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272 N.C. APP.

TABLE OF CONTENTS

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THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
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ALLEGRA K. COLLINS
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SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

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

PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

EDWARD G. CONNETTE, AS GUARDIAN AD LITEM FOR AMAYA GULLATTE, A MINOR, AND ANDREA HOPPER, INDIVIDUALLY AND AS PARENT OF AMAYA GULLATTE, A MINOR, PLAINTIFFS

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS HEALTHCARE SYSTEM, AND/OR THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A CAROLINAS MEDICAL CENTER, AND/OR THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY D/B/A LEVINE CHILDREN'S HOSPITAL, AND GUS C. VANSOESTBERGEN, CRNA, DEFENDANTS

No. COA19-354

Filed 16 June 2020

1. Nurses—medical malpractice claim—liability for treatment plan—barred by precedent

A negligence-based claim brought against a certified registered nurse anesthetist on behalf of a three-year-old girl who suffered cardiac arrest during a mask induction procedure prior to surgery, which alleged that the nurse anesthetist breached a duty of care to the patient when planning the procedure and drug protocol, was barred by *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337 (1932), which stated that nurses cannot be held liable for medical malpractice resulting from diagnosis and treatment decisions, which are the responsibility of physicians. Therefore, the trial court properly excluded plaintiffs' evidence relating to this theory of liability.

2. Evidence—medical procedure—illustrative video shown to jury—foundation—probative value

In a trial against a nurse anesthetist for injuries sustained by a young girl during an anesthesia mask induction procedure, the trial

court did not abuse its discretion by allowing defendants to show a video of the procedure to the jury for the purpose of illustrating the expert's hypothetical scenario and not to depict what actually occurred. The expert's testimony provided a proper foundation by demonstrating the video was a fair and accurate representation of the described procedure, and the video's probative value in assisting the jury was not outweighed by any prejudice under Evidence Rule 403 where the trial court clearly instructed the jury to consider the video solely for illustrative purposes.

3. Trials—medical negligence—reference to nurse-defendant during trial—shorthand name—discretionary ruling

In a trial against a nurse anesthetist for injuries sustained by a young girl during a medical procedure, the trial court did not abuse its discretion by allowing defense counsel to refer to the nurse by his first name "Gus" or "Nurse Gus." Although plaintiffs argued these shorthand references constituted an improper strategy to minimize defendant's authority or professional status, the trial court had broad discretion to manage the trial and its ruling was a reasoned one where defendant had a long last name and defendant testified that he was often referred to as "Gus" at work for that reason.

4. Trials—jury instructions—negligence—separate instruction for nurse-defendant and hospital—discretionary ruling

In a trial against a nurse anesthetist for injuries sustained by a young girl during a medical procedure, the trial court did not abuse its discretion by instructing the jury regarding the defendant's liability separately from the liability of the hospital where the procedure took place. Trial courts have broad discretion in the framing and wording of jury instructions and in this case, the entirety of the instructions properly informed the jury of both issues to be resolved and were not misleading.

5. Jury—negligence trial—questions during deliberations—re-instruction—trial court's discretion

In a trial against a nurse anesthetist for injuries sustained by a young girl during a medical procedure, the trial court did not abuse its discretion by re-instructing the jury on what it considered to be the relevant portions of the original instructions in response to questions sent by the jury during deliberations. The trial court made a reasoned ruling after an extensive discussion with the parties about how to adequately address the jury's questions and did not have to re-instruct on an additional portion requested by plaintiffs where

the trial court stressed to the jury that one section of the instructions was not more important than any other section.

Appeal by plaintiffs from judgment entered 20 August 2018 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 October 2019.

Edwards Kirby, L.L.P., by Mary Kathryn Kurth and John R. Edwards, for plaintiffs-appellants.

Gallivan, White & Boyd, P.A., by Janice Holmes and Christopher M. Kelly, for defendants-appellees.

DIETZ, Judge.

Nearly a century ago, our Supreme Court rejected the notion that nurses can be liable for medical malpractice based on their diagnosis and treatment of patients. The Court reasoned that nurses "are not supposed to be experts in the technique of diagnosis or the mechanics of treatment." *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337, 162 S.E. 738, 740 (1932). Medicine is quite different today than in the early twentieth century and so, too, is the knowledge and skill of nurses in their varying fields and specializations.

Plaintiffs Edward Connette and Andrea Hopper argue that the nurse anesthetist in this case participated in the treatment plan for Hopper's young daughter to such a degree, and with such an exercise of expertise and discretion, that the nurse effectively was treating the patient and thus should be subject to legal claims for medical malpractice.

We must reject this argument. Had *Byrd* left room for evolving standards as the field of medicine changed, this may be a different case. But the *Byrd* court's holding is categorical, and it is controlling here. If this Court were free to reject Supreme Court precedent that we felt did not age well, it would destabilize our position as an intermediate appellate court. On issues where our Supreme Court already has spoken, we do not make law, we follow it.

Plaintiffs also challenge a series of discretionary decisions by the trial court during the trial. As explained below, under the limited standard of review we apply to these arguments, the trial court acted well within its sound discretion. Accordingly, we find no error in the trial court's judgment.

Facts and Procedural History

In the fall of 2010, Andrea Hopper took her three-year-old daughter Amaya to an emergency room for an upper respiratory infection and an ear infection. While treating Amaya, medical professionals discovered that her heartrate was higher than normal, or "tachycardic," so they referred Amaya to a cardiologist, Dr. Nicholas B. Sliz, at a hospital affiliated with Defendant Charlotte-Mecklenburg Hospital Authority.

Dr. Sliz determined that Amaya's increased heart rate caused her heart to develop cardiomyopathy, a disease which makes it hard for the heart to pump blood to the body and enlarges the heart. Because Amaya's cardiac output was severely depressed, Dr. Sliz recommended she undergo an "ablation procedure" to fix her irregular heart rhythm. Dr. Sliz was confident that the ablation procedure would be a success and scheduled a surgery for Amaya.

Dr. James M. Doyle, an anesthesiologist, and Defendant Gus C. VanSoestbergen, a certified registered nurse anesthetist, administered Amaya's anesthesia. Doyle and VanSoestbergen decided to induce Amaya with a mask to avoid the stress that might be caused by pricking her with a needle and inducing her intravenously. The two also chose to induce her with "sevoflurane," an anesthetic that can cause one's blood pressure to drop and cardiac output to decrease.

Soon after the anesthesia team administrated the sevoflurane, Amaya went into cardiac arrest. After about thirteen minutes, Amaya's treatment team was able to revive her, but the oxygen deprivation left her with permanent brain damage, cerebral palsy, and profound developmental delay.

In 2011, Plaintiffs filed a complaint against various medical professionals involved in Amaya's treatment. The case went to trial in 2015. The jury failed to reach a verdict on the claims against Doyle and VanSoestbergen in this first trial. Before the second trial, Doyle and his anesthesiology practice settled the claims against them. Thus, the only remaining parties in the second trial were VanSoestbergen, who is a certified registered nurse anesthetist, and the hospital that employed VanSoestbergen.

The second trial began in 2018. Plaintiffs asserted a number of negligence-based claims, including a claim that VanSoestbergen breached the applicable standard of care by agreeing, during the anesthesia planning stage, to induce Amaya with sevoflurane using the mask induction procedure. Plaintiffs asserted that certified registered nurse anesthetists

are highly trained and have greater skills and treatment discretion than regular nurses. Moreover, they asserted, nurse anesthetists often use those skills to operate outside the supervision of an anesthesiologist. Plaintiffs also argued that VanSoestbergen was even more specialized than an ordinary nurse anesthetist because he belonged to the hospital's "Baby Heart Team" that focused on care for young children.

The trial court refused to admit Plaintiffs' evidence of this claim. The court determined that this theory of liability was precluded by *Daniels v. Durham County Hosp. Corp.*, 171 N.C. App. 535, 615 S.E.2d 60 (2005), a decision that analyzed and applied the Supreme Court's holding in *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337, 162 S.E. 738 (1932).

The trial court concluded that a nurse may be liable for improperly administering a drug, but not for breaching a duty of care for planning the anesthesia procedure and selecting the appropriate technique or drug protocol. Thus, the trial court excluded all expert testimony suggesting that VanSoestbergen breached a standard of care by agreeing to mask inhalation with sevoflurane. The trial court submitted Plaintiffs' other claims against VanSoestbergen to the jury. The jury found VanSoestbergen not liable for Amaya's injuries. Plaintiffs timely appealed.

Analysis

I. Nurse's liability for treatment decisions

[1] Plaintiffs first argue that the trial court erred by excluding evidence that VanSoestbergen "shared responsibility with Dr. Doyle for both planning and administering anesthesia to Amaya." Plaintiffs contend that a certified registered nurse anesthetist is "not a mere appendage of the anesthesiologist" but instead an "independent collaborator" who owes a duty of care to the patient when participating in the creation of a patient's treatment plan.

The trial court rejected this argument after concluding that it was barred by settled precedent. As explained below, this Court, too, is bound by that precedent and we therefore find no error in the trial court's ruling.

Nearly a century ago, a plaintiff sought to hold a nurse liable for decisions concerning diagnosis and treatment. *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337, 162 S.E. 738, 740 (1932). Specifically, the plaintiff was suffering from convulsions and alleged that she was severely burned after the nurse placed her in a "sweat cabinet" or "sweating machine" as part of her treatment. *Id.*

Our Supreme Court declined to recognize the plaintiff's legal claim, explaining that "nurses, in the discharge of their duties, must obey and diligently execute the orders of the physician or surgeon in charge of the patient." *Id.* The Court held that the "law contemplates that the physician is solely responsible for the diagnosis and treatment of his patient. Nurses are not supposed to be experts in the technique of diagnosis or the mechanics of treatment." *Id.*

Since *Byrd*, this Court repeatedly has rejected legal theories and claims based on nurses' decisions concerning diagnosis and treatment of patients. In 1985, for example, this Court cited *Byrd* to reject a claim that a nurse owed a separate duty of care to the patient because any "disagreement or contrary recommendation she may have had as to the treatment prescribed would have necessarily been premised on a separate diagnosis, which she was not qualified to render." *Paris v. Michael Kreitz, Jr., P.A.*, 75 N.C. App. 365, 381, 331 S.E.2d 234, 245 (1985).

Similarly, in 2005, this Court rejected a theory that a registered nurse was part of the "delivery team" in obstetrics and engaged in a "collaborative process with joint responsibility." *Daniels v. Durham County Hosp. Corp.*, 171 N.C. App. 535, 539, 615 S.E.2d 60, 63 (2005). We observed that, although "medical practices, standards, and expectations have certainly changed since 1932 and even since 1987, this Court is not free to alter the standard set forth in *Byrd*." *Id.* We therefore affirmed summary judgment in favor of the nurse because "plaintiffs present a medical dispute regarding diagnosis and treatment that nurses are not qualified to resolve." *Id.* at 540, 615 S.E.2d at 63.

In short, as this Court repeatedly has held in the last few decades, trial courts (and this Court) remain bound by *Byrd*, despite the many changes in the field of medicine since the 1930s. Thus, the trial court properly determined that Plaintiffs' claims based on VanSoestbergen's participation in developing an anesthesia plan for Amaya are barred by Supreme Court precedent.

We acknowledge that Plaintiffs have presented many detailed policy arguments for why the time has come to depart from *Byrd*. We lack the authority to consider those arguments. We are "an error-correcting body, not a policy-making or law-making one." *Davis v. Craven County ABC Bd.*, 259 N.C. App. 45, 48, 814 S.E.2d 602, 605 (2018). And, equally important, *Byrd* is a Supreme Court opinion. We have no authority to modify *Byrd*'s comprehensive holding simply because times have changed. Only the Supreme Court can do that. *State v. Scott*, 180 N.C. App. 462, 465,

637 S.E.2d 292, 294 (2006). Thus, we decline to address Plaintiffs' policy arguments individually, but recognize that they were presented to us and thus are preserved should Plaintiffs seek further appellate review.

II. Video evidence

[2] Next, Plaintiffs argue that the trial court erred by permitting Defendants to show the jury an illustrative video depicting mask induction anesthesia. Plaintiffs contend that the video was inadmissible and unduly prejudicial.

Before we address Plaintiffs' specific evidentiary arguments, we must first address a framing issue concerning the illustrative nature of the exhibit. The determination of whether an exhibit is sufficiently illustrative "is a matter within the sound discretion of the trial judge." *Thomas v. Dixson*, 88 N.C. App. 337, 345, 363 S.E.2d 209, 214 (1988).

Here, Plaintiffs characterize the video as one used to illustrate Amaya's induction, similar to how one might use an illustrative video to reconstruct the scene of an accident. They contend that, viewed in this way, the exhibit was not admissible for illustrative purposes because the child in the video was struggling and had to be restrained, while undisputed evidence showed Amaya was calm and cooperative during the procedure.

The flaw in this argument is that both the Defendants and the trial court emphasized that this was not the purpose of the illustration. During this portion of Defendants' case, their expert was addressing Plaintiffs' theory that the induction should have proceeded more slowly. Defendants' expert sought to explain why the anesthesiology team tried to move Amaya more quickly to another "stage" in the process because young children, during this particular stage of induction, can become excitable and combative.

So the purpose of the video was not to illustrate something that happened to Amaya, but rather to illustrate a hypothetical scenario—one which the expert was describing in detail in his testimony—that Amaya's anesthesiology team sought to avoid.

Defendants were careful to point this out when questioning the expert: "Dr. Yasser, I want to be real clear about this. We're not showing a picture of what happened to Amaya or representing that this is Amaya. This is just an example of a child going through stage two and an induction, sevo induction so the Ladies and Gentlemen of the Jury can understand your testimony?" The expert responded, "Yes."

Similarly, the trial court emphasized this point to the jury, explaining that the video was "not to illustrate what transpired with Amaya, but to help you understand something that can occur in the inhalation process to help you understand this witness's testimony about how an anesthesiologist, CRNAs do what they do." Thus, in our analysis of the admissibility and potential prejudice of the challenged video, we focus our review on the video's use as an illustration of the expert's hypothetical scenario, not as an illustration of events that actually occurred during Amaya's induction.

We begin with Plaintiffs' challenge based on lack of foundation. To lay the foundation for this type of illustrative exhibit, the proponent must demonstrate that the exhibit is a "fair and accurate portrayal" of the thing it seeks to illustrate. *Id.* at 344, 363 S.E.2d at 214. If there is conflicting evidence concerning the accuracy of the illustrative exhibit, the determination of whether to admit the exhibit "is a matter within the sound discretion of the trial judge." *Id.* at 345, 363 S.E.2d at 214.

Here, Defendants' expert testified that he had performed "tens of thousands" of similar inhalation inductions on children and saw children induced using sevoflurane every day. He further testified that he had viewed the video and that, based on his experience, the video illustrated "a child who is getting a normal mask induction and this would be on any kid on any day in any operating room in the United States." Finally, he testified that the video would assist him "to illustrate or to help explain" to the jury his testimony about the type of chaotic reactions that children can have during this stage of sevoflurane induction.

The trial court was well within its sound discretion to admit the exhibit based on this foundational testimony. Plaintiffs argue that the expert "did not know when or where [the video] was recorded" and "knew nothing about the child" in the video. But this is irrelevant. It was not even necessary that the video be real—it could have been an animated video, or a photo-realistic one created with computer-generated effects. What matters for purposes of foundation is that the expert established that the video was a fair and accurate representation of a procedure he was describing, based on his experience with "tens of thousands" of the same procedure on other children. Accordingly, the trial court did not abuse its discretion in this admissibility analysis.

Plaintiffs next argue that the video should have been excluded under Rule 403 of the Rules of Evidence because its probative value was "substantially outweighed by the danger of unfair prejudice." They contend that the "obvious purpose" of the video was to incite anxiety and

emotion in the jury and exaggerate the difficulty of VanSoestbergen's work as a nurse anesthetist.

Rule 403 permits a trial court to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 808–09 (2015). We review a trial court's Rule 403 analysis for abuse of discretion. *Id*. at 178, 775 S.E.2d at 809.

Here, the challenged video had probative value—it provided a visual perspective of a complicated medical procedure described by an expert. Moreover, the trial court took steps to minimize the risk of any prejudicial effect from the video. Although there were differences between the video and Amaya's circumstances, the trial court addressed those by informing the jury that it was to consider the video solely for illustrative purposes and "not to illustrate what transpired with Amaya, but to help you understand something that can occur in the inhalation process."

In short, the trial court properly determined that the risk of potential prejudice or confusion was not so great as to substantially outweigh the probative value of this illustrative exhibit. The trial court's decision to admit this evidence was a reasoned one and not arbitrary. We therefore find no abuse of discretion in the admission of this illustrative video.

III. Use of short-hand references to "Gus" and "Nurse Gus" at trial

[3] Plaintiffs next argue that the trial court erred by permitting defense counsel to refer to VanSoestbergen as "Gus" and "Nurse Gus" during trial. Plaintiffs argue that this trial strategy, contrasted with references to physicians using the prefix "Doctor," downplayed VanSoestbergen's authority as a certified registered nurse anesthetist and caused the jury to view Gus as someone with less professional skill and authority than he actually possessed.

"The conduct of a trial is left to the sound discretion of the trial judge, and absent abuse of discretion, will not be disturbed on appeal." *Gray v. Allen*, 197 N.C. App. 349, 352, 677 S.E.2d 862, 865 (2009). Under this narrow standard of review, we cannot find reversible error unless the trial court's ruling "was so arbitrary that it could not have been the result of a reasoned decision." *Kearney v. Bolling*, 242 N.C. App. 67, 72, 774 S.E.2d 841, 846 (2015).

The trial court's decision to permit VanSoestbergen to be referred to as "Nurse Gus" was well within the court's broad discretion. To be sure, the defense may indeed have used the references to "Nurse Gus" in part as a trial strategy. But, to be fair, Gus VanSoestbergen's last name is a

tongue-twister for some, and even he testified that people at work often called him Gus for that reason. Moreover, Plaintiffs' counsel could—and did—emphasize VanSoestbergen's knowledge and expertise to the jury, which diminished any risk of prejudice from the short-hand reference.

Thus, the trial court's decision to permit defense counsel to refer to VanSoestbergen as "Gus" was a reasoned one, and well within the trial court's sound discretion in managing the trial proceeding. Accordingly, we find no abuse of discretion in the trial court's decision to permit this short-hand reference at trial.

IV. Challenge to jury instructions

[4] Plaintiffs next argue that the trial court erred by declining to instruct the jury on whether Amaya was "injured by the negligence *of the defendants*," which would have included both VanSoestbergen and his employer, the Charlotte-Mecklenburg Hospital Authority, which Plaintiffs contend is "the largest hospital system in the western part of the state" and a party that is "financially responsible" for any judgment against VanSoestbergen. Instead, the trial court instructed the jury to find whether Amaya was "injured by the negligence of the defendant Gus VanSoestbergen" and then, in a separate portion of the instruction, explained that the hospital "would be responsible for any alleged acts of negligence by Gus VanSoestbergen." We hold that the trial court's instruction was proper and within the court's sound discretion.

When instructing a jury, the "framing and wording of the issues lies within the discretion of the trial judge." *Pittman v. First Protection Life Ins. Co.*, 72 N.C. App. 428, 432, 325 S.E.2d 287, 290 (1985). "This Court reviews jury instructions contextually and in its entirety. The charge will be held to be sufficient if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed." *State v. Blizzard*, 169 N.C. App. 285, 296–97, 610 S.E.2d 245, 253 (2005). "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury." *Id.* at 297, 610 S.E.2d at 253.

The trial court's instructions were well within its sound discretion under this standard and did not mislead the jury. The factual issues to be decided by the jury concerned acts by VanSoestbergen. The court properly instructed the jury on those issues. The court also instructed the jury that "the Charlotte-Mecklenburg Hospital Authority would be responsible for any alleged acts of negligence by Gus VanSoestbergen."

Thus, the jury properly was instructed both on the issues it must decide, and on the legal responsibility of the respective defendants. Indeed, the trial court may have rejected Plaintiffs' proposed instruction because it could have misled the jury. Had the jury been asked to consider the negligence of the hospital itself, it may have led to speculation about acts or omissions by medical professionals involved in Amaya's care who were not part of the claims tried in this case. Accordingly, we find no abuse of discretion in the trial court's instructions.

V. Trial court's instructions in response to jury questions

[5] Finally, Plaintiffs argue that the trial court erred in its answers to questions from the jury during deliberations. Again, we reject this argument.

"A trial court's answer to a jury question is treated as an instruction to the jury." *Martin v. Pope*, 257 N.C. App. 641, 648, 811 S.E.2d 191, 197 (2018). Thus, as with the jury instruction analysis above, we review this issue for abuse of discretion, examining whether the trial court's framing and wording left no reasonable cause to believe the jury was misled or misinformed about the law. *Pittman*, 72 N.C. App. at 432, 325 S.E.2d at 290.

During deliberations, the jurors asked several questions, including some about the evidence they could consider in their deliberations. The trial court responded with the following instruction:

> No. 1, the question is: What is evidence? Evidence is the testimony of the witnesses and the exhibits or records that were offered into evidence. You may and should determine what evidence you believe to be – or you believe. . . . You may also consider any matters that you infer from the testimony and exhibits in the case, so long as any inference is reasonable and logically drawn from the testimony and the exhibits in the case.

Plaintiffs agree that this was an accurate statement of the law and they do not assert any error in this instruction standing alone.

Later in deliberations, the jury asked a specific question concerning the court's original instruction on the standard of care. At the same time, the jury submitted a note indicating that they were unable to reach a unanimous verdict.

The court thoroughly discussed with the parties how to respond to the jury's question. In a conversation stretching for nearly fifteen pages

of the trial transcript, the parties speculated about what the jury likely was getting at with this question, particularly in light of the lack of unanimity. Ultimately, the trial court announced that it would simply repeat its original instruction on negligence and the standard of care, taken from pattern jury instructions, explaining that "I think if they listen to what I'm telling them that that will give them the answer."

Plaintiffs' counsel then stated that "I think you made your decision. I am not in any way requesting you change that." But counsel asked the court also to repeat the instruction, quoted above, that the trial court gave in response to the jury's question about the evidence the jury properly could consider.

The court responded that "I think the Court, in the exercise of its discretion, will just limit the answer to these four paragraphs which I believe answers what the – what they are seeking to know." After the jury returned to the courtroom, the trial court read the jury's question and gave the following explanation:

> What I'm going to do is repeat a portion of the jury instructions that I think provides an answer to that question. This does not say that this section is any more or less important than any other section. It is just simply the one that appears, to me, to be most responsive to your request.

The court then repeated its original instructions on negligence and the standard of care, which the parties agree were accurate statements of the law, taken from pattern instructions.

Plaintiffs contend that it was error not to also re-instruct the jury using the earlier instruction on evidence and inferences because, without that re-instruction, the court was "in effect implying to the jury that, contrary to its earlier instruction, all evidence and reasonable inferences therefrom could *not* be considered."

We do not agree that the trial court's re-instruction created any contradiction or confusion. The trial court emphasized to the jury that the instruction it chose to repeat was no "more or less important than any other." And the instruction it chose to repeat was accurate and directly addressed the substance of the jury's question. Simply put, the trial court's decision to re-instruct in the way that it did was a reasoned one. Thus, under the narrow standard of review applicable to this issue, we cannot find that the trial court abused its discretion.

Conclusion

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

NO ERROR.

Judges BRYANT and BERGER concur.

IN THE MATTER OF A. B.

No. COA19-422

Filed 16 June 2020

1. Appeal and Error—preservation of issues—juvenile case—disposition order—judicial notice—failure to object—waiver

At a disposition hearing in a juvenile case where DSS asked the trial court to take judicial notice of the file in the case and a non-secure custody order filed earlier, respondent-mother did not object to the requests for judicial notice and made no argument that judicial notice should be limited due to the possibility of hearsay being used at earlier hearings. Therefore, respondent failed to preserve for appellate review her argument that the trial court's findings of fact in its disposition order were not based on competent evidence.

2. Child Abuse, Dependency, and Neglect—abused juvenile—disposition order—findings of fact—identity of abuser

A dispositional order in an abuse, neglect, and dependency case was affirmed on appeal where the respondent-mother's argument—contending a finding of fact and conclusion of law that the child's parents and caretakers of the juvenile inflicted serious injury upon her or allowed it to be inflicted upon her was not supported by the evidence—lacked merit. Although respondent-mother did not have custody of the child and had only spent a few hours with the child in the two years before the filing of the abuse petition, an adjudication of abuse, neglect, and dependency pertains to the status of the child—not to the identity of any perpetrator of abuse or neglect of the child—and clear and convincing evidence supported the findings of fact and conclusion of law that the child was an abused juvenile.

Appeal by Respondent-Mother from order entered 7 January 2019 by Judge Lee W. Gavin in Randolph County District Court. Heard in the Court of Appeals 26 May 2020.

Melissa Starr Livesay for Petitioner-Appellee Randolph County Department of Social Services.

K&L Gates LLP, by Maggie D. Blair, for Appellee Guardian ad Litem.

Robert W. Ewing for Respondent-Appellant-Mother.

COLLINS, Judge.

Respondent-Mother appeals from the trial court's "Order of Disposition," which maintained placement authority of the minor child with petitioner Randolph County Department of Social Services ("DSS") and required DSS to continue reunification efforts with Mother. We affirm.

I. Factual and Procedural Background

On 19 October 2011, Amy[1] was born to parents Father and Mother. For the first seven years of Amy's life, the status of her custody and of Father and Mother's ability to provide for Amy's care were repeatedly contested.

Mother suffers from mental illness and mental health issues, including depression, bipolar disorder, borderline personality disorder, and substance abuse issues. On 17 January 2014, when Amy was two years old, Father attempted to give his step-mother, Linda Byrd ("Linda"), temporary custody of Amy. Father stated in writing that Mother had been "involuntarily committed" that same day and that, because he worked 12-hour shifts, he was "not able to give [Amy] the proper care she needs around the clock[.]" Father stated that he wanted Linda to care for Amy until Father and Mother were "able to do so together."

From March 2014 to December 2014, Amy lived with Linda. DSS identified Linda as a safety placement and placed Amy into her care. In 2015, Father and Mother separated; Father was awarded custody of Amy and Mother received visitation. The last time Mother was considered Amy's primary caregiver was in October 2015, and Mother spent approximately 12 hours with Amy between October 2015 and November 2017.

1. We use pseudonyms to protect the identity of the minor child. N.C. R. App. P. 42.

At various times in 2016 and 2017, Amy was placed into the care of her paternal step-great uncle and aunt, Seth and Kelly Smith (the "Smiths"). Amy lived with the Smiths for at least 11 months, and they provided her with food and clothes. The Smiths were temporarily appointed as Amy's temporary guardian in 2016.

On 19 April 2017, the Smiths sought custody of Amy, but custody was awarded to Father. After Father obtained custody of Amy, Mother did not see Amy until September 2017.

On 10 September 2017, the Randleman City Police Department received a report from Amy's daycare concerning her welfare and possible mistreatment. On 11 September 2017, a detective with the police department personally visited Amy's daycare to view photographs of Amy and interview the daycare workers.

Officers went to Father's home to locate Amy and heard a child crying; the officers climbed through an unlocked window, heard a child screaming from the kitchen, and found Amy locked inside a closet. The closet was latched from the outside with a slide dead bolt. Officers found Amy squatting on the floor, wearing dirty clothes, and noticed that there was rat poison, paint, and electrical wiring around her. Her head was shaven, she had injuries on her head, face, and neck, and she was "just skin and bones." Amy was transported to the police department and met with a DSS worker.

On 13 September 2017, DSS filed a juvenile petition alleging that Amy was an abused, neglected, and dependent juvenile. DSS obtained non-secure custody of Amy that same day. Mother was served with the juvenile pleadings that same day.

On 1 March 2018, the case came on for an adjudication hearing. The hearing took place over the course of 6 court sessions: 1, 2, and 23 March 2018; 4 and 25 April 2018; and 15 June 2018. On 11 July 2018, the trial court entered an order adjudicating Amy a dependent, neglected, and abused juvenile.

On 9 and 11 July 2018, the case came on for a disposition hearing. On 7 January 2019, the trial court entered a disposition order continuing Amy in the custody of DSS. On 6 February 2019, Mother gave written notice of appeal.

II. Discussion

Mother argues that (1) the trial court's finding of fact that she lacked an appropriate childcare arrangement was not supported by competent

findings of fact[2] and (2) the trial court's finding of fact and conclusion of law that she either committed felony assault or allowed the felony assault to occur causing Amy to sustain a serious physical injury was not supported by the findings of fact or by the evidence presented at the adjudication hearing.

1. Judicial Notice of Prior Orders

[1] Mother argues that the trial court's findings of fact regarding her lack of an appropriate childcare arrangement were "not based upon competent evidence because the trial court took judicial notice of prior nonsecure orders where the Rules of Evidence are not applied and not based upon the evidence at the adjudication hearing."

Mother has failed to properly preserve this issue for appeal. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). A respondent's failure to object "to the trial court's taking judicial notice of [] underlying juvenile case files . . . waive[s] appellate review" of the issue. *In re W.L.M.*, 181 N.C. App. 518, 522, 640 S.E.2d 439, 442 (2007).

Here, DSS asked the trial court to take judicial notice of "the file in this case" and then specifically asked the court to take notice of a nonsecure custody order filed on 6 February 2018. At the conclusion of the adjudication hearing, DSS again asked the trial court to take judicial notice of the prior orders in this case and to "refresh its recollection about those orders." Mother did not object at any time to the requests for judicial notice, and she made no argument that judicial notice should be limited due to the possibility of hearsay evidence being used at earlier hearings.

Mother's failure to raise a timely objection thus waives the issue on appeal. *See In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991) ("Respondent also contends that the court erred in basing these findings on evidence that was not substantive or was hearsay. Respondent failed to raise these objections at trial, however, and must be considered to have waived them.") (internal quotation marks and citation omitted).

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2. Mother does not contest the adjudication order's conclusions of law that Amy is an abused and neglected juvenile.

2. Finding of Fact 129 & Conclusion of Law 5

[2] Mother next argues that the trial court's finding of fact 129 and conclusion of law 5 contained in the adjudication order are not supported by the evidence. Finding of fact 129 and conclusion of law 5 both state:

> The parents and caretaker of the minor child [Amy] inflicted or allowed to be inflicted upon the juvenile a serious physical injury by other than accidental means and/or created or allowed to be created a substantial risk of serious physical injury to the juvenile by other than accidental means.

We review a trial court's order of adjudication to determine "(1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re Q.A.*, 245 N.C. App. 71, 73-74, 781 S.E.2d 862, 864 (2016) (quotation marks, brackets, and citation omitted). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, 245 N.C. App. 35, 41, 781 S.E.2d 685, 689 (2016). We review a trial court's conclusions of law de novo. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

When determining whether a child is abused, neglected, or dependent, "the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). In *In re J.S.*, 182 N.C. App. 79, 641 S.E.2d 395 (2007), this Court explained:

> The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected or dependent. . . . In contrast, proceedings to terminate parental rights focus on whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination. The purpose of the adjudication and disposition proceedings should not be morphed on appeal into a question of culpability regarding the conduct of an individual parent. The question this Court must look at on review is whether the court made the proper determination in making findings and conclusions as to the status of the juvenile.

