22, and *Minter*, 111 N.C. App. at 42-43, 432 S.E.2d at 148).

However, a trial court does not err when it fails to name in the jury instruction the specific individuals named in an indictment, *if* the indictment, evidence, and instructions are in accord. *Id.* at 566-67, 694 S.E.2d at 508. In *Pringle*, the defendant was indicted on the charge of conspiracy to commit robbery with "Jimon Dollard and another unidentified male . . . ." *Id.* at 567, 694 S.E.2d at 508. During the jury charge, the trial court instructed the jury that it could find the defendant guilty if it found that the defendant agreed "with at least one other person to commit robbery . . . ." *Id.* at 565, 694 S.E.2d at 507. The evidence at trial tended to show that the defendant conspired with Dollard and one other man, and this Court explained that "during jury instructions the trial court need not specifically name the individuals with whom defendant was alleged to have conspired so long as the instruction comports with the material allegations in the indictment and the evidence presented at trial." *Id.* at 566, 694 S.E.2d at 508. *Pringle* reaffirmed *Mickey* and *Minter*, explaining that in those cases the evidence at trial tended to show that the defendant may have conspired with other individuals not named in the indictment; thus, the indictment, evidence, and jury instruction were not "in accord" and the trial courts in *Mickey* and *Minter* erred in delivering the jury instructions. *Pringle*, 204 N.C. App. at 566-67, 694 S.E.2d at 508.

Here, as in *Minter*, Defendant was indicted for conspiracy to commit first degree murder with a single named co-conspirator—Carlos Manzanares. At trial, however, the State provided evidence that Defendant conspired with two people: Carlos and another unidentified male.

The State first introduced Officer Terry Weaver with the Charlotte Mecklenburg Police Department, who testified that he had been dispatched to the scene and was the first officer to interact with Maria. Upon his arrival, Weaver spoke with Maria and had Maria draft a written statement. Maria told Weaver that "she was in the apartment with her child, . . . and the next thing you know, a Hispanic female came

upstairs, along with two other Hispanic males. One was carrying a machete. Another was carrying a hammer, and they then began to assault [Roberto]." Weaver then read Maria's written statement to the jury, which said, "[Defendant] came in the room saying, all right mother f[***]er I'm going to f[**]k you up. . . . [T]hen the other two guys came in and started . . . hitting [Roberto] . . . ."

The State next called Maria to testify and asked her to explain who came into the bedroom on the night of the assault; Maria said "[Defendant] with two other men." When asked whether the men had anything with them, Maria replied "a hammer. . . . [Defendant] had a machete." Maria explained that "[Defendant] threw the machete at [Roberto] . . . and he tried to defend himself, and that's when the other two men came in and started hitting him, kicking him[,]" and that "one of them took [the machete] from [Defendant] to hit Roberto in the head with it." "[The guys] hit him. They kicked him. They hit him in the head with the machete and with the hammer." Maria then testified that one of the two men—"the one that we don't know anything about,"—ran away from the apartment with the machete. When asked whether she ever again saw the two men who came with Defendant to the apartment, Maria answered "No, I haven't seen them again." Maria then positively identified a photo of Carlos, explaining that "[h]e's one of the guys who attacked Roberto." The State asked Maria whether Carlos was "the guy who stayed? Or is this the guy who left with the machete?" Maria replied that Carlos was "[t]he one that stayed."

Additionally, Maria's handwritten statement, made on the night of the attack, along with witness testimony and a recording of Maria's 911 phone call, is substantial evidence that Defendant conspired with two men on the night of the attack.

Because the indictment specifically named only Carlos as Defendant's co-conspirator, but the evidence presented at trial supported a finding that Defendant conspired with Carlos and another unidentified male, the trial court erred when it instructed the jury as follows:

> The defendant has been charged with conspiracy to commit murder. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt. First; that the defendant *and at least one other person* entered into an agreement. Second; that the agreement was to commit murder. Murder is the unlawful killing of another with malice. And third; that the defendant *and at least one other person* intended that

> the agreement be carried out at the time it was made. The State is not required to prove that the murder was committed. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant conspired with another to commit murder, and that the defendant *and at least one other person* intended at that time that the murder be committed, 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.

(emphasis added). This instruction was not "in accord," with both the indictment and evidence presented at trial, and thus the trial court's instruction was error. *Pringle*, 204 N.C. App. at 566-67, 694 S.E.2d at 508.

Moreover, the trial court's error was prejudicial. Because the trial court's instruction put Defendant "on trial for an offense additional to that named in the bill of indictment[,]" it violated Defendant's right to be informed of the accusation against her and permitted the jury to convict her upon a theory unsupported by the indictment. *Id.* at 567, 694 S.E.2d at 508; N.C. Const. Art. I, sec. 23; *see also Minter*, 111 N.C. App. at 42-43, 432 S.E.2d at 148. This type of error has long been held to be plain error by our Supreme Court, which explained that "it would be difficult to say that permitting a jury to convict a defendant on a theory not legally available to the state because it is not charged in the indictment or not supported by the evidence is not plain error even under the stringent test required to invoke that doctrine." *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986); *see id.* at 537-38, 346 S.E.2d at 420 (explaining that "[a]lthough the state's evidence supported [the trial court's] instruction, the indictment does not. It is a well established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." (citations omitted)); *see also Turner*, 98 N.C. App. at 448, 391 S.E.2d at 527 ("[W]e believe that the State's evidence does support the trial court's instruction; however, the indictment does not. Consequently we must award defendant a new trial on the conspiracy charge.").

Because the trial court's instructional error permitted the jury to convict Defendant on a theory not legally available to the State, the erroneous instruction was grave error which amounted to a denial of Defendant's fundamental right to be informed of the accusations against him, N.C. Const. Art. I, sec. 23, and thus the trial court plainly erred its jury instruction on the charge of conspiracy to commit first-degree murder. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. Moreover, we have examined

the charge as a whole to determine whether the error was cured, and cannot conclude that it was. *Minter*, 111 N.C. App. at 43, 432 S.E.2d at 148; *Mickey*, 207 N.C. at 609, 178 S.E. at 221. Accordingly, we order a new trial on the conspiracy to commit first degree murder charge.

3. Testimonial Evidence

[5] We next address Defendant's contention that the trial court plainly erred by admitting hearsay evidence that violated Defendant's right to confrontation.

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

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2018). "The Confrontation Clause of the Sixth Amendment bars admission of testimonial evidence unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant." *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 304 (2009) (citations omitted). However, "admission of nonhearsay raises no Confrontation Clause concerns." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002) (internal quotation marks and citations omitted).

Defendant challenges the following exchange between the State and Rooks:

> [State]: You interviewed, you said, Maria Navarro, Luis Martinez and Carlos Manzanares, and Fabiola Chavez. In your interview of Ms. Navarro and Mr. Martinez and Mr. Manzanares, was -- did you receive any conflicting information from those three individuals?
>
> [Rooks]: No. As far as who the other defendant was? No.

Defendant argues that Rooks' response was a testimonial statement which was used as an "obvious substitute for live testimony" of a codefendant, and its admission violated Defendant's right to confront her witnesses and ask any clarifying questions. Defendant further argues that Rooks' response to the State's question was "in effect that Martinez

and Manzanares told [Rooks] that it was Fabiola Chavez who entered the bedroom with Manzanares and the other man." We find no merit in Defendant's claims.

Rooks' response contained no statements from Maria, Carlos, or Luis Martinez, and certainly no statements that were used to prove the truth of the matter asserted—the identity of the other defendant. Rooks' response that there was no conflict between the three witnesses could mean that all three witnesses said the same thing; however, it could also mean that they said nothing at all about the identity of the other defendant. As Rooks' testimony did not contain a statement used to prove the truth of the matter asserted, the testimony was not hearsay and its admission "raises no Confrontation Clause concerns." *Gainey*, 355 N.C. at 87, 558 S.E.2d at 473 (internal quotation marks and citations omitted).

Even assuming arguendo that Rooks' response was hearsay and improperly admitted at trial, the error did not have a probable impact on the jury's finding of guilt. Aside from Rooks' testimony, there was sufficient evidence of Defendant's guilt: Maria testified for the State and provided an eyewitness account of who attacked her on the night of the offense, and she identified both Defendant and Carlos as two of the perpetrators. Maria's handwritten statement, made on the night of the attack, explicitly named Defendant as one of the perpetrators. Additionally, Officer Weaver testified that Maria told him on the night of the attack that Defendant was one of the people who assaulted her and Roberto and attempted to assault her baby.

Rooks' response was made in passing, and there was no emphasis or follow up questions by the State. *See State v. Stroud*, 252 N.C. App. 200, 215, 797 S.E.2d 34, 45 (2017) (the "passing nature of the[] statements" and "the lack of emphasis or detailed discussion of the[] comments by the prosecutor" supported the conclusion that the admission of the testimony was not plain error). Therefore, because Rooks' testimony was not hearsay, the trial court did not err by allowing it into evidence. Even assuming arguendo that the trial court erred in allowing the testimony into evidence, Defendant can show no prejudice as there was other, sufficient evidence of her guilt. However, as we determine that the trial court did not err, it did not plainly err, and Defendant's argument to the contrary is overruled. *See State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468 (1986).

III. Conclusion

As there was sufficient evidence to support the charge of conspiracy to commit first-degree murder, Defendant has failed to show that her

attorney's failure to move to dismiss prejudiced Defendant. Moreover, as Rooks' testimony was not hearsay, the trial court did not err in allowing the testimony into evidence. However, because the trial court plainly erred in the delivery of jury instructions on the conspiracy to commit first-degree murder charge, we vacate the judgment entered upon the verdict of guilty of conspiracy to commit first-degree murder and order a new trial on that charge.

NO ERROR IN PART, VACATED AND NEW TRIAL IN PART, AND REMANDED.

Judge BROOK concurs.

Judge TYSON concurs in part and dissents in part per separate opinion.

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

Sufficient evidence supports the jury's conviction of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant has failed to show his attorney's failure to move to dismiss was prejudicial, or that he received ineffective assistance of counsel.

Sergeant Rooks' testimony was not hearsay. The trial court did not err by allowing the testimony into evidence. There is no error in the jury's verdicts or the judgments entered thereon for the attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury charges. I fully concur with the majority's opinion in those conclusions of no error.

The transcript and record show Defendant's trial counsel actively engaged in the pre-trial jury charge conference and requested an instruction on mere presence for the conspiracy charge, which the trial court included in the final jury's instructions. Defendant's counsel reviewed and affirmatively acknowledged the applicability of the trial court's proposed instructions. After the instructions were given, Defendant's counsel affirmatively accepted the instructions as given. There is no basis for this Court to invoke plain error to review any purported prejudice in the unobjected-to and affirmatively accepted jury instructions.

Even were plain error review available to Defendant, as the majority's opinion asserts, Defendant failed to and cannot show any prejudice

to be awarded a new trial under any standard of appellate review. Overwhelming evidence of Defendant's guilt overcomes any prejudice under either preserved error or plain error review. The majority's opinion fails to require Defendant to demonstrate any prejudice in light of the overwhelming evidence of her guilt and awards a new trial on the conspiracy to commit first-degree murder charge despite this failure.

Presuming error or even plain error, Defendant also cannot demonstrate prejudice in the instruction on conspiracy to commit first-degree murder to set aside the jury's verdict, reverse the judgment entered thereon, and be awarded a new trial. I concur in part to sustain Defendant's other convictions and respectfully dissent in part from awarding Defendant a new trial on the conspiracy indictment.

I. Background

Defendant's counsel and the trial court engaged in the following exchange during the charge conference:

> [Defendant's counsel]: And Your Honor, I believe under *conspiracy* there's mere presence. I want that to be read as well.
>
> The Court: Do you have the number for that [Pattern Jury Instruction]?
>
> [Defendant's counsel]: No. It should be under conspiracy. If you read the *conspiracy* charge, there's a set that says that, however mere presence at the crime scene, even with knowledge of the crime- - I have it. I'll bring it after lunch. [Emphasis supplied].

The record is silent on whether Defendant's counsel provided the trial court with the promised draft of jury instructions on mere presence in relation to the conspiracy charge. Following the morning charge conference, the trial court again met with trial counsel and read aloud the final proposed list, by the number of the proposed pattern jury instructions, he intended to give.

Defendant's counsel voiced no concerns after being asked by the trial judge if any other proposed instructions needed to be included or altered. Once the jury had left the courtroom following their charge, the following exchange took place:

> The Court: Okay for the record, any comments, concern, corrections from either side for the charges?

[Defendant's Counsel]: No, Your Honor.

[The State]: No, Your Honor.

Defendant failed to object to the instruction when given to the jury to preserve any issue for appeal. Defendant now seeks to invalidate the jury instruction on and his conviction for conspiracy to commit first-degree murder. His counsel was actively involved at the charge conferences, failed to object then or when instruction was given to the jury, and failed to correct or object when given another opportunity. Defendant's counsel expressly consented to the jury instructions as given.

II. Invited Error

"[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) (emphasis supplied). North Carolina's statutes provide: "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." N.C. Gen. Stat. § 15A-1443(c) (2019).

Here, Defendant's counsel participated in, made recommendations, and proposed changes to the conspiracy to commit first-degree murder jury instruction during the charge conference. Defendant's counsel never made additional requests nor voiced any objection regarding the jury instructions proposed after he was specifically asked. Defendant's counsel also failed to object when the instructions were given. Defendant was provided the further opportunity to object or correct the instructions and expressly agreed to the instruction as given.

Defendant's failure to object during the charge conference or when the instructions were given to the jury along with express agreement to those given constitutes invited error and waives any right to appellate review concerning the invited error, "*including plain error review*." *Barber*, 147 N.C. App. at 74, 554 S.E.2d at 416 (emphasis supplied). Defendant's counsel's requests and active participation in the formulation of the final instruction during the charge conference forecloses appellate review. *Id.*

Our Supreme Court in *State v. White*, 349 N.C. 535, 570, 508 S.E.2d 253, 275 (1998), examined a defendant's counsel's involvement in jury instructions in a death penalty case. The Court held:

> Here, defense counsel did not submit any proposed instructions in writing. Counsel also did not object when given the opportunity either at the charge conference or after the charge had been given. In fact, defense counsel

> affirmatively approved the instructions during the charge conference. Where a defendant tells the trial court that he has no objection to an instruction, he will not be heard to complain on appeal.

Id. (citing *State v. Wilkinson*, 344 N.C. 198, 213, 474 S.E.2d 375, 396 (1996)).

The majority's opinion cites this Court's opinion in *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254 (2018), as contrary to this holding. Presuming a conflict exists between an opinion from this Court and one from our Supreme Court, we are bound to follow the Supreme Court's opinion. *Mahoney v. Ronnie's Road Servic*e, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997). Defendant invited any asserted error and waived plain review. *See White*, 349 N.C. at 570, 508 S.E.2d at 275.

III. Plain Error Analysis

Even if the notion that appellate or plain error review is not foreclosed due to Defendant's invited errors and is either available or proper, Defendant does not and cannot show "that the erroneous jury instruction was a fundamental error—that the error had a probable impact on the jury verdict" and was so prejudicial to be awarded a new trial. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Defendant failed to meet her burden of showing her asserted error should be reviewed for plain error. Even presuming plain error review, she cannot demonstrate any prejudice, in light of overwhelming evidence of her guilt. The majority's opinion of *per se* error ignores the overwhelming and uncontroverted evidence of Defendant's guilt and omits any analysis or conclusion of prejudice or evidence of her guilt to award a new trial.