Id. at 86, 641 S.E.2d at 399 (citations omitted).

In the instant case, clear and convincing evidence supports the findings of fact, which in turn support the conclusion of law that Amy is an abused juvenile; Mother concedes on appeal that Amy is an abused juvenile. The trial court's evidence and findings include, inter alia, that: law enforcement officers discovered Amy locked in a closet with no food or water; surrounded by rat poison, paint, and exposed wiring; Amy weighed only 28-pounds at the age of five-years-old, her "legs, buttocks and cheeks . . . were remarkable for their lack of fat storage," and she had "hanging skin on her buttocks" due to extreme malnutrition; Amy was covered in lanugo, a type of very fine hair which takes months to develop and which is a secondary sign of starvation; Amy suffered from "refeeding syndrome which occurs when individuals have been starved and then been fed" and the body does "not know how to handle the food"; and that Amy developed a form of hepatitis due to the refeeding syndrome. In fact, the trial court found that Amy was at risk of a heart attack and "had only a few more days before it would have been very possible for her to die."

Additionally, the trial court found that Amy is "a victim of child torture" who was locked in a closet, beaten, isolated, and starved on multiple occasions. Portions of Amy's hair had been pulled out, resulting in red, irritated bald patches across her scalp; Amy's body showed "physical signs of being beaten," as she had bruises on her face, scratches on her neck, and abrasions across her face and body; and there was a scratch mark on her ankle from where Father tied stereo wire to Amy's wrist and ankle. The record evidence and findings of fact support that Amy endured a non-accidental, serious physical injury, and thus the trial court properly determined Amy's status as an abused juvenile. *Id.*

As "an adjudication of abuse, neglect, or dependency pertains to the status of the child and not to the identity of any perpetrator of abuse or neglect of the child[,]" *In re S.C.R.*, 217 N.C. App. 166, 170, 718 S.E.2d 709, 713 (2011), and because there is clear and convincing evidence supporting findings of fact that Amy is an abused juvenile, Mother's argument that finding of fact 129 and conclusion of law 5 are not supported by the evidence is without merit. *See id.* (determining that "the trial court erred when it dismissed the petition against the father on the grounds that he was not involved in any of the actions enumerated in the Petition" because "[a]djudication and disposition proceedings do not involve the culpability regarding the conduct of an individual parent") (quotation marks and citations omitted).

III. Conclusion

As Mother's failure to raise a timely objection waives the first issue on appeal, and because there was ample evidence to support the trial court's findings of fact and conclusion of law that Amy was an abused juvenile, we affirm the trial court's order.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

IN THE MATTER OF A.N.T.

No. COA19-690

Filed 16 June 2020

1. Child Abuse, Dependency, and Neglect—permanent plan of guardianship—nonrelatives—failure to consider placement with relative—required findings of fact

In a neglect and dependency case, the trial court erred in granting guardianship of respondent-father's minor daughter to nonrelatives (the daughter's second-grade teacher and her teacher's husband) at a permanency planning hearing without first considering placement with the child's grandmother and making the specific findings mandated under N.C.G.S. § 7B-903(a1)—which requires courts to consider placement with a relative before considering placement with a nonrelative—explaining whether the grandmother was willing and able to care for and provide a safe home for the child and whether placement with the grandmother would be contrary to the child's best interests.

2. Child Visitation—permanency planning order—forbidding visitation with father—challenge dismissed without prejudice

In a neglect and dependency case, the Court of Appeals declined to review respondent-father's argument that the trial court improperly forbade him from having visitation with his minor daughter while he was incarcerated, where the permanency planning order forbidding visitation was vacated and remanded on appeal (on other grounds) and respondent-father was scheduled for release from prison during the same month as the appeal. The Court of Appeals

dismissed respondent-father's argument without prejudice so that he could raise the visitation issue in the trial court after his release.

Appeal by respondent from order entered 17 April 2019 by Judge Jeanie R. Houston in Wilkes County District Court. Heard in the Court of Appeals 26 May 2020.

Erika Leigh Hamby for petitioner-appellee Wilkes County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Tiffany M. Burba and Catherine G. Clodfelter, for guardian ad litem.

Forrest Firm, P.A., by Patrick S. Lineberry for respondent-appellant.

TYSON, Judge.

Respondent appeals from the trial court's order placing his daughter into a guardianship with a nonrelative. We vacate the order for nonrelative guardianship and remand.

I. Factual and Procedural Background

Respondent is a federal inmate currently serving a sentence for manufacturing methamphetamine. Respondent has been incarcerated since 2010. His wife was released from federal prison in late 2016 after serving her sentence for manufacturing methamphetamine. Their daughter, A.N.T. ("Alexis") was born in 2009 and has not lived with either parent since birth. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles). Alexis was placed to live with her maternal grandparents.

DSS had previously been involved with these grandparents after receiving reports that drugs were being sold out of their home, and that Alexis' uncle was a pedophile and living in the home. On 8 June 2016, Wilkes County Department of Social Services ("DSS") filed a petition alleging abuse and neglect of Alexis by her maternal grandparents. By the time of the filing of the petition, Alexis had been moved into another family placement with her maternal great-grandparents.

On 26 July 2016, Alexis was adjudicated as neglected and dependent as defined in N.C. Gen. Stat. § 7B-101 (2019). Alexis remained in the care of her maternal great-grandparents. Overnight and weekend visits were allowed with her paternal aunt, Respondent's sister.

Alexis' mother entered into a case plan with DSS in November 2016 upon her release from prison. The mother visited with Alexis under supervision. The permanent plan for the child was reunification with her mother. On 8 May 2017, the court held a permanency planning hearing. By this date, Alexis' mother had become sporadic in her drug screens, and in maintaining housing and employment. The trial court ordered a primary permanent plan of reunification and a concurrent plan of custody with an approved caregiver.

Additional review hearings were held in August and October 2017. Reunification of Alexis with her mother remained the primary plan, with custody with an approved caregiver as the concurrent plan. At the 30 October 2017 hearing, the trial court specifically allowed Alexis to receive letters from Respondent through DSS.

DSS received reports of physical and sexual abuse and illegal drug use by another relative living in the maternal great-grandparents' home. The great-grandparents were not transporting Alexis to medical or therapy appointments. DSS concluded Alexis' maternal great-grandparents were no longer able to adequately care for her. In February 2018, Alexis was moved to a nonrelative placement with her second-grade teacher and her teacher's husband ("Mr. and Mrs. L."). Alexis' mother consented to this placement.

After a permanency planning hearing held 19 March 2018, the district court relieved DSS of further reunification efforts with Respondent, who remained incarcerated in a federal prison, and continued the primary permanent plan of reunification with the mother. Two relatives were identified as potential placements for Alexis: a second cousin and a paternal aunt.

Alexis indicated she did not wish to live with her paternal aunt. Concerns had arisen earlier that the paternal aunt's children had engaged in sexual conduct with Alexis. Alexis' mother was re-incarcerated and subsequently released in August 2018.

Respondent's mother ("Mrs. T.") was recognized as a potential placement for Alexis for the first time at the 29 October 2018 permanency planning hearing. An adult son with a criminal record was reported to be living in the paternal grandparent's home. The court heard testimony from a DSS social worker and from Respondent's mother.

The trial court found Alexis was happy in Mr. and Mrs. L.'s home, she wanted to stay with them, and Mr. and Mrs. L. were agreeable to facilitating and maintaining a relationship with Alexis and her family.

The court found Alexis had stated she wanted to stay with Mr. and Mrs. L., and did not want to be placed back into her maternal grandmother's home.

The court also found Respondent's release date from custody was June 2020. Alexis had refused a letter from her father and stated she did not know him. As noted, the trial court had specifically allowed Alexis to receive letters from Respondent through DSS at the 30 October 2017 hearing. Respondent had offered to "sign [his] rights over" to his daughter for her placement with his sister in June 2016.

The court found Respondent's mother was interested in opening her home for Alexis to live with her and her husband. The court's order includes a conclusion that DSS shall "explore the homes of the child's paternal grandmother's and her current foster home as a permanent placement." The record does not contain any home study for Respondent's mother.

Alexis' primary permanent plan was modified to custody with an approved caregiver and the secondary plan to be guardianship. Respondent failed to appeal from this order.

At the permanency planning hearing on 18 February 2019, the court heard testimony from Mrs. T. about the condition of her home, her desire to have Alexis placed in her care, and that Respondent had indicated it was his desire as well. Mrs. T. testified and the district court noted that her other adult son was no longer living in her home. Following this hearing, the court entered a permanency planning order on 17 April 2019 granting guardianship of Alexis to Mr. and Mrs. L. Respondent timely appealed.

II. Jurisdiction

This Court possesses jurisdiction over Respondent's appeal from an order changing legal custody of a juvenile pursuant to N.C. Gen. Stat. § 7B-1001(a)(4) (2019).

III. Issues

Respondent argues the trial court erred in granting guardianship to nonrelatives and in forbidding him to have visitation with Alexis while he was incarcerated.

IV. Standard of Review

This Court's "review of a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906.1 is limited to whether there is competent

evidence in the record to support the findings and whether the findings support the conclusions of law." *In re D.S.*, 260 N.C. App. 194, 196, 817 S.E.2d 901, 904 (2018) (internal quotation marks and citation omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (internal quotation marks and citation omitted).

V. Analysis

A. Guardianship

[1] Respondent challenges the trial court's grant of guardianship of Alexis to nonrelatives. Respondent asserts the statutes and precedents require the trial court to make specific findings of placement with his mother, Alexis' grandmother, before it could consider nonrelatives, Mr. and Mrs. L. We agree.

The district court "*shall first consider* whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home," in determining "out-of-home" care for a juvenile. N.C. Gen. Stat. § 7B-903(a1) (2019) (emphasis supplied). The statute further directs that "[i]f the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then *the court shall order* placement of the juvenile with the relative *unless* the court finds that the placement is contrary to the best interests of the juvenile." *Id.* (emphasis supplied).

N.C. Gen. Stat. § 7B-906.1(j) requires the court to "verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-906.1(j) (2019). Consistent with N.C. Gen. Stat. § 7B-903, the court may consider the guardian to have "adequate resources" when the guardian has "provided a stable placement for the juvenile for at least six consecutive months." *Id.*

The guardian *ad litem* asserts N.C. Gen. Stat. § 7B-903 provides options and guidance to a court when a child must be removed from the home. *See* N.C. Gen. Stat. § 7B-903(a1). The guardian *ad litem* notes Alexis had been living outside of her parents' home since birth, was placed in two maternal relatives' homes, and was moved from both.

1. *In re D.S.*

"This Court has held that before placing a juvenile in an out-of-home placement at a permanency planning hearing, the trial court was required

to first consider placing [the juvenile] with [her relatives] unless it found that such a placement was not in [the juvenile's] best interests." *In re D.S.*, 260 N.C. App. at 197, 817 S.E.2d at 904 (internal quotation marks and citation omitted). We have further held "[f]ailure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citation omitted).

In the case of *In re D.S.*, the trial court had made no findings indicating it had considered placement of the child with her paternal grandmother, but concluded placement with her was not in the child's best interest. *In re D.S.*, 260 N.C. App. at 200, 817 S.E.2d at 906. In that case, the trial court made none of the "findings of fact or conclusions of law resolving this issue, which it [was] statutorily required to do." *Id.*

In that case, the district court specifically found that both parents opposed appointment of a nonrelative guardian and had expressed preference for the child to be placed with the maternal grandmother. The court made no finding indicating the grandmother's home had been investigated, considered, or rejected as a placement option for D.S. *Id.*

Here, the trial court was aware of the application and desire of Respondent's mother as a relative placement for Alexis. The record and the court's order show it heard testimony from Mrs. T. and viewed photos of her home at the October 2018 and the 19 February 2019 hearings. She testified Respondent desired for Alexis to be placed into her care. At the October 2018 hearing, the trial court had ordered DSS to "explore the home[] of the child's paternal grandmother." No DSS home study appears in the record.

In support of its decision to award guardianship to Mr. and Mrs. L, the court made the following findings of fact.

> 14. It is not possible for the child to be returned to a parent immediately or within the next six (6) months.
>
> 15. There are relatives of the child who are willing and able to provide proper care and supervision in a safe home. [Alexis] was residing in the home of her maternal great grandparents, [Mr. and Mrs. C.,] but she was moved due to [Alexis'] uncle [M.C.'s] drug use and he was living with [Mr. and Mrs. C.]. [M.C.] has not been approved by Wilkes DSS to live in the home with [Alexis]. The child's paternal grandmother . . . is interested in becoming a placement for [Alexis].

16. The child's paternal grandmother, [Mrs. T.], lives on Yellow Banks Road in North Wilkesboro, N.C. in a 3-bedroom home. She and her husband are disabled and they draw $1,200.00 per month. [Mrs. T.] has not seen [Alexis] in approximately 2 years. [Mrs. T.] has a son [B.T.], who lived in her home and he works seasonally doing roofing, but he has a criminal record. [Mrs. T.] stated that [B.T.] no longer lives in her home. [Mrs. T.] has presented photos in the past of her home to the court as Father's Exhibit 1 and these were at that time admitted into evidence and incorporated herein as Findings of Fact.

17. There are non-relative kin who are willing and able to provide proper care and supervision for the child in a safe home, namely the child's current placement.

. . .

21. [Mr. and Mrs. L.] were present at the hearing. Pursuant to N.C.G.S. § 7B-600(b), the Court questioned [Mr. and Mrs. L.], and [Mr. and Mrs. L.] understand the legal significance of being appointed the minor child's guardian, and they have adequate resources to care appropriately for the minor child, and are able and willing to provide proper care and supervision of the minor child in a safe home.

22. The minor child has been placed with [Mr. and Mrs. L.] since February 2, 2018, and it is in the minor child's best [interest] that she be placed in guardianship with [Mr. and Mrs. L.]. [Mr. and Mrs. L.] are committed to caring for the minor child and providing guardianship, and it is unlikely that the respondent parents will be able to care for the minor child within the next six months. The minor child has been doing well in this placement and this placement is in her best interests.

Based upon these findings of fact, the trial court concluded:

1. That, pursuant to N.C.G.S. § 7B-600(b), the Court questioned [Mr. and Mrs. L.], and Mr. and Mrs. L[] understand the legal significance of being appointed the minor child's guardian, and they have adequate resources to care appropriately for the minor child, and are able and willing to provide proper care and supervision of the minor child in a safe home.

> 2. That the minor child has been placed with [Mr. and Mrs. L.] since February 2, 2018, and it is in the minor child's best [interest] that she be placed in guardianship with [Mr. and Mrs. L.]. Mr. and Mrs. L[]. are committed to caring for the minor child and providing guardianship, and it is unlikely that the respondent parents will be able to care for the minor child within the next six months. The minor child has been doing well in this placement and this placement is in her best interests.

The trial court's order memorializing the 18 February 2018 hearing is silent regarding whether the court had considered and rejected Mrs. T. as a willing and able relative placement for Alexis. No testimony or records produced at this hearing show the results of any DSS home study of Alexis' paternal grandmother's home.

The trial court made no finding that Respondent had expressed his desire for his daughter to be placed to live with his mother, or that it was not in Alexis' best interests to be in the care and custody of her paternal grandmother. As in the case of *D.S.*, the court "never made any findings of fact or conclusions of law resolving this issue, which it is statutorily required to do before placing [Alexis] with a non-relative." *Id.*

2. *In re E.R.*

Respondent also cites the case of *In re E.R.*, 248 N.C. App. 345, 795 S.E.2d 103 (2016). In that case the children, E.R. and E.R., were placed in a nonrelative guardianship. *Id.* at 347, 795 S.E.2d at 104. The district court determined it was in the best interests of E.R. and E.R. to be placed with a nonrelative guardian without making any reference to its consideration of placement with the maternal grandmother. *Id.* at 351, 795 S.E.2d at 106. The court's only mention of both children's grandmother was that she "may continue to be used as a resource for childcare of [the] minor children." *Id.*

In the case at bar, Respondent's expressed desire as a parent was for his daughter to live with his mother. Mrs. T. testified she was willing and able to care for Alexis and offered her home. The trial court referenced Respondent's mother's desire to be a placement for Alexis and the court listed the number of bedrooms in her home and the disability benefits she and her husband draw each month. Mrs. T. also testified her other son no longer lives in their home. This testimony is evidence to consider Mrs. T.'s ability to care for and provide a safe environment for eleven-year-old Alexis.

3. *In re L.L.*

This Court, in the case of *In re L.L.*, incorporated the requirement set forth in N.C. Gen. Stat. § 7B-903, that a trial court "shall" first give consideration to placement of a juvenile with relatives, before it may order the juvenile into placement with a nonrelative by a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906. *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), *abrogated on other grounds by In re T.H.T.*, 362 N.C. 446, 665 S.E.2d 54 (2008). Section 7B-906 was repealed and replaced by N.C. Gen. Stat. § 7B-906.1. *See* 2013 N.C. Sess. Laws 129, §§ 25-26. Subsection 7B-906(d), addressed by this Court in *In re L.L.*, contained the mandatory language authorizing dispositions under N.C. Gen. Stat. § 7B-903. *In re L.L.*, 172 N.C. App. at 701, 616 S.E.2d at 399.

Current section 7B-906.1(i) contains the same reference to the same mandatory language of N.C. Gen. Stat. § 7B-903. *Id.* This Court's holding in *In re L.L.* remains controlling on this issue. *Compare* N.C. Gen. Stat. § 7B-906(d) (2003) *with* N.C. Gen Stat. § 7B-906.1(i) (2019). "Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." *In re A.S.*, 203 N.C. App. at 141-42, 693 S.E.2d at 660 (citation omitted).

Our statutes and precedents mandate "a preference, where appropriate, to relative placements over non-relative, out-of-home placements." *In re T.H.*, 232 N.C. App. 16, 29, 753 S.E.2d 207, 216 (2014); *see also In re A.S.*, 203 N.C. App. at 141, 693 S.E.2d at 660 (recognizing our statutes "direct a juvenile court to consider placement with a relative as a first priority").

As in the cases of *In re D.S.*, *In re E.R.*, and *In re L.L.*, the trial court made no finding rejecting Mrs. T. as both willing and able to provide proper care and supervision in a safe home for her granddaughter. *See In re D.S.*, 260 N.C. App. at 197, 817 S.E.2d at 904; *In re E.R.*, 248 N.C. App at 351, 795 S.E.2d at 106; *In re L.L.*, 172 N.C. App. at 703, 616 S.E.2d at 400.

The order appealed from is inconsistent with the statutes and numerous precedents mandating placement of a juvenile with a suitable relative prior to considering a nonrelative. The court's order ignored the statutory requirements that it "shall order placement" with Mrs. T. over Mr. and Mrs. L. *See* N.C. Gen. Stat. § 7B-903(a1) ("If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then *the court shall order* placement of the juvenile with

the relative *unless* the court finds that the placement is contrary to the best interests of the juvenile" (emphasis supplied)).

The court's order placing Alexis in the legal guardianship of Mr. and Mrs. L. is vacated and this matter is remanded for a new permanency planning hearing where the trial court is to follow the statutes and precedents to make the required statutory findings of fact and conclusions of law. *See id.*

B. Visitation

[2] Respondent asserts the trial court's prohibition of visitation with Alexis while he is incarcerated was improper. He argues the trial court did not make a determination whether visitation would be in Alexis' best interest.

During the pendency of this case, N.C. Gen. Stat. § 7B-905.1(a) provided "[a]n order that removes custody of a juvenile from a parent, guardian, or custodian or that continues the juvenile's placement outside the home *shall provide for appropriate visitation* as may be in the best interests of the juvenile consistent with the juvenile's health and safety. The court may specify in the order conditions under which visitation may be suspended." N.C. Gen. Stat. § 7B-905.1(a) (2017) (emphasis supplied).

At the hearing from which the April 2019 order was appealed, Respondent did not seek a modification of the prohibition of prison visitation. Respondent's counsel attended every hearing in this matter. The guardian *ad litem* and DSS assert Respondent has waived his right to argue the trial court erred by forbidding him visitation while he was incarcerated because he had multiple opportunities to object or seek modification and failed to do so.

It is unnecessary to determine whether Respondent has waived this argument. Respondent is scheduled for release from incarceration in June 2020. The trial court's order provides for Respondent's visitation with his daughter upon release from prison. Subject to the constitutional protection to "the interest of parents in the care, custody, and control of their children," disposition and visitation orders are always subject to review and revision. *See Troxel v. Granville*, 530 U.S. 57, 65, 147 L. Ed. 2d 49, 56 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); N.C. Gen. Stat. § 7B-905.1(d) (2019) ("If the court retains jurisdiction, all parties shall be informed of the right to file a motion

for review of any visitation plan entered pursuant to this section. Upon motion of any party and after proper notice and a hearing, the court may establish, modify, or enforce a visitation plan that is in the juvenile's best interest."); N.C. Gen. Stat. § 7B-1000(a)-(b) (2019) ("Upon motion in the cause or petition, and after notice, the court may conduct a review hearing to determine whether the order of the court is in the best interests of the juvenile, and the court may modify or vacate the order in light of changes in circumstances or the needs of the juvenile [and] the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile, until terminated by order of the court, or until the juvenile is otherwise emancipated.").

Since we are vacating the trial court's permanency planning order entered 17 April 2019 and remanding for a new permanency planning hearing, it is unnecessary to reach the merits of Respondent's argument. We dismiss without prejudice to Respondent to raise the visitation issue after release from incarceration.

VI. Conclusion

Our statutes and precedents clearly mandate relative placements of a juvenile to maintain familial bonds. The statutes and precedents require and presume the juvenile's best interest is served when placed with a family member.

The district court is statutorily required to consider and place Alexis with a family member, who is willing and able to provide a safe home for her, before consideration of a juvenile's placement with a nonrelative. *See* N.C. Gen. Stat. § 7B-903(a1). The court erred when it disregarded Alexis' grandmother's and Respondent's wishes and proceeded to order guardianship with a nonrelative.

The trial court's award of guardianship of Alexis to Mr. and Mrs. L. is vacated and the case is remanded for a new permanency planning hearing consistent with the statutes, precedents, and changed conditions. *It is so ordered.*

VACATED AND REMANDED.

Judges BRYANT and YOUNG concur.

IN RE K.L.

[272 N.C. App. 30 (2020)]

IN THE MATTER OF K.L., J.A. II

No. COA19-800

Filed 16 June 2020

1. Child Abuse, Dependency, and Neglect—adjudication of abuse —unexplained injuries—findings of fact

A trial court's order adjudicating an infant abused—based on fractures the child suffered in both legs for which there was no concrete explanation—contained findings of fact that were not supported by clear and convincing evidence, including that the child was in the sole and exclusive care of respondent-parents during the period of time when the fractures likely occurred. Other challenged findings were either an accurate reflection of the evidence or contained an immaterial error.

2. Child Abuse, Dependency, and Neglect—adjudication of abuse —unexplained injuries—conclusion of law

The trial court erred by concluding as a matter of law that an infant was abused where, even though the child had several unexplained fractures to both legs, there was no clear and convincing evidence to support an inference respondent-parents inflicted or allowed to be inflicted those injuries. The evidence showed that the child was well-cared-for and healthy, respondent-mother sought immediate medical attention after noticing symptoms, those symptoms were subtle enough to escape the babysitter's notice and a diagnosis by the pediatrician, the fractures were not diagnosed until respondent-mother insisted on X-rays, and no concerns about the family or home environment were revealed after an investigation with which respondents fully cooperated.

3. Child Abuse, Dependency, and Neglect—subject matter jurisdiction—no allegations of neglect in petition—adjudication of neglect in error

The trial court erred by adjudicating a child neglected where the petition filed by the department of social services only contained factual allegations relating to abuse. Where the box on the form petition for neglect was not checked, and there were no allegations that clearly alleged a separate claim of neglect, respondent-parents were not given notice that neglect would be at issue.

4. Child Abuse, Dependency, and Neglect—adjudication of neglect —adjudication of abuse of child's sibling reversed

The trial court's adjudication of a child as neglected based on a younger sibling's unexplained injuries was reversed. Since there was no evidence to establish where the sibling suffered the injuries, the court's findings that the sibling was injured in the home and that the child therefore lived in an injurious environment were unsupported. Further, the Court of Appeals reversed the sibling's abuse adjudication for lack of support and the trial court found no other factors that would support a conclusion of neglect.

Appeal by Respondents from order entered 29 April 2019 by Judge Shamieka L. Rhinehart in Durham County District Court. Heard in the Court of Appeals 27 May 2020.

Senior Assistant County Attorney Elizabeth Kennedy-Gurnee for Petitioner-Appellee Durham County Department of Social Services.

Garron T. Michael for Respondent-Appellant Mother.

David A. Perez for Respondent-Appellant Father.

Christopher J. Waivers for Guardian Ad Litem.

BROOK, Judge.

Respondent-Mother and Respondent-Father (collectively "Respondents") appeal from an order adjudicating their son Joseph abused and neglected and Respondent-Mother's son Kenneth neglected.[1] On appeal, Respondents argue that the trial court erred in adjudicating Joseph abused and neglected and Kenneth neglected. After careful review, we reverse the order of the trial court.

I. Background

A. Factual Background

Early in the morning on 29 May 2018, around 1:00 a.m., Respondent-Mother woke up to feed three-month-old Joseph and afterward started to bounce him as she usually did after a feeding. However, she noticed that Joseph was not putting weight on his left leg. Respondent-Mother then woke Respondent-Father to tell him that Joseph was "not jumping

1. "Joseph" and "Kenneth" are pseudonyms used by the parties to refer to the juveniles in this case.

like he usually does." Joseph was not crying, nor did he appear to be in any distress, so Respondent-Father suggested that they wait and see how Joseph was feeling in the morning. When Joseph woke up at 5:00 a.m., he "didn't seem to be in any pain," but he still was not jumping when he was held up. Respondent-Mother dropped Joseph off at the babysitter and checked in with the babysitter regularly to see how Joseph was doing. The babysitter reported that Joseph appeared to be fine, but Respondent-Mother was still concerned, so she scheduled an appointment with his pediatrician for the following day, 30 May 2018.

The pediatrician examined Joseph and said that his leg looked "normal to her" and that "babies sometimes change their habits." Respondent-Mother asked the pediatrician if "she was sure," and the pediatrician told Respondent-Mother that she could order an X-ray if Respondent-Mother was still concerned. Respondent-Mother asked for the X-ray but did not receive the results until she arrived home with Joseph. The pediatrician called Respondent-Mother and told her that fractures had been identified on Joseph's legs and that she needed to take Joseph to the emergency room at the University of North Carolina hospital. Respondent-Mother went to Duke University Medical Center since it was closer. She called Respondent-Father on the way and told him what the X-rays had revealed and that she did not know how the fractures could have happened. Respondent-Father told her that two days prior, on 28 May 2018, he had placed Joseph on the couch, and, when he turned around, Joseph had fallen about two feet onto carpeted floor.

When Respondent-Mother arrived at Duke Emergency Center, she told the intake nurses what Respondent-Father had told her and gave them a letter from the diagnostic center that had taken the X-rays. The letter read that the center had identified fractures on Joseph's leg and that "non-accidental trauma should not be excluded." At the hospital, four classic metaphyseal lesion fractures were identified on Joseph's left and right legs, and, according to the doctors, these types of fractures were "highly concerning for non-accidental trauma or child abuse." Furthermore, they were not consistent with injuries from the short fall off the couch that Respondent-Father had reported but rather with force generated by "traction, torsion and/or shearing of the leg." After doctors at Duke read the X-rays, they admitted Joseph and decided to call child protective services.

Joseph was discharged from Duke Hospital on 1 June 2018 and placed in a kinship placement with his paternal grandparents. On 4 June 2018, DSS filed a juvenile petition alleging abuse as to Joseph and

neglect as to eight-year-old Kenneth, Respondent-Mother's son from a previous relationship who lived with Respondents.

B. Adjudication and Disposition

The adjudication hearing began on 18 December 2018 with Judge Rhinehart presiding. Dr. Deanna Adkins testified first for DSS as an expert in pediatric endocrinology and offered testimony as to her treatment of Joseph during his hospital stay. Dr. Adkins testified that she had performed an evaluation on Joseph on 30 May 2018 to identify whether Joseph had a bone disorder known as rickets because tests revealed that Joseph was vitamin D deficient with corresponding elevated parathyroid hormone ("PTH") levels.[2] Despite initially believing that Joseph had rickets in his left rib, Dr. Adkins testified that Joseph did not exhibit signs of rickets. Dr. Adkins further testified that vitamin D deficiency is common in infants like Joseph who are exclusively breastfed.

Next, Dr. Gary Schooler, the pediatric radiologist who interpreted Joseph's X-rays, testified that six fractures were identified on Joseph—two were not visible on the initial X-rays—but all were healing by the time of Joseph's follow-up visit on 18 June 2018. Dr. Schooler testified that Joseph would not have had the ability to generate the force to create his injuries on his own. Dr. Schooler also testified that, at the time he interpreted Joseph's X-rays, he was not aware that Joseph had vitamin D deficiency or PTH issues.

Dr. Lindsey Terrell, who worked at the Duke Child Abuse and Neglect Medical Evaluation Clinic ("CANMEC"), then testified. Dr. Terrell performed medical examinations of Joseph on 31 May 2018, 1 June 2018, and 18 June 2018. Dr. Terrell collected a complete patient history from Respondents—questioning them together and separately—to try to determine the source of Joseph's injuries. Dr. Terrell testified that Respondents were cooperative, answered her questions, and provided the information that she requested. Dr. Terrell also testified that she spoke with Joseph's primary care provider at Chapel Hill Pediatrics, and the providers at the practice told her they had seen Joseph for his newborn, two-week, one-month, and two-month wellness checks and they had no concerns about him or his family.

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2. Dr. Adkins testified that rickets is "a bone mineral problem" of which there are multiple types. She further testified that in Joseph's case, doctors evaluated him for "vitamin D deficiency rickets . . . where bone is formed without being calcified at the growth plate. And so the growth plate's widened and that area is not as hard as the other parts of the bone because there is not the calcium in it."

Dr. Terrell testified that when a child under the age of one has a fracture, it is recommended that their whole body be assessed and their brain, skull, organs, bones, and eyes be examined for other injuries. Dr. Terrell testified that those tests were ordered, and there were no abnormal findings—save for the fractures in Joseph's legs. Dr. Terrell also testified that Respondent-Mother asked that Joseph be tested for osteogenesis imperfecta ("OI"), another form of rickets, because OI ran in her family, and Respondent-Mother reported that she had sustained a fracture when she was ten or twelve merely from walking. The test was performed and ultimately came back negative.

Dr. Terrell testified that in her opinion Joseph's injuries were acute and based on the history provided by the parents, most likely occurred on or around 28 May 2018. Moreover, "it was very concerning to" her that "despite multiple times in trying to obtain a history [from Respondents] there was no history provided that could explain the six fractures found in [Joseph]'s legs." Without an explanation or an account for the force she indicated was likely necessary to cause the injuries, Dr. Terrell opined that it was "highly probable" that Joseph had experienced some type of physical abuse.

Durham DSS social worker Shekinah Taylor testified last for DSS. Social Worker Taylor testified that she was assigned to Joseph and Kenneth's case on 31 May 2018 and that as part of her investigation she spoke with the doctors at the CANMEC clinic. As DSS had interviewed Respondents and Kenneth the evening Joseph had been admitted to the hospital, they were not formally interviewed again regarding Joseph's injuries. Social Worker Taylor testified that her role at that time was to complete a safety plan with Respondents regarding Joseph and Kenneth, and, once that was done, she transferred the case to another social worker on either 1 or 4 June 2018. Social Worker Taylor also testified that no bruises, markings, or indications of abuse or injury were ever found on Kenneth. She further testified that DSS had concerns for an injurious environment due to Kenneth's living in the home where Joseph's injuries "potentially occurred[,]" which resulted in the juvenile petition alleging Kenneth to be a neglected juvenile.

Respondents then testified. Both Respondent-Father and Respondent-Mother testified that they did not know how Joseph sustained his injuries. Respondent-Mother testified that not knowing what caused Joseph's fractures "bothers me because if something's wrong with him I definitely[] . . . want to know . . . if it's, you know a bone disease or something." Respondent-Father testified that criminal child abuse charges were never brought against him or Respondent-Mother.

Following the presentation of all evidence, the trial court announced its judgment in court on 20 December 2018, adjudicating Joseph abused and Kenneth neglected.

The matter then proceeded to the disposition stage.

Social Worker Taylor testified first that she did not have any concerns regarding Respondents' ability to maintain stable housing or employment. Social Worker Brianna Dearing, who was then assigned to the case, testified that Respondents had fully complied with DSS's recommendations and been "very cooperative." Social Worker Dearing testified that she had spoken with Kenneth several times since being assigned to the case and Kenneth told her that "he doesn't like the fact that his brother doesn't live in the home[,]" that he loved Respondent-Father, and wanted to live with his mom, Respondent-Mother. Social Worker Dearing also testified that Respondents visited Joseph daily, driving an hour and a half each way to visit Joseph at his grandparents' home.

Guardian Ad Litem ("GAL") Susan Fisher then testified about her investigation regarding Joseph and Kenneth. She testified that she had no concerns regarding Respondents' interactions with both Joseph and Kenneth and that the two children appeared to be very bonded to Respondents. GAL Fisher also testified that she had spoken with Respondent-Father's ex-wife of ten years, with whom he had three children, who reported that Respondent-Father "wouldn't hurt a fly" and that she had "no concerns at all that he did anything to injure [Joseph]." Finally, GAL Fisher testified that, contrary to what she wrote in her court summary, she did not "feel that there is a danger for the children to be in [Respondents'] home."

On 21 December 2018, the trial court determined that it would be in Kenneth's best interest to remain in Respondents' home but in Joseph's best interest to remain in the legal custody of DSS and in a kinship placement with his paternal grandparents.

The trial court's written order was entered on 29 April 2019, adjudicating Joseph abused and neglected and Kenneth neglected and including findings of fact and conclusions of law for disposition.

Respondents timely appealed.

II. Analysis

On appeal, Respondents argue that the trial court erred in adjudicating Joseph abused based only on unexplained injuries. Respondents further argue that the trial court lacked subject matter jurisdiction

to adjudicate Joseph neglected because DSS failed to properly allege neglect in the original juvenile petition, and the allegations pertaining to abuse were insufficient to put Respondents on notice that neglect was at issue. Finally, Respondents argue that the trial court erred by adjudicating Kenneth neglected solely on the basis of unexplained injuries sustained by his half-brother.

We consider Respondents' arguments in turn.[3]

A. Standard of Review

We review an adjudication under N.C. Gen. Stat. § 7B-807 (2019) to determine whether the trial court's findings of fact are supported by "clear and convincing competent evidence" and whether the court's findings support its conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). The "clear and convincing" standard "is greater than the preponderance of the evidence standard required in most civil cases." *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation and marks omitted). Clear and convincing evidence is "evidence which should fully convince." *Id.* (citation and marks omitted). Findings of fact unchallenged by the appellant are "binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Labels are not dispositive in our review of a lower court's factual findings and conclusions of law. *See State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) ("[F]indings of fact which are essentially conclusions of law will be treated as such on appeal.") (internal marks and citation omitted).

Whether a child is abused or neglected is a conclusion of law, *In re Ellis*, 135 N.C. App. 338, 340, 520 S.E.2d 118, 120 (1999), and we review a trial court's conclusions of law de novo, *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006). We also review the question of whether the trial court had subject matter jurisdiction over the action de novo. *In re J.A.P.*, 189 N.C. App. 683, 685, 659 S.E.2d 14, 16 (2008). Under a de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 8 (2013) (citation omitted).

B. Adjudication of Joseph as Abused

Respondents first argue that the trial court erred in adjudicating Joseph abused. We agree.

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3. Respondent-Mother and Respondent-Father filed separate briefs, but many of their arguments on appeal are similar so we consider them together. We have noted where their arguments differ throughout this opinion.

i. Findings of Fact Regarding Abuse

[1] Respondents argue that the trial court erred in adjudicating Joseph abused because several of the trial court's findings of fact are not supported by clear and convincing evidence. Respondents both challenge findings of fact 28 and 42, Respondent-Father challenges findings 17 and 18, and Respondent-Mother further challenges finding 23.

These challenged findings (or pertinent portions thereof) state:

> 17. . . . The mother reported that [Joseph] had been in her or his father's exclusive care from the evening of May 24, 2018 until the morning of May 29, 2018. . . .
>
> 18. . . . The child was not with the sitter during the evening of May 24, 2018 through the morning of May 29, 2018. . . .
>
> . . .
>
> 23. While providing history to Dr. Terrell, Father describes several times that Mother was in the kitchen and came right into the living room after [Joseph] reportedly fell from the couch. . . .
>
> . . .
>
> 28. According to Dr. Adkins, [Joseph]'s Vitamin D deficiency is consistent with a diagnosis of Vitamin D deficiency without evidence of Rickets. At trial, Dr. Adkins confirmed that [Joseph] does not have evidence of Rickets. [Joseph]'s evaluated [sic] PTH and parathyroid hormone are explained by his low Vitamin D level. According to Dr. Adkins, [Joseph]'s Calcium and Phosphorous are normal. Dr. Adkins opined that [Joseph]'s metaphyseal fractures are likely not related to his Vitamin D level and his long bones are not at increased risk of fractures.
>
> . . .
>
> 42. The Court finds that these (6) fractures occurred when [Joseph] was in the sole care of his two parents on May 28, 2018 and that these injuries were not from a fall. [Joseph] suffered non-accidental trauma based on all the medical documentation.

As to findings 17 and 18, Respondent-Father argues that the evidence shows Joseph was not in Respondents' exclusive care from

24 May 2018 to the morning of 29 May 2018, but rather clear and convincing evidence established that Joseph was with the babysitter on 25 May 2018 and was held by family members on 26 and 27 May 2018. We agree with Respondent-Father. The record demonstrates that Joseph was in the care of his babysitter for portions of 24 and 25 May 2018. Further, while Respondent-Mother testified that she and Respondent-Father were watching Joseph the whole weekend, she also noted that Joseph was held by family members at several family events on the weekend of 26 to 27 May 2018. Accordingly, we hold that both findings 17 and 18 are not supported by clear and convincing evidence insomuch as Joseph was not in Respondents' exclusive care from 24 May 2018 to 27 May 2018, and we are not bound by that portion of either finding.

Respondent-Mother next challenges finding 23, arguing Respondent-Father told Dr. Terrell that Respondent-Mother was in the kitchen *or* came into the living room after Joseph's fall from the couch. Though Respondent-Mother is correct, we hold that any error here is immaterial given that the record establishes the salient point: Respondent-Mother was not in the room when Joseph fell from the couch.

As to finding of fact 28, Respondents challenge this portion of that finding: "According to Dr. Adkins, [Joseph]'s Vitamin D deficiency is consistent with a diagnosis of Vitamin D deficiency without evidence of Rickets." Though she did not use these exact words, Dr. Adkins did testify that Joseph did not have rickets, but he was Vitamin D deficient. This finding thus is a fair summation of Dr. Adkins's testimony.

Finally, Respondents argue that finding of fact 42 is not supported by clear and convincing evidence in finding that Joseph was in the sole care of his parents when injured on 28 May 2018 and that he suffered "non-accidental trauma." We agree in part. Dr. Terrell testified that in her opinion, it was "highly probable" Joseph's injuries were caused by non-accidental trauma and not a fall from the couch. Dr. Terrell also testified Joseph's injuries occurred around when he became symptomatic, which was "on or around 28 May 2018[,]" not *on* 28 May 2018. Accordingly, clear and convincing evidence supports that Joseph suffered non-accidental trauma that was not from a fall. But there is no clear and convincing evidence that the fractures occurred when Joseph was in the sole care of his parents on 28 May 2018, and, thus, we are not bound by that portion of finding 42.

ii. Conclusion of Law Regarding Abuse

[2] Respondents next argue that the trial court erred as a matter of law by adjudicating Joseph abused where there was no

evidence—aside from Joseph's unexplained injuries—to support the trial court's conclusion.

An abused juvenile is defined, in pertinent part, as one whose parent, guardian, custodian, or caretaker "[i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means[.]" N.C. Gen. Stat. § 7B-101(1) (2019). "This Court has previously upheld adjudications of abuse where a child sustains non-accidental injuries, even where the injuries were unexplained[,]" where clear and convincing evidence supported the inference that the respondent-parents inflicted the child's injuries or allowed them to be inflicted. *In re J.M.*, 255 N.C. App. 483, 495, 804 S.E.2d 830, 838-39 (2017). While "the determinative factors [in a neglect proceeding] are the circumstances and conditions surrounding the child, not the fault or culpability of the parent[,]" *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984), the same is not true in an abuse proceeding, *see* N.C. Gen. Stat. § 7B-101(1) (defining an "abused juvenile" as one "whose parent, guardian, custodian, or caretaker: (a) [*i*]*nflicts or allows to be inflicted* . . . (b) *creates or allows to be created* . . . (c) *uses or allows to be used* . . .") (emphasis added).

For example, in *In re R.S.*, 254 N.C. App. 678, 683, 802 S.E.2d 169, 172 (2017), this Court upheld the trial court's abuse adjudication where, in addition to the infant's "serious, yet unexplained injuries," the infant was diagnosed with failure to thrive (weighing less than he did at birth), and a skeletal survey revealed prior, healing fractures on the infant. Testimony established that the infant's injuries "would have resulted in a significant amount of bleeding" such that it was "not credible" that the respondent-parents claimed not to have observed any bleeding or pain associated with the injury. *Id.* at 681, 802 S.E.2d at 171. We held that "the trial court's finding that the parents were responsible for those injuries was entirely appropriate." *Id.* at 683, 802 S.E.2d at 172.

And in *In re C.M.*, 198 N.C. App. 53, 678 S.E.2d 794 (2009), this Court affirmed an abuse adjudication where the child suffered from an unexplained subdural hematoma and further examination revealed bruises and marks on his back and chin. *Id.* at 58, 678 S.E.2d at 797. Additionally, witness testimony established the respondent-father had hit the child on the head earlier that day, and there were also confirmed instances of domestic violence in the home. *Id.* at 62, 678 S.E.2d at 799.

In *In re J.M.*, we again affirmed an abuse adjudication where a two-month-old was observed with "marks" on his neck. 255 N.C. App. at 485, 804 S.E.2d at 832. A subsequent skeletal survey revealed "healing

fractures to his ribs, tibia, and fibula; ear and tongue bruising; subconjunctival hemorrhages; and excoriation under the chin." *Id.* The mother also revealed to DSS that the respondent-father had punched the son in the stomach, excessively disciplined the daughter, engaged in domestic violence in front of the children, and smoked marijuana in the presence of the children. *Id.* Though the exact cause and manner of the infant's injuries were unknown, "[t]he binding findings of fact establish[ed] that the son sustained multiple non-accidental injuries and [the r]espondent-[f]ather was responsible for the injuries." *Id.* at 495, 804 S.E.2d at 838.

In each of these cases, though the exact cause of the child's injury was unclear, the trial court's findings of fact—or other evidence in the record—supported the inference that the respondent-parents were responsible for the unexplained injury. While "[t]he caselaw does not require a pattern of abuse or the presence of risk factors[,]" we do require clear and convincing evidence to support this inference. *In re L.Z.A.*, 249 N.C. App. 628, 637, 792 S.E.2d 160, 168 (2016) (affirming abuse adjudication where the infant sustained an unexplained bilateral midline shift, brain bleeding, and a skull fracture, the infant's skeletal survey revealed a one- to three-week-old healing fracture on her upper arm, and there was a delay in seeking medical treatment for the child). Such evidence can serve as the basis for findings of fact that, in turn, sufficiently support the conclusion that the respondent-parents inflicted or allowed the infliction of the injury at issue.

Here, the trial court's binding findings of fact established that

> 10. On or about May 30, 2018, After Hours Durham DSS CPS Social Worker Courtney Munroe ("Social Worker Munroe") conducted a hospital visit to initiate an assessment/CPS investigation in reference to [Joseph] and the family. Social Worker Munroe spoke with the mother, [], and observed the child, [Joseph]. [Respondent-Mother] stated she did not know how the child's leg was fractured. [Respondent-Mother] stated she had noticed that the child was not putting any pressure on his leg and took him to his pediatrician where it was confirmed that [Joseph] had a fracture in his left leg. The pediatrician recommended that the mother take the child to the UNC ED for further evaluation. However, the mother took him to DUMC immediately due to the closer proximity of DUMC. The medical providers at DUMC ED reported that the explanation given by the respondent parents was inconsistent with the injuries [Joseph] sustained. Due to concern for nonaccidental trauma, CANMEC was consulted.

11. . . . That same evening on May 30, 2018, Social Worker Munroe interviewed [Respondent-Father] at the family home . . . . Social Worker Munroe spoke with [Respondent-Father] who stated that . . . the child, [Joseph], rolled off the couch and fell to the floor; but he appeared fine afterwards. [Respondent-Father] reported that no family members were present in the room when [Joseph] rolled off the couch. . . . [Respondent-Father] also stated that he did not actually see the child roll off the couch but found him on the floor after placing [Joseph] on the couch. Social Worker Munroe observed that the couch was about 18 inches high and there was carpeted floor underneath it.

12. Social Worker Munroe also interviewed the minor child [Kenneth] (8 years old) who stated he did not see his baby brother fall nor did he know how he was hurt. Social Worker Munroe asked [Kenneth] how [Respondent-Father] disciplined him. [Kenneth] responded that [Respondent-Father] talks to him and tells him what to do or sometimes makes him write sentences. [Kenneth] denied that [Respondent-Father] ever hit him. Social Worker Munroe also asked [Kenneth] how his mother disciplined him. [Kenneth] stated that his mother takes his phone away or does not allow him to play games or watch TV. [Kenneth] also reported that he was happy at his mother's home. Social Worker Munroe did not observe any bruises, marks, or physical injuries to [Kenneth]. . . .

13. Durham DSS CPS Social Worker Shekinah Taylor was immediately assigned this case. On May 31, 2018, Social Worker Taylor contacted the family and requested a child and family team ("CFT") meeting to be held on June 1, 2019 [sic] to further discuss the CPS case and to develop a plan with the family for the children. [Respondent-Father] and [Respondent-Mother] attended the CFT and discuss [sic] planning for the children [Joseph and Kenneth]. Both [Respondent-Mother] and [Respondent-Father] have been forthcoming with the investigation and asking questions with hopes of finding out what could have caused these injuries in their son, [Joseph]. Durham DSS expressed their concerns for the safety of the children, especially [Joseph] who suffered metaphyseal fractures. . . .

. . .

17. . . . The mother reported to physician at DUMC ED that after noticing a change in [Joseph]'s behavior in the early morning of May 29, 2019 [sic], the mother took the child to his pediatrician at Chapel Hill Pediatrics on May 30, 2019 [sic]. During the CPS investigation, the mother shared that she asked [Joseph]'s father what happened, and he had provided the same account, that the child rolled off the couch and hit the floor. According to the father, the child did not cry after falling off the couch. Therefore, he thought that the child was okay. The mother also stated that she was upstairs with her (8-year-old son) [Kenneth] when [Joseph] fell off the couch.

18. On or about May 30, 2018, the mother also informed the DUMC ED doctor [] that other than [Joseph]'s left leg, he appeared completely normal and that she almost did not take him to the doctor. However, the mother did take him to the doctor because she concerned. The mother mentioned that the child started going to a sitter (Shonda Collins, a family friend of over 40 years) when the mother went back to work about a week ago. The child was with the sitter . . . on May 29, 2018 and again on May 30, 2018 for a few hours in the daytime. The mother stated that she called the sitter on May 29, 2018 and on May 30, 2018 to check on [Joseph]'s movement on his left leg. The mother reported that the sitter did not notice any issues with [Joseph]. The mother reported that she was concerned about [Joseph]'s leg, so she scheduled a doctor appointment for May 30, 2018 with his pediatrician at Chapel Hill Pediatrics.

19. At DUMC ED, additional x-rays were performed on [Joseph] as protocol. There were no visual [sic] bruises or marks on [Joseph]'s body when he presented at the ED on May 30, 2018. That same night (May 30, 2018), [Joseph] was seen by several physicians[.] . . .

20. [Joseph] is a previously healthy three months [sic] old male who was referred for consultation by Dr. Bordley of Pediatric ED Service for evaluation of broken bones. Due to concern for possible maltreatment the

following testing was recommended: a skeletal survey, dilated eye exam, head CT, screening abdominal injury labs (AST/ALT/Lipase), as well as labs to assess bone health (Vitamin D, PTH, Ca, Phos, Alk Phos). . . .

21. On May 31, 2018, Dr. Terrell introduced herself to [Respondent-Mother] as a Pediatrician on Duke Hospital's Child Abuse Consult Team. Dr. Terrell explained that Pediatric ED and Trauma Surgery Teams requested her consult to help assess [Joseph] given the injuries. Dr. Terrell explained that she provides medical evaluations regarding injury etiology. The Mother verbalized understanding and agreement and agreed to the evaluation. During the medical evaluation, the mother provided additional information to Dr. Terrell. Mother explained that their car was rear-ended in April 2018. Mother reported that [Joseph] was strapped in the car seat and the car seat was strapped in the car. . . . Mother called [Joseph]'s doctor after the accident. Mother reported that [Joseph] seemed fine; therefore, the doctor did not think that the child, [Joseph] needed to come in. Mother asked Dr. Terrell if [Joseph]'s fractures could have come from changing diapers. Dr. Terrell informed the mother that changing diapers would not cause these fractures. Dr. Terrell also stated that the automobile accident that the mother described was too long ago in time to be considered the cause of [Joseph]'s fractures. It would take significant force to cause this type of fracture with a closer time proximity. . . .

. . .

25. When asked about any risk factors and exposures to domestic violence in the home [by Dr. Terrell], the mother reported that [Joseph] has not witnessed domestic violence ("DV") first hand between caregivers or family members. Mother was asked with the father out of the room if there have been concern [sic] of DV or if she ever worries about her safety. Mother denied. Mother has previous marijuana use. [Joseph]'s meconium was positive for marijuana at birth. There is a history of mental illness involving family member(s) or caregiver(s). There is no history of criminal arrest or legal charges

against family member(s) or caregiver(s). Dr. Terrell also reviewed family medical history with the mother and father and there was no significant medical history. Dr. Terrell also reviewed all the available lab work and noted that the dilated eye exam, head CT, screening abdominal injury labs (AST/ALT/Lipase) were within normal limits.

26. . . . According to [Respondent-Mother]'s pregnancy/birth history for [Joseph], [Joseph]'s fetal movement and amniotic fluid volume were normal. Ultrasound examination during the pregnancy were normal. The mother took the following medications during pregnancy[:] Zoloft, Klonopin, Trazodone with a history of anxiety and depression. The mother was smoking marijuana every day before she found out about the pregnancy (first trimester). At birth, [Joseph]'s meconium drug screen was positive for marijuana ("THC"). [Joseph] was born at full-term (40 weeks and 3 days) by repeat C-section. According to medical records, labor was uncomplicated. There were perinatal issues of concern of withdrawal in view of the mother's drug use of THC. [Joseph] had a stuffy nose after delivery, but this resolved after 2 days. [Joseph] was discharged home with his mother at 3 days old.

. . .

29. On May 31, 2018, Dr. Gary Schooler, Pediatrics Radiologist, was also consulted regarding [Joseph]'s injuries. Dr. Schooler reviewed multiple prior left lower extremity x-rays (radiographs) completed on [Joseph] while at DUMC. Dr. Schooler also reviewed [Joseph]'s standard skeletal survey of a total of 20 images. There were no fractures identified with the calvarium (skull), visualized facial bones or spine and there was no evidence of static listhesis (joint instability); however, Dr. Schooler noted that there was a metaphyseal corner fracture (classic metaphyseal lesion) to [Joseph]'s right leg, highly suggestive of nonaccidental trauma. Findings and impressions regarding the right proximal tibial metaphyseal fracture were discussed with Dr. Terrell in the late evening of May 31, 2018. [Joseph] was found to have three metaphyseal corner fractures which are known as "classic metaphyseal lesions." . . .

. . .

37. On June 28, 2018, [Joseph] had genetic labs drawn. [Joseph]'s genetic labs were not different from his last genetic lab results from admission to DUMC from May 31, 2018 through June 1, 2018. The genetic/metabolic test results remain the same: negative for bone disorder. According to the Pediatric Endocrinology Team, [Joseph]'s Vitamin D insufficiency did not contribute to his multiple fractures and does not contradict the diagnosis of child abuse.

38. Based on the history provided by the parents, medical examinations, genetic testing, labs, x-rays, and skeletal surveys, Dr. Schooler, Dr. Terrell and Dr. Adkins agree along with other physicians consulted in this case that [Joseph]'s fractures are highly suspect for nonaccidental trauma.

39. The Court gives great weight to the fact that the parents could not provide history that could explain the six (6) fractures that [Joseph] sustained. The Court is concerned that the types of fractures that [Joseph] sustained were the kinds that are created by twisting, pulling, shearing, or torsion. It takes a significant amount of force to create the types of fractures that [Joseph] endured.

40. According to Dr. Terrell and the testimony the Court heard, May 28, 2018 was the day that [Joseph] became symptomatic. At the time that he became symptomatic or it became evident that he was not placing weight on his left leg, he was in the care of the two persons that are to make sure he is protected which are his mother and father.

. . .

42. The Court finds that these six (6) fractures occurred when [Joseph] was in the sole care of his two parents on May 28, 2018 and that these injuries were not from a fall. [Joseph] suffered non-accidental trauma based on all the medical documentation[.]

Unlike those instances in which this Court has upheld an abuse adjudication based on unexplained injuries, the trial court's detailed findings of fact in this case do not sufficiently support the conclusion

that Respondents inflicted or allowed the infliction of Joseph's injuries. Doctors noted in medical records, which were admitted into evidence and fully incorporated into the adjudication order, that Joseph was a healthy, well-cared-for, three-month-old baby. *Cf. In re R.S.*, 254 N.C. App. at 679, 802 S.E.2d at 170 (noting child was "diagnosed with failure to thrive" and weighed less than he did at birth). Both DSS and the doctors noted that Respondents were at all times forthcoming and cooperative in the ongoing investigation and Joseph's medical care and did not delay in seeking prompt medical attention for Joseph. *Cf. id.* at 682, 802 S.E.2d at 172 ("[Respondents] delayed meetings between the social worker and the [older] children, delayed and limited medical tests, and appear to have omitted information."); *cf. In re Y.Y.E.T.*, 205 N.C. App. 120, 122, 695 S.E.2d 517, 519 (2010) (noting two-day delay "in the parents' getting the child to the hospital"). In fact, Joseph's injuries manifested themselves so subtly that they were not noticed by his babysitter and initially escaped notice by his pediatrician and were diagnosed due to Respondent-Mother's persistence in seeking X-rays, which, in turn, revealed fractures in both his symptomatic and asymptomatic leg. And subsequent testing did not reveal any prior injuries, marks, bruising, or medical concerns with Joseph. *Cf. In re J.M.*, 255 N.C. App. at 485, 804 S.E.2d at 832 (skeletal survey revealed healing fractures to infant's ribs, tibia, fibula; ear and tongue bruising; subconjunctival hemorrhages; and excoriation under the chin). Finally, as noted above, the evidence does not support the finding that Joseph was in Respondents' exclusive care when his injuries occurred. *Cf. In re Y.Y.E.T.*, 205 N.C. App. at 127, 695 S.E.2d at 522 (noting unchallenged findings that the child was in the exclusive care of the respondent-parents at the time of the injuries).

The broader record raises no red flags about the family. There was no ongoing substance abuse nor domestic violence in the home, *cf. In re J.M.*, 255 N.C. App. at 485, 804 S.E.2d at 832, and Respondents had no prior history with DSS, *cf. In re K.B.*, 253 N.C. App. 423, 424-25, 801 S.E.2d 160, 162 (2017). Moreover, Kenneth told DSS that he was unaware of how Joseph was hurt, Respondents never punished him with violence, and he provided examples of appropriate discipline, including by talking with him and taking away his privileges. And neither Kenneth nor Joseph ever exhibited bruises or marks on their bodies.

The trial court was rightly concerned that Respondents were unable to explain Joseph's fractures. But, that alone, as a matter of law, cannot support the trial court's conclusion that Respondents were responsible for Joseph's injuries. There is nothing to bridge the evidentiary gap between the unexplained injuries here and the conclusion that Respondents inflicted them, and, in fact, much of the evidence is in

tension with that conclusion.[4] We therefore reverse the trial court's order adjudicating Joseph abused and remand to the trial court for further proceedings consistent with this opinion.

C. Adjudication of Joseph as Neglected

[3] Respondents next argue that the trial court erred in adjudicating Joseph neglected because the petition filed by DSS only alleged abuse. We agree.

i. Preservation

We first address DSS's argument that this issue is not preserved for our review.

"The pleading in an abuse, neglect, or dependency action is the petition[,]" N.C. Gen. Stat. § 7B-401 (2019), and must contain "allegations of facts sufficient to invoke jurisdiction over the juvenile[,]" *id.* § 7B-402(a). If the allegations are insufficient to put the party on notice as to which alleged grounds are at issue, then the trial court lacks subject matter jurisdiction over the action. *See In re K.B.*, 253 N.C. App. 423, 427, 801 S.E.2d 160, 163 (2017); *In re D.C.*, 183 N.C. App. 344, 349, 644 S.E.2d 640, 643 (2007). Since it is well established that "a question of jurisdiction may be addressed by this Court at any time, *sua sponte*, regardless of whether [the] parties properly preserved it for appellate review[,]" Respondents' argument is properly before us. *In re C.M.H.*,

4. We do not gainsay the nature of the challenges and concerns DSS faces when dealing with allegations of abuse in pre-mobile infants who are completely dependent on their caregivers and unable to report what has happened to them. In instances such as these, DSS is charged with taking quick and decisive action to assess and address unexplained trauma. Nor do we take lightly the risk that parents who are witness to or perpetrators of child abuse or neglect can collaborate to frustrate investigation by DSS. *See, e.g.*, *In re J.C.M.J.C*, 268 N.C. App. 47, 60, 834 S.E.2d 670, 679 (2019) ("We recognize [r]espondents' actions frustrated CCDHS's ability to gather evidence in this case.").

That being said, a review of the record before us indicates that DSS engaged in only a limited investigation of how Joseph sustained his injuries. According to Respondents' and Social Worker Taylor's testimony, Respondents were interviewed once by DSS regarding Joseph's injuries: the night he was admitted to the ER. (The report on that interview is not a part of our record.) Kenneth was also only interviewed once about Joseph's injuries, a discussion that, based on the record before us, did not touch on his physical interactions with his little brother. Neither Joseph's babysitter nor family members who had spent the weekend with him were interviewed. Instead, the causal link between Respondents and Joseph's injuries was based strictly on medical opinions about the serious nature of the fractures and, relatedly, that they were "highly probable" to have resulted from abuse. In this instance, given that there is no affirmative evidence in the record giving rise to even an inference that Respondents inflicted or allowed the infliction of a serious injury upon Joseph, these opinions are insufficient to support an abuse adjudication.

187 N.C. App. 807, 808, 653 S.E.2d 929, 930 (2007) (internal marks and citation omitted).

ii. Merits

Only "those conditions alleged in the juvenile petition" may "be considered, proved, and adjudicated[.]" *In re D.C.*, 183 N.C. App. at 349, 644 S.E.2d at 643. "[I]f the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate." *Id.* at 350, 644 S.E.2d at 643. This is so even if DSS fails to "check the [correct] box" on the petition. *In re K.B.*, 253 N.C. App. at 427, 801 S.E.2d at 163-64.

> While it is certainly the better practice for the petitioner to "check" the appropriate box on the petition for each ground for adjudication, if the specific factual allegations of the petition are sufficient to put the respondent on notice as to each alleged ground for adjudication, the petition will be adequate.

In re D.C., 183 N.C. App. at 350, 644 S.E.2d at 643. However, if the correct box is not checked *and* the factual allegations do not clearly allege the separate claim, then that adjudication must be reversed. *Id.*

In *In re K.B.*, we affirmed the trial court's adjudication of an abused, neglected, and dependent juvenile despite the fact that the petition only explicitly alleged that the child was abused and neglected. 253 N.C. App. at 426, 801 S.E.2d at 163. Though "DSS did not 'check the box' alleging dependency" on the petition, "[t]he allegations attached to the petition [] were sufficient to put respondent-mother on notice that dependency would be at issue during the adjudication hearing" because they "encompass[ed] the language reflected in the statutory definition of dependency[.]" *Id.* at 427-28, 801 S.E.2d at 163-64 (petition alleged specifically "that respondent-mother failed to provide for [the child]'s care or supervision and lacks an appropriate alternative child care arrangement." (internal marks omitted)). Moreover, our Court noted that an order entering stipulations for adjudication stated in the first sentence that the petition alleged abuse, neglect, and dependency. *Id.* at 428, 801 S.E.2d at 164.