Their opinion asserts, *ipse dixit*, the un-objected to and unpreserved plain error had a probable impact on the jury's finding of guilt, and *de facto* holds the trial court plainly erred, which *per se* compels an award of a new trial. This assertion is unprecedented and elevates an unchallenged and unpreserved plain error remedy without an analysis of the overwhelming evidence of Defendant's guilt or prejudice above appellate review of preserved constitutional errors.

Even during appellate review of preserved constitutional errors employing harmless error review, no error is so *per se* prejudicial to compel a new trial without further analysis of whether the error was harmless beyond a reasonable doubt or prejudicial. *See State v. Malachi*,

371 N.C. 719, 738, 821 S.E.2d 407, 421 (2018); *State v. Veney*, __ N.C. App. __, __, 817 S.E.2d 114, 118, *disc. review denied*, 371 N.C. 787, 821 S.E.2d 169 (2018).

We all agree the trial court properly instructed the jury on the elements of attempted first-degree murder. The jury properly convicted Defendant of that offense, which we also agree was without error. The only additional element necessary to convict Defendant of conspiracy to commit first-degree murder was that she entered into an agreement to do so with a co-conspirator. *State v. Crowe*, 188 N.C. App. 765, 771, 656 S.E.2d 688, 693 (2008).

The majority's opinion agrees that: "This testimonial evidence supports that Defendant and Carlos entered into an agreement to commit murder of Roberto." The majority's opinion later correctly states: "[T]here was substantial evidence of a conspiracy between Defendant and Carlos to commit murder of Roberto."

The evidence against Defendant is overwhelming to overcome any asserted prejudice under unpreserved plain error review or even harmless error review. *See State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) ("an error in jury instructions is prejudicial and requires a new trial *only if* there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises" (emphasis supplied) (citations and quotation marks omitted).

The record contains explicit and unchallenged testimony, which the majority's opinion acknowledges, of the conspiracy between Defendant and Carlos Manzanares and of their coordinated attack to commit the first-degree murder of Roberto. *See State v. Lamb*, 342 N.C. 151, 463 S.E.2d 189 (1995). Defendant demonstrated no prejudice in her conspiracy conviction.

A. *State v. Tucker*

The majority's opinion does not complete a prejudice analysis, holding "[t]his type of error has long been held to be plain error by our Supreme Court." In support of this assertion, the majority's opinion cites *State v. Tucker*, 317 N.C. 532, 540, 346 S.E.2d 417, 422 (1986). Even if their assertion of error is presumed, our Supreme Court in *Tucker* conducted a prejudice analysis of the probable impact of the "plain error" upon the jury's verdict, holding: "In light of the highly conflicting evidence in the instant kidnapping case on the unlawful removal and restraint issues, we think the instructional error might have . . . tilted the

scales and caused the jury to reach its verdict convicting the defendant." *Id.* (quotations omitted).

Unlike in *Tucker*, the uncontroverted evidence of Defendant's guilt is more than enough to overcome any asserted prejudice, even under the notion that the purported error was not invited and plain error review is available and proper. *See id. Tucker* does not support awarding Defendant a new trial on the conspiracy charge.

B. *State v. Pringle*

The majority's opinion cites *State v. Pringle* and states the "instruction was not 'in accord,' with both the indictment and evidence presented at trial, and thus the trial court's instruction was error." *State v. Pringle*, 204 N.C. App. 562, 566-67, 694 S.E.2d 505, 508 (2010). In *Pringle*, the indictment alleged the defendant had "conspired with 'Jimon Dollard and another unidentified male' and the trial court instructed the jury that it could find defendant guilty of conspiracy if the jury found defendant conspired with 'at least one other person.' " *Pringle*, 204 N.C. App. at 567, 694 S.E.2d at 508.

The evidence at trial in *Pringle* tended to show the "defendant and two other men entered into a conspiracy to commit robbery with a dangerous weapon. One of the other men was specifically identified by the testifying officers as 'Jimon Dollard,' the second suspect arrested by officers after they pursued the three men seen robbing the gas station. The third man evaded capture and was never identified." *Id.*

The ultimate conclusion this Court reached in *Pringle* was that the defendant had not demonstrated any reversible prejudice and there was no error in the trial court's instruction or the jury's conviction. *Id.* "[The] instruction was in accord with the material allegations in the indictment and the evidence presented at trial. Consequently, we find no error, much less plain error, in the trial court's instruction." *Id. Pringle* does not support awarding Defendant a new trial on the conspiracy charge.

C. *State v. Lawrence*

The proper legal conclusion in this case, presuming plain error review is available and proper, mirrors the analysis our Supreme Court conducted in *State v. Lawrence*:

> In light of the *overwhelming and uncontroverted evidence*, defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he *cannot show the prejudicial effect necessary to establish*

> *that the error was a fundamental error*. In addition, the error in no way seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Lawrence, 365 N.C. at 519, 723 S.E.2d at 335 (emphasis supplied).

Defendant's conspiracy conviction under *any* legitimate analysis is properly left undisturbed. In the cases of *Lawrence*, *Tucker*, and *Pringle*, our Supreme Court and this Court conducted analyses of the probable impact of the asserted error on the jury's verdict, and the other "overwhelming and uncontroverted evidence" of guilt, a prejudice analysis that is *wholly omitted* by the majority's opinion. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335; *see also Tucker*, 317 N.C. at 540, 346 S.E.2d at 422, *Pringle*, 204 N.C. App. at 567, 694 S.E.2d at 508.

The properly admitted and unchallenged evidence against Defendant is "overwhelming and uncontroverted" to overcome any asserted and unpreserved prejudice under plain error, or even harmless error review. *Lawrence*, 365 N.C. at 519. The majority's opinion errs by disregarding long established and binding Supreme Court precedents as well as this Court's procedures to reach its conclusion, without any analysis weighing the considerable evidence of Defendant's guilt against any probable impact of plain error on the jury's verdict. The majority's opinion cites no precedent to award a new trial in the absence of prejudice. The only rational and legitimate conclusion from this absence of authority is none exists.

IV. Conclusion

Defendant received a fair trial, free from prejudicial errors she preserved and argued on all convictions. I concur with the majority's opinion to find no error in Defendant's attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury convictions.

Defendant is not entitled to a new trial on conspiracy to commit first-degree murder. Any purported error was invited and waived. *White*, 349 N.C. at 570, 508 S.E.2d at 275. Even if Defendant did not invite the error, Defendant wholly failed and cannot carry her burden to show any prejudice under the standard of review of plain error to warrant a new trial.

"[O]verwhelming and uncontroverted evidence" of Defendant's guilt exists in the record to overcome any asserted prejudice. *Lawrence*, 365 N.C. at 519. Defendant failed to show plain error in the

jury's verdict of conspiracy to commit first-degree murder or in the judgment entered thereon.

Presuming plain error analysis is appropriate here, there is no showing by Defendant or analysis by the majority of prejudice to award a new trial. The evidence of her guilt is overwhelming. *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335; *see also Tucker*, 317 N.C. at 540, 346 S.E.2d at 422, *Pringle*, 204 N.C. App. at 567, 694 S.E.2d at 508. There is no error in the jury's verdicts and the judgment entered thereon. I respectfully dissent from awarding a new trial to Defendant for conspiracy to commit first-degree murder under plain error review.

STATE OF NORTH CAROLINA
v.
LARRY LEE DUDLEY

No. COA19-542

Filed 7 April 2020

Jurisdiction—notice of appeal to superior court—in-person notice requirement—applicability

Where defendant properly appealed his conviction for misdemeanor stalking to the superior court by filing written notice of appeal in accordance with N.C.G.S. § 15A-1431(b) and (c), the trial court improperly dismissed defendant's appeal for lack of jurisdiction based on subsection (d), which requires in-person notice of appeal when a defendant is in "compliance with the judgment." The statute's plain language and context indicate that this requirement only applies to defendants who voluntarily comply with a judgment; thus, it did not apply to defendant, even though he had served his full sentence at the time judgment was rendered, because the State had forced him to preemptively serve his sentence in pretrial confinement.

Appeal by defendant from orders entered 16 December 2016 by Judge Susan Bray and 2 August 2018 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 3 December 2019.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant.

DIETZ, Judge.

Larry Lee Dudley was convicted of misdemeanor stalking in district court and sentenced to time served. He filed a written notice of appeal within ten days of entry of judgment, as required by the general statute governing criminal appeals from district court to superior court.

The State moved to dismiss Dudley's appeal based on a more specific statutory provision requiring "in person" notice of appeal when the defendant seeks to appeal but already is in "compliance with the judgment." The State argued that this provision applied because Dudley was sentenced to time served and thus already was in compliance with the judgment as soon as it was entered. The trial court agreed and granted the State's motion to dismiss.

We reverse. The statute's plain language, its context, and other accompanying indications of intent all show that this special, in-person filing requirement applies only when the defendant *voluntarily* complies with the judgment. Here, by contrast, the State forced Dudley to preemptively serve his sixty-day sentence by jailing him while he awaited trial. That was not Dudley's choice. Accordingly, we hold that Dudley was not in "compliance with the judgment" as that phrase is used in the statute and he therefore properly appealed the judgment by filing a timely written notice of appeal. We reverse the trial court's dismissal of Dudley's appeal and remand this matter to the trial court.

Facts and Procedural History

In 2015, Defendant Larry Lee Dudley was charged with felony stalking and the lesser-included offense of misdemeanor stalking. Dudley was held in pre-trial confinement pending his trial.

In 2016, the district court convicted Dudley of misdemeanor stalking and sentenced him to 60 days in prison. But the court credited Dudley for the time served in pre-trial confinement, which was substantially more than 60 days. As a result, Dudley was immediately released following entry of judgment.

Nine days later, Dudley filed a *pro se* written notice of appeal with the clerk of the superior court. The State then moved to dismiss the appeal pursuant to N.C. Gen. Stat. § 15A-1431(d), arguing that Dudley failed to comply with the statute's jurisdictional notice requirements.

The trial court dismissed Dudley's appeal for lack of jurisdiction and later denied his petition for a writ of certiorari. This Court granted Dudley's petition for a writ of certiorari and ordered appointment of counsel to represent Dudley in this appeal.

Analysis

The sole issue in this appeal is whether Dudley complied with the jurisdictional requirements to appeal his district court conviction to superior court. The parties acknowledge that this issue presents a novel question of statutory interpretation.

We review this statutory interpretation question *de novo*. *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011). "Our task in statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment." *State v. Rieger*, __ N.C. App. __, __, 833 S.E.2d 699, 700–01 (2019). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *Id.* at __, 833 S.E.2d at 701.

The statute in question is N.C. Gen. Stat. § 15A-1431, which creates the jurisdictional rules for an appeal from district court to superior court in criminal cases. The statute provides that a "defendant convicted in the district court before the judge may appeal to the superior court for trial de novo with a jury as provided by law." N.C. Gen. Stat. § 15A-1431(b). A defendant seeking to appeal may give notice of appeal within 10 days of entry of judgment either "orally in open court or in writing to the clerk." N.C. Gen. Stat. § 15A-1431(b), (c). There is no dispute that Dudley gave written notice of appeal to the clerk of superior court in writing within 10 days of entry of the challenged judgment.

But the State points to a separate provision of the statute requiring "in person" notice of appeal in situations where, at the time of the notice of appeal, the defendant already was in "compliance with the judgment":

> (d) A defendant convicted by a magistrate or district court judge is not barred from appeal because of compliance with the judgment, but notice of appeal after compliance must be given by the defendant in person to the magistrate or judge who heard the case or, if he is not available, notice must be given:
>
> (1) Before a magistrate in the county, in the case of appeals from the magistrate; or

(2) During an open session of district court in the district court district as defined in G.S. 7A-133, in the case of appeals from district court.

N.C. Gen. Stat. § 15A-1431(d).

The State argues that, at the time Dudley filed his written notice of appeal, he was in "compliance with the judgment" because he was sentenced to time served, which, in the State's view, meant he had fully complied with his sentence. Dudley, by contrast, argues that the word "compliance" requires some element of "assent" and, because the State forced him to be confined until trial, he did not assent to that time served.

We agree with Dudley that, in the context of this statute, the word "compliance" carries with it a connotation of voluntariness. We begin, as we must, with the statute's plain language. "When examining the plain language of a statute, undefined words in a statute must be given their common and ordinary meaning." *Rieger*, __ N.C. App. at __, 833 S.E.2d at 701. Dictionaries define "compliance" as "giving in to a request, wish, or demand; acquiescence." *Webster's New World College Dictionary* 304 (5th ed. 2014). Thus, in its most natural usage, the term "compliance" carries with it a notion that the defendant somehow *chose* to be in compliance.

This interpretation is confirmed by the Criminal Code Commission's official commentary discussing the drafting of this provision. The commentary states that the statute "deals with a problem which has recurred with some frequency. That problem has been presented by the defendant, not represented by counsel, who pays his fine and then wishes to appeal. When he secures counsel, he finds that he has lost his right to appeal by complying with the sentence." N.C. Gen. Stat. § 15A-1431(d), Criminal Code Commission Commentary. This commentary further confirms that the drafters of this provision viewed the term "compliance" as requiring some voluntary step by the defendant. It thus would not apply to a defendant who was forced by the State to comply with a judgment without the freedom to decline.

Here, Dudley's purported "compliance" with his criminal sentence was not his choice. He was involuntarily detained in pre-trial confinement while awaiting trial and was later credited with time served as part of his criminal judgment. As a result, although Dudley had fully served his sentence at the time judgment was rendered, he was not in "compliance with the judgment" under the plain meaning of Section 15A-1431(d). Dudley therefore properly gave notice of appeal by doing so in writing within ten days of the entry of judgment. N.C. Gen. Stat.

§ 15A-1431(c). We reverse the trial court's order dismissing Dudley's appeal and remand for his appeal to be heard by the trial court.

Conclusion

We reverse the trial court's order and remand this matter to the trial court.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
MARK DOUGLAS DUDLEY, DEFENDANT

No. COA19-780

Filed 7 April 2020

1. Discovery—request for sanctions—criminal case—disclosures by State

In a prosecution for multiple drug offenses, the trial court did not abuse its discretion by declining to sanction the State for a violation of N.C.G.S. § 15A-903 where, even though defendant was not provided with the source of a tip that led to defendant's traffic stop, the prosecutor took steps to obtain the name of the source and, upon being informed that the source was an officer with the local police department, passed that information on to defense counsel, who took no steps to inquire further about the source's identity.

2. Drugs—maintaining a vehicle—keeping or selling drugs—sufficiency of evidence

The State presented sufficient evidence from which the jury could find that defendant maintained a vehicle to keep or sell controlled substances, where a search of defendant's car revealed drug paraphernalia and carefully hidden methamphetamine (in a tire-sealant can with a false bottom), and the amount of drugs was consistent with trafficking, not personal use.

Appeal by Defendant from judgments entered 24 January 2019 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 4 February 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Scott Stroud, for the State.

Richard Croutharmel for Defendant-Appellant.

COLLINS, Judge.

Defendant Mark Douglas Dudley appeals from the trial court's judgments entered upon his convictions for: (1) trafficking in methamphetamine by transportation; (2) trafficking in methamphetamine by possession; (3) maintaining a vehicle to keep or sell controlled substances; and (4) possession of drug paraphernalia. Defendant contends that the trial court erred by declining to sanction the State for failing to comply with its discovery obligations and by denying Defendant's motion to dismiss the maintaining-a-vehicle charge. We affirm in part and discern no error in part.

I. Background

The evidence presented at Defendant's trial tended to show the following: early in the morning on 1 September 2016, Deputy Brad Belk of the Union County Sheriff's Office received a call from Officer Stephen Goodwin of the Town of Wadesboro Police Department. Goodwin told Belk that he had spotted a black Chevrolet Camaro IROC parked outside of a "known drug house[.]" Belk relayed the make, model, and license-plate number to Officer James Pedersen of the Town of Wingate Police Department, who began looking out for the vehicle.