On the other hand, in *In re D.C.*, this Court reversed the trial court's neglect adjudication where DSS alleged dependency in its juvenile petition but proceeded on the theory of neglect at adjudication. 183 N.C. App. at 349, 644 S.E.2d at 643. We held that the "specific factual allegations" attached to the petition "were insufficient to put [the] respondent

on notice that both dependency *and neglect* of C.C. would be at issue during the adjudication hearing." *Id.* at 350, 644 S.E.2d at 643 (emphasis in original). The attachment alleged that the respondent: "(1) received sporadic prenatal care for C.C., (2) refused to divulge the identity of C.C.'s father, (3) does not possess a crib, diapers, clothes, or formula for C.C., and (4) is incapable of providing care for a newborn." *Id.* We held that "[t]hese minimal allegations . . . while supporting the claim of dependency, did not clearly allege the separate claim of neglect."[5] *Id.*

Here, the juvenile petition that DSS filed alleged only that Joseph was an abused juvenile. The abuse box on the petition alone was checked and all allegations were found in this section of the form. Further, the petition tracked the language of the abuse statute, alleging "that the juvenile's parent, guardian, custodian, or caretaker: has inflicted or allowed to be inflicted on the juvenile a serious physical injury by other than accidental means." The only facts that DSS alleged in support of the petition were that

> [t]hree month old [Joseph] has two fracture [sic] in the left leg and one in the right leg. The mother and father can not [sic] explain how the injury occurred. The father stated the child fell of the couch, but the doctors state the injuries are not consistent with the story.

Not only did DSS fail to "check the box" for "neglect" on the form petition, but, as in *In re D.C.*, the factual allegations here do not "clearly allege the *separate claim* of neglect." 183 N.C. App. at 350, 644 S.E.2d at 643 (emphasis added). There is no reference to "neglect" in the allegations, nor do they encompass language from the statutory definition of neglect. Additionally, the arguments of counsel for Respondent-Mother, Respondent-Father, and the Guardian Ad Litem in the adjudicatory phase of the proceedings focused only on whether DSS had proved by

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5. Under N.C. Gen. Stat. § 7B-101(15) (2019), a "neglected juvenile" is

> Any juvenile less than 18 years of age . . . (ii) whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or the custody of whom has been unlawfully transferred under G.S. 14-321.2; or who has been placed for care or adoption in violation of law. . . .

Unlike in *In re K.B.*, the factual allegations in *In re D.C.* did not encompass the language in the statutory definition of neglect such that the respondent-parents had no notice that neglect would be at issue in the proceedings.

clear and convincing evidence that Joseph was abused. And when the trial court orally announced its judgment on 20 December 2018, it adjudicated Joseph abused—not abused *and neglected*. While the trial court's written order, entered over four months later, adjudicated Joseph abused and neglected, the record indicates that the Respondents did not have notice the issue of neglect was before the trial court.

We therefore reverse that portion of the trial court's order adjudicating Joseph neglected.

D. Adjudication of Kenneth as Neglected

[4] Finally, Respondents argue that the trial court erred in adjudicating Kenneth neglected. We agree.

i. Findings of Fact Regarding Neglect

Respondents first challenge finding of fact 9 as not supported by clear and convincing evidence. Respondent-Mother separately challenges finding of fact 43. Those findings are:

> 9. The child, [Kenneth], lives in the same home in which the injures occurred with his younger sibling, [Joseph]. [Kenneth] was residing with his mother and mother's live-in boyfriend [Respondent-Father] and younger sibling, [Joseph] . . .
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> . . .
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> 43. Moreover, the parents continue to endorse that they have no knowledge of what could have caused the six fractures in the infant, [Joseph]. Because of their lack of knowledge, the Court finds that the home of the parents creates an injurious environment to the welfare of [Kenneth] and continuous risk of harm to [Kenneth] at the time. [Kenneth] was living and present in the home when [Joseph] became symptomatic.

As to finding of fact 9, Respondents argue that no clear and convincing evidence established exactly where Joseph's injuries occurred, much less that they occurred in the home. While doctors opined that Joseph's injuries occurred on or about 28 May 2018, the record contains no evidence from witnesses, expert or otherwise, about where Respondents, Kenneth, or Joseph were on 28 May 2018. The only information regarding that day came from Respondent-Mother and Respondent-Father, who told Dr. Terrell that Joseph rolled off the couch around 6:00 p.m. However, as the expert witnesses repeatedly testified and the trial court

ultimately found, Joseph's injuries were not consistent with a fall from the couch, so that evidence cannot support this finding. Given this record, the trial court's finding here is unsupported by the evidence to the extent it indicates that the injury occurred in the family's home.

Respondent-Mother also challenges finding of fact 43. While there is clear and convincing evidence in the record to support the trial court's finding that Respondents "continue to endorse that they have no knowledge of what could have caused the six fractures" in Joseph, the remainder of this finding is properly labeled a conclusion of law, and we consider it as such below.

ii. Conclusion of Law Regarding Neglect

"In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives . . . in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (2019). "[T]he neglect statute affords the trial judge some discretion in determining the weight to be given [] evidence" of prior abuse or neglect. *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999) (internal marks and citation omitted). "[T]he fact of prior abuse, standing alone," however, "is not sufficient to support an adjudication of neglect." *In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 51 (2007). "Instead, this Court has generally required the presence of other factors to suggest that the neglect or abuse will be repeated." *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014); *see also In re J.A.M.*, 372 N.C. 1, 10, 822 S.E.2d 693, 699 (2019) (explaining that the trial court's findings must show that the juvenile "presently face[s] substantial risk in [his or] her living environment.").[6]

Other factors that suggest that the neglect or abuse will be repeated include the presence of domestic violence in the home and current and ongoing substance abuse issues, *see In re D.B.J.*, 197 N.C. App. 752, 755-56, 678 S.E.2d 778, 781 (2009) (affirming adjudication of D.B.J. as neglected where "parents engaged in acts of domestic violence in D.B.J.'s

6. We note that in neglect cases involving newborns, "the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127; *see also In re A.B.*, 179 N.C. App. 605, 611, 635 S.E.2d 11, 16 (2006) ("To hold that a newborn child must be physically placed in the home where another child was abused or neglected would subject the newborn to substantial risk, contrary to the purposes of the statute."). A trial court is not limited to forecasting, however, in instances such as the current controversy in which Kenneth lived in the house where Joseph was allegedly abused. Accordingly, our case law demands more by way of evidence here.

presence," the mother "never ceased contact with [the] [r]espondent[,]" and the "[m]other has abused alcohol and/or controlled substances"), unwillingness to engage in recommended services or work with or communicate with DSS regarding the prior abuse or neglect, *see In re N.G.*, 186 N.C. App. 1, 9-10, 650 S.E.2d 45, 51 (2007), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008) (emphasizing the respondent-parents' unwillingness to work with DSS in prior case in upholding neglect adjudication), and failing to accept responsibility for prior adjudications, *see In re J.A.M.*, 372 N.C. at 7, 822 S.E.2d at 697 (affirming neglect where respondent-mother "(1) continued to fail to acknowledge her role in her rights being terminated to her six other children, (2) denied the need for any services for J.A.M.'s case, and (3) became involved with the father, who had engaged in domestic violence even though domestic violence was one of the reasons her children were removed from her home") (internal marks omitted).

In *In re J.C.B.*, this Court reversed the trial court's adjudication of J.C.B., C.R.R., and H.F.R. as neglected where the petitions alleged that the juveniles lived in an environment injurious to their welfare because they resided in a home where another juvenile, R.R.N., allegedly had been sexually abused by the respondent-father. 233 N.C. App. at 642, 757 S.E.2d at 488. "[A]ssum[ing] *arguendo* that respondent-father abused R.R.N." our Court determined that "this fact alone [did] not support a conclusion that J.C.B., C.R.R., and H.F.R. were neglected" because the trial court failed to make any findings of fact that the juveniles "were either abused themselves or were aware of [the] respondent-father's inappropriate relationship with R.R.N." *Id.* at 644, 757 S.E.2d at 489. Furthermore, "the trial court failed to make any findings of fact regarding other factors that would support a conclusion that the abuse would be repeated[,]" which warranted reversal of the trial court's adjudications of neglect. *Id.* at 644-45, 757 S.E.2d at 489-90.

Our review of the record and the trial court's findings of fact similarly reveals that the trial court's adjudication of Kenneth as neglected is predicated on its adjudication of Joseph as abused. The requisite additional factors supporting an adjudication of neglect are absent in the case at hand.

We first note that the majority of the trial court's adjudicatory findings of fact address Joseph's fractures and the fact that Respondents did not know how Joseph sustained his injuries. And of the nine findings of fact which mention Kenneth, only three specifically concern him:

> 9. The child, [Kenneth], lives in the same home in which the injures occurred with his younger

> sibling, [Joseph]. [Kenneth] was residing with his mother and mother's live-in boyfriend [Respondent-Father] and younger sibling, [Joseph] . . .
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> . . .
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> 12. Social Worker Munroe also interviewed the minor child [Kenneth] (8 years old) who stated he did not see his baby brother fall nor did he know how he was hurt. Social Worker Munroe asked [Kenneth] how [Respondent-Father] disciplined him. [Kenneth] responded that [Respondent-Father] talks to him and tells him what to do or sometimes makes him write sentences. [Kenneth] denied that [Respondent-Father] ever hit him. Social Worker Munroe also asked [Kenneth] how his mother disciplined him. [Kenneth] stated that his mother takes his phone away or does not allow him to play games or watch TV. [Kenneth] also reported that he was happy at his mother's home. Social Worker Munroe did not observe any bruises, marks, or physical injuries to [Kenneth]. . . .
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> . . .
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> 43. Moreover, the parents continue to endorse that they have no knowledge of what could have caused the six fractures in the infant, [Joseph]. Because of their lack of knowledge, the Court finds that the home of the parents creates an injurious environment to the welfare of [Kenneth] and continuous risk of harm to [Kenneth] at the time. [Kenneth] was living and present in the home when [Joseph] became symptomatic.

These findings cannot support a conclusion of neglect. First, as noted above, the record does not support finding of fact 9 as it relates to Joseph's injuries occurring in the home. The trial court further found that Kenneth was not abused nor was he aware of how his brother was injured. *See In re J.C.B.*, 233 N.C. App. at 644, 757 S.E.2d at 489 (holding the same counsels against adjudicating neglect in a sibling). And the trial court did not make any findings regarding "other factors" that would show Kenneth faced a "substantial risk" of neglect. *See id.* Indeed, the trial court found that Respondents were forthcoming, cooperative, and willing to work with DSS and doctors, there were no incidents of domestic violence in the home, nor current and ongoing substance abuse, nor prior DSS involvement. *Cf. In re J.A.M.*, 372 N.C. at 10, 822 S.E.2d at 699 (present risk factors included denial of services, DV in the home,

and failure to acknowledge circumstances that led to TPR of six other children); *In re D.B.J.*, 197 N.C. App. at 756, 678 S.E.2d at 781 (DV in the home and ongoing substance abuse issues); *In re McLean*, 135 N.C. App. at 396, 521 S.E.2d at 127 (parents not cooperative with social worker, parents did not express concern for future safety of child, respondent-father—who had been convicted of involuntary manslaughter of his daughter—provided most of the care for the child).

The only finding of fact that attempts to establish a connection between Joseph's injuries and any risk to Kenneth is finding of fact 43. However, "lack of knowledge" of what caused an injury to one child, standing alone, is not sufficient to support an adjudication of neglect of another child. That is particularly the case where, as here, the trial court found that Kenneth was properly cared for, disciplined, supervised, and, by all accounts, happy in Respondents' home. We therefore reverse Kenneth's adjudication and remand to the trial court for further proceedings consistent with this opinion.

III. Conclusion

For the reasons stated above, we reverse the trial court's order adjudicating Joseph neglected. We remand to the trial court on the issues of Joseph's adjudication as abused and Kenneth's adjudication as neglected. If necessary, the trial court shall in its discretion either proceed based on the present record evidence or after receiving additional evidence and argument. The trial court shall then, only if necessary, enter a new order making findings of fact and conclusions of law consistent with this opinion in deciding the legal question or questions remaining before it.

REVERSED AND REMANDED.

Judges DILLON and ZACHARY concur.

IN RE M.M.

[272 N.C. App. 55 (2020)]

IN THE MATTER OF M.M.

No. COA19-870

Filed 16 June 2020

1. Child Abuse, Dependency, and Neglect—discovery—deposition of social worker—applicability of Rules of Civil Procedure in juvenile proceeding

In an abuse and neglect hearing, the trial court did not err when it instructed respondent-father to cancel a notice of deposition and a subpoena issued to a social worker pursuant to Civil Procedure Rule 30 because the Juvenile Code provided for discovery—including depositions—and the Rules of Civil Procedure did not apply. The trial court did not improperly refuse to allow the father to depose the social worker, but instead instructed him to seek information under the sharing provisions of N.C.G.S. § 7B-700(a) and later, if necessary, file a motion for discovery requesting a deposition under N.C.G.S. § 7B-700(c).

2. Evidence—child psychologist—qualification as expert in psychology and child and family evaluation—Rule 702(a)—three-pronged reliability test

In an abuse and neglect hearing, the trial court did not abuse its discretion in allowing a child psychologist to testify as an expert in psychology and child and family evaluation where the evidence was sufficient to satisfy the three-pronged reliability test required by Evidence Rule 702(a)(1)-(3). The evidence showed the psychologist formed his opinion upon sufficient facts or data relevant to the case, satisfying the first prong, and that his testimony was the product of reliable principles and methods which he reliably applied to the facts of the case, satisfying the second and third prongs, where he reviewed information from the case file and a social worker, interviewed the child and the parents, reviewed questionnaires completed by the parents, and followed clinical protocols for determining if a child has been emotionally abused.

3. Child Abuse, Dependency, and Neglect—abuse and neglect—chronic emotional abuse—findings of fact—sufficiency of evidence

In an abuse and neglect case, the trial court's findings of fact—that the child lived in a constant state of chronic emotional abuse and suffered from functional abdominal pain due to stress and that

respondent disregarded the terms of the Safety Plan by demeaning the mother and her family—were supported by clear and convincing evidence where the civil custody order admitted as an exhibit reflected a history of conflict between the parents and its emotional impact on the child, witnesses testified the child was emotionally abused by respondent-father and was subjected to conflict and disagreements between the parents, the child's stomach aches were due to stress and felt better when she was not with respondent, and the child testified that respondent said mean things about the mother's family.

4. Child Abuse, Dependency, and Neglect—abuse and neglect—sufficiency of findings of fact to support conclusion

In an abuse and neglect case, the trial court did not err by concluding the child was abused and neglected where the findings of fact showed the child lived in a constant state of chronic emotional abuse due to her parents' high conflict relationship—exacerbated by respondent-father's anger and repeated attempts to demean and blame the mother—and suffered serious emotional damage as evidenced by her anxiety and health issues.

5. Child Abuse, Dependency, and Neglect—abuse and neglect hearing—consideration of prior juvenile adjudication and civil custody order

In an abuse and neglect hearing, the trial court did not err by considering a prior juvenile adjudication and a civil custody order because they were among the matters alleged in the abuse and neglect petition.

Appeal by Respondent-Father from order entered 29 April 2019 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 26 May 2020.

Assistant County Attorney Theresa A. Boucher for Petitioner-Appellee Forsyth County Department of Social Services.

Matthew D. Wunsche for Appellee-Guardian ad Litem.

Morrow Porter Vermitsky & Taylor, PLLC, by John C. Vermitsky and Erin Woodrum, for Respondent-Appellant-Father.

COLLINS, Judge.

Father appeals from the trial court's order adjudicating his minor child "Molly"[1] abused and neglected. Father argues that the trial court erred or abused its discretion by disallowing a deposition, allowing certain expert testimony, and considering evidence of previous juvenile proceedings and a civil custody order. Father also argues that certain findings of fact were not supported by competent evidence and, even if supported by competent evidence, did not support the trial court's adjudication of abuse and neglect. We discern no error or abuse of discretion by the trial court, and we affirm the order.

I. Procedural History and Factual Background

Father and Molly's mother ("Mother")[2] had histories of substance abuse when they met in a rehabilitative program in 2008. "Their courtship was marked by relapses, hospitalizations, domestic violence and extremely careless behavior." They married in 2009, and their daughter Molly was born in October 2010. When Molly was two days old, Mother became intoxicated and argued with Father. They physically struggled while Mother was holding Molly, causing Molly to be dropped onto the hardwood floor. Father called 911, and Mother was taken to the hospital for evaluation. In response to reports from the hospital that Father and Mother were constantly fighting and refused to submit to drug and alcohol tests, the Forsyth County Department of Social Services ("DSS") filed a juvenile petition in October 2010, alleging that Molly was an abused juvenile because her parents created or allowed to be created serious emotional damage to her, and Molly was a neglected juvenile because she lived in an environment injurious to her welfare. The trial court granted custody of Molly to DSS, who placed her with her maternal grandparents. The trial court ordered Father and Mother to complete several rehabilitative programs. That same month, Father and Mother separated. While the juvenile case was still pending, Father filed a complaint in December 2010 seeking custody of Molly.

In February 2011, Molly was adjudicated neglected, and DSS continued Molly's placement with her grandparents. In August 2011, Father and Mother divorced and were allowed unsupervised visitation with Molly in their homes. In November 2011, the trial court administratively closed Father's pending custody action and removed it from the calendar.

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1. A pseudonym is used throughout the opinion to protect the identity of the child. *See* N.C. R. App. P. 3.1(b).

2. Mother is not a party to this appeal.

In April 2012, the trial court conducted a review hearing, after which it entered an order awarding joint custody of Molly to Father and Mother based on a determination that Father and Mother had complied with previous orders and had demonstrated that they could safely care for Molly.

When Mother was hospitalized in March or April 2014 for alcohol-related health issues and was admitted into a treatment program, the trial court granted Father temporary legal and sole physical care, custody, and control of Molly, subject to the appointment of a guardian ad litem ("GAL"). In July 2014, the trial court granted Mother temporary supervised visitation. During interviews with the GAL in 2014 and 2015, Father expressed resentment over having to spend money on Mother and her family, admitted that he had questioned Molly about what happened during her visits with Mother, and tried several times to make Mother appear to be a bad parent. In June 2015, the trial court granted Mother temporary unsupervised visitation. In September 2015, the trial court entered a temporary order granting Father and Mother shared custody.

A licensed professional counselor who served as Molly's therapist from October 2015 to March 2016 diagnosed Molly with adjustment disorder with mixed depression and anxiety.

In November 2016, the trial court modified the temporary custody order after conducting voir dire of Father and Mother and reviewing a report submitted by the GAL. The trial court ordered Father and Mother to begin co-parenting therapy sessions, in which they should refrain from making personal attacks against each other, and ordered Father to begin counseling sessions with a psychologist. In December 2016, Father admitted to his psychologist that he had said inappropriate things to Molly about Mother. In January 2017, the GAL expressed concerns about negative comments Father had made about Mother. Molly told the GAL that she was happy with her living situation and that she would like to spend more time with Father.

In February 2017, Father told his psychologist that he was frustrated because Mother had failed to bring Molly to a father-daughter event at school and that Father was concerned about how much time Molly was spending with one of Mother's ex-husbands. The psychologist encouraged Father to stop obsessing about Mother and what was going on in her house. During a surprise visit by the GAL to Father's home in April 2017, Father tried to discuss with the GAL a list he had made of Mother's violations, and the GAL had to tell Father three times not to discuss the matter in front of Molly. During a telephonic conference in April

2017 involving Father, Mother, the therapist, and the GAL, both parents alleged that Molly was telling each of them adverse things that the other had said about them. Father told his psychologist that he thought the therapist was setting him up by putting him in situations in which he would be likely to get upset. During a May 2017 session with the therapist, Father called Mother a sociopath and refused to apologize.

As the therapy sessions were winding down in May 2017, Father was in favor of employing a parenting coordinator going forward, but Mother was opposed. A conversation during a session became heated, and Father said he thought the sessions were designed to destroy his relationship with Molly. In one session, Father said he was frustrated because Molly had told him that Mother blamed everything on him. In their last therapy session in June 2017, Father said he believed Mother was still drinking and complained about Mother's ex-husband's involvement. Mother explained that she was in treatment. In June 2017, Father's psychologist thought Father was making progress and was beginning to put Molly first. The therapy and counseling sessions ended in June 2017.

The trial court held a civil custody hearing that began on 11 July 2017 and ended on 30 August 2017.

While Father and Mother were awaiting the custody order, DSS received a child protective services ("CPS") report on 30 January 2018 indicating that Molly had reported concern over conditions at Father's home. Social worker Janesha Faulk ("Faulk") contacted Molly's pediatrician, Dr. Lia Erickson, on 31 January 2018 and learned that Dr. Erickson had diagnosed Molly with chronic functional abdominal pain related to anxiety, stress, or psychological distress, which Dr. Erickson believed was related to the "family situation" because Molly said she was sick when there were no signs of physical illness. Molly had told Dr. Erickson that Father spanked her for no reason and took her toys out of her room.

Faulk began a CPS investigation on 1 February 2018 by speaking with Molly at Mother's home. Molly told Faulk that Father made her stay in her room until he called her, beat her with a wooden board, fed her only noodles and hot dogs, removed all her toys from her room except one, and painted over the pink walls in her room with white paint. Faulk visited Father unannounced on 5 February 2018 and discovered that Molly's allegations were not true. After Molly admitted to Faulk and Father that she had lied, Father repeatedly asked her why she would do that and blamed Mother for encouraging her to lie. Faulk suggested that they call Mother and try to work it out together over the phone with Faulk as a mediator, but Father "adamantly refused." When Faulk spoke with Molly a few days later, Molly said that Father continued to talk

about and blame Mother. Molly later told Faulk that Father was pressuring her to say she wanted to live with him.

The trial court entered an order on 28 March 2018 granting legal and primary physical custody to Mother and visitation to Father. The order prohibited the parties from denigrating each other in Molly's presence and from attempting to alienate Molly's affection for the other party.[3]

As part of its ongoing investigation, DSS requested that Dr. Christopher Sheaffer, a child psychologist and expert in child and family evaluations referred by the North Carolina Child Medical Examiner's Office, perform a child and family evaluation. Dr. Sheaffer conducted the evaluation in March and April 2018 by interviewing Molly, Father, Mother, and Faulk and considering documents including DSS files, an addendum to a report by the GAL, and the March 2018 custody order.

On 14 June 2018, DSS met with Father and Mother to discuss Dr. Sheaffer's findings and DSS's recommendations. During that meeting, Father demeaned Mother and refused to seriously discuss how to deal with concerns about emotional abuse of Molly. Father and Mother entered into a safety agreement with DSS that prohibited them from badgering, demeaning, or questioning Molly about the other parent; both stated that they understood the agreement.

On 3 July 2018, DSS filed a juvenile petition alleging that Molly was abused and neglected. The petition specifically alleged that Molly was an abused juvenile because her parents created or allowed to be created serious emotional damage to her, and Molly was a neglected juvenile because she lived in an environment injurious to her welfare. On the same day, the trial court granted nonsecure custody to DSS, who placed Molly with Mother. On 6 July 2018, the trial court vacated the nonsecure custody order and granted temporary legal custody to Mother. At a second nonsecure custody hearing on 18 July 2018, the trial court ordered that Father should have supervised visitation one hour per week and two phone calls per week to be supervised by Mother.

The trial court held a pre-trial hearing on 16 August 2018, followed by adjudication and disposition hearings beginning on 10 October 2018 and ending on 9 January 2019. The trial court heard testimony from Molly, Father, Faulk, Dr. Erickson, Dr. Sheaffer, and the therapist who had counseled Father and Mother in 2016 and 2017. Dr. Sheaffer testified that Molly had been "chronically subjected to conflict and disagreement

3. Father appealed the custody order, which this Court affirmed in *McMillan v. McMillan*, 833 S.E.2d 692 (N.C. Ct. App. 2019).

between her parents" and that Father had "repeatedly over the course of years displayed poor boundaries in sharing his anger and dissatisfaction" regarding Mother with Molly. Dr. Sheaffer's expert opinion was that "exposure to this conflict and to her father's lack of boundaries reaches the level of emotional abuse."

Molly, who was eight years old at the time of the hearing, testified that (a) she had told lies to try to keep Mother, Mother's family, and herself safe from Father, who had "said a bunch of mean things about [Mother's] family"; (b) Father had been mean to Molly during the time she told the lies to Faulk; (c) she felt "very upset" when Father said that Mother was "spending all of the money"; (d) she felt scared when she could tell from the tone of Father's voice that he was going to be mean; and (e) she did not want to go back to Father's house because she was afraid he would get mad at her.

On 29 April 2019, the trial court entered an order ("Order") adjudicating Molly abused and neglected, granting legal and physical custody to Mother and visitation to Father, and ordering Mother and Father to receive individual and parent counseling.

Father timely filed notice of appeal of the Order.[4]

II. Discussion

On appeal, Father argues that (1) the trial court erred and abused its discretion by disallowing a scheduled deposition of Faulk; (2) the trial court erred by allowing Dr. Sheaffer to testify as an expert witness; (3) certain findings of fact were not supported by competent evidence; (4) the trial court erred in concluding that Molly is abused and neglected; and (5) the trial court erred by considering evidence of the previous juvenile proceeding and the civil custody order.

A. Deposition request

[1] Father first argues that the trial court reversibly erred, abused its discretion, and violated Father's due process rights by not allowing Father to depose Faulk.

"We review a trial court's ruling on discovery matters under the abuse of discretion standard." *In re J.B.*, 172 N.C. App. 1, 14, 616 S.E.2d 264, 272 (2005) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary

4. At the adjudication hearing, Mother stood mute to the allegations by DSS and is not part of this appeal of the trial court's Order.

that it could not have been the result of a reasoned decision." *Id.* (citation omitted).

N.C. Gen. Stat. § 7B-700 governs the regulation of discovery under the Juvenile Code in cases involving abuse, neglect, and dependency. The statute provides:

> (a) Sharing of Information. — A department of social services is authorized to share with any other party information relevant to the subject matter of an action pending under this Subchapter. . . .
>
> (b) Local Rules. — The chief district court judge may adopt local rules or enter an administrative order addressing the sharing of information among parties and the use of discovery.
>
> (c) Discovery. — Any party may file a motion for discovery. The motion shall contain a specific description of the information sought and a statement that the requesting party has made a reasonable effort to obtain the information pursuant to subsections (a) and (b) of this section or that the information cannot be obtained pursuant to subsections (a) and (b) of this section. The motion shall be served upon all parties pursuant to [N.C. Gen. Stat. §] 1A-1, Rule 5. The motion shall be heard and ruled upon within 10 business days of the filing of the motion. The court may grant, restrict, defer, or deny the relief requested. . . ."

N.C. Gen. Stat. § 7B-700 (2019). In juvenile cases, "the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code." *In re E.H.*, 227 N.C. App. 525, 531, 742 S.E.2d 844, 849 (2013) (internal quotation marks and citation omitted).

In this case, Father's counsel noticed a deposition of Faulk, the social worker, on 7 August 2018 under Rule 30 of the North Carolina Rules of Civil Procedure and served a subpoena on Faulk to appear at the deposition. On the same day, Father filed a motion for discovery in the juvenile matter under N.C. Gen. Stat. § 7B-700, which did not include a request for a deposition. At the pre-trial hearing on 16 August 2018, counsel for DSS opposed the noticed deposition, arguing that Father should obtain information provided by Faulk, including her dictated notes, through the information sharing provisions of N.C. Gen.

Stat. § 7B-700(a)—not by deposing Faulk under the rules of civil procedure. Counsel for DSS also explained that N.C. Gen. Stat. § 7B-700(c) was the proper vehicle for Father to request a deposition, by filing a motion for discovery in the juvenile proceeding.

The trial court expressed concern that conducting a deposition of Faulk could delay the juvenile adjudication. The trial court further stated:

> But I see this deposition before you've even gone through what's in the file or what's available a shore enough fishing expedition in my mind. I mean so what you're trying to do is really see what else you might be missing that might be underneath. You know, they -- they -- they have an obligation to report what's reported, and the question about anything since this -- since these -- since this last exhibit or whatever, is going to be answered in Court, and I think you will be printing whatever new information is there. So if there was a way that I could streamline and I can't. I don't even know what you plan to ask, and I don't think at this time you do either because you haven't even seen what's there, I'll allow you to recalendar this or to put this back on the table for a deposition after you have reviewed what's in the file.
>
> . . . .
>
> And I will not put any bearing on it being rescheduled once [counsel for Father] has had an opportunity to look at all of the information that the social worker has already provided.
>
> . . . .
>
> You'll have to file something to come back in for the deposition, . . .

Contrary to Father's argument, the trial court did not refuse to allow Father to depose Faulk. Instead, it instructed Father to first avail himself of the information sharing provisions under N.C. Gen. Stat. § 7B-700(a), while explicitly leaving open the possibility that Father could later file a motion for discovery requesting a deposition under N.C. Gen. Stat. § 7B-700(c). As the trial court did not exercise its discretion under N.C. Gen. Stat. § 7B-700(c) to deny a discovery request, it could not have abused its discretion. Furthermore, the trial court did not err by disallowing a deposition under the Rules of Civil Procedure. The Juvenile Code provides for discovery, specifically including depositions, and thus

the Rules of Civil Procedure do not apply here. *See In re E.H.*, 227 N.C. App. at 531, 742 S.E.2d at 849. The trial court merely instructed Father to cancel the noticed civil deposition and affirmed that Father could request a deposition later in the juvenile proceeding.

B. Expert witness

[2] Father next argues that the trial court erred by allowing Dr. Sheaffer to testify as an expert in psychology and child and family evaluations.

"Whether a witness has the requisite knowledge or training to testify as an expert is within the exclusive province of the trial court, and its decision will not be overturned absent an abuse of discretion." *In re Faircloth*, 137 N.C. App. 311, 315, 527 S.E.2d 679, 682 (2000) (citations omitted). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re A.R.D.*, 204 N.C. App. 500, 504, 694 S.E.2d 508, 511 (2010) (internal quotation marks and citation omitted).

North Carolina Rule of Evidence 702 governs admissibility of expert testimony:

> (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 (2019).

"Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible." *State v. McGrady*, 368 N.C. 880, 889, 787 S.E.2d 1, 8 (2016). "First, the area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* (internal quotation marks omitted) (citing Rule 702(a)). "Second, the witness must be qualified as an expert by knowledge, skill, experience, training, or education." *Id.* at 889, 787 S.E.2d at 9 (internal quotation

marks omitted) (citing Rule 702(a)). "Third, the testimony must meet the three-pronged reliability test" found in Rule 702(a)(1)-(3). *Id.* at 890, 787 S.E.2d at 9.

On appeal, Father does not argue that Dr. Sheaffer's testimony failed to satisfy the first and second parts of Rule 702, but only argues that the trial court erred by failing to determine that Dr. Sheaffer's testimony satisfied the three-pronged reliability test. Accordingly, we consider whether the trial court abused its discretion by determining that Dr. Sheaffer's testimony satisfied the three-pronged reliability test.

"The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* (citation omitted). This is a "flexible inquiry." *Id.* at 891, 787 S.E.2d at 9.

In this case, the trial court conducted voir dire of Dr. Sheaffer to determine if he was qualified to testify as an expert in psychology and child and family evaluations. After testifying about his education, training, expertise in psychology, and experience performing child and family evaluations, Dr. Sheaffer testified about the facts and data upon which he based his opinion, as follows:

> I reviewed documents provided to me by [DSS], primarily a -- I believe it was a 40-page court report or court order signed by Judge Bedsworth [(the custody order)]. I obtained information from the social worker [(Faulk)] regarding the [CPS] involvement. I reviewed an addendum to a [GAL] report although I was not given the initial report to read. I met with [Molly] on two occasions. I met with each of the parents. I had both of the parents complete behavioral questionnaires regarding [Molly]. I had [Father] complete a questionnaire that addresses coparenting kinds of issues. And I relied on all of that information to form my opinions.

This testimony shows that Dr. Sheaffer formed his opinion based upon sufficient facts or data relevant to this case; thus, the first prong of the reliability test was satisfied. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(1).

Dr. Sheaffer also testified about the protocol he used to perform his evaluation:

> Q. Dr. Sheaffer, when you perform one of these evaluations and you're asked to look for whether or not there's

emotional abuse of a child, what is the protocol you follow for that kind of assessment?

A. As I just described, the protocol involves obtaining, primarily obtaining information from the possible perpetrators, obtaining information from the apparent victim, and as much as possible relying on collateral or corroborative information to determine whether the information provided by the possible perpetrators is accurate or not.

Q. And you said that you employed some questionnaires to the parents. What questionnaires were those?

A. I used a questionnaire called the Clinical Assessment of Behavior or CAB, which is a caregiver report questionnaire that just describes the parents' perspectives regarding a child on a number of dimensions, and I used – I had [Father] complete something called the Parent Alliance Measure to get his perspective of the parenting relationship that he has with [Mother].

Q. And why did you choose only [Father] for the Parenting Alliance Measure test?

A. Primarily because of the degree to which [Father] expressed anger and hostility toward [Mother], but also because of information that was included in [the custody order], information from the [GAL], information from DSS indicated that [Father] had a history of and his discussion with me suggested he currently had a great deal of anger and animosity toward [Mother].

Q. So you used questionnaires. Did you use any psychometric testing on the parties?

A. Well, you would consider both of those to fit the criteria for psychometric testing, but I didn't use any others.

Q. Both of what?

A. The CAB and the Parent Alliance Measure.

Q. Okay. Why did you choose the CAB?

A. Because it's a good questionnaire.

Q. Okay. What is that questionnaire trying to fish out?

A. In the case of the CAB, I was trying to gather a sense of both parents' perspectives of [Molly] regarding behavioral, social, emotional, academic kinds of processes.

Q Is there a definition of emotional abuse that you're using?

. . . .

A. I can give you my working definition of emotional abuse. I'm not basing this on the legal definition. From a mental health perspective, emotional abuse occurs when a caregiver is providing parenting or acting in a way toward a child that creates an undue emotional stress and burden on them and that action is outside what would be considered the norm for the culture.

Q. So where does that definition come from?

A. 30 years of practice and reading and studying.

Q. Okay. That's not a DSM diagnosis in your field?

A. There is a DSM diagnosis of a child who has been emotionally abused, yes.

Q. There is a DSM diagnosis for child emotional abuse?

A. There's a -- there is discussion in the DSM about emotional abuse, about a child who has experienced emotional abuse.

Q. So what axis is that diagnosis on?

A. The axes have been taken away. There are no longer axes 1, 2, and 3.

Q. But there's a numbered definition, it's your testimony, for emotional abuse?

A. As I recall, yes, but I couldn't tell you.

Q. What paper, journal article, anything generally accepted in your field are you taking this definition from?

A. I'm taking it as a -- as a totality from all of the information that I have gleaned over the years.

Q. So rather than using reliable, peer-reviewed, evidence-based definition, you were using your definition --

. . . .

A. I would disagree. I think what I am explaining or attempting to explain is that the definition, the working definition that I use is gathered from a number of different definitions that are peer reviewed and scientifically based.

Q. So you're gathering your own definition that you're calling a working definition?

A. My perspective regarding whether or not the child has been abused is based on my perception about what emotional abuse is, which is based on the research and data that have been conducted over 50 years.

Q. So in your field as a doctoral-level practitioner, there is such a thing as evidence-based practice, correct?

A. Yes.

Q. Okay. And there are tests that you can employ to determine the level of mental anguish a child is experiencing, for example?

A. Yes.

Q. Okay. And you could use different psychometric testing to determine if the person in front of you has different mental health conditions?

A. Not to determine, to give information to assist in the clinical diagnosis.

Q. Okay. And you didn't mention performing any of that testing on [Molly], is that correct?

A. I did not do direct assessment of [Molly]. I relied on the caregiver report questionnaires, which is fairly typical of the child at 7.

Q. Okay. So it's fairly typical to rely on those?

A. It -- yes. It's the standard of practice.

Q. Okay. Is it part of the standard of practice to employ other psychometric testing that gives you actual data?

A. I -- this gives actual data.

Q. What gives actual data?

> A. The CAB, which I believe your question infers that I'm not getting data from it. But that is not correct. There is data that is obtained from the child -- the Clinical Assessment of Behavior.

This testimony shows that Dr. Sheaffer followed a clinical protocol for determining if a child has been emotionally abused, which included interviewing relevant individuals; reviewing behavioral and parenting questionnaires completed by the parents; and analyzing documents and historical information provided by DSS, the GAL, and the social worker. This evidence is sufficient to support a determination that Dr. Sheaffer's testimony was the product of reliable principles and methods, which Dr. Sheaffer applied reliably to the facts of this case. Thus, the second and third prongs of the reliability test were satisfied. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a)(2), (3).

Because the evidence was sufficient to satisfy the three prongs of the reliability test, we reject Father's argument that the trial court did not consider or establish the requirements of this test in determining that Dr. Sheaffer's testimony was reliable. *See McGrady*, 368 N.C. at 890-91, 787 S.E.2d at 8-9 (noting that the three-pronged reliability test is a "flexible inquiry"). Accordingly, the trial court did not abuse its discretion by allowing Dr. Sheaffer to testify as an expert in psychology and child and family evaluations.

C. Findings of fact

[3] Father next argues that the trial court's findings of fact 9, 10, 13, 16, and 21 are not supported by competent evidence.

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact." *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (internal quotation marks and citation omitted). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citation omitted). "The trial court determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial court alone determines which inferences to draw and which to reject." *Id.* (internal quotation marks, brackets, and citation omitted). "Unchallenged findings of fact are binding on appeal." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) (citation omitted).

i. Findings of fact 9, 10, and 21

Father challenges the following findings of fact:

> 9. Based upon the evidence presented by both medical and psychological experts, the court finds that [Molly] has lived in a constant state of chronic emotional abuse based upon the stress created by the conflictual relationship of her parents.
>
> 10. [Molly] has been exposed to her parent's [sic] high conflict relationship and lived in a state of chronic emotional abuse. She has lived a life of stress that would be hard for someone as young as she to overcome.
>
> . . . .
>
> 21. On or about June 26, 2018, [DSS] received information from [Molly's] pediatrician, Dr. Lia Erickson. [Molly] was diagnosed with Functional Abdominal pain. Dr. Erickson reported:
>
> "I have diagnosed [Molly] with function abdominal pain. She exhibited signs and symptoms consistent with this diagnosis including inability to clearly describe the pain being located throughout her abdomen instead of one specific location, inability to describe particular triggers such as food, and lack of symptoms that would point to an organic cause of pain (such as weight loss, vomiting, diarrhea, constipation, urinary symptoms). In most children with functional abdominal pain, the pain is triggered by psychological distress. As I explain it to families, it is their body's way of telling them that they are worried or stressed about something. [Molly] did seem anxious to me when describing her symptoms. It was also concerning to me that she had not disclosed her pain to her father but complained frequently to her mother. In my opinion, she did not seem to feel comfortable or safe talking about her pain with her father."

These findings of fact are supported by clear and convincing evidence. The civil custody order admitted as an exhibit at the adjudication hearing contained nearly 40 pages describing the history of conflict between Father and Mother and its emotional impact on Molly. Dr. Sheaffer testified that Molly was emotionally abused by Father, who lacked boundaries in sharing with Molly his anger and dissatisfaction regarding Mother.

Dr. Sheaffer offered an expert opinion that Molly had "chronically been subjected to conflict and disagreements between her parents." Dr. Erickson testified that she thought Molly's stomachaches were related to stress or anxiety and that Molly was afraid to talk to Father about it. Finally, Faulk's testimony, discussed directly below, is further evidence supporting these findings.

ii. Finding of fact 13

Father challenges the following finding of fact:

> 13. Over the course of the CPS investigation, the DSS social worker continued to receive information that[:] 1) [Molly] reports that [Father] continues to blame [Mother] for the CPS investigation, 2) [Molly] was having stomach aches which correlated to visits with [Father], [and] 3) [Molly] reported her [Father] telling her upsetting stories regarding her maternal family.

Finding of fact 13 is supported by clear and convincing evidence. Faulk testified that she had observed Father blaming Mother in front of Molly and that Molly told her that it was upsetting when Father talked about Mother's family and blamed Mother, that she was afraid of Father getting mad at her, that Father pressured her to say she wanted to live with him, and that she did not want to visit Father at his house. Faulk also testified that Molly said her stomach felt better when she was not at Father's house.

iii. Finding of fact 16

Father challenges the following finding of fact:

> 16. [Father] did not follow the terms of [the civil custody] order as well as the Safety Plan he entered into with [DSS] as they related to his continued disregard for [Molly's] emotional needs.

The civil custody order prohibited Father and Mother from denigrating each other in Molly's presence and from attempting to alienate Molly's affection for the other party. The safety agreement between DSS and Father and Mother prohibited the parents from demeaning or questioning Molly about the other parent. Finding of fact 16, that Father failed to abide by these requirements, is supported by clear and convincing evidence, including Molly's testimony that Father had "said a bunch of mean things" about Mother's family, Father had been mean to her, she felt "very upset" when Father said that Mother was "spending all of the

money," she felt scared when she could tell from the tone of Father's voice that he was going to be mean, and she did not want to go back to Father's house because she was afraid he would get mad at her.

In summary, we conclude that all five of the challenged findings of fact are supported by clear and convincing evidence.

D. Abuse and neglect

[4] Father next argues that even if the findings of fact are supported by competent evidence, the trial court erred by concluding that Molly was abused and neglected.

Whether a child is abused or neglected is a conclusion of law, which we review only to determine whether it is supported by the findings of fact. *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 675-76 (1997).

The Juvenile Code defines abuse and neglect of juveniles as follows:

> (1) Abused juveniles. — Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker:
>
> . . . .
>
> e. Creates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others[.]
>
> . . . .
>
> (15) Neglected juvenile. — Any juvenile less than 18 years of age . . . whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare; . . .

N.C. Gen. Stat. § 7B-101 (2019). An adjudication of abuse may be based on emotional damage and anxiety caused by actions of parents during marital conflict and custody disputes. *Powers v. Powers*, 130 N.C. App. 37, 42, 502 S.E.2d 398, 401 (1998) (findings supported adjudication of abuse, where juvenile's personality changed from energetic to depressed as parents' conflict worsened, her stomach hurt when her parents fought, and being removed from one parent's home alleviated stomach problems). To adjudicate a juvenile neglected, a trial court must establish "some physical, mental, or *emotional impairment* of the juvenile or a substantial risk of such impairment as a consequence of

the failure to provide proper care, supervision, or discipline." *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019) (internal quotation marks and citation omitted) (original emphasis omitted and emphasis added).

In this case, the trial court found as fact that (1) Molly "lived in a constant state of chronic emotional abuse based upon the stress created by the conflictual relationship of her parents"; (2) Molly had been exposed to her parents' "high conflict relationship," "lived in a state of chronic emotional abuse," and "lived a life of stress that would be hard for someone as young as she to overcome"; (3) Father "acted angry," "continuously questioned" Molly regarding who or what "made her say things about him," and told Molly that Mother "made her say those things"; (4) Dr. Sheaffer concluded that Molly had been chronically subjected to emotional abuse; and (5) Molly told Faulk that Father continued to talk about Mother and Mother's family when Molly visited with him.

These findings of fact support the conclusion that, as a result of the conflict between her parents, Molly suffered serious emotional damage, evidenced by her anxiety and health issues, which was injurious to her welfare. *See* N.C. Gen. Stat. § 7B-101(1), (15). As in *Powers*, the factual findings regarding Molly's emotional abuse being exacerbated by Father's anger, repeated attempts to demean and blame Mother, and pressure on Molly during the custody dispute, support an adjudication of abuse. These findings also support a finding of emotional impairment necessary for an adjudication of neglect. *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698. Therefore, the trial court's findings of fact support its adjudications of abuse and neglect, and we discern no legal error by the trial court.

E. Prior juvenile adjudication and civil custody order

[5] Father finally argues that the trial court erred by considering "evidence and impressions not before the court"—specifically, the 2010 juvenile adjudication and the civil custody order.

In a juvenile proceeding adjudicating a petition for abuse, neglect, or dependency, the trial court must protect the due process rights of the juvenile and the juvenile's parents while determining the existence or nonexistence of the conditions alleged in the petition. N.C. Gen. Stat. § 7B-802 (2019). As such, the trial court should limit its consideration to only the matters alleged in the petition. *In re D.C.*, 183 N.C. App. 344, 349, 644 S.E.2d 640, 643 (2007). "Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply." N.C. Gen. Stat. § 7B-804 (2019).

In this case, the DSS petition explicitly alleged (a) that Molly had been in DSS custody from October 2010 to April 2012 "due to the conflictual relationship and substance abuse concerns" of Father and Mother and that Molly had been adjudicated neglected on 21 February 2011; and (b) that a trial court had entered a civil custody order on 28 March 2018 finding that Father was "still obsessed with denigrating and demonizing" Mother, Father was telling Molly things "designed to lessen [Molly's] love and affection" for Mother—which was not in Molly's best interest, and Father had shown that he could not or would not attempt to promote a loving relationship between Mother and Molly.

Because the prior juvenile court involvement and the civil custody order were among the matters alleged in the petition, the trial court did not violate Father's due process rights by considering this evidence. *See In re D.C.*, 183 N.C. App. at 349, 644 S.E.2d at 643. Moreover, Father cites no rule of evidence that precludes admissibility of a civil custody order in determining whether there is clear and convincing evidence of matters alleged in a juvenile petition. Thus, we reject Father's argument that the trial court's consideration of the prior juvenile court involvement and the civil custody order violated his due process rights.

III. Conclusion

We find no abuse of discretion or error by the trial court, and we conclude that the findings of fact were supported by clear and convincing evidence and supported the trial court's conclusions of law. Accordingly, we affirm the Order adjudicating Molly abused and neglected.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

MONROE v. REX HOSP., INC.

[272 N.C. App. 75 (2020)]

ROBERT E. MONROE, AS ADMINISTRATOR OF THE ESTATE OF NAKA HAMILTON, PLAINTIFF
v.
REX HOSPITAL, INC. D/B/A REX HOSPITAL, REX HEALTHCARE, UNC REX HOSPITAL, UNC REX HEALTHCARE, UNC REX HEMATOLOGY ONCOLOGY ASSOCIATES AND HENRY CROMARTIE, III, M.D., DEFENDANTS

No. COA20-27

Filed 16 June 2020

Medical Malpractice—wrongful death—summary judgment—causation—intervening act—foreseeability

In a wrongful death action based on medical malpractice where defendant doctor ordered an allegedly improper treatment plan and defendant hospital then negligently delayed implementing the plan, the trial court properly granted summary judgment in favor of the doctor where there was no genuine issue of material fact regarding causation. Although plaintiff's medical expert testified that the doctor's ordered course of treatment breached the standard of care, he also testified it was reasonable for the doctor to anticipate the treatment plan would be administered within the time frame he expected, and that if it had been timely implemented, it was more likely than not that the decedent would have survived. The hospital's subsequent negligence was not reasonably foreseeable to defendant doctor and plaintiff failed to show that the doctor's alleged negligence proximately caused the decedent's death.

Appeal by defendant from order entered 24 July 2019 by Judge A. Graham Shirley II in Wake County Superior Court. Heard in the Court of Appeals 26 May 2020.

Charles G. Monnett III & Associates, by Charles G. Monnett III, and Spangenberg Shibley & Liber LLP, by Jeremy A. Tor and Stuart E. Scott, for plaintiff-appellant.

Young Moore and Henderson, P.A., by Madeleine M. Pfefferle and Elizabeth P. McCullough, for defendant-appellee.

YOUNG, Judge.

This appeal arises out of a medical malpractice claim. Plaintiff failed to show causation, and there was no genuine issue of material fact. Therefore, the trial court properly granted summary judgment. Accordingly, we affirm.

I. Factual and Procedural History

On 27 April 2016, Naka Hamilton ("Ms. Hamilton") went to the Rex Hospital Emergency Department ("Rex ED"). John Lilley, M.D., ("Dr. Lilley") was the doctor present at Rex ED when Ms. Hamilton arrived. Dr. Lilley called Henry Cromartie, III., M.D., ("Dr. Cromartie"). Ms. Hamilton was admitted to Rex and received a diagnosis of Thrombotic thrombocytopenic purpura ("TTP"). TTP can rapidly progress and the treatment for it is plasma exchange therapy ("PLEX"). If TTP is left untreated, multi-organ failure and death can occur. Without PLEX, the mortality rate is 90%. If PLEX is timely administered, the mortality rate is 10%.

Upon Ms. Hamilton's TTP diagnosis, Dr. Cromartie recommended a bridge therapy treatment be administered to correct her anemia prior to the initiation of further treatment. Dr. Cromartie recommended that Dr. Lilley order Ms. Hamilton further laboratory tests and believed Ms. Hamilton should receive packed blood cells ("PRBC") and fresh frozen plasma ("FFP") as her first line of treatment. Dr. Cromartie claims he was not the on-call hematologist on 27 or 28 April 2016, but that he agreed to consult on the patient and did not tell Dr. Lilley that he was not on-call.

After Dr. Cromartie's conversation with Dr. Lilley, Ms. Hamilton was admitted to the Intensive Care Unit ("ICU") by Rex Hospitalist Ahmed Khan, M.D. ("Dr. Khan"). Dr. Cromartie spoke with Dr. Khan at approximately 1:30 a.m. on 28 April 2016 and provided his recommendations. Dr. Cromartie was not consulted further and did not have any further involvement in Ms. Hamilton's care. Dr. Cromartie expected transfusions of PRBC and FFP would be completed within five to seven hours, which would approximately coincide with shift changes when the morning physicians would arrive at the hospital.

The orders were not entered until 4:40 a.m. on 28 April 2016, the first FFP transfusion was not administered until around 9:00 a.m., and the first PRBC was not administered until 11:08 a.m. Ms. Hamilton remained at the hospital for more than eleven hours after Dr. Cromartie's conversation with Dr. Khan. She was treated by numerous health care providers until she passed on 28 April 2016 at approximately 2:28 p.m. without receiving PLEX.

Ms. Hamilton was survived by a one-year-old daughter. A complaint for wrongful death, medical malpractice was filed by Ms. Hamilton's estate. The complaint named Dr. Cromartie and several other defendants. All defendants except Dr. Cromartie have been voluntarily dismissed

from the case. Plaintiff called John Feigert, M.D. ("Dr. Feigert") as the only causation expert.

On 31 May 2019, Dr. Cromartie filed a motion for summary judgment, a motion to strike, and a motion to dismiss. The trial court entered an order granting summary judgment and dismissed the case based on the defense of superseding negligence. Plaintiff filed timely written notice of appeal.

II. Standard of Review

"On appeal, the appellate court reviews summary judgments to determine if there was a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. The standard of review for summary judgment is *de novo*." *Howse v. Bank of Am., N.A.*, 255 N.C. App 22, 26, 804 S.E.2d 552, 555 (2017); *see also Robinson v. Duke Univ. Health Sys., Inc.*, 229 N.C. App. 215, 219, 747 S.E.2d 321, 326 (2013); N.C. Gen. Stat. § 1A-1, Rule 56 (c)(2019).

III. Causation

Summary judgment is proper when the plaintiff fails to produce sufficient evidence of an essential element of a medical malpractice action: applicable standard of care, breach of the standard of care, causation, and damages. *Weatherford v. Glassman*, 129 N.C. App. 618, 621-22, 500 S.E.2d 466, 468-69 (1998). North Carolina courts "rely on medical experts to show medical causation because 'the exact nature and probable genesis of a particular type of injury involves complicated medical questions so far removed from the ordinary experience and knowledge of laymen[.]' " *Day v. Brant*, 218 N.C. App. 1, 11, 721 S.E.2d 238, 246 (2012) (quoting *Azar v. Presbyterian Hosp.*, 191 N.C. App. 367, 371, 663 S.E.2d 450, 453 (2008)). To hold a defendant responsible for injuries, expert medical testimony is necessary to establish that defendant's negligence was a substantial factor, that is, a proximate cause of the particular injuries for which plaintiff seeks recovery. *See Lee v. Stevens*, 251 N.C. 429, 433-34, 111 S.E.2d 623, 626-27 (1959).

In North Carolina, the legal definition of proximate cause is:

> a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries, would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Adam v. Mills, 312 N.C. 181, 192-93, 322 S.E.2d 164, 172 (1984) (quoting *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984)).

The natural and continuous sequence of causation may be interrupted or broken by the negligence of a second actor. *Muse v. Charter Hosp.*, 117 N.C. App. 468, 452 S.E.2d 589 (1995); *see also* N.C.P.I. Civil 102.65 (2016). In analyzing when a subsequent negligent act insulates a defendant's negligence, the North Carolina Supreme Court reasoned, "[s]upposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that no causal connection between negligence and damage is broken by interposition of independent responsible human action." *Butner v. Spease*, 217 N.C. 82, 87, 6 S.E.2d 808, 811 (1940).

If a second actor's conduct creates a "new cause, which intervenes between the original negligent act and the injury ultimately suffered" and "breaks the chain of causation set in motion by the original wrongdoer", the second actor becomes "solely responsible for the injury." *Muse*, 117 N.C. App. at 476, 452 S.E.2d at 595. "The doctrine of insulating negligence is an elaboration of a phase of proximate cause." *Hampton v. Hearn*, 269 N.C. App. 397, 402, 838 S.E.2d 650, 655 (2020) (internal quotes omitted) (citing *Clarke v. Mikhail*, 243 N.C. App. 677, 686, 779 S.E.2d 150, 158 (2015) (holding intervening and superseding cause is an extension of proximate cause, which the plaintiff bears the burden of establishing). The burden of proof remains on the plaintiff to prove the defendant's conduct was a proximate cause of his injuries and the burden is not shifted to the defendant to prove that his negligence, if any, was insulated by the negligence of another. *Hampton*, 269 N.C. App. at 402, 838 S.E.2d at 655.

IV. Intervening and Superseding Cause

For an intervening cause to insulate an original negligent actor of liability the "cause must be an independent force which turns aside the natural sequence of events set in motion by the original wrongdoer and produces a result which would not otherwise have followed, and which could not have been reasonably anticipated." *Muse*, 117 N.C. App. at 476, 452 S.E.2d at 595. "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." *Adams v. Mills*,

312 N.C. 181, 194, 322 S.E.2d 164, 173 (1984). Therefore, "in order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable grounds to anticipate it." *Id.* North Carolina rejects the rule that "subsequent medical treatment is foreseeable as a matter of law." *Barber v. Constien*, 130 N.C. App. 380, 384, 502 S.E.2d 912, 915 (1998).

The trial court can declare whether an act was the proximate cause of an injury when there is such little evidence as to warrant an inference of proximate cause. *Lee*, 251 N.C. 433-43, 111 S.E.2d at 627 ("We may say with certainty that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury").

V. Analysis

In this case, there is no evidence that the subsequent negligence was directly related to or dependent upon Dr. Cromartie's alleged negligence. Plaintiff's only causation expert, Dr. Feigert, testified that the negligent delay in administering the blood products redirected the natural sequence of events set in motion by Dr. Cromartie's recommendation and produced a result that would not have otherwise occurred.

Furthermore, there is no evidence that the negligent delay in the administration of blood products was related to or dependent upon Dr. Cromartie's alleged negligent failure to immediately order PLEX or to more adequately convey a sense of urgency to Dr. Khan. Dr. Cromartie was entitled to presume and act upon the presumption that Ms. Hamilton's subsequent health care providers would comply with their duty to treat her according to the applicable standard of care. *See Weavil v. Myers*, 243 N.C.386, 391, 90 S.E.2d 733, 737 (1956); *Barber*, 130 N.C. App. at 384, 502 S.E.2d at 915.

Dr. Cromartie does not dispute that he did not order PLEX upon his initial consultation, but rather ordered PRBC and FFP to correct Ms. Hamilton's anemia, nor does he dispute Dr. Feigert opined those actions were a breach of standard of care. Rather, Plaintiff is unable to prove that Dr. Cromartie's alleged negligence proximately caused Ms. Hamilton's death.

Dr. Feigert expected all orders for Ms. Hamilton to be "STAT" orders based on her admission to the ICU. Furthermore, Dr. Feigert's expected

time frame within which it would be reasonable for PRBC and FFP to be prepared and transfused is consistent with Dr. Cromartie's expectation and the other Rex physicians. Dr. Feigert opined that it was a breach of the standard of care to order blood products as a bridge to PLEX, but if bridge therapy was the plan, then it was reasonable to anticipate the blood products would have been administered within the time frame Dr. Cromartie expected.

Therefore, the evidence shows that the delay in the administration of blood products was not reasonably foreseeable to Dr. Cromartie. Dr. Feigert also opined the result would have been different if the natural sequence of events had occurred according to Dr. Cromartie's reasonable expectation and no delay in the administration of the blood products intervened. Plaintiff contends that Dr. Cromartie's recommendation would not permit the team to begin to mobilize until 8:00 a.m. and PLEX not to be initiated until 4 p.m., which is past the point of no return. However, this is contrary to the evidence in the record, most importantly the testimony of Plaintiff's only expert witness designated to offer causation opinions. Dr. Feigert testified that not only would Ms. Hamilton more likely than not have survived if Dr. Cromartie's expectation had come to fruition, but also that Ms. Hamilton more likely than not would have survived if the blood products had been administered in a timely fashion.

Here, the hospital's failure to administer the ordered blood products was an independent force, at least two steps removed from Dr. Cromartie, such that he could not have foreseen its occurrence. Plaintiff's causation expert opined it was not foreseeable to Dr. Cromartie that the blood products ordered by Dr. Khan would not be provided and Ms. Hamilton's death would result.

North Carolina law clearly establishes that Dr. Cromartie is "not bound to anticipate negligent acts or omissions on the part of others", so he was entitled to presume and to act upon the presumption that the individuals caring for Ms. Hamilton would perform their duties. *Weavil*, 243 N.C. at 391, 90 S.E.2d at 737. As such, it was not reasonably foreseeable that the blood products would not be timely and efficiently administered, thereby delaying the initiation of PLEX past the point of no return.

The delay in the administration of blood products redirected the natural sequence of events set in motion by Dr. Cromartie's recommendation. Plaintiff did not dispute this. Plaintiff also did not address his own expert's testimony that the delay redirected the sequence of events set into motion by Dr. Cromartie such that Ms. Hamilton died, a result that would not have followed.

Plaintiff failed to establish a *prima facie* case because he did not prove that Dr. Cromartie's alleged negligence was a proximate cause of Ms. Hamilton's death. The independent and unforeseeable negligent delay in the administration of the blood products redirected the natural sequence of events set in motion by Dr. Cromartie's recommendation and caused Ms. Hamilton's death, which would not have otherwise followed. Without proving proximate cause, Plaintiff cannot prove causation, and therefore, cannot prove medical malpractice. There is no genuine issue of material fact. Accordingly, summary judgement was properly granted, and the trial court's order is affirmed.

AFFIRMED.

Judges BRYANT and TYSON concur.

STATE OF NORTH CAROLINA
v.
STEVE LEONARD JOHNSON COBB, DEFENDANT

No. COA19-496

Filed 16 June 2020

1. Evidence—relevance—drug field test results—assault on a law enforcement officer—harmless error analysis

In a case involving assault on a law enforcement officer, the erroneous admission of the result of a drug field test was harmless error where there were no charges involving a controlled substance, the field test occurred after the assault and had no relevance to any consequential facts concerning the assault, and the State presented overwhelming evidence to support defendant's conviction of assault.

2. Appeal and Error—habitual felon status indictment—fatal variance—guilty plea—waiver—Appellate Rule 2 review

Where the indictment charging defendant with attaining habitual felon status incorrectly stated that one of his prior convictions was in Wake County Superior Court rather than Wake County District Court, defendant waived his right to challenge the indictment on appeal where he pleaded guilty to habitual felon status and never moved to dismiss the indictment for a fatal variance. The Court of Appeals declined to review the matter under Appellate Rule 2

because the indictment named the correct charge and the correct dates of offense and conviction, the indictment variance was not an exceptional circumstance affecting significant issues of importance in the public interest, and it did not constitute manifest injustice to defendant.

Appeal by Defendant from judgment entered 7 December 2018 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 30 October 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Martin T. McCracken, for the State.

James R. Parish for defendant-appellant.

MURPHY, Judge.

In this case involving assault and attempted robbery charges, the trial court's erroneous admission of drug field test results was not prejudicial when the test had no connection to whether an assault occurred and Defendant was found not guilty of the attempted robbery. The State presented overwhelming evidence the assault occurred, and no reasonable possibility existed that a different result would have been reached had the field test results been properly omitted. When reviewing a habitual felon status enhancement, a defendant waives his right to challenge the indictment for incorrect information when he does not object to a variance at trial, but rather pleads guilty. We decline to invoke Rule 2 to permit further review.

BACKGROUND

On 14 June 2014, Sergeant Brian McLamb ("McLamb") surveilled a parked car holding Defendant and another individual. McLamb initiated a voluntary encounter and, upon smelling marijuana, radioed for a check-in officer. He also asked Defendant, who was smoking, about the marijuana smell. Defendant admitted he was smoking a blunt and handed the blunt to McLamb, who placed it on top of the car.

After the check-in officer arrived, McLamb had Defendant exit the vehicle to search him for drugs and weapons incident to arrest.[1] When

1. Defendant did not object to the search at trial, and Defendant did not challenge McLamb's search on appeal. We do not consider its admissibility. N.C. R. App. P. 28(a) (2020) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

McLamb discovered "a couple thousand dollars" in "a wad of money" on Defendant and asked him about it, Defendant fled the scene on foot, and McLamb pursued. McLamb caught Defendant, and a wrestling match ensued, with Defendant escaping and McLamb catching Defendant again. At one point during the scuffle, McLamb "felt a pull up on [his] duty weapon and [his] holster," believed Defendant was attempting to take the weapon, and drew his taser. Defendant eventually surrendered, but transferred a bag containing white powder from his pants to his mouth while he moved to the ground.