A black Camaro IROC with a license-plate number matching that relayed by Belk soon passed Pedersen while he was sitting at a gas station with, among others, Deputy Tommy Gallis of the Union County Sheriff's Office, who was in his own vehicle with his canine. Pedersen began to follow the vehicle and ran the license-plate number through a vehicle-registration database, which showed that Defendant was the registered owner of the vehicle. Pedersen also noticed that the vehicle had an obscured inspection sticker and did not have a rear-view mirror, and soon initiated a traffic stop. The vehicle, driven by Defendant, pulled into a gas station.

Pedersen approached the vehicle and asked Defendant for his driver's license and registration. Pedersen noticed that Defendant had open sores on his left arm which, based upon his training and experience, Pedersen believed were consistent with drug use. Gallis had his canine at the vehicle, and the officers asked Defendant to step out of

the vehicle, or to turn off the ignition, in the interest of officer safety. Defendant refused to heed the officers' request, and Gallis reached into the vehicle and removed the keys from the ignition. Gallis then ran the canine around the vehicle, and the canine alerted on the driver's side where Defendant was seated. The officers again asked Defendant to step out of the vehicle, and eventually Defendant did so. Pedersen asked Defendant whether he had anything incriminating on his person, and Defendant stated that he had a pipe for using methamphetamine in his pocket. Pedersen seized the pipe and placed Defendant under arrest.

The officers then searched the vehicle. They found a tire-sealant can with a false bottom that contained a plastic baggie holding a clear crystalline substance. One of the officers conducted a field test of the substance, which tested positive for methamphetamine. The officers then seized the can and the substance, cited Defendant for the trafficking violations, and took Defendant to jail in connection with the suspected drug activity. Analysis by the State Bureau of Investigation determined that the substance was approximately 28.29 grams of methamphetamine.

On 24 April 2017, Defendant was indicted by a Union County grand jury for: (1) trafficking in more than 28 but less than 200 grams of methamphetamine by transportation; (2) trafficking in more than 28 but less than 200 grams of methamphetamine by possession; (3) maintaining a vehicle to keep or sell controlled substances; (4) possession with intent to sell or deliver methamphetamine; and (5) possession of drug paraphernalia. On 19 June 2018, Defendant filed a motion to suppress all evidence seized from his vehicle during the traffic stop, arguing that his rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, section 20 of the North Carolina Constitution had been violated when the officers searched his vehicle. In his motion to suppress, Defendant argued that Pedersen had only cited an "unknown source" of the information he had received from Belk which eventually led to Defendant's arrest, and therefore there were no "objective, specific, or articulable facts" to justify any suspicion that Defendant was in possession of any controlled substance at the time Defendant's car was searched. Defendant's motion to suppress came on for hearing on 28 August 2018. At the motion-to-suppress hearing, Belk testified that Goodwin was the source of his tip to Pedersen, and that Goodwin had told him that the Camaro was parked outside of a known drug house, but Belk admitted that he had not so specified in the report he created for the district attorney's office. Defendant's trial counsel argued that Defendant had not been made aware of Goodwin's identity prior to the hearing, saying that "[a]ll of a sudden we're hearing

about law enforcement officers who may well be credible, names that had never been provided in two years."

The prosecutor stated at the hearing that "there ha[d] been a little bit of difficulty in getting all the information to" Defendant's trial counsel, noting that she had followed up with Belk regarding the source of his information and that Belk had told her it was an officer with the Town of Wadesboro Police Department, but that she had not received a name from Belk and had requested that Belk provide a supplemental report to her. The prosecutor said she had "relayed that information that [she] had"—i.e., that the source was an officer with the Town of Wadesboro Police Department—to Defendant's trial counsel, and Defendant's trial counsel told the trial court that "that was not an issue with the district attorney's office." But the prosecutor argued that the traffic violations provided the bases for the traffic stop, and that the canine was "already present at the time of the stop" and therefore that its sniff of the vehicle, which provided the officers probable cause to search, did not implicate constitutional concerns. The trial court entered an order denying Defendant's motion to suppress on 8 October 2018.

Defendant pled not guilty to all charges on 9 November 2018, and the matter came on for trial on 23 January 2019. At the close of State's evidence on 24 January 2019, Defendant moved to dismiss all of the charges for insufficient evidence. The trial court granted the motion to dismiss the possession-with-intent-to-sell-or-deliver charge, but denied the motions to dismiss the four other charges. The defense rested, and the jury returned guilty verdicts on the remaining charges later that afternoon.

Also that afternoon, the trial court entered judgment upon the convictions, and sentenced Defendant to: (1) 70 to 93 months' imprisonment for each trafficking offense (along with a fine and costs to be imposed as a civil judgment), to run concurrently; and (2) 6 to 17 months' imprisonment for the maintaining-a-vehicle and paraphernalia offenses, to run at the expiration of the earlier sentence, and the trial court suspended that sentence and instead placed Defendant on supervised probation for 24 months at the conclusion of his incarceration for the trafficking offenses. Defendant gave oral notice of appeal in open court.

II. Discussion

A. Discovery Sanction

[1] Defendant first argues that the trial court erred by declining to sanction the State for failing to comply with its discovery obligations.

N.C. Gen. Stat. § 15A-903 generally states that upon motion of a defendant, the State must provide the defendant with, inter alia, the "complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant[,]" including "witness statements, investigating officers' notes . . . or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." N.C. Gen. Stat. § 15A-903(a) (2017). That statute also provides that "[o]ral statements shall be in written or recorded form, except that oral statements made by a witness to a prosecuting attorney outside the presence of a law enforcement officer or investigatorial assistant shall not be required to be in written or recorded form unless there is significantly new or different information in the oral statement from a prior statement made by the witness." *Id.* at § 15A-903(a)(1)(C). Pursuant to N.C. Gen. Stat. § 15A-903(b), if discovery is provided by the State voluntarily pursuant to a written request rather than upon the defendant's motion (as contemplated by N.C. Gen. Stat. § 15A-902), such discovery must conform to the same standards as if a motion had been made.[1] Finally, N.C. Gen. Stat. § 15A-907 is an evergreen provision that requires, inter alia, that once it provides discovery to a defendant, the State must thereafter notify the defendant of any new developments in evidence it discovers prior to or during trial.

N.C. Gen. Stat. § 15A-910 sets forth as follows, in relevant part:

> (a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may:
>
> (1) Order the party to permit the discovery or inspection, or
>
> (2) Grant a continuance or recess, or
>
> (3) Prohibit the party from introducing evidence not disclosed, or
>
> (3a) Declare a mistrial, or

1. The record contains no motion by Defendant seeking discovery, but the exhibits appended to Defendant's motion to suppress indicate either that (1) Defendant made a motion seeking discovery pursuant to N.C. Gen. Stat. § 15A-903 or (2) the State provided discovery voluntarily pursuant to N.C. Gen. Stat. § 15A-902 in this case.

(3b) Dismiss the charge, with or without prejudice, or

(4) Enter other appropriate orders.

N.C. Gen. Stat. § 15A-910(a) (2017).

Defendant's argument that the trial court erred by declining to apply a discovery sanction against the State focuses upon the uncontested fact that Defendant was not made aware that the source of Belk's tip to Pedersen was Goodwin[2] until the hearing on Defendant's motion to suppress. Defendant argues that this was a failure by the State to comply with its discovery obligations under N.C. Gen. Stat. §§ 15A-902 to -910 (as set forth in relevant part above), and that the trial court erred by concluding that the State had not violated these statutes and declining to apply some sanction against the State as a result.

"Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court." *State v. East*, 345 N.C. 535, 552, 481 S.E.2d 652, 664 (1997). We will reverse for abuse of discretion "only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

The record reflects that: (1) the prosecutor followed up with Belk regarding the source of the tip; (2) Belk told the prosecutor that the source was an officer with the Town of Wadesboro Police Department; (3) the prosecutor requested that Belk provide a supplemental report to her with more information; and (4) the prosecutor told Defendant's trial counsel that the source was an officer with the Town of Wadesboro Police Department. Although it appears that Belk never provided the prosecutor with Goodwin's identity, and accordingly that Defendant was never apprised of Goodwin's identity prior to Belk's testimony that Goodwin was the source on the stand at the motion-to-suppress hearing, the State did provide Defendant with Belk's supplemental report—which Defendant introduced as Exhibit 1/E at the hearing on his motion to suppress—and the record does not reflect that Defendant took any steps to seek to ascertain the identity of the specific officer thereafter.

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2. Although Defendant argues in his brief on appeal that Defendant "learned for the first time at the motion to suppress hearing that the person providing the tip that led to Officer Pedersen's stop of his car was a Wadesboro police officer rather than an 'unknown source[,]'" the transcript from the motion-to-suppress hearing reveals that Defendant's trial counsel there agreed that the prosecutor had made her aware prior to the hearing that the source was an officer with the Town of Wadesboro Police Department, albeit not Goodwin, specifically.

On these facts, we cannot conclude that the trial court abused its discretion in determining that the State had complied with discovery or by declining to apply sanctions against the State for failing to provide him with Goodwin's identity.

B. Maintaining-a-vehicle Charge

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the charge of maintaining a vehicle to keep or sell controlled substances, because the State presented insufficient evidence that Defendant's vehicle was used for storing or selling controlled substances.

This Court reviews a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). 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. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). In reviewing the trial court's decision on appeal, the evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted).

Defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance, in violation of N.C. Gen. Stat. § 90-108(a)(7). That provision states, in pertinent part, that "[i]t shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances] in violation of this Article." N.C. Gen. Stat. § 90-108(a)(7) (2019).

> To prove a defendant guilty under this portion of subsection 90-108(a)(7), the State must prove that the defendant
>
> (1) knowingly
>
> (2) kept or maintained
>
> (3) a vehicle
>
> (4) which was used for the keeping or selling
>
> (5) of controlled substances.

State v. Rogers, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018) (internal brackets and citation omitted). "[T]he keeping . . . of" drugs referred to in this subsection means "the storing of drugs." *Id.* at 403, 817 S.E.2d at 155.

"The determination of whether a vehicle . . . is used for keeping or selling controlled substances will depend on the totality of the circumstances." *State v. Mitchell*, 336 N.C. 22, 34, 442 S.E.2d 24, 30 (1994). Circumstances our courts have considered relevant to this determination include: the amount of controlled substances found, the presence of drug paraphernalia, the presence of large amounts of cash, and whether the controlled substances were hidden in the vehicle. *See Rogers*, 371 N.C. at 403, 817 S.E.2d at 155; *State v. Alvarez*, 818 S.E.2d 178, 182 (N.C. Ct. App. 2018), *aff'd per curiam*, 372 N.C. 303, 828 S.E.2d 154 (2019); *State v. Dunston*, 256 N.C. App. 103, 106, 806 S.E.2d 697, 699 (2017); *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 687 (2001). While no factor is dispositive, "[t]he focus of the inquiry is on the use, not the contents, of the vehicle." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30 (emphasis omitted).

In *Rogers*, the State presented sufficient evidence that defendant used a car to keep illegal drugs where law enforcement officers found two purple plastic baggies containing cocaine in a small space behind the door covering the vehicle's gas cap; a marijuana cigarette and $243 in the vehicle's passenger compartment; and similar purple plastic baggies containing larger amounts of cocaine, a digital scale, and small ziplock bags in defendant's hotel room. *Rogers*, 371 N.C. at 403, 817 S.E.2d at 155. Similarly, in *Dunston*, the State presented sufficient evidence that defendant used a car to keep illegal drugs where officers observed defendant in the car engaging in activities consistent with those commonly used in distributing marijuana, and officers discovered in the car a travel bag containing a 19.29-gram mixture of heroin, codeine, and morphine; plastic baggies; two sets of digital scales; and three cell phones. *Dunston*, 256 N.C. App. at 106, 806 S.E.2d at 699. Likewise, in *Alvarez*, the State presented sufficient evidence that defendant used a car to keep illegal drugs where officers discovered one kilogram of cocaine wrapped in plastic and oil to evade detection by canine units in a false-bottomed compartment on defendant's truck bed floor. *Alvarez*, 818 S.E.2d at 182.

In this case, as in *Rogers* and *Alvarez*, Defendant attempted to hide the methamphetamine. "[A] defendant who wants to store contraband will, all other things equal, want to store it in a hidden place, which is exactly what putting the" methamphetamine in the false-bottomed

tire-sealant can would accomplish. *Rogers*, 371 N.C. at 404, 817 S.E.2d at 155. Moreover, similar to the trafficking amounts of controlled substances found in *Rogers*, *Dunston*, and *Alvarez*, the tire-sealant can contained more than 28 grams of methamphetamine—an amount consistent with trafficking, not personal use. Additionally, as in *Rogers* and *Dunston*, officers also discovered drug paraphernalia in Defendant's possession.

While "merely having drugs in a car . . . is not enough to justify a conviction under subsection 90-108(a)(7)[,]" *Rogers*, 371 N.C. at 406, 817 S.E.2d at 157, viewing the evidence in this case in the light most favorable to the State and drawing all reasonable inferences from that evidence, a reasonable jury could find that Defendant used the Camaro to store the methamphetamine. The trial court thus correctly denied Defendant's motion to dismiss the charge of keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances.

III. Conclusion

The trial court did not abuse its discretion in determining that the State had complied with its discovery obligations or by declining to apply sanctions against the State. The trial court thus did not err by denying Defendant's motion to suppress. As the State presented substantial evidence that Defendant's vehicle was used for the keeping or selling of controlled substances, the trial court correctly denied Defendant's motion to dismiss the charge. The trial court's order denying Defendant's motion to suppress is affirmed, and the trial court did not err by denying Defendant's motion to dismiss.

AFFIRMED IN PART AND NO ERROR IN PART.

Judges STROUD and BERGER concur.

STATE OF NORTH CAROLINA
v.
RAFIEL FOREMAN, DEFENDANT

No. COA19-738

Filed 7 April 2020

1. Constitutional Law—effective assistance of counsel—concession of guilt—knowing and voluntary

In a trial for attempted murder, defense counsel's performance was not constitutionally ineffective for conceding that defendant committed assault with a deadly weapon inflicting serious injury where defendant knowingly and voluntarily consented to this strategy, as indicated by the *Harbison* statement defendant signed and submitted to the trial court and by the court's subsequent questioning of defendant. Further, the concession was not an admission to the murder charge because assault with a deadly weapon inflicting serious injury was not a lesser-included offense of attempted first-degree murder.

2. Constitutional Law—concession of guilt—Harbison inquiry—informed consent

In a trial for attempted murder, defendant knowingly and voluntarily consented to having his counsel concede guilt for assault with a deadly weapon inflicting serious injury, as demonstrated by the *Harbison* statement defendant signed and submitted to the trial court and by the trial court's inquiry into defendant's knowledge of and consent to that strategy and its potential consequences. The admission was not a concession of guilt to the murder charge since that offense required proof of elements beyond those needed to prove assault with a deadly weapon inflicting serious injury.

Appeal by defendant from judgments entered 28 August 2018 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Forrest P. Fallanca, for the State.

Michael E. Casterline, P.A., by Michael E. Casterline, for defendant-appellant.

BERGER, Judge.

On August 28, 2018, Rafiel Foreman ("Defendant") was convicted by a Pitt County jury of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), and felonious breaking and entering. On appeal, Defendant contends he received ineffective assistance of counsel when his trial counsel conceded Defendant's guilt to assault with a deadly weapon inflicting serious injury ("AWDWISI") without his knowing and voluntary consent. Defendant also argues the trial court erred when it failed to inquire into whether Defendant's *Harbison* acknowledgment was knowing and voluntary. Defendant also filed a motion for appropriate relief with this Court pursuant to N.C. Gen. Stat.§ 15A-1418. We find no error, and deny Defendant's motion for appropriate relief.