McLamb believed Defendant had ingested cocaine, and testified regarding the bag and his concerns as follows:

> [State:] When you saw [Defendant] put [the bag] in his mouth, what was your concern, or if you had multiple concerns, what were they?
>
> [McLamb:] Well, at that point, really, there's two concerns. He's destroying evidence. And if it's a toxic substance, I've seen people get very sick or -- and die from ingesting a substance like that.

Upon observing Defendant put the bag in his mouth, McLamb jumped on Defendant's back and squeezed his cheeks to force him to spit out the bag. During the struggle, Defendant bit McLamb's finger, ignored commands to stop, and bore down so hard that he broke the skin.

After Defendant spit out the bag and was arrested, both Defendant and McLamb went to the hospital—McLamb for injuries to his knees, elbows, wrist, and finger, and Defendant for potential cocaine ingestion. Other officers conducted a field test on the bag Defendant put in his mouth, which tested positive for cocaine.

The Grand Jury indicted Defendant for assault inflicting serious injury on a law enforcement officer and attempted common law robbery. Over Defendant's objection, the trial court admitted evidence concerning the field test. The jury convicted Defendant for the lesser included offense of assault on a law enforcement officer inflicting physical injury, but acquitted Defendant of assault inflicting serious injury on a law enforcement officer and attempted common law robbery.

Defendant had previous felony convictions for possession of cocaine, common law robbery, and delivering cocaine. After the guilty verdict, Defendant pleaded guilty to habitual felon status. The

indictment incorrectly stated that one of Defendant's prior convictions was in Wake County Superior Court, while that prior conviction was actually in Wake County District Court.

On appeal, Defendant argues that the admission of the field test results constituted prejudicial error preventing a fair trial and requests a new trial. Additionally, Defendant argues that the variance regarding the division of court listed for one of his prior felony convictions in the indictment and in evidence was fatal and merits remand for resentencing without the habitual felon status.

ANALYSIS

A. Field Test Results[2]

[1] "The admissibility of evidence [under N.C.G.S. § 8C-1, Rule 401 (2017)] is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Holmes*, 822 S.E.2d 708, 720 (N.C. Ct. App. 2018) (internal citations omitted), *review denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). "Trial court rulings on relevancy technically are not discretionary." *Id* "Whether evidence is relevant is a question of law . . . [and] we review the trial court's admission of the evidence *de novo*." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Even though we review these rulings de novo, we give "great deference on appeal" to trial court rulings regarding whether evidence is relevant. *State v. Allen*, 828 S.E.2d 562, 570 (N.C. Ct. App. 2019), *appeal dismissed*, *review denied*, 373 N.C. 175, 833 S.E.2d 806 (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.G.S. § 15A-1443(a) (2019).

In this case, the State charged Defendant with assault inflicting serious injury on a law enforcement officer and attempted common law robbery, but no charges involving a controlled substance. The assault charge required the State to prove "(1) [Defendant] assaulted the victim; (2) serious bodily injury occurred; (3) the victim was a law enforcement officer performing his official duties at the time of the assault; and (4)

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2. While Defendant has not shown that the admission of evidence regarding the field test results, namely evidence of drugs, prejudiced him in such a way as to prevent a fair trial on his assault charge, we reemphasize the lack of admissibility of field test results due to concerns regarding their reliability. *State v. Carter*, 237 N.C. App. 274, 281-83, 765 S.E.2d 56, 62-63 (2014).

[Defendant] knew or had reasonable grounds to know that the alleged victim was a law enforcement officer." *State v. Burwell*, 256 N.C. App. 722, 727, 808 S.E.2d 583, 589 (2017) (citing N.C.G.S. § 14-34.7(a) (2015)). The attempted common law robbery charge required the State to prove "(1) [D]efendant's specific intent to commit the crime of common law robbery, and (2) a direct but ineffectual act by [D]efendant leading toward the commission of this crime." *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982). The field test purporting to confirm the existence of a controlled substance was conducted after the acts for which the Grand Jury indicted Defendant: assault and attempted common law robbery.

The field test conducted *after* the charged assault and attempted common law robbery was not relevant to prove any fact that is of consequence concerning (1) the occurrence of an assault; (2) whether serious bodily injury resulted; (3) whether McLamb was performing his official duties at the time of the assault; (4) whether Defendant knew or had reason to know McLamb was a law enforcement officer; (5) whether Defendant had the specific intent to commit the crime of common law robbery; or (6) whether Defendant committed a direct but ineffectual act leading toward the commission of a common law robbery when he allegedly grabbed for McLamb's gun.

The field test conducted *after* the charged assault and attempted common law robbery did not help to explain the officers' investigative actions before or during the events underlying the charges. While evidence regarding the officer's *perceptions* of the bag and its contents *before and during* the assault was relevant to explain McLamb's actions, evidence regarding whether the contents of the bag actually were a controlled substance McLamb attempted to prevent Defendant from ingesting and potentially destroying was not. Evidence regarding the presence of the bag containing white powder was properly admitted, but the testimony regarding the field test should have been excluded, not limited via judicial instruction. *See State v. Ward*, 364 N.C. 133, 142-43 n.4, 694 S.E.2d 738, 744 n.4 (2010) (noting for support other jurisdictions' exclusion of field test and visual inspection evidence when "never verified by further laboratory testing").

Although the field test results were irrelevant to this case, and the trial court erred in admitting those results into evidence, such error was not prejudicial. Defendant bears the burden "to show both error and that he was prejudiced by [the] admission" of the improperly admitted evidence. *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987). To demonstrate such prejudice, Defendant must show that "there is a

reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." *State v. Barrow*, 216 N.C. App. 436, 442, 718 S.E.2d 673, 677 (2011) (quoting N.C.G.S. § 15A-1443(a) (2009)) *aff'd*, 366 N.C. 141, 727 S.E.2d 546 (mem.) (2012).

Defendant does not carry his burden to demonstrate that he was prejudiced by the admission; specifically, no "reasonable possibility [exists] that, had [the erroneously admitted field test results] not been [admitted], a different result would have been reached at the trial . . . ." *Id.* In fact, Defendant's case did not include a controlled substance charge. The trial court improperly admitted the field test evidence, which indicated the presence of cocaine, in a case where Defendant was convicted of assault on a law enforcement officer inflicting physical injury. *See State v. Carter*, 237 N.C. App. 274, 283-84, 765 S.E.2d 56, 63-64 (2014). Whether the drug field test performed after the events underlying the assault charge reliably confirmed the presence of cocaine had no connection to whether Defendant actually assaulted McLamb. To that end, the State presented overwhelming evidence to support Defendant's conviction of assault on a law enforcement officer inflicting physical injury.[3] *See id.* at 285-86, 765 S.E.2d at 64. The evidence of the officer's encounter with Defendant, Defendant fleeing the officer, Defendant and the officer wrestling, Defendant shoving the bag into his mouth, Defendant biting the officer, and the officer's resulting injuries—"[c]ut to elbow and wrist, bit his finger and broke the skin," as alleged in the indictment—was sufficient to prove Defendant committed assault on a law enforcement officer inflicting physical injury.

On appeal, Defendant contends our prior holding in *Moctezuma* is controlling on the issue of prejudice in this case, arguing that "[D]efendant suffered the same prejudice as the defendant in [that case] . . . [and] the same logic applies." *State v. Moctezuma*, 141 N.C. App. 90, 92-93, 539 S.E.2d 52, 54-55 (2000). We disagree.

In *Moctezuma*, the trial court erroneously admitted irrelevant evidence of a large amount of drugs found in the defendant's shared residence when the defendant was charged with trafficking of drugs in a van. *Id.* at 92-93, 539 S.E.2d at 54-55. We found that such an admission was not only irrelevant, but was prejudicial, because "the jury could have easily concluded, given the value and quantity of the seized drugs,

3. Defendant was acquitted of attempted common law robbery and assault inflicting serious injury on a law enforcement officer, making it impossible for the erroneous admission of the field test evidence to have prejudiced him on those charges.

. . . that [the] defendant was a high level drug trafficker." *Id.* at 95, 539 S.E.2d at 56. Unlike the prejudicial effect of evidence of a large amount of irrelevant drugs on a drug trafficking charge in *Moctezuma*, here Defendant's case centered on an assault charge, did not include any controlled substance charge, and the irrelevant and erroneous evidence was the presence of a controlled substance indicated in a field test. Whether the field test reliably showed the presence of cocaine would not affect a determination of whether Defendant assaulted McLamb or the extent of his injuries. Here, the erroneous field test evidence was not prejudicial like the irrelevant drug evidence admitted in *Moctezuma*.

A reasonable possibility does not exist that, had the erroneously admitted field test results not been admitted, a different result would have been reached at trial. Defendant was not exposed to prejudicial error.

B. Habitual Felon Status Indictment Variance

[2] "In order to preserve a fatal variance argument for appellate review, a defendant must specifically state at trial that a fatal variance is the basis for his motion to dismiss." *State v. Scaturro*, 253 N.C. App. 828, 833-34, 802 S.E.2d 500, 505 (2017) (citing *State v. Hooks*, 243 N.C. App. 435, 442, 777 S.E.2d 133, 139 (2015); *State v. Curry*, 203 N.C. App. 375, 384, 692 S.E.2d 129, 137 (2010)). However, instead of moving to dismiss the habitual felon status enhancement, Defendant pleaded guilty to attaining habitual felon status. Defendant's guilty plea "waived his right to challenge the [habitual felon] indictment on the ground that the information in the indictment was incorrect." *State v. McGee*, 175 N.C. App. 586, 588, 623 S.E.2d 782, 784 (2006).

Despite his failure to preserve the variance issue for appeal, Defendant argues that we should invoke Rule 2 and review this issue, because "[i]n the instant case the injustice is manifest because the variance established an invalid habitual felon indictment and thus [Defendant] was sentenced to a punishment grossly disproportionate to that to which he was statutorily authorized." While we have the ability under Rule 2 of the Rules of Appellate Procedure to allow review, we only apply it "*in exceptional circumstances*, [involving] significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017); *see also State v. Diaz*, 256 N.C. App. 528, 534, 808 S.E.2d 450, 455 (2017) (holding that we may apply Rule 2 "based on the specific circumstances [of the] case and in order to avoid the possibility of a manifest injustice") *aff'd in relevant part and rev'd in part on other grounds*, 372 N.C.

493, 831 S.E.2d 532 (2019); N.C. R. App. P. 2 (2020). Defendant does not present any argument or evidence that his conviction in Wake County District Court did not occur. Here, the indictment variance of the division of the court of conviction is not an exceptional circumstance affecting significant issues of importance in the public interest, and does not constitute manifest injustice to Defendant, particularly when the indictment correctly named the relevant charge, showed the correct dates of offense and conviction, the correct county, and listed the correct file number.[4] *See generally* N.C.G.S. § 14-7.3 (2019). We decline to invoke Rule 2 to reach the variance issue presented by Defendant and accordingly find no error. *McGee*, 175 N.C. App. at 588, 590, 623 S.E.2d at 784-85 (issuing a mandate of "NO ERROR" when the defendant pleaded guilty and "waived his right to challenge the [habitual felon] indictment on the ground that the information in the indictment was incorrect").

CONCLUSION

The trial court erroneously admitted irrelevant evidence of field test results in an assault and attempted robbery case, but such evidence did not prejudice Defendant. Defendant failed to preserve the variance issue, and we decline to invoke Rule 2 to permit review under the circumstances of this case.

NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.

Judges STROUD and ZACHARY concur.

4. The indictment indicated file number 11 CRS 202645, whereas the judgment was file number 11 CR 202645.

STATE OF NORTH CAROLINA
v.
QUINTON DANTE ENGLISH

No. COA19-518

Filed 16 June 2020

1. Kidnapping—first-degree—intent to terrorize—sufficiency of evidence

In a prosecution for first-degree kidnapping, the State presented substantial evidence that defendant confined the victim, his girlfriend, with the purpose of terrorizing her, including evidence that defendant lay in the back seat of the victim's car holding a knife while he waited for her to get off work, he forced the victim to stay in the car and start driving by choking her and threatening her with the knife, and he attempted to force her to stay in the car after she pulled into a gas station by hitting her in the head. Evidence of the victim's fear and her escape from the car to get away from defendant was also relevant in the determination of defendant's intent.

2. Assault—with a deadly weapon—use of car to try to hit victim—show of violence—apprehension of harm—sufficiency of evidence

In a prosecution for assault with a deadly weapon, the State presented substantial evidence of assault based on a show of violence where defendant drove a car at a high rate of speed toward the victim and the victim moved away to avoid being hit, indicating the victim had a reasonable fear of being immediately harmed. Any contradictions in the evidence regarding the extent of the victim's fear were for the jury to resolve.

Appeal by Defendant from judgments entered 21 December 2018 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 26 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Ellen A. Newby, for the State-Appellee.

Leslie Rawls for Defendant-Appellant.

COLLINS, Judge.

Defendant Quinton Dante English appeals judgments entered upon jury verdicts of guilty of felony first-degree kidnapping, misdemeanor simple assault, misdemeanor unauthorized use of a vehicle, and two counts of misdemeanor assault with a deadly weapon. On appeal, Defendant argues that the trial court erred by denying his motion to dismiss the charge of first-degree kidnapping and one of the counts of assault with a deadly weapon, on grounds that the State failed to present sufficient evidence of the offenses. We discern no error by the trial court.

I. Procedural History

Defendant was indicted on 9 January 2018 for first-degree kidnapping and assault by strangulation. On 11 January 2018, Defendant was indicted for larceny of a motor vehicle, assault with a deadly weapon inflicting serious injury, and two counts of assault with a deadly weapon with intent to kill.

A jury trial began on 17 December 2018. The jury found Defendant guilty of felony first-degree kidnapping, misdemeanor simple assault as a lesser-included offense of assault by strangulation, misdemeanor unauthorized use of a motor vehicle as a lesser-included offense of larceny of a motor vehicle, and two counts of misdemeanor assault with a deadly weapon as a lesser-included offense of assault with a deadly weapon with intent to kill. The jury found Defendant not guilty of assault with a deadly weapon inflicting serious injury.

The parties stipulated that Defendant was a prior record level III for sentencing of the misdemeanor convictions and a prior record level IV for sentencing of the felony conviction. The trial court consolidated the convictions of felony first-degree kidnapping, misdemeanor simple assault, and misdemeanor unauthorized use of a motor vehicle into one judgment, sentencing Defendant to 110 to 144 months' imprisonment. The trial court consolidated the convictions of two counts of misdemeanor assault with a deadly weapon into another judgment, sentencing Defendant to two consecutive sentences of 150 days. The judgments were entered on 21 December 2018.

Defendant gave oral notice of appeal in open court.

II. Factual Background

The State's evidence at trial tended to show the following: Defendant and Evelyn Gonzalez were in a relationship for approximately two years, which involved frequent arguments and Defendant's physical abuse of Gonzalez. Although Gonzalez did not report several incidents of physical

abuse, she called the police on one occasion when Defendant hit her, pulled her hair, and choked her.

The two argued during the weekend of 4 and 5 November 2017. After Gonzalez blocked Defendant's phone numbers on 5 November 2017, Defendant sent Gonzalez private messages on Facebook. Gonzalez replied to a few of the messages that day, but she stopped responding while she was at work. When Gonzalez left work at 5:00 p.m., she walked to her car, which she had left unlocked in the parking lot near the back of the building. Just as Gonzalez entered the car, Defendant sat up in the back seat. Defendant testified that there had been previous times he had waited for Gonzalez in either the driver's or passenger's seat of her car to pick her up from work, but on this day, he was lying down in the back seat waiting for her. Gonzalez asked Defendant what he was doing in her car, and they began to argue. Defendant was holding a red knife.

Defendant took Gonzalez's phone from her and began looking at her messages. Gonzalez hesitated to give it to him but did not refuse because she was afraid Defendant would get angry like he had before, when Defendant "would start screaming, getting abusive, verbal and physical" if Gonzalez did not give him access to her phone. Defendant became angry, called Gonzalez a liar, and said that she did not love him. Gonzalez testified, "I knew he was about to do what he always does when he got mad," which is to "[p]ut his hands on me" and "[m]ake me stay in the car until he is not mad anymore."

Defendant told Gonzalez to drive the car. When she refused, Defendant got angry, put his arm around her neck, and "started choking" her. Gonzalez had difficulty breathing. Defendant brandished the knife, held it to her right side, and applied force to her neck until she started driving the car. Gonzalez was afraid.

In order to try to get out of the car, Gonzalez pulled quickly into a gas station up the street from where her car had been parked. A witness estimated that the car was travelling about 30 or 40 miles an hour when the driver abruptly stopped in front of a gas pump, and the tires screeched. Gonzalez told Defendant that she wanted to go inside the convenience store to get a drink, but Defendant told her that she could not get out of the car, that they were not stopping, and to keep driving. Gonzalez noticed people nearby, so she opened the door and screamed for help. Defendant leaned over the seat, started to choke her, and punched her. Gonzalez testified, "It was a lot, and he was like he had his hand around my neck and he was punching like on the top of my head and I started to get lightheaded." While Gonzalez tried to get out of the car, Defendant

tried to close the door, told Gonzalez to put her foot on the pedal, and screamed at her, "Bitch, drive."

Jacob Capps and Jackson Capps, two brothers whom Gonzalez had never seen before, pulled up on motorcycles to a gas pump at the same station, noticed a car pulling into the gas station at a speed of approximately 30 to 40 miles per hour, and heard the "horrific" sounds of a female screaming. Jacob testified that Defendant was in the back seat of the car, "over the center console with his arm around [Gonzalez's] neck. She was crying. It looked like she had been beaten." Gonzalez's neck was red, her face was swollen and bruised, and she was "screaming, crying, pleading for help." The Capps brothers approached the car to try to help Gonzalez. Jacob started hitting Defendant, and Gonzalez was able to slide underneath Defendant, get out of the car, and run into the gas station. The convenience store clerk called 911 and instructed Gonzalez to go in the freezer until the doors to the station were locked.

Jacob entered the back seat on the driver's side of the car and pinned Defendant against the roof. Defendant punched Jacob and tried to poke him in the eyes. Defendant brandished the knife at Jacob. Jacob and Defendant came out of the car and continued to wrestle, both throwing more punches. Jackson told Jacob that Defendant had a knife. Jacob tried to subdue Defendant while Defendant was on top of him. Jackson kicked Defendant in the face a few times. When Defendant asked Jacob to let him go, Jacob told Defendant he would let him go after Defendant dropped the knife. Jackson wrapped his arms around Defendant's legs and pushed his foot up against Defendant's ribs to help subdue him. After approximately one minute, Defendant dropped the knife, Jackson picked it up, and Jacob let Defendant get up.

When the Capps brothers started to walk away from Defendant, Defendant got in the car, put it in drive, turned it around with tires squealing, and "floored it" in their direction. He "stomped" the gas "at high RPMs" and drove about 15 to 20 miles per hour toward them. Jackson stepped behind the gas pump to shield himself. Jacob jumped up on the hood of the car to avoid being pinned against the concrete wall of the gas station. When Defendant crashed the car into the wall of the gas station, Jacob rolled off the hood onto the ground. Defendant backed the car up and sped away.

III. Discussion

Defendant argues that the trial court erred by denying his motion to dismiss for insufficient evidence the charges of first-degree kidnapping and one count of assault with a deadly weapon.

This Court reviews a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Denial of a motion to dismiss is proper if there is substantial evidence of each essential element of the offense and that the defendant was the perpetrator. *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000). "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) (citations omitted). When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Fritsch*, 351 N.C. at 378-79, 526 S.E.2d at 455.

A. First-degree kidnapping

[1] Defendant's sole argument on appeal regarding the kidnapping offense is that the State failed to provide substantial evidence that Defendant's purpose was to terrorize Gonzalez.

Kidnapping is defined by statute as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person . . .

N.C. Gen. Stat. § 14-39(a)(3) (2018). The offense is first-degree kidnapping if the person kidnapped was not released by the defendant in a safe place. *State v. Moore*, 315 N.C. 738, 742, 340 S.E.2d 401, 404 (1986) (citing N.C. Gen. Stat. § 14-39)). "Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute." *Id.* at 743, 340 S.E.2d at 404. For purposes of this statute, "[i]ntent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury." *State v. White*, 307 N.C. 42, 48, 296 S.E.2d 267, 271 (1982) (citations omitted).

In this case, the State indicted Defendant on the charge of first-degree kidnapping, alleging that Defendant unlawfully confined and

restrained Gonzalez for the purpose of terrorizing her. Terrorizing is "more than just putting another in fear"; it is "putting that person in some high degree of fear, a state of intense fright or apprehension." *Moore*, 315 N.C. at 745, 340 S.E.2d at 405 (internal quotation marks and citation omitted). In determining the sufficiency of the evidence of intent to terrorize, "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her." *Id.* Nonetheless, the "victim's subjective feelings of fear, while not determinative of the defendant's intent to terrorize, are relevant." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000) (citations omitted) (sufficient evidence that defendant acted with purpose to terrorize victim, who was "petrified" when defendant confined her to her apartment against her will by brandishing a loaded gun, despite her requests to leave). *See also State v. Surrett*, 109 N.C. App. 344, 350, 427 S.E.2d 124, 127 (1993) (sufficient evidence that defendant "intended by his actions and commands to put the victim in a state of intense fright or apprehension" where defendant struggled to hold victim in car against her will despite her screams).

In this case, the evidence shows the following: (a) unbeknownst to Gonzalez, Defendant lay in the back seat of her car holding a knife while he waited for her to get off work; (b) Defendant forced Gonzalez to remain inside and drive the car by applying enough choking force to her neck to create visible red marks and threatening her with a knife; and (c) even after arriving at the gas station where Gonzalez screamed for help and tried to open the door to get out of the car, Defendant attempted to force Gonzalez to stay in the car by hitting the top of her head with enough force to cause her to be lightheaded. Considered in the light most favorable to the State, this evidence was sufficient to support a finding that Defendant confined Gonzalez with the intent to put her in a "high degree of fear, a state of intense fright or apprehension." *Moore*, 315 N.C. at 745, 340 S.E.2d at 405. Moreover, Gonzalez's screams, frantic exit from the car, and escape into the convenience store show her fear during the incident, which is also relevant to support the finding that Defendant intended to terrorize her. *See Baldwin*, 141 N.C. App. at 604, 540 S.E.2d at 821. Accordingly, the State provided substantial evidence of this element of the offense, and denial of Defendant's motion to dismiss was proper. *See Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455.

B. Assault with a deadly weapon

[2] Defendant next argues that the trial court erred by denying Defendant's motion to dismiss for insufficient evidence the charge of assault with a deadly weapon on Jackson, because the State failed to present sufficient evidence that Defendant assaulted him.

Misdemeanor assault with a deadly weapon is defined by statute to include assault with use of a deadly weapon. N.C. Gen. Stat. § 14-33(c)(1) (2018). "There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). Our Supreme Court has defined assault as "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Id.* (internal quotation marks and citations omitted). The Court further explained:

> This common law rule places emphasis on the intent or state of mind of the person accused. The decisions of the Court have, in effect, brought forth another rule known as the "show of violence rule," which places the emphasis on the reasonable apprehension of the person assailed. The "show of violence rule" consists of a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. . . . Thus, there are two rules under which a person may be prosecuted for assault in North Carolina.

Id. (citation omitted). *See also State v. Floyd*, 369 N.C. 329, 336, 794 S.E.2d 460, 465 (2016) (the show of violence rule is based on a violent act or threat that causes fear in another person, as distinguished from an attempt to cause injury to another person).

On appeal, Defendant argues that the State's evidence does not satisfy either rule for establishing assault, as it does not show that Defendant drove the car toward Jackson or that Defendant's conduct would put a reasonable person in Jackson's position in fear of immediate bodily harm. Defendant supports this argument by highlighting conflicting testimony.

On direct examination as a witness for the State, Jackson provided the following testimony:

> Q. And at what point did you realize that that vehicle was coming towards you?
>
> A. When it -- once the gas was stomped and it started heading towards us.

Q. When you say the gas was stomped, what alerted you to that?

A. You could hear it. High rpm's.

Q. And you mentioned the location where you were over at the pump. Were -- did you have to take any measures to avoid being hit by the vehicle?

A. No, Ma'am, I didn't.

Q. And what about your brother? What were you able to observe?

A. He tried to get out of the way. Obviously, he couldn't. Jumped up, like perfect timing and just caught the hood of the car and landed on it with his knees and kind of just plopped on the front and then rolled right off and jumped behind that pillar right there.

On cross-examination, Jackson testified:

Q. . . . . You got out of the way?

A. Yes, sir.

Finally, on re-direct examination, Jackson testified:

Q. Jackson, you mentioned earlier that when the defendant was driving the car in your direction, you had to hide behind the gas pump?

A. Yes, sir. Or yes, Ma'am. Excuse me.

Q. Why did you even go to hide behind the gas pump?

A. A moving vehicle coming towards me and I don't really like that. Just getting out of the way.

Q. How far away was the vehicle from you when you made the decision to go and hide where the gas pumps were?

A. I don't know. Maybe 10 or 15 feet. I am not sure.

Q. Where the vehicle actually drove, was that in the place you were standing from when you first noticed the vehicle coming towards you?

A. No.

> Q. Let me ask that another way. Were you standing, prior to moving behind the gas pump, were you standing in the direction the vehicle was moving?
>
> A. Do you mean like when he started pulling towards the bushes? No.
>
> Q. But when he started pulling towards you and your brother?
>
> A. Yes. When he started pulling towards -- well, yes, when he started pulling towards us, I was kind of already walking up on that little sidewalk area, so I was already right there by the pump. All I had to do was take two steps and I was behind it.

The State also presented testimony by a police officer who interviewed Jackson. The officer testified that Jackson stated that Defendant "drove directly towards the two brothers attempting to run them over."

When viewed in the light most favorable to the State, the trial testimony provides substantial evidence of assault. First, the testimony supports a conclusion that Defendant committed an "overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury" to Jackson by driving a moving vehicle toward him at a high rate of speed. *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. Second, the testimony supports a conclusion that Defendant's actions—which included driving the car fast toward Jackson immediately after both had engaged in a violent struggle—put Jackson reasonably in fear of immediate bodily harm and prompted him to get out of the way. *See id.*; *Floyd*, 369 N.C. at 336, 794 S.E.2d at 465 (show of violence rule is based on a violent act or threat that causes fear in another person).

We reject Defendant's contention that any conflicting testimony in the record renders the State's evidence insufficient. "[C]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted). Thus, all evidence about whether Jackson was in fear of immediate harm was properly put before the jury. *State v. Allen*, 360 N.C. 297, 305, 626 S.E.2d 271, 279 (2006) (citation omitted) ("It is for the jury to decide issues of fact when conflicting information is elicited by either party.").

Because the State presented sufficient evidence to support the conclusion that Defendant assaulted Jackson, the trial court did not err by denying Defendant's motion to dismiss.

IV. Conclusion

The State presented sufficient evidence of Defendant's intent to terrorize Gonzalez and that Defendant assaulted Jackson. Accordingly, we discern no error by the trial court in denying Defendant's motion to dismiss for insufficient evidence of these two offenses.

NO ERROR.

Chief Judge McGEE and Judge DIETZ concur.

STATE OF NORTH CAROLINA
v.
DAMIAN MAURICE GORE

No. COA19-608

Filed 16 June 2020

1. Search and Seizure—historical cell-site location information—warrantless search—federal constitution—good faith exception

The trial court in a murder prosecution did not err by denying defendant's motion to suppress his cell phone records and historical cell-site location information (CSLI) from the time of the murder—which police acquired without a warrant and pursuant to a court order under N.C.G.S. §§ 15A-262 and 15-263—where, assuming this warrantless search violated defendant's rights under the Fourth Amendment of the U.S. Constitution, the federal "good faith" exception to the exclusionary rule applied. Police sought the court order two years before the U.S. Supreme Court issued its decision requiring a warrant for CSLI searches, and therefore the police had a reasonable, good-faith belief that a warrantless search of defendant's CSLI was lawful.

2. Search and Seizure—historical cell-site location information—warrantless search—North Carolina constitution—probable cause

The trial court in a murder prosecution did not err by denying defendant's motion to suppress his cell phone records and historical cell-site location information (CSLI) from the time of the murder—which police acquired without a warrant and pursuant to a court order issued under N.C.G.S. §§ 15A-262 and 15-263—where

defendant's rights under the "General Warrants" clause of the North Carolina Constitution were not violated. Although warrantless searches of historical CSLI constitute unreasonable searches, the application to obtain defendant's CSLI contained all the information necessary from which the trial court could have issued a warrant supported by probable cause, and the trial court in its order explicitly found that probable cause existed to search defendant's CSLI.

Judge DILLON concurring in part and concurring in result in part by separate opinion.

Appeal by defendant from judgment entered 28 January 2019 by Judge John E. Nobles, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 19 February 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defenders Brendan O'Donnell and Emily Zvejnieks, for defendant.

ARROWOOD, Judge.

Damian Maurice Gore ("defendant") appeals from judgment entered on his *Alford* guilty plea to voluntary manslaughter and robbery with a dangerous weapon following the denial of his motion to suppress certain evidence. On appeal, defendant argues the trial court erred in denying his motion to suppress because the State acquired his historical cell-site information without a warrant, in violation of both his federal and state constitutional rights. For the following reasons, we affirm.

I. Background

On 24 April 2017, defendant was indicted on charges of first-degree murder, possession of a stolen firearm, and robbery with a dangerous weapon. Evidence against defendant included certain cell-phone records and historical cell-site location information ("CSLI"), which police obtained pursuant to orders issued under N.C. Gen. Stat. §§ 15A-262 and 15-263. Defendant moved to suppress this evidence and a hearing was held on 27 August 2018.

At the hearing, Detective Travis Williams ("Detective Williams") of the Wilmington Police Department testified that on 30 December 2015

at 12:44 a.m., his department received reports of a shooting. Detective Williams responded to the reports and found a deceased black male lying in the front yard of an abandoned home. The man suffered from multiple gunshot wounds and was later identified as Rashaun McKoy ("Mr. McKoy"). Law enforcement also received information that a white Altima was seen possibly leaving the murder scene, and proceeded to treat it as a possible suspect vehicle.

Deputy Johnson of the New Hanover County Sherriff's Department spotted the white Altima and followed it into an apartment complex. Deputy Johnson contacted the owner of the car and was advised that Rashaun McKoy should be driving the car. As the white Altima backed into a parking space, Deputy Johnson pulled in front of the car, blocking it in, and activated the blue lights on her patrol vehicle. A black male exited the car and asked Deputy Johnson why she pulled him over. When Deputy Johnson ordered the man to get back into the car, he took off running. Deputy Johnson chased after the man but was unable to catch him. However, she observed that the man appeared to be grabbing at his waistband while he was running. Later that morning, police found a .38 caliber revolver covered in blood in the direction that the man had fled.