Factual and Procedural Background

Defendant and Dawn Rook ("Dawn") dated for approximately ten years, from 2007 until December 2017. Throughout the course of their relationship, Defendant never met Dawn's father, Bennet Rook ("Mr. Rook"). Mr. Rook was unaware that his daughter had been dating anyone. In December 2017, Dawn ended the relationship because Defendant was becoming "verbally mean."

On February 13, 2018, Dawn woke to several messages and missed calls from Defendant. Since Dawn had blocked Defendant's phone number, he messaged her over Facebook Messenger. The messages from Defendant included the following statements: "You better get a restraining order because this just got worse. I hope you know you pushed me to do this;" "I hope you know I'm going to physically hurt her, then I'm coming for you. I swear on my life today;" and "[I]t's over for everyone today. I'm glad I'm doing what I'm doing . . . I'm out of my mind, and you just gave me reasons to hurt people. I'm about to walk up to your house right now and talk with your father and hope to start a fistfight." Defendant then sent a photograph of the Rooks' home to Dawn, stating "I'm at your [expletive deleted] house, Dawn. Answer my call or I'm walking up there, I swear."

Dawn and her mother had already left for work by the time Defendant arrived at the Rooks' home. Mr. Rook, who was in his late 60s, was home alone. Around 10:00 a.m., Mr. Rook saw Defendant carrying a package up the sidewalk. Mr. Rook did not recognize Defendant but assumed he was a delivery person. Thinking that his wife or his daughter had ordered something, Mr. Rook met Defendant at the front door. When Mr. Rook opened the door, Defendant asked, "Are you Benny Rook?" Defendant then stabbed Mr. Rook and forced his way inside the home.

Once inside, Defendant hit Mr. Rook with two side-tables, a large glass cake dome, and a wine bottle.

Defendant left the residence. He then called Dawn and told her what he had done. Meanwhile, Mr. Rook grabbed his gun, locked the door, and called his wife for help. Officers found broken glass and blood in the Rooks' home. They also observed stab marks in the linoleum floor and recovered a bent knife. Defendant also left the package with his name and address on the delivery label.

By the time Mr. Rook arrived at the hospital, he had lost approximately 20% of his blood and had sustained "life-threatening" injuries. Mr. Rook had several lacerations to his head and face and an injury to his left forearm where Defendant struck him with a table. While in surgery for his injuries, Mr. Rook suffered from an aspiration event which required the operating team to conduct a bronchoscopy. Mr. Rook spent several days in the hospital recovering.

Defendant was tried in August 2018. Prior to opening statements, Defendant's counsel introduced a "*Harbison* Acknowledgment." This sworn document was signed by Defendant and his trial counsel, and it stated that:

> Pursuant to *State v. Harbison*, 315 N.C. 175 (1985), I, Rafiel Foreman, hereby give my informed consent to my lawyer(s) to tell the jury at my trial that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury. I understand that:
>
> 1. I have a right to plead not guilty and have a jury trial on all of the issues in my case.
>
> 2. I can concede my guilt on some offenses or some lesser offense than what I am charged with if I desire to for whatever reason.
>
> 3. My lawyer has explained to me, and I understand that I do not have to concede my guilt on any charge or lesser offense.
>
> 4. My decision to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury is made freely, voluntarily and understandingly by me after being fully appraised of the consequences of such admission.
>
> 5. I specifically authorize my attorney to admit that I am guilty of Assault with a Deadly Weapon Inflicting Serious Injury.

The following colloquy then occurred between the trial court and Defendant regarding the *Harbison* Acknowledgement:

> THE COURT: Mr. Foreman, I'm reading a paper that your attorney handed me. Did he discuss with you his intention to admit and concede that you are guilty of assault with a deadly weapon inflicting serious injury?
>
> [DEFENDANT]: Yes, Your Honor, he did.
>
> THE COURT: Do you understand that you have the right to plead not guilty and be tried by a jury on all issues?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: You understand that if you concede your guilt in this case, that the jury could in fact find you guilty of that offense?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: And you understand that you do not have to concede your guilt on that point?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: And is the decision to admit your guilt to assault with a deadly weapon inflicting serious injury made freely, voluntarily, and understandingly?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: Do you understand the ramifications of that and the consequences of such admission?
>
> [DEFENDANT]: Yes, Your Honor.
>
> THE COURT: And do you specifically authorize your attorney to admit that you're guilty of assault with a deadly weapon inflicting serious injury?
>
> [DEFENDANT]: Yes, Your Honor.

The trial court then found:

> that the Defendant . . ., under *State v. Harbison*, has been advised of his attorney's intention to admit his guilt to assault with a deadly weapon inflicting serious injury; [t]hat the Defendant has consented to that strategy; [t]hat consent was given freely and voluntarily after

> being advised of his rights; [a]nd that he knowingly, voluntarily, freely, and understandingly has acknowledged and has consented to that strategy on behalf of his counsel.

During opening statements, defense counsel conceded that Defendant was guilty of AWDWISI pursuant to the *Harbison* Acknowledgment. Counsel then argued the evidence would fail to show Defendant intended to kill Mr. Rook. At the close of the State's evidence, Defendant moved to dismiss the charges of AWDWIKISI and attempted murder. Defendant's motion was denied. The defense presented no evidence at trial.

Defense counsel also conceded Defendant's guilt to AWDWISI during closing arguments and argued that Defendant did not intend to kill Mr. Rook. The jury found Defendant guilty of AWDWIKISI, attempted first-degree murder, and felonious breaking and entering.

Defendant timely appeals, alleging he was denied effective assistance of counsel because his concession of guilt to AWDWISI was not knowing or voluntary and that he was not informed his admission of guilt would then support a conviction for attempted first-degree murder. Defendant also alleges the trial court failed to conduct an adequate *Harbison* inquiry to determine if he understood the consequences of his admission of guilt. We disagree.

Standard of Review

"On appeal, this Court reviews whether a defendant was denied effective assistance of counsel de novo." *State v. Wilson*, 236 N.C. App. 472, 475, 762 S.E.2d 894, 896 (2014). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

Analysis

[1] Ordinarily, to prevail on a claim of ineffective assistance of counsel, the defendant "must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our Supreme Court has held that *per se* ineffective assistance of counsel exists "in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985). "*Harbison* applies when defense counsel concedes defendant's guilt to either the charged offense or a lesser included offense." *State v. Alvarez*, 168 N.C. App. 487, 501,

608 S.E.2d 371, 380 (2005). However, *Harbison* does not apply where defense counsel has conceded an element of a crime charged, while still maintaining the Defendant's innocence. *Wilson*, 236 N.C. App. at 477, 762 S.E.2d at 897.

Defendant argues that his trial counsel's concession of guilt to AWDWISI "effectively admitted to the far more serious charge of attempted first-degree murder."

"For an offense to be a lesser-included offense, all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *State v. Rainey*, 154 N.C. App. 282, 285, 574 S.E.2d 25, 27 (2002) (citation and quotation marks omitted). "The essential elements of assault with a deadly weapon inflicting serious injury are: (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 306 (2003) (citations and quotation marks omitted). The essential elements of attempted first-degree murder are (1) a specific intent to kill another person unlawfully; (2) "an overt act calculated to carry out that intent, going beyond mere preparation;" (3) the existence of malice, premeditation and deliberation accompanying the act; and (4) a failure to complete the intended killing. *State v. Cozart*, 131 N.C. App. 199, 202-03, 505 S.E.2d 906, 909 (1998).

AWDWISI is not a lesser-included offense of attempted first-degree murder. *See Rainey*, 154 N.C. App. at 285, 574 S.E.2d at 27 ("Assault with a deadly weapon requires the State to prove the existence of a deadly weapon; however, attempted murder does not require a deadly weapon. Accordingly, assault with a deadly weapon inflicting serious injury is not a lesser-included offense of attempted first-degree murder."). AWDWISI requires proof of an element not required for attempted first-degree murder: the use of a deadly weapon. *Cozart*, 131 N.C. App. at 204, 505 S.E.2d at 910. In addition, attempted first-degree murder requires proof of elements not required for AWDWISI: an intent to kill, and premeditation and deliberation. Although defense counsel conceded guilt to AWDWISI, the State, in this case, still had to prove the elements of intent to kill, and malice, premeditation and deliberation. Because the State had to prove additional elements for attempted first-degree murder, AWDWISI is not a lesser-included offense and Defendant's concession of guilt to that offense does not support a conviction for attempted first-degree murder.

Furthermore, Defendant's consent to his concession of guilt for AWDWISI was knowing and voluntary. Defendant confirmed that he understood the ramifications of conceding guilt to AWDWISI and that

he had the right to plead not guilty. Defendant's counsel filed the *Harbison* Acknowledgment in which Defendant expressly gave his trial counsel permission to concede guilt to AWDWISI after "being fully appraised of the consequences of such admission." In this case, the facts show that Defendant knew his counsel was going to concede guilt to AWDWISI, and the trial court properly ensured that Defendant was aware of the ramifications of such a concession. In addition, at no point at trial did defense counsel concede guilt to attempted murder. Defendant's argument that his concession to AWDWISI was a concession of guilt for attempted murder is meritless. Therefore, we conclude that Defendant was not denied effective assistance of counsel in violation of *Harbison*. *See State v. Matthews*, 358 N.C. 102, 109, 591 S.E.2d 535, 540 (2004).

[2] Defendant next argues that the trial court failed to conduct an adequate *Harbison* inquiry to determine if he understood the consequences of conceding guilt to AWDWISI because the court "focused solely on the implications of being convicted of the lesser assault," not the "*de facto* admission of the elements of attempted first-degree murder." We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Hamilton*, ___ N.C. App. ___, ___, 822 S.E.2d 548, 552 (2018), *rev. dismissed*, ___ N.C. ___, 830 S.E.2d 822 (2019), and *rev. denied*, ___ N.C. ___, 830 S.E.2d 824 (2019).

"[T]he trial court must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Maready*, 205 N.C. App. 1, 7, 695 S.E.2d 771, 776 (2010). "The facts must show, at a minimum, that defendant *knew* his counsel [was] going to make such a concession." *Matthews*, 358 N.C. at 109, 591 S.E.2d at 540 (emphasis in original).

In *State v. Johnson*, the defendant argued on appeal that the trial court failed to conduct an adequate *Harbison* inquiry as to whether he knowingly and voluntarily consented to conceding guilt. 161 N.C. App. 68, 76, 587 S.E.2d 445, 451 (2003). At trial, the court directly asked the defendant the following:

> THE COURT: [Y]ou have heard what [defense counsel] just said. Have ya'll previously discussed that before he made his opening statements?
>
> THE DEFENDANT: Yes, sir, we did.

> THE COURT: And did he have your permission and authority to make that opening statement to the jury?
>
> THE DEFENDANT: Yes, sir, he did.
>
> THE COURT: You consent to that now?
>
> THE DEFENDANT: Yes, sir.

Id. at 77, 587 S.E.2d at 451 (ellipses omitted). This Court found that the trial court's inquiry was sufficient "to establish that defendant had previously consented to his counsel's concession that he was present and had" committed the crime for which he was conceding guilt. *Id.* at 77-78, 587 S.E.2d at 451.

In the present case, Defendant's concession of guilt to AWDWISI was not a concession of guilt to attempted first-degree murder because, as stated earlier, the State still had to prove the elements of intent to kill and premeditation and deliberation. Moreover, Defendant understood the implications of admitting guilt to AWDWISI as shown by his colloquy with the trial court. The trial court questioned Defendant to determine whether he gave his defense counsel permission to admit guilt. The record demonstrates that Defendant fully understood that trial counsel was going to concede guilt to AWDWISI, and the Defendant expressly consented to the concession. Further, Defendant specifically acknowledged that he understood the consequences of the concession. In addition, the trial court also inquired as to whether Defendant met with defense counsel about the admission of guilt, and whether Defendant understood he could plead not guilty to all issues. Thus, the trial court did not err.

Finally, Defendant filed a motion for appropriate relief with this Court pursuant to N.C. Gen. Stat. § 15A-1418. A defendant's motion for appropriate relief may be determined by this Court if there is sufficient information in the record. N.C. Gen. Stat. § 15A-1418 (2019). "A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief." N.C. Gen. Stat. § 15A-1420(c)(6) (2019). Because the trial court conducted an appropriate *Harbison* inquiry, as set forth above, Defendant cannot show that his "conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(3) (2019). Because Defendant cannot show the existence of the asserted ground for relief, i.e., a *Harbison* violation, Defendant's motion for appropriate relief is denied.

Conclusion

For the foregoing reasons, we hold Defendant's consent was knowing and voluntary as he was aware of the consequences and ramifications of such an admission. As Defendant's consent to his attorney's concession of guilt was knowing and voluntary, he was not denied effective assistance of counsel in violation of *Harbison*. Defendant's motion for appropriate relief is denied.

AFFIRMED IN PART, DENIED IN PART.

Judges DIETZ and BROOK concur.

STATE OF NORTH CAROLINA
v.
JOSHUA KOIYAN, DEFENDANT

No. COA19-951

Filed 7 April 2020

Evidence—expert testimony—reliability—Rule 702—latent fingerprint analysis—plain error analysis

At a trial for robbery with a dangerous weapon, the trial court erred by admitting an expert's opinion that defendant's fingerprints matched latent prints found at the crime scene, where the expert described his general method of analyzing fingerprints without explaining how he reliably applied that method to the facts of this case, and therefore his testimony fell short of the three-pronged reliability test under Evidence Rule 702. However, the trial court's error did not amount to plain error where the State presented other overwhelming evidence of defendant's guilt, and therefore defendant could not show that the improper testimony prejudiced him.

Appeal by Defendant from judgment entered 3 May 2019 by Judge Donnie Hoover in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Tien Cheng, for State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Katz, for Defendant-Appellant.

COLLINS, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty of robbery with a dangerous weapon. Defendant argues that the trial court plainly erred by admitting expert testimony because the testimony did not demonstrate that the expert applied accepted methods and procedures reliably to the facts of the case. We discern no plain error.

I. Background

On 24 October 2016, a grand jury indicted Defendant Joshua Koiyan for robbery with a dangerous weapon, in violation of N.C. Gen. Stat. § 14-87. On 29 April 2019, Defendant's case came on for trial. The evidence at trial tended to show: On 12 October 2016, two employees were working at a Boost Mobile store in Charlotte, North Carolina. The employees were Ana Torres and Guadalupe Morin, both of whom worked the floor of the store as sales representatives. That afternoon, both observed a young man—later identified as Defendant—enter the Boost Mobile store; Defendant wandered the store for approximately 45 minutes and repeatedly asked the employees whether the store sold iPhones. Torres noticed that Defendant seemed nervous and she became suspicious that something was going to happen; in light of her suspicion, Torres took all of the money out of her cash register except for the dollar bills and hid the money. Torres also took pictures of Defendant with her personal cell phone while he spoke with Morin.

Approximately 45 minutes after Defendant entered the store, and after all other customers had exited, Defendant pulled out a silver gun and jumped over the counter. Defendant ordered Morin to open the cash registers, and then told both women to go to the corner while he put the money into a plastic bag. Defendant then took Torres' purse, which contained two of her cell phones, her passport, her jewelry, and her wallet, along with several display phones. Defendant told the women, "I'm not going to hurt you all today because you all are being good," jumped back over the counter, and ran out of the store. Torres followed Defendant out of the store but lost sight of him, and then called 911.

Charlotte Mecklenburg Police Officers Kelly Zagar and David Batson arrived at the store within four to five minutes. Torres provided them with a description of Defendant, explaining that he was: a black male; approximately 5'7" tall; skinny build; wore a black visor, black hoody, and jeans; and looked to be about 20 years old. Zagar secured the crime scene for evidence and called the Charlotte Mecklenburg Crime Scene Search. Keywana Darden, an investigator with the Crime Scene Search

team, collected, documented, and preserved all of the evidence found at the store. The evidence included surveillance footage taken from cameras located inside the Boost Mobile store and photographs of the scene. Darden also dusted areas throughout the store and obtained latent fingerprints from the scene. Torres also gave the officers the photographs she took of Defendant while he was in the store. Those photographs were later obtained by the news media and broadcasted to the public.

On 14 October 2016, two days after the robbery, Defendant was apprehended and arrested by the Charlotte Mecklenburg police. Torres independently viewed Defendant's mugshot online but did not participate in a photographic or in-person lineup.

During the trial, Torres testified for the State and identified Defendant as being the individual who committed the armed robbery of the Boost Mobile store. Prior to trial, Defendant filed a motion to suppress Torres' in-court identification, arguing that Torres could not make an identification of him until just one week before trial. Defendant argued that Torres admitted to viewing his mugshot prior to the trial and thus could not independently identify him as the perpetrator. The trial court denied Defendant's motion to suppress, and Torres identified Defendant at trial in the presence of the jury.

Todd Roberts, a latent fingerprint examiner with the State of North Carolina, testified as an expert witness at trial. Roberts testified to his education, training in the field of latent fingerprint analysis, and his conclusion that the latent fingerprints found at the Boost Mobile store were a match to Defendant's fingerprints.

On 3 May 2019, the jury found Defendant guilty of robbery with a firearm. The trial court sentenced Defendant to 45-66 months' imprisonment. Following judgment, Defendant gave oral notice of appeal.

II. Discussion

Defendant's sole argument on appeal is that the trial court plainly erred by admitting Roberts' expert opinion that Defendant's fingerprints matched the latent fingerprints left at the Boost Mobile store because Roberts' testimony did not demonstrate that he applied accepted methods and procedures reliably to the facts of this case.

Defendant acknowledges his failure to object to Roberts' testimony at trial but specifically argues plain error on appeal. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). In order to show fundamental error,

a defendant must establish prejudice—that the error "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quotation marks and citation omitted). Accordingly, we review whether the trial court erred in admitting Roberts' testimony for plain error.

It is the trial court's role to decide preliminary questions concerning the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2019). Rule 702 of the North Carolina Rules of Evidence governs testimony by experts. Pertinent to Defendant's argument, Rule 702 provides as follows:

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

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). Prongs (a)(1), (2), and (3) together constitute the reliability inquiry discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *State v. McGrady*, 368 N.C. 880, 890, 787 S.E.2d 1, 9 (2016). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate[.]" *Id.* (internal quotation marks and internal citations omitted). However, "conclusions and methodology are not entirely distinct from one another[;]" thus, when the "analytical gap between the data and the opinion proffered" is too great, the trial court is not required to admit the expert opinion evidence "that is connected to existing data only by the *ipse dixit* of the expert." *Id.* (internal quotation marks and citation omitted).

In *State v. McPhaul*, 256 N.C. App. 303, 314, 808 S.E.2d 294, 304 (2017), this Court recently examined expert testimony regarding latent fingerprint analysis under the three-prong reliability test set forth in

McGrady. In *McPhaul*, the State's expert witness testified that she had worked as a print examiner for more than nearly a decade; explained that each fingerprint contains distinguishing characteristics called "minutia"; and testified that it was possible to identify the source of a latent print by comparing the print to an individual's "known impressions" and evaluating the "minutia points." *Id*. She further explained that she uses an optic camera to compare the minutia points and examine the print pattern type, and she stated that the procedures she followed were commonly used in the field of fingerprint identification. *Id*. at 315, 808 S.E.2d at 304.

However, when the expert testified to her ultimate conclusions, the expert was "unable to establish that she reliably applied the procedure to the facts of this case[.]" *Id*. The expert concluded that the latent print matched the defendant's fingerprints, and stated that she based that conclusion on her "training and experience." *Id*. The State asked the expert whether her other conclusions were based upon "the same procedure" she described to the jury, and the expert stated that was correct. *Id*. at 316, 808 S.E.2d at 305. This Court determined that the expert's testimony was insufficient and failed to satisfy Rule 702's three-pronged reliability test because the testimony failed to show that the expert "reliably applied that methodology to the facts of the case" and failed to explain "how she arrived at her actual conclusions *in this case*." *Id*. As the expert's testimony "implicitly asked the jury to accept her expert opinion that the prints matched[,]" this Court determined the testimony insufficient and held that the trial court erred by admitting the testimony. *Id*.

We determine that the testimony here is similar to the testimony in *McPhaul* and hold that Roberts' testimony failed to demonstrate how he arrived at his conclusion that Defendant's fingerprints matched the fingerprints left at the Boost Mobile store. On direct examination, Roberts first explained that he was a latent fingerprint examiner, had worked in the field for more than 14 years, and that his primary responsibilities were to "evaluate, compare, and attempt to identify latent [fingerprint] lifts collected by a crime scene investigator . . . to its individual[.]" Roberts has degrees in "correctional and juvenile services and criminal justice," two years of in-house training with the State Crime Lab, and has been trained in "logical latent analysis, advanced palm print comparison techniques, forensic ridgeology, and fingerprint comparisons." At the time of trial in this case, Roberts had testified as an expert witness in latent fingerprint identification more than 75 times in state and federal courts and estimated that he had identified and analyzed "tens of thousands" of fingerprints.

Roberts explained that he examines fingerprints by looking for three levels of detail, with "level 1 being the basic just ridge flow. The level 2 detail is what we use for identification, that is, consists of ending ridges and bifurcations and their spatial relationship to each other. And then the level 3 [] detail is more on the microscopic level, but it's actually the structure of the ridge. It's the pores located within the ridge[.]" Roberts explained that he takes the latent fingerprints, puts it beside an inked fingerprint, magnifies the prints, and examines the likenesses or dissimilarities. Roberts testified that an example of "level 1 detail . . . is a right loop, meaning that the ridge is just coming from the right side of the finger. They loop around the core and then back out the right side." "[L]evel 2 detail . . . , they're located within the print . . . . The ending ridges and the bifurcations is what makes that print unique. There are places that you can see a bifurcation come over to another bifurcation, creating an enclosure." "The level 3 detail . . . includes the pores within the print. . . . [T]hose holes that are in the ridge are pores, they're actually in the top of ridge, and that's what secretes sweat, allows the fingerprint to print. That is the level 3 detail." This testimony sufficiently explained Roberts' qualifications, training, and expertise, and showed that Roberts uses reliable principles and methods.

However, Roberts testified to his conclusions later on direct examination:

> [State]: The latent-print cards that were in State's Exhibit 6, did you compare those to [Defendant's prints] that were State's Exhibit 11?
>
> [Roberts]: Yes, ma'am.
>
> [State]: Did any of those latent prints match [Defendant's] prints?
>
> [Roberts]: They did.
>
> [State]: Which ones?
>
> [Roberts]: 2-4-2, 2-4-3, 2-4-4, and then 2-11-1. All were identified to [Defendant].

Pursuant to Rule 702, this testimony is insufficient as it fails to show that Roberts applied accepted methods and procedures reliably to the facts of this case in order to reach his conclusion that the fingerprints were a match. While Roberts testified earlier that he generally examines prints for "three levels of detail" and looks for "ridges and bifurcations and their spatial relationship" on each print, Roberts failed to provide

any such detail when testifying as to *how* he arrived at his conclusions *in this case*. Moreover, he never explained what—if any—characteristics from the latent fingerprints matched with Defendant's fingerprints. Instead, when asked whether any of the prints matched, Roberts merely stated that they did and provided no further explanation for his conclusions. Like in *McPhaul*, Roberts' testimony had the impermissible effect of "implicitly ask[ing] the jury to accept [his] expert opinion that the prints matched." *McPhaul*, 256 N.C. App at 316, 808 S.E.2d at 305. As Roberts failed to demonstrate that he "applied the principles and methods reliably to the facts of the case," as required by Rule 702(a)(3), we determine that the trial court erred by admitting the testimony.

However, under plain error review, we do not conclude that the trial court plainly erred by admitting the testimony. Defendant cannot show that he was prejudiced as a result of this error because of the otherwise overwhelming evidence that he was the perpetrator of the robbery.

Torres provided two photographs of Defendant, which she took with her cell phone while Defendant was in the Boost Mobile store, and the State entered the photographs into evidence and published them to the jury. Torres also provided testimony that Defendant was the individual who robbed her and the Boost Mobile store. The State entered into evidence the surveillance video footage taken from the store, played the video for the jury, and Torres identified Defendant when he appeared on screen. Torres further identified Defendant by pointing him out in the courtroom as the perpetrator of the robbery, and stated that she was "a hundred percent" certain that Defendant was the person who robbed her. Torres noted that she spent nearly 45 minutes with Defendant while he robbed the Boost Mobile store, and that she would not "forget his face."

Altogether, Torres' testimony and in-court identification of Defendant, along with the photographs of Defendant and surveillance video footage showing Defendant rob the Boost Mobile store, provided sufficient evidence that Defendant was the perpetrator of the robbery. In light of this overwhelming evidence, we are not persuaded by Defendant's argument that the trial court's error was so great as to have had "a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citation omitted). As such, we conclude that the trial court's admission of Roberts' expert testimony was not plain error.

NO PLAIN ERROR.

Judges DILLON and BROOK concur.

STATE v. SHULER

[270 N.C. App. 799 (2020)]

STATE OF NORTH CAROLINA
v.
SHANNA CHEYENNE SHULER

No. COA19-967

Filed 7 April 2020

Constitutional Law—right against self-incrimination—evidence of post-arrest, pre-Miranda silence—prior notice of affirmative defense of duress

In a prosecution for drug trafficking and possession, where defendant filed pretrial notice of her intent to assert duress as an affirmative defense (claiming that a friend threatened to harm her if she refused to hide drugs on her person) and where the trial court informed prospective jurors of defendant's affirmative defense before empaneling the jury, the trial court did not violate defendant's constitutional right against self-incrimination by admitting testimony during the State's case in chief highlighting defendant's post-arrest, pre-*Miranda* warnings silence to police regarding the alleged duress. This testimony constituted valid impeachment evidence because—where police had already arrested and removed the friend from the scene—it would have been natural for defendant to have told police about the threat at that time.

Appeal by defendant from judgment entered 31 October 2018 by Judge William H. Coward in Haywood County Superior Court. Heard in the Court of Appeals 17 March 2020.

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

W. Michael Spivey for defendant-appellant.

TYSON, Judge.

Shanna Cheyenne Shuler ("Defendant") appeals from judgment entered upon the jury's verdicts finding her guilty of trafficking in methamphetamine and simple possession of marijuana. We find no error.

I. Background

A. State's Evidence

Maggie Valley Chief of Police Russell Gilliland and Detective Brennan Regner responded to a disturbance call at a motel involving the occupants of a silver Ford Fusion automobile on 2 March 2017. Detective Regner observed the vehicle at a nearby residence, with a man standing outside the vehicle. Both officers approached the man, who identified himself as Joshua Warren and presented a South Carolina driver's license. The officers determined outstanding warrants were pending for Warren's arrest. Warren was arrested, searched, and taken from the scene. The officers found $1,700.00 in cash on Warren when he was searched.

The officers approached Defendant, who had been sitting in the vehicle, and asked her for identification. Defendant produced a valid identification card. The officers learned an arrest warrant was also pending for Defendant. Chief Gilliland informed Defendant of the arrest warrant and asked if she had any contraband on her. Defendant appeared hesitant, then removed a clear bag containing a leafy substance from inside of her bra. Chief Gilliland specifically referenced methamphetamine and asked Defendant again if she had anything else on her person.

Detective Regner explained to Defendant that she could face additional charges if she arrived at the detention facility with other contraband on her. Defendant produced another clear bag, also from inside of her bra, containing a crystal-like substance. The officers seized the evidence and the vehicle, and took Defendant into custody.

The next day, officers searched the vehicle. A digital scale, rolling papers, and a clutch bag with Defendant's name on it were found in the center console. Defendant was charged with felony trafficking in methamphetamine and with misdemeanor possession of marijuana. Prior to trial, Defendant timely filed her notice of intent to offer the defense of duress pursuant to N.C. Gen. Stat. § 15A-905(c)(1).

Detective Regner testified for the State. The State asked her if Defendant had made "any statements about Joshua Warren when she took those substances out of her bra?" Defendant's counsel objected, citing the right to counsel under the Fifth Amendment to the Constitution of the United States. The trial court overruled the objection. Detective Regner answered: "No, ma'am. She made no -- no comment during that one time."

Defendant's counsel moved for the court to excuse the jury. Outside the presence of the jury, Defendant's counsel moved for a mistrial

over the State's question, which had "solicited an answer highlighting [Defendant's] silence at the scene." The trial court acknowledged Defendant's prior objection and conducted a *voir dire* of Detective Regner's testimony to address whether Defendant was under arrest at the time of her alleged silence.

Detective Regner testified during the *voir dire* that Defendant was not in custody when she was approached and asked if she possessed any illegal substances on her. On cross-examination during the *voir dire*, Detective Regner testified she and Chief Gilliland approached Defendant once they had learned of her pending arrest warrant and asked her: "You're under arrest, do you have anything on you?"

The trial court allowed the State to re-ask the question when the jury returned over Defendant's objection.

B. Defendant's Testimony

Defendant testified in her own defense. She admitted she was addicted to methamphetamine. Defendant had known Warren's family. Warren had befriended her on social media on 28 February 2019. She testified Warren asked her if she wanted to accompany him as he rented a car on 2 March 2019. Defendant explained Warren was "known to police" and "just wanted to be in a different car so he could go and do whatever." She testified she agreed to go with Warren because she had been using methamphetamine, had been awake for eight days, and was bored.

Defendant testified Warren drove to a motel in Maggie Valley to meet the person who would rent him another car. She testified the motel owner "had some words" and was cursing with Warren when he stepped out of the car there. Warren and Defendant left the motel. Defendant testified Warren then saw a truck with the people he had intended to meet. Warren told them to meet him at a store across the street from the motel.

Warren drove to the store and met with the people in the truck. Defendant testified she saw Warren pull "a small baggie" out of his pants and hand it into the passenger side window of the truck. She then saw someone from the truck hand money to Warren. She was sitting in the passenger seat of Warren's car at the store when they first saw the police arrive at the motel.

She testified Warren drove away from the store. Warren pulled the car into the driveway of a house she did not know and exited the car. She presumed Warren went to knock on the door of the house, while she remained in the passenger seat. She testified Warren was returning to

the car when the police officers arrived. The officers spoke with Warren and left.

After the officers left, Warren told her he thought he had an active warrant for his arrest "for tying my girlfriend to a tree." She testified Warren then saw the officers returning and cursed. He pulled a bag out of his pants and tossed it into Defendant's lap. She testified Warren stated, "if you don't hide it then you'll be the next one chained to a tree."

Defendant testified she took Warren's threat seriously and put the bag he had given to her into her bra. Defendant did not testify concerning her silence about Warren's threat in response to the officers' questions to her.

Defendant also called Warren as a witness in her defense. Warren plead his Fifth Amendment rights rather than answering most questions Defendant's counsel asked. Warren denied he had ever tied his girlfriend to a tree or had threatened Defendant.