Detective Williams later searched the white Altima and found illegal drugs, a gun, and a blood-covered cell phone which belonged to Mr. McKoy. A search of Mr. McKoy's phone log revealed several incoming and outgoing calls from a number ending in 0731 and listed under the name "Dame." All of the calls occurred within four hours of the shooting, including three calls placed just minutes before the incident. Upon determining that the number belonged to defendant, Detective Williams applied for a court order to obtain defendant's cell phone records, including CSLI, for the period of 28 December 2015 through 1 January 2016.

Detective Williams completed the application pursuant to N.C. Gen. Stat. §§ 15A-262 and 15-263, sworn under oath and including a supporting affidavit. A judge issued an order granting the application, finding that "the applicant has shown Probable Cause that the information sought is relevant and material to an ongoing criminal investigation, involving a First Degree Murder." The order required Sprint to disclose the requested cell phone records, including defendant's historical CSLI. Based on the CSLI, law enforcement placed defendant in both the neighborhood of the shooting and in the area where Deputy Johnson had confronted the driver of the white Altima at the relevant times.

In support of his motion to suppress, defendant argued that Detective Williams violated both his federal and state constitutional rights in searching his cell phone records, including his CSLI, without

first obtaining a warrant supported by probable cause. Finding that the court order was equivalent to a warrant and supported by probable cause, the trial court denied defendant's motion. Defendant entered a conditional *Alford* guilty plea to voluntary manslaughter and robbery with a dangerous weapon, but appealed the order denying his motion to suppress.

II. Discussion

On appeal, defendant contends the trial court erred in denying his motion to suppress because the State's acquisition of his CSLI without a warrant or probable cause violated his federal and state constitutional rights to be free from unreasonable search and seizure. He further contends that, in light of this violation, his CSLI and the evidence derived from it should be suppressed. We disagree.

This Court reviews a denial of a motion to suppress for "whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law." *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (2003). The trial court's conclusions of law are reviewed *de novo*. *State v. Johnson*, 204 N.C. App. 259, 262, 693 S.E.2d 711, 714 (2010).

A. Federal Constitution

[1] We first address defendant's claim with respect to his rights under the federal constitution. The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government without a warrant supported by probable cause. U.S. Const. amend. IV. In *Carpenter v. United States*, __ U.S. __, 201 L. Ed. 2d 507 (2018) the United States Supreme Court considered whether the government's warrantless acquisition of a defendant's historical CSLI was an unreasonable search prohibited by the Fourth Amendment. Concluding that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI," the Court held that the government's acquisition of a defendant's CSLI constitutes a search within the meaning of the Fourth Amendment. *Id.* at __, 201 L. Ed. 2d at 521. Accordingly, if the government wishes to access such information, it must first obtain a warrant. *Id.* at __, 201 L. Ed. 2d at 525.

In addition, the *Carpenter* court further held that the Stored Communications Act, which allowed law enforcement to obtain CSLI so long as they had " 'reasonable grounds' for believing that the records

were 'relevant and material to an ongoing investigation,' " did not satisfy the warrant requirement because it required something less than probable cause. *Id.* at __, 201 L. Ed. 2d at 525-26. Thus, the Court held that government acquisition of CSLI based on an order issued pursuant to the Stored Communications Act or its equivalent, rather than pursuant to a warrant based on probable cause, would violate a defendant's Fourth Amendment rights. *Id.* at __, 201 L. Ed. 2d at 526.

On remand, the Sixth Circuit held that though the government should have obtained a warrant before searching the defendant's CSLI, the trial court did not err in denying the defendant's motion to suppress his CSLI because the federal "good faith exception" to the exclusionary rule applied. *United States v. Carpenter*, 926 F.3d 313, 317-18 (2019). Though evidence obtained in violation of the Fourth Amendment is generally excluded, under the good faith exception, "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful,' " the evidence obtained from an otherwise unlawful search will not be excluded. *Davis v. United States*, 564 U.S. 229, 238, 180 L. Ed. 2d 285, 295 (2011) (citations omitted). Thus, the Sixth Circuit held that though the warrantless search of the defendant's CSLI violated his Fourth Amendment rights, "it was not unreasonable for the FBI agents who acquired Carpenter's CSLI to rely on [the Stored Communications Act]" because it was valid at the time. *Carpenter*, 926 F.3d at 317-18.

Here, as discussed in more detail below, the search of defendant's CSLI was pursuant to a court order supported by probable cause. However, we note that even assuming law enforcement did conduct a warrantless search in violation of defendant's Fourth Amendment rights, the federal good faith exception to the exclusionary rule would apply.[1] Detective Williams applied for the court order to obtain defendant's cell phone records in 2016, two years prior to the United States Supreme Court's decision in *Carpenter*. In light of the prevailing law at the time, it was reasonable for Detective Williams and the judge who approved

1. Defendant argues that the trial court did not base its decision to deny defendant's motion to suppress on the good faith exception, and that the State did not preserve the good faith exception for our consideration on appeal by raising it in the trial court below. However, Rule 28(c) provides that "an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R. App. P. 28(c) (2020). In addition, "[o]ur precedents clearly allow the party seeking to *uphold* the trial court's presumed-to-be-correct and 'ultimate ruling' to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from." *State v. Hester*, 254 N.C. App. 506, 516, 803 S.E.2d 8, 16 (2017) (emphasis in original) (citations omitted).

the application to access defendant's CSLI to believe that a warrantless search of five days of a suspect's CSLI was lawful. Accordingly, we hold that the trial court did not err in denying defendant's motion based on any Fourth Amendment grounds.

B. State Constitution

[2] Defendant next contends his rights under the North Carolina Constitution were violated as well, and that it was error for the trial court to deny his motion to suppress on that basis. Our Supreme Court has recognized that Article I, Section 20 of the North Carolina Constitution (the "General Warrants clause"), like the Fourth Amendment, "prohibits unreasonable searches and seizures." *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). Nevertheless, "we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision." *Carter*, 322 N.C. at 713, 370 S.E.2d at 555 (citations omitted). As our Supreme Court has explained,

> because the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state Constitution. For all practical purposes, therefore, the only significant issue for this Court when interpreting a provision of our state Constitution paralleling a provision of the United States Constitution will always be whether the state Constitution guarantees additional rights to the citizen above and beyond those guaranteed by the parallel federal provision. In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.

State v. Jackson, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998) (emphasis in original). Thus, all defendants must be afforded at least those rights granted under the Constitution of the United States.

In *Carpenter*, the U.S. Supreme Court held that law enforcement's acquisition of a defendant's historical CSLI from a wireless carrier without a warrant constitutes an unreasonable search under the Fourth Amendment. __ U.S. at __, 201 L. Ed. 2d at 525-26. Because warrantless

searches of historical CSLI have been deemed a violation of citizens' Fourth Amendment rights under the federal Constitution, and state constitutions must be interpreted to provide at least those rights guaranteed under the federal Constitution, it follows that this Court is required to hold that a warrantless search of historical CSLI constitutes an unreasonable search in violation of a defendant's rights under the North Carolina Constitution as well. *See Jackson*, 348 N.C. at 648, 503 S.E.2d at 103.

Our state constitution has not been interpreted to provide "any enlargement or expansion of rights beyond those afforded in the Fourth Amendment[.]" *State v. Gardner*, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992). Thus, this Court need not inquire whether defendant enjoys greater protection under our State's constitutional guarantee against unreasonable searches and seizures. However, we must accord defendant the constitutional rights he is entitled to under the Fourth Amendment. Accordingly, in keeping with *Carpenter*, we hold that a warrantless search of historical CSLI constitutes an unreasonable search in violation of a defendant's rights under the North Carolina Constitution.

C. Application for CSLI met Warrant Requirement

Although this Court is, as a general matter, bound by *Carpenter*, we hold the trial court did not err in denying defendant's motion to suppress because the application to obtain defendant's CSLI contains all the information necessary from which the trial court could have issued a warrant supported by probable cause, and in fact, the trial court in its order specifically found that probable cause existed to obtain this information.

In *Carpenter*, the Supreme Court held that the acquisition of a defendant's CSLI constituted a search requiring a warrant, and that an application to access a defendant's CSLI data under the Stored Communications Act ("SCA") did not satisfy the warrant requirement. __ U.S. at __, 201 L. Ed. 2d at 525-26. As the *Carpenter* Court explained, a court order issued under the SCA did not meet the probable cause standard required for warrants because it only required that the government "show 'reasonable grounds' for believing that the records were 'relevant and material to an ongoing investigation.' " *Id.* at __, 201 L. Ed. 2d at 525 (citing 18 U.S.C. § 2703(d)). Accordingly, law enforcement's acquisition of a defendant's CSLI without a warrant or its equivalent would violate the defendant's Fourth Amendment rights. *See id.* at __, 201 L. Ed. 2d at 525.

A search warrant is a court order which directs law enforcement to "search designated premises, vehicles, or persons for the purpose of

seizing designated items . . . .” N.C. Gen. Stat. § 15A-241 (2019). An item may be seized pursuant to a search warrant “if there is probable cause to believe that it . . . [h]as been used or is possessed for the purpose of being used to commit or conceal the commission of a crime; or [c]onstitutes evidence of an offense or the identity of a person participating in an offense.” N.C. Gen. Stat. § 15A-242(3)-(4) (2019). “Probable cause requires not certainty, but only a ‘*probability or substantial chance* of criminal activity.’ ” *State v. McKinney*, 368 N.C. 161, 165, 775 S.E.2d 821, 825 (2015) (emphasis in original) (quoting *State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991). Thus, “an affidavit is sufficient to establish probable cause ‘if it supplies reasonable cause to believe that the proposed search for evidence *probably* will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender.’ ” *State v. Frederick*, 259 N.C. App. 165, 170, 814 S.E.2d 855, 859 (2018) (emphasis in original) (quoting *Arrington*, 311 N.C. at 636, 319 S.E.2d at 256).

In North Carolina, an application for a search warrant must adhere to the following requirements:

> Each application for a search warrant must be made in writing upon oath or affirmation. All applications must contain:
>
> (1) The name and title of the applicant; and
>
> (2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and
>
> (3) Allegations of fact supporting the statement. The statements must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and
>
> (4) A request that the court issue a search warrant directing a search for and the seizure of the items in question.

N.C. Gen. Stat. § 15A-244 (2019). In contrast, an application for an order for a pen register or trap and trace device, which law enforcement here used to apply for access to defendant’s CSLI, requires: “(1) The identity of

the law enforcement officer making the application and the identity of the law enforcement agency conducting the investigation; and (2) A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." N.C. Gen. Stat. § 15A-262 (2019).

Here, the record reflects that the application for the release of defendant's CSLI was written under oath sworn before a judge. It also included many of the other elements required for a warrant, such as: (1) the name and title of the applicant, Detective Travis Williams; (2) statements that Detective Williams was seeking certain of defendant's cell phone records that he believed would be found in Sprint's Call Detail Records and were relevant and material to an ongoing criminal investigation; (3) allegations of fact supporting those statements, including a description of the circumstances leading him to believe defendant's cell phone records for the telephone number subscribed with Sprint would reveal evidence of a crime; and (4) a request that the trial court grant an order directing Sprint to furnish the requested records. The requirements for an application for a warrant and for an application under N.C. Gen. Stat. § 15A-262 are thus similar in many respects, save for the probable cause requirement.

Notably, following an application under N.C. Gen. Stat. § 15A-262, a superior court judge may issue an order authorizing the requested action if the judge finds:

> (1) That there is reasonable suspicion to believe that a felony offense, or a Class A1 or Class 1 misdemeanor offense has been committed;
>
> (2) That there are reasonable grounds to suspect that the person named or described in the affidavit committed the offense, if that person is known and can be named or described; and
>
> (3) That the results of procedures involving pen registers or trap and trace devices will be of material aid in determining whether the person named in the affidavit committed the offense.

N.C. Gen. Stat. § 15A-263 (2019).

Regarding warrants, a judicial official may issue a search warrant upon a finding of probable cause to believe that the requested search will lead to the discovery of the item(s) specified in the application. N.C. Gen. Stat. § 15A-245(b) (2019). The search warrant itself must contain the following information:

(1) The name and signature of the issuing official with the time and date of issuance above his signature; and

(2) The name of a specific officer or the classification of officers to whom the warrant is addressed; and

(3) The names of the applicant and of all persons whose affidavits or testimony were given in support of the application; and

(4) A designation sufficient to establish with reasonable certainty the premises, vehicles, or persons to be searched; and

(5) A description or a designation of the items constituting the object of the search and authorized to be seized.

N.C. Gen. Stat. § 15A-246 (2019).

In the present case, the court order granting the search of defendant's cell phone records contained all of the information required in a search warrant. In addition, the trial court went beyond the "reasonable suspicion" and "reasonable grounds," required under N.C. Gen. Stat. § 15A-263, and instead found that "the applicant has shown *Probable Cause* that the information sought is relevant and material to an ongoing criminal investigation, involving a First Degree Murder." (emphasis added). While an application under N.C. Gen. Stat. § 15A-262 need not show it meets the more stringent probable cause standard, the trial court nevertheless evidently believed that it did. The information contained in the application shows the trial court had a substantial basis for reaching that conclusion. *See Frederick*, 259 N.C. App. at 169, 814 S.E.2d at 858 ("[A] reviewing court is responsible for ensuring that the issuing magistrate had a substantial basis for concluding that probable cause existed.").

In his application for a court order requiring Sprint to release defendant's historical CSLI, Detective Williams alleged that the victim, Rashaun McKoy, was murdered and had sustained multiple gunshot wounds to his body. His vehicle was taken from the scene by the individual suspected of murdering him. When the vehicle was spotted a short time later, the black male who was driving exited the vehicle and fled the scene, leaving behind a blood-soaked gun and cell phone. Deputies investigating the murder later searched the cell phone's call

history and discovered several outgoing and incoming calls from a number ending in 0731 that were placed only minutes prior to the shooting. The deputies determined that this number was registered with Sprint and belonged to defendant, and believed that obtaining defendant's CSLI would assist with the investigation. Thus, the application supplied information supporting a discovery of the "*probability or substantial chance* of criminal activity," *McKinney*, 368 N.C. at 165, 775 S.E.2d at 825 (emphasis in original) (quoting *Riggs*, 328 N.C. at 219, 400 S.E.2d at 433), "or the identity of a person participating in an offense," N.C. Gen. Stat. § 15A-242(4), that is required under the probable cause standard.

Furthermore, the trial court stated in its order denying defendant's motion to suppress that:

> The paper writing designated as Order, State's Exhibit P-9, is indeed a warrant based on probable cause. . . . The Court makes this determination based on the four corners of the search warrant, so that based on those four corners of the search warrant that there was probable cause that a fair probability that evidence of a crime would be found by the issuance of such warrant.
>
> The Court concludes as a matter of law concerning Exhibit Number 9 that there was probable cause for a search warrant to be issued, that there were no violations constitutionally of the US Constitution or the North Carolina Constitution or the statutes of law, and the Court denies the defendant's motion in that matter.

Though, as defendant argues, the application for defendant's cell phone records did not specifically assert that probable cause existed—likely because N.C. Gen. Stat. § 15A-262 does not require such an assertion—the substance of the application nevertheless supports that conclusion. We therefore agree with the trial court's findings and conclusions on this issue.

While the Supreme Court in *Carpenter* determined the "relevant and material" standard required under the SCA and other such statutes falls short of the probable cause standard required for a warrant, the present case is distinguishable because the trial court here explicitly found there was probable cause. This is a significant distinction which compels a different outcome than that of *Carpenter*. Accordingly, because the trial court determined there was probable cause to search defendant's historical CSLI, the requirements for a warrant were met

and defendant's constitutional rights were not violated. Because we hold that the warrant requirement was met, we do not consider whether there exists any good faith exception to the exclusionary rule in North Carolina, such as that which exists in the federal courts.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order denying defendant's motion to suppress.

AFFIRMED.

Judge BERGER concurs.

Judge DILLON concurs in part, concurs in result in part by separate opinion.

DILLON, Judge, concurring in part, concurring in result in part.

Defendant argues that his Cell Site Location Information ("CSLI") data should have been suppressed because the retrieval of this data by investigating officers violated his rights both under the federal constitution and our state constitution.

As explained more fully below, I agree with the majority's mandate affirming the trial court's order denying Defendant's motion to suppress his CSLI data but not entirely with the majority's reasoning. Specifically, I disagree with the majority's conclusion that the application and court order allowing retrieval of Defendant's CSLI data complied with the requirements of a valid warrant. I agree, though, with the majority's alternate conclusion with respect to Defendant's *federal* constitutional argument that, assuming the warrant requirements were not met, the good faith exception to the exclusionary rule applies. The majority rejects Defendant's *state* constitutional argument solely based on its conclusion that the warrant requirements were met. I conclude, however, that the good faith exception applies to Defendant's state constitutional argument as well.

I. Federal Constitution

I agree with the majority's alternate basis for rejecting Defendant's federal constitutional argument, that the good faith exception to the exclusionary rule applies. That is, though Defendant's federal constitutional rights under the Fourth Amendment were violated based on *Carpenter*, he was not entitled under to an order suppressing his

evidence. *Carpenter v. United States*, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018)

II. State Constitution

A. The Warrant Was Defective.

In this case, the investigating officer did not seek a warrant in the classic sense, but rather applied for an order under Section 15A-262. *See* N.C. Gen. Stat. § 15A-262 (2017). At the time the officer sought Defendant's CSLI data from the phone company, it was thought that the retrieval of this data from a third party did not constitute a search under the Fourth Amendment. The United States Supreme Court later handed down its *Carpenter* decision declaring that the retrieval of CSLI data from a phone company may constitute a search. *See Carpenter v. United States*, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018). The requirements to obtain a court's approval under Section 15A-262 are less stringent than the requirements to obtain a warrant. A warrant requires probable cause, whereas an order under Section 15A-262 does not.

In this case, however, the majority concludes that the order issued allowing law enforcement to retrieve Defendant's CSLI data, though entered pursuant to Section 15A-262 prior to *Carpenter*, still met the requirement for a warrant, as the court expressly concluded that "probable cause" existed. I disagree with the majority that the requirements for a warrant were met, for two independent reasons.

1. Affidavit did not establish probable cause.

First, I do not agree that the investigating officer's supporting affidavit in any way provided probable cause to justify the issuance of a warrant. In determining whether probable cause exists, North Carolina has adopted the "totality of the circumstances" test. *State v. Arrington*, 311 N.C. 633, 642-43, 319 S.E.2d 254, 260 (1984). The *only* "circumstance" listed in the affidavit providing a nexus between Defendant and the victim's death was that Defendant engaged in several cell phone calls with the victim near the time of the victim's death, the most recent occurring about 3 minutes before the victim was killed. There is nothing else. The affidavit merely states that the victim was killed; a deputy spotted the victim's car being driven shortly after the victim's death; a "black male driver" stopped the victim's car, got out, and fled; the victim's cell phone, covered in blood, was still in the car; and, regarding Defendant:

> [s]everal outgoing calls were placed to [Defendant's cell phone number][.] There were also several incoming calls from that number. Most of these calls were placed

> just prior to the shooting . . . [including] [t]hree [which occurred] approximately 3 or 4 minutes before [the victim was shot]. . . . [Defendant] is a person of interest in this case and [his cell phone] records are relevant and material information [to this investigation].

There is nothing else regarding Defendant: there is no allegation regarding Defendant's physical characteristics or that he resembled the person seen fleeing from the victim's car or was seen near the location of the killing; there is no allegation regarding the nature of Defendant's relationship with the victim, much less any allegation that their relationship was contentious or that Defendant had some motive to kill the victim; there is no allegation that Defendant was otherwise engaged in any kind of criminal activity.

Simply put, I conclude that the mere fact that a person happens to be talking to someone on the cellphone shortly before that someone is killed, without anything more, does not constitute probable cause that the person killed the victim. My conclusion is consistent with the only cases I have found on point, though they are out of state cases. *See*, *e.g.*, *Commonwealth v. Fulgiam*, 477 Mass. 20, 34, 73 N.E.3d 798, 813 (2017) ("Although the fact that [the victim and the defendant] may have used their cellular telephones to communicate with each other on the day of the murders elevated their relationship to a matter of importance in the investigation, it did not, without more, justify intrusion [to search Defendant's cellphone]"); *Commonwealth v. Snow*, 96 Mass. App. Ct. 672, 677, 138 N.E.3d 418, 423 (2019) ("Multiple cell phone calls and text messages between a defendant and a murder victim on the day of the killing, without more, also are not sufficient to establish probable cause to search the defendant's cell phone."); *State v. Marble*, 218 A.3d 1157, 1161 (Me. 2019) (upholding finding of probable cause for CSLI search where affidavit included allegation that the defendant communicated with the victim on day of the killing *and* included several other facts establishing a nexus with the defendant and the killing).

2. The court did not make the appropriate "probable cause" determination.

Alternatively, I do not believe that the trial court made the required "probable cause" finding. Specifically, the trial court found that the applicant had probable cause "that the information sought is *relevant and material to an ongoing criminal investigation*, involving a First Degree Murder" (emphasis added). However, to obtain a warrant, there must be a finding that there is probable cause that "*evidence of a crime*

will be found in a particular place." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258 (emphasis added). I believe that the universe of what constitutes information "relevant and material to an ongoing investigation" is a bigger universe than "evidence of a crime." *See Carpenter*, 138 S. Ct. at 2221, 201 L.Ed.2d at 526 (stating that showing that evidence "might be pertinent to an ongoing investigation [is a] 'gigantic' departure from the probable cause rule").

B. Defendant's Motion Was Otherwise Properly Denied.

Notwithstanding my disagreement with the majority regarding the sufficiency of the warrant in this case, I conclude that Defendant's CSLI data was properly admitted, for two independent reasons.

1. We have a good faith exception under North Carolina law.

First, I conclude that the exclusionary rule does not apply because the detective acted in good faith in relying on our State law, pre-*Carpenter*. I note Defendant's argument that the good faith exception is not recognized under the North Carolina Constitution. However, I conclude that our North Carolina Constitution does not *forbid* the General Assembly from passing a law, as that body has done, to allow for a good faith exception to the judicially adopted rule that evidence collected in violation of the constitution generally must be excluded.

The seminal case on the good faith exception in North Carolina, upon which Defendant relies, is *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988). A superficial reading of that opinion may lead one to believe that our Supreme Court was holding that our state constitution *prohibits* a good faith exception from being enacted by our General Assembly; that is, that our state constitution *forbids* the good faith exception to the exclusionary rule. Indeed, our General Assembly seems to have made this mistake when amending N.C. Gen. Stat. § 15A-974 in 2011 *to provide for* a good faith exception to the exclusionary rule. Specifically, the Editor's Notes to the statute's amendment states that "[t]he General Assembly respectfully requests that the North Carolina Supreme Court reconsider, and overrule, its holding in *State v. Carter* that the good faith exception to the exclusionary rule which exists under federal law does not apply under North Carolina law." N.C. Gen. Stat. § 15A-974 (ed. note).

But a closer reading of *Carter* reveals that our Supreme Court did not hold that the absence of a good faith exception under state law at that time (in 1988) was a constitutional matter which could only be changed by *constitutional* amendment. Rather, the Court held that the

recognition or non-recognition of a good faith exception is a matter of public policy within the purview of our General Assembly's lawmaking authority.[1] And, at that time, the General Assembly had provided that there was no good faith exception; and the Supreme Court merely held that the General Assembly's law was not unconstitutional, that our North Carolina Constitution *required* the recognition of a good faith exception.

In *Carter*, officers obtained blood evidence from a search without first obtaining a warrant. Our Supreme Court noted that the search violated the defendant's rights under both our state and federal constitutions. *Carter*, 322 N.C. at 714, 370 S.E.2d at 556. The Court reviewed the history of the exclusionary rule in our State, recognizing that it was originally a creation of the General Assembly decades before the rule was mandated by the United States Supreme Court in its 1961 case *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081 (1961). *See id.* at 718, 370 S.E.2d at 559 ("North Carolina was among a handful of states that adopted an exclusionary rule by statute rather than by judicial creation.").

In the face of a state statute which, at the time, required that *all* illegally-obtained evidence be suppressed, the State "urge[d] the Court to adopt a 'good faith' exception to our long-standing exclusionary rule," similar to that which had been adopted by the United States Supreme Court in Fourth Amendment cases, *id.* at 714, 370 S.E.2d at 556, to "create a good faith exception to the exclusionary rule under our state constitution, *id.* at 722, 370 S.E.2d at 561.

Logically, the State's argument was *not* that our state constitution should *simply allow* for a good faith exception. Such a ruling would not prohibit the General Assembly from enacting a statute providing for *greater* protections to criminal defendants, for instance by enacting a statute that required *all* illegally obtained evidence be excluded, even if gathered in good faith.

Rather, logically, the State was essentially asking our Supreme Court to declare the portion of the state statute to be unconstitutional, based on an interpretation that our state constitution *requires* that evidence collected in good faith be allowed into evidence, notwithstanding a statute to the contrary.

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1. We note that the exclusionary rule itself (and by extension the good faith exception to that rule) is not a rule mandated by the Fourth Amendment but rather is a judicially established "rule [to] effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Illinois v. Krull*, 480 U.S. 340, 347, 94 L.Ed.2d 364, 373 (1987).

Our Supreme Court rejected the State's argument, refusing to "engraft a good faith exception" into our state constitution. But, in so holding, the Court did not engraft a constitutional prohibition against the enactment of a law by our General Assembly to provide for a good faith exception. Indeed, the Court recognized in its conclusion that its holding was based on long-standing public policy based on enactments by our General Assembly *and expressly stated* that our General Assembly had the authority to change the policy by changing the law:

> This policy has existed since 1937. If a good faith exception is to be applied to this public policy, *let it be done by the legislature*, the body politic responsible for the formation and expression of matters of public policy.

Id. at 724, 370 S.E.2d at 562 (emphasis added). Had our Supreme Court thought that the issue of a public policy exception was constitutional in nature, the Court would not have made such a statement, but rather would have directed the State to seek a constitutional amendment.

I understand that there has been a lot of commentary regarding the belief that North Carolina does not recognize the good faith exception, based on our Supreme Court's enunciation in *Carter*. However, the only fair reading of *Carter* is that our state constitution neither prohibits nor provides for a good faith exception, but rather the matter is one of public policy to be decided by the people's representatives serving in our General Assembly. *See State v. Foster*, 264 N.C. App. 135, ___, 823 S.E.2d 169 n.2 (2019) (Table) (recognizing that the language in *Carter* has been superseded by statute).

2. We are bound by precedent that the retrieval was not a search under state law.

Alternatively, as my second basis, assuming that the good faith exception does not apply to searches under our state constitution, I conclude that we are bound to hold that the retrieval of Defendant's CSLI data did not constitute a search *under our state constitution*, notwithstanding that it might be under the federal constitution.

The United States Supreme Court held in *Carpenter* that obtaining a suspect's CSLI records from the phone company constitutes an unreasonable search under the Fourth Amendment. But our Supreme Court has instructed that our state appellate courts are "not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States." *Arrington*, 311 N.C. at 642, 319 S.E.2d at 260. And "the language of Article 1, Section 20 of

the Constitution of North Carolina [actually] differs markedly from the language of the Fourth Amendment to the Constitution of the United States." *Id*. at 642, 319 S.E.2d at 260.

Notwithstanding the differing language between the state and federal constitutions, our Supreme Court has held that our state constitutional provision, like the Fourth Amendment, "prohibits unreasonable searches and seizures." *Id.* at 642, 319 S.E.2d at 260. I recognize that if the federal constitution provides greater protection, then we must apply the federal constitution. Here, though, the federal constitution does not provide relief to Defendant because of the federal good faith exception. Defendant, however, claims that the state constitution provides greater protection in that our state constitution prohibits the application of a good faith exception. I note that our Supreme Court has recognized that our state constitution does not provide "any enlargement or expansion of rights beyond those afforded in the Fourth Amendment[.]" *State v. Gardner*, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992). But assuming that our state constitution prohibits the application of a good faith exception, then Defendant may be entitled to greater relief than provided under the federal constitution if the retrieval of his data constitutes a "search" within the meaning of the state constitution.

With all this said, our appellate courts are not bound to conclude that a particular type of action constitutes a search within the meaning of our state constitution simply because the United States Supreme Court holds that similar conduct by law enforcement constitutes a search under the Fourth Amendment. I am persuaded by the reasoning in *Carpenter* that the conduct in this case *did* constitute a search under our state constitution; however, our panel is bound by precedent established by another panel from our Court. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). And three years prior to *Carpenter*, a panel of our Court held that obtaining a suspect's CSLI data does not constitute a search *under our state constitution*. *See State v. Perry*, 243 N.C. App. 156, 776 S.E.2d 528 (2015).[2]

In *Perry*, the panel then made the logical leap that since retrieval of CSLI did not violate the Fourth Amendment, then the conduct did not

2. I note that there is a more recent case from our Court on this topic, *State v. Thomas*, 268 N.C. App. 121, 834 S.E.2d 654 (2019). However, the panel in that case found that the doctrine of attenuation applied and thus, the trial court did not err in denying Defendant's motion to suppress the phone records obtained by the State. Here, the attenuation doctrine is inapplicable due to the absence of an intervening circumstance, which is necessary for the doctrine to apply.

violate the state constitution. It could therefore be argued that since the United States Supreme Court subsequently "moved the goal posts" from where they were established by the federal cases relied upon by our Court in *Perry*, the state constitutional goal posts have also been moved. Perhaps our state constitutional goal posts should be moved from where the *Perry* panel planted them. However, we remain bound by the *Perry* holding, as we should remain bound by a decision from our Supreme Court regarding a state constitutional issue, notwithstanding a decision by the United States Supreme Court, until controlling precedent concerning our state constitution is overruled by our Supreme Court. Of course, we should *apply* federal constitutional protections where those protections are greater than the protections afforded by our state constitution.

STATE OF NORTH CAROLINA
v.
DEMON HAMER

No. COA19-473

Filed 16 June 2020

1. Constitutional Law—North Carolina—right to jury—waiver—N.C.G.S. § 15A-1201—requirements

In a prosecution for misdemeanor speeding, the trial court erred by consenting to defendant's waiver of a trial by jury before conducting the colloquy mandated in N.C.G.S. § 15A-1201(d). Although defense counsel informed the trial court prior to trial that defendant waived a jury trial, and the State gave its consent, the trial court did not personally address defendant about the waiver until after the State's case-in-chief was presented.

2. Criminal Law—bench trial—ineffective waiver of trial by jury—no prejudice

In a prosecution for misdemeanor speeding, defendant was not entitled to relief after the trial court erred by consenting to defendant's waiver of a jury trial without first conducting the colloquy required by N.C.G.S. § 15A-1201(d). Defendant could not demonstrate he was prejudiced by the statutory violation where his failure to contest the essential elements of the offense meant there was no reasonable possibility that a different result would have been reached absent the error.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 29 November 2018 by Judge Michael J. O'Foghludha in Orange County Superior Court. Heard in the Court of Appeals 3 December 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Ann Stone, for the State.