The trial court instructed the jury on the defense of duress. The jury's verdict found Defendant guilty of both charges. The trial court consolidated the charges and sentenced Defendant to an active term of 70 to 93 months in prison and ordered $57,533.00 in fees, fines, and costs entered as a civil judgment. Defendant entered notice of appeal in open court.

II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

III. Issue

Defendant argues the trial court erred by admitting into evidence testimony of her silence in response to questions by the police officers. She asserts this admission violates her privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States.

IV. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Veney*, 259 N.C. App. 915, 917, 817 S.E.2d 114, 116 (citation omitted), *disc. review denied*, 371 N.C. 787, 821 S.E.2d 169 (2018). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

V. Analysis

Defendant argues the trial court erred in allowing the State to elicit evidence of her silence, specifically her failure to implicate Warren, after he had been removed from the scene, when asked by police if she had any contraband on her.

> [A] criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution. A defendant's decision to remain silent following [her] arrest may not be used to infer [her] guilt, and any comment by the prosecutor on the defendant's exercise of [her] right to silence is unconstitutional.

State v. Ward, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001) (citations omitted).

This Court has held "a defendant's pre-arrest silence and post-arrest, pre-*Miranda* warnings silence may not be used as substantive evidence of guilt, but may be used by the State to impeach the defendant by suggesting the defendant's prior silence is inconsistent with [her] present statements at trial." *State v. Booker*, __ N.C. App. __, __, 821 S.E.2d 877, 885 (2018) (citation omitted). "Whether the State may use a defendant's silence at trial depends on the circumstances of the defendant's silence and the purpose for which the State intends to use such silence." *State v. Boston*, 191 N.C. App. 637, 648, 663 S.E.2d 886, 894, *disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008).

A. Silence of Duress

Defendant argues the State elicited her silence during its case in chief, by anticipating and preemptively attacking her defense of duress. Defendant argues this testimony was impermissibly admitted as substantive evidence, rather than permissible impeachment evidence, because she had not yet testified.

The "main purpose of impeachment is to discount the credibility of a witness for the purpose of inducing the jury to give less weight to [her] testimony." *State v. Mendoza*, 206 N.C. App. 391, 397, 698 S.E.2d 170, 175 (2010) (citation omitted). This Court has held the State may not preemptively "point[] out to the jury that [a] defendant chose to remain silent when in [a police officer's] presence rather than provide the explanation proffered at trial." *Id.* at 398, 698 S.E.2d at 176.

In *Mendoza*, the State elicited testimony that the defendant did not act surprised when the arresting officer found cocaine in his car, nor did he offer any explanation as he was being arrested. *Id.* at 396-97, 698 S.E.2d at 174-75. This Court held admission of that testimony as substantive evidence was error. *Id.* at 397, 698 S.E.2d at 175. Further, in *Mendoza*, this Court considered and rejected the State's argument that it may preemptively impeach the defendant before he testified. *Id.*

B. Affirmative Defense

Unlike in *Mendoza*, Defendant in this case filed written notice of her intent to present an affirmative defense of duress. To invoke the affirmative defense of duress, the burden is on Defendant to show her "actions were caused by a reasonable fear that [s]he would suffer immediate death or serious bodily injury if [s]he did not so act." *State v. Cheek*, 351 N.C. 48, 62, 520 S.E.2d 545, 553 (1999) (citation omitted), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000).

The State argues Defendant's intended invocation of the affirmative defense of duress distinguishes this case from *Mendoza* and aligns this case with other cases allowing impeachment by silence. When the State seeks to impeach a defendant through silence, "[t]he test is whether, under the circumstances at the time of arrest, it would have been natural for defendant to have asserted the same defense asserted at trial." *State v. McGinnis*, 70 N.C. App. 421, 424, 320 S.E.2d 297, 300 (1984) (citing *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980)).

In *McGinnis*, this Court found no error in the admission of the defendant's post-arrest pre-*Miranda* warnings silence, concluding: "it would clearly have been natural for [the] defendant to have told the arresting police officer that the shooting with which [he] was accused was accidental, if [he] believed that to be the case." *Id.* Here, it would have been similarly "natural for" Defendant to have told the arresting officers the contraband she possessed belonged to Warren and he had threatened her to conceal it, if she "believed that to be the case." *Id.*

Warren had been arrested and removed from the scene before the officers asked Defendant if she possessed any contraband on her. The threat Warren assertedly posed to Defendant was greatly mitigated, if not completely eliminated, by his arrest and removal.

The only difference between this case and *McGinnis* is that the State elicited evidence of Defendant's silence asserting Warren's threat in its case in chief. Defendant had appropriately notified the State of her intended defense, pursuant to N.C. Gen. Stat. § 15A-905(c)(1) (2019).

The trial court had informed the prospective jurors of Defendant's affirmative defense of duress prior to the jury being empaneled.

Because the affirmative defense of duress was asserted before Defendant testified, the exclusion of Detective Regner's answer is not governed by *Mendoza*. We find no error in the admission of Detective Regner's testimony of Defendant's silence to challenge her affirmative defense of duress from Warren's threats and her asserted possession of contraband under duress, after his arrest and removal.

VI. Conclusion

The trial court properly overruled Defendant's objection and admitted Detective Regner's testimony of Defendant's silence of Warren's alleged threat. Defendant received a fair trial, free from prejudicial errors she preserved and argued.

We find no error in the jury's verdicts or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges BRYANT and ARROWOOD concur.

UNIFUND CCR PARTNERS, PLAINTIFF
v.
KRYSTAL G. LOGGINS, DEFENDANT

No. COA19-957

Filed 7 April 2020

Civil Procedure—action to renew judgment—entered as default judgment—action for sum certain

The trial court properly granted summary judgment to plaintiff in its action to renew a default judgment from a prior lawsuit in which plaintiff, the holder in due course of a credit card agreement between defendant and his bank, sought to recover defendant's unpaid credit card debt. Because plaintiff's complaint and affidavit in the prior lawsuit included specific allegations enabling the assistant clerk of court to determine the exact amount defendant owed, the prior lawsuit was "for a sum certain" in accordance with Civil Procedure Rule 55(b)(1), the clerk had jurisdiction to enter the

default judgment, and the judgment could be renewed because it was not void.

Appeal by Defendant from order entered 17 July 2019 by Judge Lee W. Gavin in Randolph County District Court. Heard in the Court of Appeals 18 March 2020.

Sessoms & Rogers, P.A., by Andrew E. Hoke, for Plaintiff-Appellee.

Law Office of Jonathan R. Miller, PLLC, d/b/a Salem Community Law Office, by Jonathan R. Miller, for Defendant-Appellant.

COLLINS, Judge.

Defendant Krystal G. Loggins appeals from order granting summary judgment to Plaintiff Unifund CCR Partners in its action to renew a judgment of record[1] against Defendant. Defendant argues that the judgment, entered by the assistant clerk of court as a default judgment, cannot be renewed because it was void where Plaintiff's claim was not for a sum certain. We affirm the trial court's order.

I. Factual and Procedural History

The facts are not in dispute. Defendant entered into a written credit agreement with Citibank (South Dakota), N.A., establishing a credit card account that was later sold to Plaintiff. On 2 February 2005, Defendant defaulted under the terms of the credit agreement by failing to make the required payments.

Plaintiff commenced a civil action against Defendant on 27 August 2007 by filing an unverified complaint in Randolph County District Court, alleging in relevant part:

> 6. Pursuant to the terms and provisions of the note or credit agreement, the defendant is lawfully indebted to the plaintiff in the principal sum of $4,776.88 together with interest thereon at the contract rate of 23.99% per annum. Said sum has been outstanding since February 2, 2005.
>
> 7. The written credit agreement between the parties contains provisions for the payment of attorneys fees

1. An independent action to collect on a prior judgement is often colloquially referred to as an action to "renew" a judgment. *See Raccoon Valley Inv. Co. v. Toler*, 32 N.C. App. 461, 462-64, 232 S.E.2d 717, 718 (1977).

> in the event of default. The balance outstanding is currently $7,703.04, comprised of the principal, together with interest to date of $2,926.16. Pursuant to the provisions of [N.C. Gen. Stat.] § 6-21.2, the plaintiff hereby gives notice to the defendant that it intends to enforce those provisions of the credit agreement calling for the payment of attorneys fees. . . .

N.C. Gen. Stat. § 6-21.2 allows for the recovery of reasonable attorneys' fees at a rate of 15% of the outstanding balance owed. Plaintiff attached a copy of the credit card agreement to the complaint. Plaintiff served the complaint and summons on Defendant on 28 August 2007.

After Defendant failed to file an answer or any other pleading or appear in court, Plaintiff filed a motion on 3 October 2007 for entry of default and default judgment, accompanied by an affidavit from Plaintiff's attorney and an affidavit of account from an authorized representative of Plaintiff, stating:

> [Affiant] has read the Complaint which was filed in this action, and the allegations contained therein are true and accurate of his/her own knowledge, except as to those matters and things therein stated upon information and belief, and as to those (s)he believes them to be true. The contents of said Complaint are incorporated herein by this reference, and are hereby verified to be true.
>
> The Defendant entered into a promissory note or written credit agreement with Citibank (South Dakota), N.A.[] The Plaintiff has purchased and is the holder in due course of the account referred to herein. A true and accurate copy of the terms of the promissory note or account agreement between the parties was attached to the Complaint filed herein. The Defendant is in default under the terms thereof for failure to make the required payments. As a result of the Defendant's default, [Plaintiff] has declared the entire outstanding balance due and payable.
>
> . . . . .
>
> [Defendant] is currently indebted to [Plaintiff] in the principal sum of $4,776.88, together with interest thereon at the rate of 23.99% per annum from and after February 2, 2005, the date of the [D]efendant's default, reasonable attorneys fees, and costs.

On 3 October 2007, the assistant clerk of superior court ordered entry of default and default judgment ("2007 default judgment"), pursuant to Rules 55(a) and 55(b) of the North Carolina Rules of Civil Procedure. The assistant clerk of superior court ("clerk") found that the action was "for a sum certain or a sum which can by computation be made certain," and ordered recovery for Plaintiff of the principal sum of $4,776.88 plus 23.99% interest calculated to the date of entry of the judgment; interest accrued at 8% after the date of entry of the judgment until paid; reasonable attorneys' fees in the amount of $1,155.46, an amount equal to 15% of $7,703.04, pursuant to N.C. Gen. Stat. § 6-21.2; and costs associated with the action.

On 15 September 2017, Plaintiff filed an unverified complaint in Randolph County District Court ("2017 action") seeking to renew the 2007 judgment. The complaint alleged that Plaintiff had obtained a judgment against Defendant on 3 October 2007 and that no payments had been received since entry of the judgment. Plaintiff attached the 2007 judgment and an affidavit to the complaint. Defendant filed an answer with counterclaims on or around 19 October 2017. On or around 28 November 2017, Plaintiff filed a motion to dismiss Defendant's counterclaims, which the trial court granted on 12 July 2018. Plaintiff filed a motion for summary judgment on 20 December 2018. On 17 July 2019, the trial court conducted a hearing and entered an order granting summary judgment to Plaintiff.

Defendant filed notice of appeal of the summary-judgment order on 15 August 2019.

II. Discussion

Defendant argues that the trial court erred by granting summary judgment to Plaintiff in the 2017 action, thereby allowing Plaintiff to renew the 2007 judgment. Defendant specifically argues that the clerk lacked jurisdiction to enter the 2007 default judgment because Plaintiff's claim was not for a sum certain and thus, the 2007 judgment was void ab initio.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). Likewise, an appeal of an order granting summary judgment is reviewed de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper if 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.* (internal quotation marks and citation omitted).

"A challenge to jurisdiction may be made at any time." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) (citation omitted). "A judgment is void, when there is a want of jurisdiction by the court . . . ." *Id.* (citation omitted). A void judgment "is a nullity [and] [i]t may be attacked collaterally at any time [because] legal rights do not flow from it." *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964) (citations omitted).

The owner of a judgment may obtain a new judgment to collect any unpaid amount due on a prior judgment by bringing "an independent action on the prior judgment, which . . . must be commenced and prosecuted as in the case of any other civil action brought to recover judgment on a debt." *Raccoon Valley*, 32 N.C. App. at 463, 232 S.E.2d at 718 (internal quotation marks and citation omitted). An independent action seeking to effectively renew a judgment must be brought within ten years of entry of the original judgment, and such renewal action can only be brought once. N.C. Gen. Stat. § 1-47(1) (2017). In an action to renew a judgment, a plaintiff should allege the existence of a prior judgment against the defendant; the fact that full payment on the judgment has not been made; and an accounting of the unpaid balance due and any applicable interest. *Raccoon Valley*, 32 N.C. App. at 463-64, 232 S.E.2d at 718-19.

Here, Defendant does not challenge the process by which the 2017 action to renew a judgment was brought, but instead argues that the underlying default judgment entered by the clerk in 2007 is void and thus cannot be renewed.

The clerk shall enter default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise[.]" N.C. Gen. Stat. § 1A-1, Rule 55(a) (2017). When a defendant fails to answer a complaint and default is entered, the substantive allegations raised by the complaint are deemed admitted for purposes of default judgment. *Bell v. Martin*, 299 N.C. 715, 721, 264 S.E.2d 101, 105 (1980).

After default has been entered against a defendant, judgment by default may be entered by the clerk "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain[.]" N.C. Gen. Stat. § 1A-1, Rule 55(b)(1) (2017).[2] The

2. For the clerk to enter default judgment, this rule also requires that "the defendant has been defaulted for failure to appear and [] the defendant is not an infant or incompetent person." *Id.* Neither of these requirements is at issue in this case.

amount due must appear in an affidavit. *Id.* A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to compute or determine the sum certain. *Id.* "Absent a certain dollar amount, the default judgment must be entered by a judge who may conduct a hearing to adequately determine damages." *Basnight Constr. Co. v. Peters & White Constr. Co.*, 169 N.C. App. 619, 622, 610 S.E.2d 469, 471 (2005) (citing N.C. Gen. Stat. § 1A-1, Rule 55(b)(2) (2003)). If the clerk lacked the authority to enter a default judgment because the claim was not for a sum certain, then the judgment is void as a matter of law. *Id.* at 624, 610 S.E.2d at 472.

In *Smith v. Barfield*, 77 N.C. App. 217, 334 S.E.2d 487 (1985), plaintiffs alleged in a verified complaint that defendants had agreed to move a house for $10,700, one half to be paid when the house was loaded for moving; that plaintiffs paid $5,350 under the agreement; and that defendants failed to move the house. These allegations constituted a "sum certain" under Rule 55(b)(1). *Id.* at 218, 334 S.E.2d at 488. Similarly, in *Thompson v. Dillingham*, 183 N.C. 566, 112 S.E. 321 (1922), plaintiff's verified complaint alleged that defendants owed plaintiff $2,000 on the purchase price of an automobile, which defendants had expressly promised to pay. These allegations constituted a "sum certain" sufficient to sustain the clerk's entry of default judgment. *Id.* at 567, 112 S.E. at 322.

In contrast, in *Hecht Realty, Inc. v. Hastings*, 45 N.C. App. 307, 262 S.E.2d 858 (1980), the allegations in plaintiff's complaint were not sufficient to state a claim "for a sum certain or a sum which can by computation be made certain" within Rule 55(b)(1). Plaintiff's complaint alleged a breach of contract by defendant, but nothing in the allegations of the complaint made it possible to compute the amount of damages to which plaintiff was entitled by reason of the breach. Exhibit A, a copy of the exclusive sales agreement, and Exhibit B, a copy of the sales contract, which presumably would have supported the amount of the demand, were not attached to either the original complaint filed with the clerk nor to the complaint sent to defendant. Although plaintiff demanded judgment in the prayer for relief "in the sum of Three Thousand Two Hundred Ten Dollars ($3,210.00), together with interest and the costs of this action[,]" this Court held that "[t]he mere demand for judgment of a specified dollar amount does not suffice to make plaintiff's claim one for 'a sum certain' as contemplated by Rule 55(b)." *Id.* at 309, 262 S.E.2d at 859. *See also Williams v. Moore*, 95 N.C. App. 601, 605, 383 S.E.2d 416, 418 (1989) (no sum certain when damages were mitigated by a sum based on plaintiff's estimate of fair rental value of some unspecified amount of land); *Basnight*, 169 N.C. App. at 624, 610 S.E.2d at 472 (no

sum certain where "the six sentence affidavit which the Clerk reviewed, and the only evidence of an exact amount, stated in one place that the amount owed was $ 55,779.49, and in another $ 51,779.49"); *Grant v. Cox*, 106 N.C. App. 122, 128, 415 S.E.2d 378, 382 (1992) (no sum certain where plaintiffs alleged they were damaged $25,000, the "fair market value" of the timber defendants cut; an affidavit from a consulting forester opining that the timber was worth between $25,000 and $30,000 was not properly before the court; and no other information was before the court showing how plaintiffs computed the fair market value of the trees).

In this case, Plaintiff's 2007 complaint alleged that Defendant was lawfully indebted to Plaintiff for the principal sum of $4,776.88 together with interest at a contract rate of 23.99% per annum, that the unpaid amount had been outstanding since 2 February 2005, and that Plaintiff was entitled to calculable attorneys' fees under N.C. Gen. Stat. § 6-21.2. Plaintiff attached the credit card agreement to the complaint. Plaintiff's affidavit incorporated by reference and verified the allegations in the complaint, which included the following: Plaintiff was the holder in due course of the credit agreement; Defendant was in default under the terms of the agreement; the entire outstanding balance was due under the terms of the agreement; and Defendant was "currently indebted to [Plaintiff] in the principal sum of $4,776.88, together with interest thereon at the rate of 23.99% per annum from and after February 2, 2005, the date of [Defendant's] default, reasonable attorneys fees, and costs." When Defendant failed to answer the complaint and default was entered, the substantive allegations raised by the complaint were deemed admitted for purposes of default judgment, *see Bell*, 299 N.C. at 721, 264 S.E.2d at 105, obviating the need for further evidence to support the allegations.

Unlike the complaint in *Hecht Realty*, which demanded judgment for a specified amount but failed to include allegations making it possible to compute the amount of damages to which plaintiff was entitled, here, Plaintiff's affidavit and complaint verified by affidavit included specific allegations enabling the clerk to identify the amount owed with certainty. *See Basnight*, 169 N.C. App. at 624, 610 S.E.2d at 472. Moreover, unlike in *Williams* and *Grant* wherein plaintiffs based their claims on the fair rental of land and the fair market value of trees, respectively, which are subjective values requiring the use of certain methods to determine such values, here, the amount of the money owed could be specifically determined and averred to. Thus, as in *Smith* and *Thompson*, these allegations constituted a "sum certain" sufficient to sustain the clerk's entry of default judgment.

III. CONCLUSION

As Plaintiff's claim was for a sum certain, the clerk had the authority to enter the 2007 default judgment, and thus the judgment was not void. As the judgment was not void, there is no genuine issue as to any material fact, and Plaintiff is entitled to a judgment as a matter of law in its 2017 action to renew the 2007 default judgment. Accordingly, the trial court's entry of summary judgment is affirmed.

AFFIRMED.

Judges DILLON and BROOK concur.

SHIRLEY VALENTINE, ADMINISTRATOR OF THE ESTATE OF SHANYE JANISE ROBERTS, DECEASED, PLAINTIFF
v.
STEPHANIE SOLOSKO, PA-C; NEXTCARE URGENT CARE; NEXTCARE, INC.; NEXTCARE, INC. D.B.A. NEXTCARE URGENT CARE; MATRIX OCCUPATIONAL HEALTH, INC. AND MATRIX OCCUPATIONAL HEALTH, INC. D.B.A. NEXTCARE URGENT CARE, DEFENDANTS

No. COA19-852

Filed 7 April 2020

Process and Service—dormant summons—retroactive extension of time to serve—excusable neglect—discretion of court

The trial court's retroactive extension of time allowing the administrator of an estate to serve a dormant summons and complaint was a proper exercise of the court's discretionary power under Civil Procedure Rule 6(b) where the court found the failure to timely serve within the time required by Rule 4(c) was due to excusable neglect. The summons was merely dormant and had not been discontinued since an alias or pluries summons was issued within the 90-day period specified by Rule 4(d).

Appeal by Defendants from order entered 18 March 2019 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 4 February 2020.

The Law Office of Thomas E. Barwick, PLLC, by Thomas E. Barwick, for Plaintiff-Appellee.

Lewis Brisbois Bisgaard & Smith, LLP, by Carrie E. Meigs and Justin G. May, for Defendants-Appellants.

COLLINS, Judge.

Defendants appeal from an order granting Plaintiff's motion for an extension of time to serve the summons and complaint and denying Defendants' motions to dismiss and for judgment on the pleadings. Defendants argue that the trial court erred in its application of Rules 4 and 6 of the North Carolina Rules of Civil Procedure. Because a trial court is afforded discretion under Rule 6(b) to retroactively extend the time for service of process of a dormant summons under Rule 4(c) upon a finding of excusable neglect, we discern no legal error by the trial court. Accordingly, we affirm the trial court's order.

I. Procedural History

Plaintiff, Shirley Valentine, the administrator of the estate of her deceased daughter Shanye Janise Roberts, filed a lawsuit in 2015 alleging medical malpractice and wrongful death against Stephanie Solosko, PA-C; NextCare Urgent Care; NextCare, Inc.; NextCare, Inc. D.B.A. NextCare Urgent Care; Matrix Occupational Health, Inc.; and Matrix Occupational Health, Inc. D.B.A. NextCare Urgent Care (collectively "Defendants"). The action arose out of medical care that Defendants provided to the deceased on 10 April 2013. The trial court extended the statute of limitations to 7 August 2015 pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure. Plaintiff voluntarily dismissed the lawsuit without prejudice on 24 February 2017.

Plaintiff timely filed a second lawsuit on 23 February 2018 and the Clerk of Court issued summonses ("the original summonses") for all Defendants on that day. Plaintiff served the original summonses on defendant Solosko on 15 May 2018 and the other defendants on 17 May 2018 (eighty-one and eighty-three days, respectively, after the original summonses were issued). Plaintiff filed an affidavit of service of process on 15 June 2018, including the returned registry receipts as exhibits.

Plaintiff sued out alias or pluries summonses[1] for all Defendants on 23 May 2018, eighty-nine days after the original summonses were issued. Plaintiff did not serve these alias or pluries summonses on Defendants.

1. North Carolina Rule of Civil Procedure 4 appears to use the terms "alias or pluries summons" and "alias and pluries summons" interchangeably, as do our courts. Throughout this opinion, we use the term "alias or pluries summons."

On 19 July 2018, Defendants filed an answer and a motion to dismiss on the following grounds: lack of personal jurisdiction, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, and the action being time-barred by the statute of limitations. Defendants also filed a motion for judgment on the pleadings.

Plaintiff sued out alias or pluries summonses again on 22 August 2018, ninety one days after issuance of the previous alias or pluries summonses. Plaintiff did not serve these alias or pluries summonses. On 28 September 2018, Plaintiff filed a motion to extend time to issue, file, and serve the summonses, the alias or pluries summonses, and the complaint.

After conducting a hearing, the trial court entered an order granting Plaintiff's motion for extension of time for service of the summonses and complaint, and denying Defendants' motions to dismiss and for judgment on the pleadings. Defendants filed notice of appeal.

II. Appellate Jurisdiction

The trial court's order does not dispose of all claims and all defendants, and is thus an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(a) (2019); *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). There is generally no right to immediate appeal of an interlocutory order—although immediate appeal may be permitted if the trial court certifies the order under N.C. Gen. Stat. § 1A-1, Rule 54(b), or if the appellant can show that the order affects a substantial right—because most interlocutory appeals tend to hinder judicial economy by causing unnecessary delay and expense. *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 145-46 (1982).

Here, the trial court could not certify the order pursuant to Rule 54(b) because "there has been no adjudication as to any claim(s) or part(ies) within the meaning of Rule 54(b)." *Howze v. Hughes*, 134 N.C. App. 493, 495, 518 S.E.2d 198, 199 (1999). Moreover, contrary to Defendants' argument that the order affects a substantial right under N.C. Gen. Stat. § 1-277(b), which allows "the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[,]" our courts have routinely held that that section 1-277(b) is limited to rulings on minimum contacts questions, and does not apply to rulings based on procedural issues regarding issuance or service of process, such as the order at issue in this case. *See Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 829 (1984). Nonetheless, "because the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order,

we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits." *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) (citations omitted); N.C. R. App. P. 21(a)(1).

III. Discussion

The central question is whether the trial court may, upon a showing of excusable neglect, grant an extension of time under these facts to serve a dormant summons where a second alias or pluries summons was obtained ninety-one days after the previous alias or pluries summons.

Plaintiff argues that *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 367 S.E.2d 655, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988), and its progeny control the outcome here. Conversely, Defendants contend that Plaintiff's failure to timely obtain the second alias or pluries summons effectively discontinued the action, as was the case in *Dozier v. Crandall*, 105 N.C. App. 74, 411 S.E.2d 635 (1992).

Rule 4 governs service of process. *See* N.C. Gen. Stat. § 1A-1, Rule 4 (2019). Upon the filing of a complaint, summons shall be issued within five days. *Id.* at § 1A-1, Rule 4(a). Rule 4(c) requires that a summons be served within sixty days of issuance. *Id.* at § 1A-1, Rule 4(c). A summons not served within sixty days "loses its vitality and becomes *functus officio*, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant. However, although a summons not served within [sixty] days becomes dormant and unserveable, under Rule 4(c) it is not invalidated nor is the action discontinued." *Dozier*, 105 N.C. App. at 75-76, 411 S.E.2d at 636 (citations omitted).

If the summons is not served within sixty days of issuance, Rule 4(d) permits the action to be continued in existence by an endorsement from the clerk or issuance of an alias or pluries summons within ninety days of the issuance of the preceding summons. N.C. Gen. Stat. § 1A-1, Rule 4(d). Any such alias or pluries summons must be served within sixty days of issuance. *See Lemons*, 322 N.C. at 275, 367 S.E.2d at 657.

When there is neither an endorsement nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant who was not served with summons within the time allowed. N.C. Gen. Stat. § 1A-1, Rule 4(e). Thereafter, endorsement may be obtained or alias or pluries summons may issue, but, as to any defendant who was not served with summons within the time specified in Rule 4(d), the action shall be deemed to have commenced on the date of such issuance or endorsement. *Id.*

"Rule 4 . . . must be interpreted in conjunction with Rule 6, which addresses the computation of any time period prescribed by the Rules of Civil Procedure." *Lemons*, 322 N.C. at 275, 367 S.E.2d at 657. Rule 6 provides:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.

N.C. Gen. Stat. § 1A-1, Rule 6 (2019).

In *Lemons*, our North Carolina Supreme Court concluded that Rule 6 permitted the trial court to grant an extension of time to serve a dormant summons, and thus revive it, where the alias summons was served on the defendant after the time for service of process under Rule 4(c) had expired. *Lemons*, 322 N.C. at 277, 367 S.E.2d at 658. The plaintiff commenced an action against the defendant on 6 February 1986. A summons was also issued that day but was not served. An alias summons was issued on 2 May of that year and was served on 5 June, more than thirty days[2] after its issuance. On 13 October 1986, the plaintiff filed a motion for retroactive extension of time, nunc pro tunc, from 2 June until 6 June to serve the alias summons. Construing Rule 4 in para materia with Rule 6(b), the Court determined that the General Assembly, by adopting Rule 6(b), gave trial courts the authority to extend the time provided in Rule 4(c) to serve a summons upon a finding of excusable neglect, and thus to "breathe new life and effectiveness into [a dormant summons] retroactively after it has become *functus officio*." *Id.* at 274-75, 367 S.E.2d at 657. The Court concluded that Rule 6 permitted an extension of time to serve a dormant summons and thus revive it where the alias summons was served on the defendant after the time for service of process under Rule 4(c) had expired. *Id.* at 277, 367 S.E.2d at 658.

Applying *Lemons* in *Hollowell v. Carlisle*, 115 N.C. App. 364, 444 S.E.2d 681 (1994), this Court concluded that Rule 6 permitted the trial

2. At the time the summons was issued in this case, Rule 4(c) required process to be served within thirty days. At the time the instant action was commenced, the time allowed under Rule 4(c) was sixty days.

court to grant a plaintiff an extension of time to serve a dormant summons where *no* alias or pluries summons was obtained. *Id.* at 368, 444 S.E.2d at 683. The defendant was served with the original summons and complaint sometime between sixty-eight and ninety days after issuance of the summons. Since the defendant "was served with a *dormant* summons within the 90-day limit," this Court held that "the trial court had the authority pursuant to the language of Rule 6(b) to extend the time for service of process under Rule 4(c), 'to permit the act to be done where the failure to do the act was the result of excusable neglect.' " *Id.* *See also Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756, 761, 606 S.E.2d 407, 410 (2005) ("The instant case is factually identical to *Lemons*. The alias and pluries summons became dormant after sixty days, prior to plaintiffs' effectuating service on 20 November 2002, but before the expiration of the summons on 27 November 2002. The summons was merely dormant at the time of service; it had not expired and the trial court had the discretion to retroactively extend the time for service of the alias and pluries summons.").

By contrast, in *Dozier*, this Court distinguished *Lemons* and concluded that Rule 6(b) does not allow a party to continue an action beyond the ninety-day period specified in Rule 4(e). *Dozier*, 105 N.C. App. at 77-78, 411 S.E.2d at 637-38. In *Dozier*, the plaintiff filed an action on 15 March 1990 alleging personal injuries. A summons was issued on that day but returned unserved twelve days later. Ninety-two days after the issuance of the original summons, an alias or pluries summons was issued; it was returned unserved eleven days later. The defendant accepted service on 20 August 1990 and filed a motion for judgment on the pleadings asserting the three-year statute of limitations. The plaintiff moved pursuant to Rule 6 to extend the period for issuance of the alias or pluries summons.

The Court explained that under *Lemons*, a trial court, pursuant to Rule 6, may in its discretion and upon a finding of excusable neglect extend the time provided in Rule 4(c) to serve a dormant summons and thus revive it. *Id.* *Lemons* did not control, however, because the action before the *Dozier* Court had been *discontinued*. The Court explained:

> Rule 4(e) specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, the action is discontinued as to any defendant not served within the time allowed and treated as if it had never been filed. Under Rule 4(e), either an extension can be endorsed by the clerk or an alias or pluries summons

> can be issued after the 90 days has run, but the action is deemed to have commenced, as to such a defendant, on the date of the endorsement or the issuance of the alias or pluries summons. Thus, when plaintiff failed to have this action continued through endorsement or issuance of alias or pluries summons within 90 days, this action was discontinued.

Id. at 78, 411 S.E.2d at 638 (internal quotation marks, emphasis, and citations omitted).

Accordingly, "[w]hile Rule 6 under the *Lemons* case gives the trial court discretion upon a showing of excusable neglect to permit *an act* to be done," the Court found "no authority in the rule or in *Lemons* to overrule the express language of Rule 4(e) as to the effect of failing to have an endorsement or alias or pluries summons issued 'within the time specified in Rule 4(d) . . . .' " *Id.*

Lemons and its progeny control this case, while *Dozier* involves a factual situation which materially differs from that presented here. Unlike the defendant in *Dozier* who was served some five months after the original summons was issued with an alias summons that was issued outside the ninety-day time period prescribed by Rule 4(d), Defendants in this case were served with the original summonses eighty-one and eighty-three days after issuance of the summonses. As in *Hollowell*, Defendants were served with dormant summonses within the ninety-day limit prescribed by Rule 4(d). Under *Lemons*, the trial court had the authority under Rule 6(b) to extend the time provided in Rule 4(c) to serve the summonses upon a finding of excusable neglect, and thus to "breathe new life and effectiveness" into the dormant summonses retroactively after they had become *functus officio*. *Lemons*, 322 N.C. at 274-75, 367 S.E.2d at 657. Accordingly, "the trial court had the authority pursuant to the language of Rule 6(b) to extend the time for service of process under Rule 4(c), 'to permit the act to be done where the failure to do the act was the result of excusable neglect.' " *Hollowell*, 115 N.C. App. at 368, 444 S.E.2d at 683.

As the trial court found that Plaintiff's service of the original summonses outside the sixty-day period prescribed in Rule 4(c) was a result of excusable neglect,[3] and the trial court had the authority to invoke

3. This finding is not challenged and is thus binding upon us. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The trial court's finding that Plaintiff's failure to renew the alias or pluries summons resulted from excusable neglect is not germane to this appeal, as the trial court did not extend the time for suing out the second alias or pluries summons.

its discretion to retroactively extend the time for Plaintiff to serve the summonses and complaint to 23 May 2018 and to explicitly deem service of process timely under Rule 4, the trial court did not err in granting Plaintiff's motion for an extension of time to serve the summonses and complaint.[4] Moreover, as service of process was deemed timely under Rule 4, the trial court obtained personal jurisdiction over Defendants. *See Fender v. Deaton*, 130 N.C. App. 657, 659, 503 S.E.2d 707, 708 (1998) ("[I]t is well established that a court may only obtain personal jurisdiction over a defendant by the issuance of summons and service of process by one of the statutorily defined methods."). Accordingly, Plaintiff's action was not barred by the statute of limitations. Thus, the trial court did not err by denying Defendants' motions to dismiss and for judgment on the pleadings.

IV. Conclusion

Because the trial court had the authority to exercise discretion under Rule 6(b) to extend the time for Plaintiff to serve dormant summonses under Rule 4(c) upon a finding of excusable neglect, we discern no legal error by the trial court. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges STROUD and BERGER concur.

4. The trial court also found that "Plaintiff's failure to renew her Alias and Pluries Summons prior to the hearing of these Motions were the result of excusable neglect." To the extent the trial court's order granting "Plaintiffs Motion to Extend the Time to Issue[], File and Serve Summonses and Complaint" allowed Plaintiff an extension of time to renew her Alias and Pluries Summons, such extension was erroneous under *Dozier*. *See Dozier*, 105 N.C. App. at 78, 411 S.E.2d at 638 (There is "no authority in the rule or in *Lemons* to overrule the express language of Rule 4(e) as to the effect of failing to have an endorsement or alias or pluries summons issued 'within the time specified in Rule 4(d) . . . .'").

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 APRIL 2020)

BOYD v. TAYLOR No. 19-392	Vance (18CVD945)	Affirmed
COBB v. DAY No. 19-805	New Hanover (16CVS2633)	Affirmed
COLUMBUS CNTY. DEP'T OF SOC. SERVS. v. NORTON No. 18-1198	Columbus (10CVD152)	Vacated
DUNHILL HOLDINGS, LLC v. LINDBERG No. 18-1112	Durham (17CVS3710)	Dismissed
ECO TERRA PRODS., INC. v. DAYSTAR HOLDINGS, LLC No. 19-623	Franklin (18CVS603)	Affirmed
FINN v. FINN No. 19-520	Mecklenburg (15CVD12244)	Affirmed
HOAG v. CNTY. OF PITT No. 19-826	Pitt (18CVS1976)	Affirmed
HUTCHERSON v. CANNON No. 19-199	Guilford (17CVS9271)	Affirmed
IN RE H.A.V. No. 19-353	Mecklenburg (18JA262) (18JA263) (18JA264)	Affirmed
IN RE HARPER No. 19-808	Buncombe (16E1030) (18SP758)	Dismissed
IN RE M.J.D. No. 19-1005	Surry (17JB6)	Remanded
IN RE PURSWANI No. 19-263	Guilford (16E2169)	Affirmed
ISENHOUR v. FRAME No. 19-654	Avery (17CVS129)	Dismissed
LOGUE v. LOGUE No. 19-831	Cumberland (15CVD1837)	Affirmed in part, vacated and remanded in part

MARTIN v. WAKEMED No. 19-213	N.C. Industrial Commission (16-018941)	Affirmed
NICHOLS v. ADMIN. OFF. OF THE COURTS No. 19-1011	N.C. Industrial Commission (TA-27115)	Affirmed
SCIARA v. EDWARDS No. 19-854	Jackson (17CVS301)	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
STATE v. BOONE No. 19-560	Alamance (17CRS52048-49) (18CRS610)	No Plain Error
STATE v. BOYKIN No. 19-806	Sampson (16CRS51643)	No error in part; vacated and remanded in part
STATE v. BROWN No. 19-499	Mecklenburg (16CRS208832-33) (16CRS8400)	No Error
STATE v. BURTON No. 19-246	Dare (15CRS282)	No Error
STATE v. CABRAL No. 19-835	Mecklenburg (16CRS236634)	No Prejudicial Error
STATE v. COTTRELL No. 19-981	Cumberland (15CRS63304) (16CRS53144)	Affirmed
STATE v. COUNCIL No. 19-363	Edgecombe (16CRS52962)	New Trial
STATE v. HENRY No. 19-704	Gaston (13CRS51884)	No Error
STATE v. HOUSE No. 19-702	Cabarrus (17CRS51177)	NO PLAIN ERROR; NO ERROR.
STATE v. LANIER No. 19-658	Johnston (17CRS55493-95)	No Plain Error
STATE v. LAUDERMILT No. 19-703	Durham (18CRS52574)	No Error

STATE v. POTTER No. 19-898	Pamlico (14CRS50013-14) (14CRS50020) (15CRS45)	REVERSED AND REMANDED
STATE v. SPRINKLE-SURRATT No. 19-775	Surry (14CRS53189)	No Error
STATE v. THOMAS No. 19-570	Moore (15CRS53314) (16CRS143)	No Error
STATE v. WILLIAMS No. 19-540	Cleveland (16CRS2285) (16CRS54727) (16CRS54730) (17CRS512)	Dismissed
WIGGINS v. WELLS FARGO BANK, N.A. No. 19-940	Durham (19CVS1905)	Dismissed
YOW v. HENRY No. 19-817	Cabarrus (17CVD643)	Vacated and Remanded

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APPEAL AND ERROR—Continued

the trial court's denial of his motions to dismiss, defendant's argument was deemed abandoned for failure to comply with Appellate Rule 28(b)(6). **State v. Wiles, 592.**

Abandonment of issues—unfair and deceptive trade practices—no argument or reply brief—In an action by buyers of a beach house to recover damages after discovering severe water damage that appeared to be intentionally concealed, plaintiffs' claim for unfair and deceptive trade practices against the sellers and the sellers' agents was deemed abandoned where plaintiffs failed to raise any argument in their brief or to file a reply brief responding to defendants' contention that the cause of action was abandoned. **Cummings v. Carroll, 204.**

Appeal from order denying contempt—Appellate Rules violations—substantial—subject to dismissal—Plaintiff's appeal from an order denying her motion for contempt (alleging defendant willfully failed to pay child support) was dismissed for a substantial violation of the Rules of Appellate Procedure where plaintiff failed to state a basis for appellate review. Since plaintiff's motion referenced both civil and criminal contempt and it was unclear which one formed the basis for the trial court's denial, plaintiff's failure to establish any ground for appellate jurisdiction impeded review. **Hardy v. Hardy, 687.**

Appellate jurisdiction—custody action—permanent versus temporary custody order—An order granting a mother full physical and legal custody of her minor child while granting visitation to the child's grandparents was immediately appealable as a final order—even though the order resulted from a temporary custody hearing—because it permanently adjudicated the parties' custody rights (thus, it was not entered "without prejudice to either party"), did not state a reconvening time, and determined all issues in the custody action. At any rate, interlocutory jurisdiction would have also been appropriate because the order implicated a substantial right: the mother's constitutionally protected interest in the custody, care, and control of her child. **Graham v. Jones, 674.**

Filing of appeal after order rendered but not entered—failure of record to show jurisdiction—motion to amend record—The Court of Appeals had jurisdiction to hear an appeal from a civil judgment for attorney fees in a criminal case, even though defendant entered notice of appeal and filed the record after the trial court rendered an oral ruling but before it entered a written order, because Rule 3 of the Rules of Civil Procedure allows for appeal of an order once it has been rendered by a trial court and the Court of Appeals had the authority to grant defendant's motion to amend the record to include the written order once it was filed. Assuming arguendo that amending the record failed to cure defendant's jurisdictional deficiency, defendant's petition for writ of certiorari was granted to obtain jurisdiction. **State v. Mangum, 327.**

Interlocutory appeal—denial of motion to dismiss—substantial right—collateral estoppel—In a wife's action for post-separation support, alimony, and equitable distribution (ED), which included a claim for relief in the form of a constructive trust—based on an allegation that her ex-husband fraudulently transferred marital assets to corporate defendants (multiple trusts and businesses)—the trial court's order partially denying defendants' motion to dismiss was not immediately appealable. No substantial right was affected where defendants' request for a jury trial was properly rejected as not being available in an ED case, and defendants failed to demonstrate that collateral estoppel—regarding issues addressed in a related complex business case—barred plaintiff's claim to the remedy of a constructive trust. **Poulos v. Poulos, 289.**

APPEAL AND ERROR—Continued

Interlocutory appeal—substantial right—defamation case—absolute privilege—immunity from suit—Where a mental health area authority hired an attorney and law firm (defendants) to investigate misconduct by their former chief executive (plaintiff) and to represent the authority in a lawsuit against the executive based on that investigation, and where defendants revealed their findings to the media at a press conference allowed by the authority, defendants' interlocutory appeal from the denial of their motion to dismiss plaintiff's defamation lawsuit against them did not affect a substantial right to immunity from suit, and was therefore dismissed. Defendants could not claim absolute privilege from suit because their statements were not "made in due course of a judicial proceeding," and any legislative immunity afforded to the authority—flowing from the investigation as a quasi-judicial proceeding—did not extend to defendants' statements. **Topping v. Meyers, 613.**

Interlocutory appeal—substantial right—defamation case—denial of Rule 12(b)(6) motion—risk of inconsistent verdicts—After a former executive for a mental health area authority sued an attorney and law firm (defendants) for defamation and negligence, defendants failed to show that an order denying their Rule 12(b)(6) motion to dismiss affected a substantial right, and therefore their interlocutory appeal from that order was dismissed. Although misapplication of the "actual malice standard" for defamation at the summary judgment stage can implicate a substantial right to free speech, the same is not true at the motion to dismiss stage. Further, defendants did not have a substantial right to avoid the risk of inconsistent verdicts between the defamation and negligence claims because the law only recognizes a substantial right to avoid the risk of inconsistent verdicts on the same issues in different trials. **Topping v. Meyers, 613.**

Interlocutory appeal—substantial right—order denying preliminary injunction—challenge to voter ID law—An interlocutory order denying plaintiffs' motion for a preliminary injunction enjoining a voter photo ID law—which plaintiffs (all African American) alleged violated the Equal Protection Clause of the state constitution because it intentionally discriminated against African American voters in state elections—was immediately appealable because it affected plaintiffs' substantial right to vote on an equal basis with other North Carolina citizens, and this right would be lost absent immediate appeal. **Holmes v. Moore, 7.**

Mootness—cross-appeal—alternate theories in a workers' compensation case—Where the Court of Appeals upheld the Industrial Commission's determination that a traveling employee's injury from falling in a hotel lobby was not compensable, the issues raised in the employer's cross-appeal involving alternate theories of noncompensability were moot. **McSwain v. Indus. Com. Sales & Serv., LLC, 713.**

Mootness—juvenile case—permanency planning order—juvenile turning eighteen years old during appeal—A father's appeal from a permanency planning order, which ceased reunification efforts with his daughter, was dismissed as moot where his daughter reached the age of majority while the appeal was pending (thereby terminating the trial court's jurisdiction in the underlying juvenile proceeding and preventing an appellate ruling from having any practical effect) and where the appeal did not fit into any exception to the mootness doctrine. **In re A.K.G., 409.**

Notice of appeal—timeliness—no certificate of service in the record—no argument from appellee—In an action between divorced spouses, where there was no certificate of service in the record on appeal showing when appellant was served with the trial court's judgment in the case, appellant's notice of appeal from

APPEAL AND ERROR—Continued

HOMICIDE—Continued

Second-degree murder—jury instructions—self-defense—sufficiency of evidence—In a trial for the murder of an off-duty police officer, defendant was not entitled to have the jury instructed on self-defense and on the lesser-included offense of voluntary manslaughter based on imperfect self-defense where the evidence was insufficient to support a reasonable belief that deadly force was necessary to protect defendant from death or great bodily harm. Although defendant testified that he saw a man approach him who looked at him "real mean" and he saw a gun, the evidence also showed that the time from when the officer stepped out of his car to when he was shot and killed was only seven seconds, during which the officer did not say anything to defendant, did not point a gun at defendant, and had no physical interaction with defendant. **State v. Brown, 741.**

Second-degree murder—malice—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss his second-degree murder charge arising from a car crash in which defendant—while driving on the highway at a high rate of speed, late at night, and in icy road conditions—struck and killed a man while trying to pass a parked tow truck by veering on to the shoulder of the road. There was substantial evidence of malice where defendant had an extensive record of driving-related offenses and involvement in car accidents, was driving with a revoked license during the crash, drove away from the scene without checking whether anyone was harmed, washed his damaged car (suggesting he was aware that he needed to remove blood from his vehicle), and downplayed the severity of the crash despite police informing him that he had killed someone. **State v. Nazzal, 345.**

Second-degree murder—request for jury instruction—accident as defense—harmless error—In a murder prosecution arising from a car crash, the trial court's decision not to instruct the jury on the defense of accident was, at most, harmless error where the court did instruct the jury on two lesser-included offenses (involuntary manslaughter and misdemeanor death by vehicle) that did not involve intentional killings, but the jury still convicted defendant of second-degree murder based on malice (thereby rejecting the idea that defendant acted unintentionally). **State v. Nazzal, 345.**

Self-defense—jury instruction—"necessary to kill" victim to avoid death or bodily harm—In a murder prosecution arising from an altercation between defendant and his ex-girlfriend's boyfriend, the trial court did not err when it instructed the jury that it could find defendant stabbed the boyfriend in self-defense if it found defendant believed it was "necessary to kill" the boyfriend to avoid death or bodily harm. Although a footnote in the North Carolina Pattern Instructions directs trial courts to substitute "to use deadly force against the victim" for "to kill the victim" when the evidence shows a defendant intended to disable rather than kill the victim, binding Supreme Court precedent expressly held that this substitution was unnecessary. **State v. Leaks, 317.**

Voluntary manslaughter—jury instructions—omission from pattern instruction—plain error analysis—The trial court's omission of language from the pattern jury instruction on voluntary manslaughter—regarding the use of excessive force—in its final mandate to the jury did not amount to plain error where the trial court correctly included similar language in other parts of the jury charge. Taken as a whole, the instructions accurately stated that the State carried the burden of proving every element of voluntary manslaughter beyond a reasonable doubt. **State v. Richardson, 149.**