W. Michael Spivey for defendant-appellant.

ZACHARY, Judge.

Defendant Demon Hamer appeals from a judgment entered upon the trial court's verdict finding Defendant guilty of speeding 94 miles per hour in a 65-mile-per-hour zone. On appeal, Defendant argues that the trial court erred in conducting a bench trial because Defendant did not knowingly and voluntarily waive his right to a trial by jury. After careful review, we affirm.

Background

On 12 January 2018, Trooper Michael Dodson of the North Carolina State Highway Patrol stopped Defendant on I-40 for speeding. Trooper Dodson issued a citation charging Defendant with (i) speeding 94 miles per hour in a 65-mile-per-hour zone, and (ii) reckless driving.

On 26 July 2018, Defendant's case came on for trial before the Honorable Beverly Scarlett in Orange County District Court. The State dismissed the reckless driving charge and proceeded solely on the speeding charge – a Class III misdemeanor. That day, the district court found Defendant guilty of the speeding charge, and entered judgment ordering Defendant to pay costs and a $50 fine.[1] On 6 August 2018, Defendant filed a *pro se* written notice of appeal seeking a trial de novo in Orange County Superior Court. The superior court treated Defendant's filing as a petition for writ of certiorari, which the court allowed.

1. We are unable to ascertain how Defendant pleaded before the district court. The district court's judgment indicates that Defendant pleaded "guilty/resp." Yet, when discussing a jurisdictional question with counsel immediately before Defendant's 29 November 2018 trial, the superior court noted that Defendant had pleaded "not guilty" to both charges before the district court.

On 29 November 2018, Defendant's trial de novo commenced in Orange County Superior Court before the Honorable Michael J. O'Foghludha. At the outset, the superior court confirmed with defense counsel that Defendant was waiving his right to a jury trial.

The superior court accepted the waiver, and the trial proceeded. After the State rested, the superior court personally addressed Defendant regarding the waiver of his right to a jury trial. The defense then put on its case-in-chief. At the conclusion of trial, the superior court found Defendant guilty of speeding 94 miles per hour in a 65-mile-per-hour zone. Defendant timely filed written notice of appeal.

Discussion

On appeal, Defendant argues that the trial court erred in conducting a bench trial because the record fails to establish that Defendant knowingly and voluntarily waived his constitutional right to a trial by jury. We disagree.

A. The Constitutional Right to a Jury Trial

As Defendant correctly observes, it is not the United States Constitution, but rather the North Carolina Constitution, that guarantees the right at issue in this case. The United States Supreme Court has held that although "the Sixth Amendment, as applied to the States through the Fourteenth, requires that defendants accused of serious crimes be afforded the right to trial by jury[,] . . . so-called 'petty offenses' may be tried without a jury." *Baldwin v. New York*, 399 U.S. 66, 68, 26 L. Ed. 2d 437, 440 (1970). With regard to the Sixth Amendment, "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.* at 69, 26 L. Ed. 2d at 440.

In the instant case, Defendant was convicted of a Class 3 misdemeanor punishable by a maximum of 20 days' imprisonment, to wit: speeding 94 miles per hour in a 65-mile-per-hour zone in violation of N.C. Gen. Stat. § 20-141(j1) (2019). *See also id.* § 15A-1340.23(c). Accordingly, as Defendant concedes, "the Sixth Amendment guarantee of a jury trial does not apply in this case."

North Carolina, however, "has historically mandated trial by jury in *all* criminal cases." *State v. Boderick*, 258 N.C. App. 516, 522, 812 S.E.2d 889, 893 (2018) (emphasis added) (citation omitted). Moreover, contrary to the right afforded by the Sixth Amendment, the right to a jury trial guaranteed by our state constitution historically could not be waived.

Id. (citation and internal quotation marks omitted). That changed on 1 December 2014, when "the North Carolina Constitution was amended by the citizens of North Carolina to allow criminal defendants to waive their right to a trial by jury in non-capital cases." *State v. Jones*, 248 N.C. App. 418, 421, 789 S.E.2d 651, 654 (2016).

As amended, article I, § 24 of the North Carolina Constitution provides:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

N.C. Const. art. I, § 24.

Our General Assembly codified the 2014 constitutional amendment in N.C. Gen. Stat. § 15A-1201(a)-(b). *See* 2013 N.C. Sess. Laws 300-399, § 4. The legislature subsequently amended § 15A-1201 to include subsections (c) through (f), thereby prescribing the procedures that apply when a defendant seeks to waive the right to a jury trial. *See Boderick*, 258 N.C. App. at 522-23, 812 S.E.2d at 894 (citing 2015 N.C. Sess. Laws 289-215, § 1; N.C. Gen. Stat. § 15A-1201 (c)-(f) (2015)).

B. Standard of Review

In order to prove that the trial court erred by accepting his waiver of the right to a jury trial, Defendant must show (1) that the trial court violated the waiver requirements set forth in N.C. Gen. Stat. § 15A-1201, and (2) that Defendant was prejudiced by the error. *State v. Swink*, 252 N.C. App. 218, 221, 797 S.E.2d 330, 332, *appeal dismissed and disc. review denied*, 369 N.C. 754, 799 S.E.2d 870 (2017).

We note that Defendant did not object to the trial court's action below, and generally, this Court will not address an issue that has not yet been considered and ruled upon by the trial court. *See* N.C.R. App. P. 10(a)(1). "Nonetheless, it is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the]

defendant's failure to object at trial." *In re E.D.*, 372 N.C. 111, 116, 827 S.E.2d 450, 454 (2019) (citations and internal quotation marks omitted).[2]

Whether the trial court violated a statutory mandate is a question of law, which we review de novo on appeal. *State v. Rutledge*, 267 N.C. App. 91, 95, 832 S.E.2d 745, 747 (2019).

C. Waiver of the Right to Trial by Jury

[1] N.C. Gen. Stat. § 15A-1201(b)—the waiver provision—states, in pertinent part:

> A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact . . . shall be heard and judgment given by the court.

N.C. Gen. Stat. § 15A-1201(b).

A defendant shall provide notice of his intent to waive the right to a jury trial by any of the following methods:

> (1) Stipulation, which may be conditioned on each party's consent to the trial judge, signed by both the State and the defendant . . . .

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2. Our Supreme Court recently clarified the scope of the longstanding "rule that a statute's mandate must be directed to the trial court in order to automatically preserve a statutory violation as an issue for appellate review[.]" *In re E.D.*, 372 N.C. at 117, 827 S.E.2d at 454. "[A] statutory mandate that automatically preserves an issue for appellate review is one that, either: (1) requires a specific act by a trial judge, or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial, or at specific courtroom proceedings that the trial judge has authority to direct[.]" *Id.* at 121, 827 S.E.2d at 457 (citations and quotation marks omitted).

Here, a plain reading of N.C. Gen. Stat. § 15A-1201 "leaves no doubt that the legislature intended to place" certain responsibilities on, and require specific acts by, the presiding judge in considering a defendant's waiver of the right to a jury trial. *Id.* (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-1201(d) (providing that "[t]he decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial[,]" and setting forth acts that "the trial judge *shall do*" prior to "consenting to a defendant's waiver of the right to a trial by jury" (emphasis added)). Consequently, appellate review of this issue is preserved, notwithstanding Defendant's failure to object at trial.

> (2) Filing a written notice of intent to waive a jury trial with the court and serving on the State . . . within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).
>
> (3) Giving notice of intent to waive a jury trial on the record in open court by the earlier of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).

Id. § 15A-1201(c).

After the defendant gives notice of his intent to waive his right to a jury trial, "the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury." *Id.* § 15A-1201(d). "The decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial." *Id.*

> Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:
>
> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

Id.

Here, it is unclear how Defendant first provided notice of his intent to waive his right to a jury trial pursuant to N.C. Gen. Stat. § 15A-1201(c).[3] It is evident, however, that all parties were aware of Defendant's intent, as this was the initial matter raised before trial:

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3. The record contains neither signed stipulations in accordance with subsection (c)(1), nor written notice in accordance with subsection (c)(2). Although the transcript evinces that the parties had consented to Defendant's waiver of a jury trial, there is no evidence of when or how this occurred, or whether Defendant properly gave notice pursuant to subsection (c)(3).

> [THE STATE]: Your Honor, whenever you are ready, we can address [Defendant] . . . . He is charged with speeding 94 in a 65 and reckless driving.
>
> THE COURT: All right. So this is a bench trial; correct?
>
> [THE STATE]: Yes, sir. And I understand it –
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> . . . .
>
> THE COURT: Okay. So first of all, just technically, the defendant is waiving a jury trial?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.
>
> THE COURT: Okay. And I presume that there is a statute that allows that?
>
> [DEFENSE COUNSEL]: That is correct, Your Honor. We have – the State and I have – the State has consented. We have – there is no disagreement about the bench trial.
>
> THE COURT: Is it the same statute that says that Class I felonies can be waived? Is it under that same statute?
>
> . . . .
>
> [DEFENSE COUNSEL]: It's 15A-1201 subsection (b).
>
> THE COURT: Thank you, sir. So just as a technical matter . . . that's accepted by the Court under that statute since the State consents.

The State then dismissed Defendant's reckless driving charge, but challenged the superior court's jurisdiction over the case, due to the timeliness of Defendant's notice of appeal from district court. Noting that Defendant had attempted to appeal in open court, the trial court opted to treat Defendant's filing as a petition for writ of certiorari and conduct a bench trial on the speeding charge:

> THE COURT: Okay. Now . . . before we start, . . . can we do this without – and I will do it with any formality you would like – but can we treat it like a district court trial and simply hear the evidence and have me rule? Is there any objection to that? We don't have to go through any extra procedural hoops?

> [THE STATE]: Your Honor, the State would prefer that. [Defense counsel] has filed a motion for complete recordation, which includes pretrial hearings, motions hearings, bench conferences, opening statements, and closing arguments.
>
> THE COURT: Well, that would be allowed.

The State then proceeded with its case-in-chief. Later, however, after the State rested, but before the defense presented evidence, the trial court recognized its duty under N.C. Gen. Stat. § 15A-1201(d)(1) to "[a]ddress . . . [D]efendant personally and determine whether [he] fully underst[ood] and appreciate[d] the consequences of [his] decision to waive the right to trial by jury":

> THE COURT: Okay. Hold on just one second. . . .
>
> I was just reading . . . 15A-1201, we complied completely with that statute with the exception of the fact that I'm supposed to personally address the defendant and ask if he waives a jury trial and understands the consequences of that. Would you just explain that to your client.
>
> (Pause in proceedings while [defense counsel] consulted with [Defendant].)
>
> [DEFENSE COUNSEL]: Okay, Your Honor.
>
> . . . .
>
> THE COURT: Mr. Hamer, I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That's 15A-1201. Your defendant (sic) has waived it on your behalf. The State has consented to that. Do you consent to that also?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry [the] possibility of a 20-day jail sentence. Do you understand that?
>
> DEFENDANT: Yes, sir.

THE COURT: All right. Is that acceptable to you?

DEFENDANT: Yes, sir. I feel confident it was.

THE COURT: Thank you so much. You may have a seat.

Defendant asserts, and we agree, that the trial court erred by failing to adhere to the procedures prescribed by our General Assembly in N.C. Gen. Stat. § 15A-1201(d). At the outset of the proceedings, the trial court sought confirmation that "this [wa]s a bench trial" and that Defendant was "waiving a jury trial[.]" Defense counsel affirmed, noting that the State had consented to Defendant's waiver, and there was "no disagreement about the bench trial." After a brief discussion about waiver pursuant to N.C. Gen. Stat. § 15A-1201, the trial court announced that it "accepted [Defendant's waiver] . . . since the State consents." The trial court thus erroneously commenced a bench trial without first personally addressing Defendant to determine whether he fully understood and appreciated the consequences of that decision, in violation of N.C. Gen. Stat. § 15A-1201(d)(1).

The statutory requirements are clear: "[*b*]*efore consenting* to a defendant's waiver of the right to a trial by jury, the trial judge *shall*": (1) personally address the defendant to determine whether he "fully understands and appreciates the consequences of [his] decision to waive the right to trial by jury"; and (2) "[d]etermine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial." N.C. Gen. Stat. § 15A-1201(d) (emphases added). In failing to conduct the statutorily mandated colloquy with Defendant before consenting to his waiver of a jury trial, the trial court violated N.C. Gen. Stat. § 15A-1201(d)(1).

However, we cannot agree with Defendant that "the trial court did not comply with Section 15A-1201(d) *at all*." (Emphasis added.) Nor do we agree with Defendant that "the record does not reflect that [he] knowingly and voluntarily waived his right to a jury trial because the court made no inquiry at all of him." These contentions are disingenuous and lack merit.

The transcript very clearly refutes Defendant's repeated assertions that the trial court altogether failed to address him. For example, Defendant broadly contends, without context or qualification, that "the trial court made no inquiry of [him] to determine whether he wanted to give up his right to a jury trial or whether he had been pressured or promised anything in exchange for doing so." This is simply not the case.

Despite the trial court's initial untimely and improper colloquy with defense counsel, the court did eventually conduct the requisite waiver colloquy with Defendant. When the trial court later addressed Defendant following the State's presentation of evidence, the court provided Defendant time to confer with his attorney to discuss the consequences of his decision to waive a jury trial. Thereafter, the trial court personally addressed Defendant and asked whether he waived his right to a jury trial, explained the pending charge and potential consequences of conviction, and confirmed that Defendant understood. At the conclusion of the colloquy, Defendant stated that he felt "confident" that the procedures were "acceptable."

"Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial." *Rutledge*, 267 N.C. App. at 97, 832 S.E.2d at 748. Beyond that which is expressly prescribed by statute, "[n]o . . . specific inquiries are required" for the trial court to determine whether the defendant understands and appreciates the consequences of the decision to waive a jury trial. *Id.* "This Court will not read such further specifications into law." *Id.*

Defendant correctly observes that in *State v. Swink*, 252 N.C. App. 218, 797 S.E.2d 330 (2017), this Court "considered the sufficiency of the trial court's inquiry to determine whether a defendant's jury waiver was knowing and voluntary under our amended Constitution." By its own terms, however, *Swink* is inapposite here. At the time that the *Swink* defendant made his waiver before the trial court, the General Assembly had not yet "prescribed any specific procedures for waiver" of the right to trial by jury. 252 N.C. App. at 224 n.2, 797 S.E.2d at 334 n.2. Thus, in evaluating whether the trial court "conduct[ed] an adequate inquiry into whether he made a knowing and voluntary waiver of his right" to a trial by jury, *id.* at 223, 797 S.E.2d at 334, this Court "rel[ied] upon existing law in analogous situations to resolve th[e] case, while acknowledging the limited scope of cases" to which its holding might apply, *id.* at 224 n.2, 797 S.E.2d at 334 n.2.[4] Unlike in *Swink*, in the present case,

4. For example, the *Swink* Court relied upon Fourth Circuit jurisprudence for guidance, noting that "[f]ederal courts interpreting the United States Constitution similarly are required to find whether a defendant's waiver of his Sixth Amendment right to a trial by jury is knowing, voluntary, and intelligent." 252 N.C. App. at 224, 797 S.E.2d at 334 (citing *United States v. Boynes*, 515 F.3d 284, 286 (4th Cir. 2008)). *But see Baldwin*, 399 U.S. at 68-69, 26 L. Ed. 2d at 440 (distinguishing between "serious crimes" and "petty offenses" for purposes of determining whether the Sixth Amendment right to trial by jury applies).

we have the benefit of our General Assembly's 2015 amendment to N.C. Gen. Stat. § 15A-1201, which provided "further guidance on the waiver procedure[.]" *Id.*

For the reasons explained above, we conclude that the trial court erred by failing to conduct the statutorily mandated colloquy with Defendant before consenting to his waiver of the right to trial by jury, in violation of N.C. Gen. Stat. § 15A-1201(d). We overrule the remainder of Defendant's arguments concerning the sufficiency of the trial court's inquiry in determining whether his waiver was knowing and voluntary.

D. Prejudice

[2] Despite the trial court's error, "a new trial does not necessarily follow a violation of [a] statutory mandate. Defendants must show not only that a statutory violation occurred, but also that they were prejudiced by this violation." *Rutledge*, 267 N.C. App. at 100, 832 S.E.2d at 750 (citation omitted). In order to meet his burden of demonstrating prejudice, Defendant must establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a).

Here, Defendant asserts that, absent the trial court's error in consenting to his waiver and conducting a bench trial, "[t]here is a reasonable possibility that at least one of twelve jurors would have had a reasonable doubt and voted to acquit" him of speeding. We disagree.

At trial, Defendant sought to impeach the testimony provided by the officers who clocked his speed and issued his citation; he also challenged the State Highway Patrol's failure to retain video footage of the stop captured by the dashboard camera in Trooper Dodson's patrol vehicle. However, as the State noted in closing, Defendant "took the stand and didn't even contest the speed. The evidence is that he was speeding. He admitted that he was driving." Indeed, Defendant did not refute that he was the driver of the car, *or that he was speeding 94 miles per hour in a 65-mile-per-hour zone*, nor does he challenge these essential elements on appeal.

Accordingly, Defendant fails to establish "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at" a jury trial in this matter. N.C. Gen. Stat. § 15A-1443(a).

Conclusion

Despite the trial court's initial noncompliance with N.C. Gen. Stat. § 15A-1201's waiver requirements, the trial court subsequently recognized its error and took affirmative steps to correct it. Although untimely, the trial court's subsequent colloquy with Defendant satisfied the procedural requirements of subsection (d)(1). In any case, Defendant is not entitled to relief, because he cannot meet his burden of demonstrating prejudice pursuant to N.C. Gen. Stat. § 15A-1443(a).

We therefore affirm the trial court's judgment.

AFFIRMED.

Judge DIETZ concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, dissenting.

I first note that although Defendant in this case was convicted of the "Class 3 misdemeanor" of "driv[ing] a vehicle on a highway at a speed that is . . . over 80 miles per hour[,]" N.C.G.S. § 20-141(j1) (2019), and the consequences to Defendant in this case are relatively minor, the precedent set will apply equally to a defendant charged with a serious crime, so long as the State is not seeking the death penalty. Because I believe the relevant requirements set forth in N.C.G.S. § 15A-1201 (2019) are incorporated into the constitutional mandates of N.C. Const. art. I, § 24, I would hold that the mid-trial colloquy between Defendant and the trial court was insufficient to protect Defendant's constitutional right to a jury trial as provided in art. I, § 24.

Article I, § 24 of the North Carolina Constitution provides:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that *a person accused of any criminal offense* for which the State is not seeking a sentence of death in superior court *may*, in writing or *on the record in the court and with the consent of the trial judge*, waive jury trial, *subject to procedures prescribed by the General Assembly*.

N.C. Const. art. I, § 24 (2019) (emphasis added). By the plain language of art. I, § 24, our constitution demands that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court"

unless the waiver conditions of art. I, § 24 are met. Nothing in art. I, § 24 suggests any of the material requirements included may be waived or that violations may be subjected to regular harmless error review. If a defendant, the State, or the trial court, fails to adhere to *all* the required material conditions set forth in art. I, § 24, the defendant's attempt to waive the constitutional right to a jury trial has *failed*, *no waiver has occurred*, the *constitutional mandate* that the defendant may *only* be convicted by "the unanimous verdict of a jury in open court" remains, and the defendant is in the same position as were defendants prior to the 2014 and 2015 amendments of art. I, § 24 (the "amendments"). Therefore, I believe precedent set prior to these amendments of art. I, § 24 is still binding in any case where the defendant's right to a jury trial has not been constitutionally waived—whether by a defendant's choice, or by any failure to adhere to the constitutional "procedures" required by art. I, § 24, and set forth, in part, in N.C.G.S. § 15A-1201. In this case, it is undisputed that Defendant's trial had proceeded through the close of the State's evidence with no jury present, even though there had not been a constitutionally sufficient waiver of Defendant's right to a jury trial. Because material requirements of N.C.G.S. § 15A-1201—and thus constitutional requirements of art. I, § 24—had not been met, the trial court had not and, constitutionally, could not, have consented to Defendant's attempted waiver, either prior to trial, or after the close of the State's evidence. As a result, a large portion of Defendant's trial was conducted without any constitutionally constituted trier of fact. I therefore dissent.

I. Law of art. I, § 24 Prior to Amendment

Because I believe precedent created prior to the amendment of art. I, § 24 continues to apply to cases in which the defendant has not waived the right to a jury trial pursuant to the constitutional requirements set forth in art. I, § 24, I review the pre-amendment precedent. "There are few principles more vitally important to our system of criminal justice than the right to trial by [a properly constituted] impartial jury. The framers of [the North Carolina] Constitution highly valued the insulation of justice from the power of government that results from trial by a jury of one's peers." *Cox v. Turlington*, 648 F. Supp. 1553, 1555 (E.D.N.C. 1986) (citation omitted).

Prior to the 2014 amendment, art. I, § 24 stated: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." N.C. Const. art. I, § 24 (2013). As recognized by the United States Supreme

Court and our Supreme Court, the right to a "trial by jury in criminal cases is fundamental to the American scheme of justice[.]" *Duncan v. State of La.*, 391 U.S. 145, 149, 20 L. Ed. 2d 491, 496 (1968). The right to a jury trial in criminal cases "is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' . . . it is 'basic in our system of jurisprudence,' and [] it is 'a fundamental right, essential to a fair trial[.]' " *Id.* at 148–49, 20 L. Ed. 2d at 496 (citations and quotation marks omitted); *State v. Ford*, 281 N.C. 62, 66, 187 S.E.2d 741, 744 (1972). " 'We cannot presume a waiver of . . . important federal rights from a silent record. What is at stake for an accused facing . . . imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.' " *Id.*

A. *Only Twelve Jurors Make a Jury, No Waiver of Jury Trial*

Although not specifically required by the language of art. I, § 24, our Supreme Court recognized additional constitutional requirements concerning art. I, § 24. The fundamental rights guaranteed by art. I, § 24 have been long established:

> It is a fundamental principle of the common law, declared in Magna Charta and incorporated in our Declaration of Rights, that "(n)o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const., art. I, [§] 24 (1971).
>
> It is elementary that the jury provided by law for [ ] trial . . . [must be] *composed of twelve persons*; a less number is not a jury. It is equally rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the Superior Court as long as his plea remains "not guilty."

State v. Hudson, 280 N.C. 74, 79, 185 S.E.2d 189, 192 (1971) (citations omitted) (emphasis added); *State v. Poindexter*, 353 N.C. 440, 443, 545 S.E.2d 414, 416 (2001) (citations omitted) ("Article I, Section 24 of the North Carolina Constitution, which guarantees the right to trial by jury, contemplates no more or no less than a jury of twelve persons."); *State v. Norman*, 276 N.C. 75, 79–80, 170 S.E.2d 923, 926 (1969) (Unconstitutional violation of the right to a jury trial found in statute where "[t]he judge was authorized to pass upon the weight and sufficiency of the evidence, and if it satisfied him beyond a reasonable doubt of the defendant's guilt, he was authorized to proceed to judgment and sentence upon the plea entered in like manner as upon a conviction by a jury."). The

only exception was plainly set forth in art. I, § 24 itself: "In this State, the only exception to the rule that 'nothing can be a conviction but the verdict of a jury' is the constitutional authority granted the General Assembly to provide for the initial trial of misdemeanors in inferior courts without a jury, with trial de novo by a jury upon appeal. N.C. Const., art. I, [§] 24 (1971)." *Hudson*, 280 N.C. at 79, 185 S.E.2d at 192 (citation omitted).

B. *Properly Constituted Jury; the Same Twelve Jurors Must Decide Guilt or Innocence; Structural Error*

Prior to the amendments, unless a defendant pleaded guilty, only a properly constituted jury of twelve jurors—all of whom had operated as the finders of fact for the entire trial—could convict a defendant of a criminal offense in superior court. Violation of the right that a verdict could only be rendered by a properly constituted jury, consisting of the same twelve jurors, resulted in "structural error" requiring a new trial. "Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *State v. Thompson*, 359 N.C. 77, 86, 604 S.E.2d 850, 860 (2004) (citations and quotation marks omitted). Conviction by an improperly constituted jury did not require a showing of prejudice:

> A trial by a jury that is improperly constituted is so fundamentally flawed that the verdict cannot stand. In *Bindyke*, 288 N.C. at 627, 220 S.E.2d at 533, this Court held that a violation of a defendant's constitutional right to have the verdict determined by twelve jurors constituted error *per se*. Accordingly, this case is not subject to harmless error analysis; and defendant is entitled to a new trial.

Poindexter, 353 N.C. at 444, 545 S.E.2d at 416 (citation omitted); *State v. Bunning*, 346 N.C. 253, 257, 485 S.E.2d 290, 292 (1997) (citation omitted) ("The State contends that if there is error, we should apply a harmless error analysis. This we cannot do. A trial by a jury which is improperly constituted is so fundamentally flawed that the verdict cannot stand.").

However, this Court noted that precedent of our Supreme Court

> demonstrate[ed] that a violation of Article I, Section 24 require[ed] automatic reversal only where a jury was "improperly constituted" in terms of its numerical

> composition. In other words, where the verdict was rendered by a jury of less than twelve fully-participating jurors, as in *Hudson*, *Bunning*, and *Poindexter*, the verdict is a nullity. However, *Ashe* demonstrates that a violation of Article I, Section 24 is subject to harmless error review where the error did not affect the numerical structure of the jury, but rather resulted in jurors acting on unequal instructions from the trial court in reaching a verdict.

State v. Wilson, 192 N.C. App. 359, 368-69, 665 S.E.2d 751, 756 (2008). If a violation of art. I, § 24 did not result from an "improperly constituted" jury, *constitutiona*l harmless error analysis applied—this Court could "sustain the defendant's conviction only if the State prove[d] beyond a reasonable doubt that the error in the defendant's case was harmless." *Id.* at 369, 665 S.E.2d at 756 (citations omitted).

Further, it was the duty of this Court to ensure a defendant's right to a trial by jury, as required by art. I, § 24 and related precedent, was not violated, *ex mero motu* if needed:

> Although defendant has not assigned it as error, and the Attorney General has ignored it, we must, *ex mero motu*, take notice of a fatal defect appearing upon the face of the record. Between the conclusion of the evidence and the judge's charge to the jury, a juror became ill and had to be excused. Whereupon, defendant and his trial counsel, . . . "waived trial by twelve." They agreed that the eleven remaining jurors might pass upon defendant's guilt or innocence and that defendant would be bound by their verdict. The trial then proceeded with eleven jurors who "returned a verdict of guilty as charged."

Hudson, 280 N.C. at 78, 185 S.E.2d at 192 (overturning the defendant's assault with intent to commit rape conviction). Our Supreme Court concluded: "The verdict in this cause is . . . a nullity despite defendant's failure to assign his conviction by eleven jurors as error. If imprisoned under the sentence imposed defendant would be entitled to his release upon a writ of habeas corpus[.]" *Id.* at 80, 185 S.E.2d at 193; *see also State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (a "defendant's remedy for structural error is not dependent upon harmless error analysis; rather, such errors are reversible *per se*"); *id.* (citation omitted) (" '[t]he very premise of structural-error review is that even convictions reflecting the "right" result are reversed for the sake of protecting a basic right' ").

The General Assembly enacted N.C.G.S. § 15A-1201 in 1977, as a statutory recognition of art. I, § 24. Prior to the amendments, N.C.G.S. § 15A-1201 stated:

> In all criminal cases the defendant has the right to be tried by a *jury of 12 whose verdict must be unanimous*. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court *all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury*.

N.C.G.S. § 15A-1201 (2013) (emphasis added). Because of a defendants' art. I, § 24 right to a jury trial for all criminal charges in superior court, prior to the amendments a judge in superior court could never assume the functions of a jury without violating art. I, § 24 and committing structural error. *State v. Boderick*, 258 N.C. App. 516, 523, 812 S.E.2d 889, 894 (2018) (citation omitted) (Under "the pre-amendment version of Article I, Section 24 . . . the defendant [could] not be convicted 'but by the unanimous verdict of a jury[.]' N.C. Const. art. I, § 24 (2014). This [wa]s the case despite the defendant's and the State's attempt to stipulate otherwise.").

B. *Amendments to Art. I, § 24 and N.C.G.S. § 15A-1201*

1. Art. I, § 24

The 2014 amendment of art. I, § 24 carved out a single exception to this principle to permit a bench trial pursuant to a defendant's properly executed waiver of the right to a jury trial, but only if the trial court properly "consents" to the waiver. Absent a properly executed and accepted waiver of the right, I believe the pre-amendment precedents and supporting reasoning, including those cited above, are still controlling law. As amended, art. I, § 24 now states:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, *except* that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court and with the consent of the trial judge, waive jury trial, subject to procedures prescribed by the General Assembly. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

N.C. Const. art. I, § 24 (2019) (emphasis added).

2. 2014 Amendment of N.C.G.S. § 15A-1201

As noted in the majority opinion, congruent with the passage of the constitutional amendment of art. I, § 24, the General Assembly enacted the additional constitutional "procedures" for waiver of a jury trial under art. I, § 24, effective 1 December 2014. *See* 2013 N.C. Sess. Laws 300, §§ 4 and 5; N.C.G.S. §§ 15A-1201(a) and (b) (2014). The 2014 legislation set the following "procedures" for waiver of a jury trial as required by art. I, § 24, adding the underlined portion of subsection (a) and all of subsection (b):

> (a) In all criminal cases the defendant has the right to be tried by a jury of 12 whose verdict must be unanimous. In the district court the judge is the finder of fact in criminal cases, but the defendant has the right to appeal for trial de novo in superior court as provided in G.S. 15A-1431. In superior court all criminal trials in which the defendant enters a plea of not guilty must be tried before a jury, unless the defendant waives the right to a jury trial, as provided in subsection (b) of this section.
>
> (b) A defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing *or* on the record in the court and with the consent of the trial judge, waive the right to trial by jury. When a defendant waives the right to trial by jury under this section, the jury is dispensed with as provided by law, and the whole matter of law and fact shall be heard and judgment given by the court.

N.C.G.S. § 15A-1201 (effective 1 December 2014 to 30 September 2015) (emphasis added). N.C.G.S. § 15A-1201(a) states the constitutional requirement that all criminal charges must be decided by a jury trial, and the common law interpretation that the jury must consist of twelve jurors, but added the conditional right of a defendant to waive trial by jury, so long as all the requirements set forth in subsection (b) and art. I, § 24 are met.[1]

In response to the 2014 amendment of art. I, § 24, N.C.G.S. § 15A-1201(b) was added to set forth constitutionally required "procedures" for waiver of a jury trial: (1) the defendant's waiver must

1. The later amendments to N.C.G.S. § 15A-1201, discussed below, did not alter sections (a) and (b). *See* 2015 N.C. Sess. Laws 289, § 1, eff. Oct. 1, 2015.

be in writing *or* be made in the trial court, and on the record, N.C. Const. art. I, § 24; and (2) the same trial judge must consent to waiver and agree to conduct the entire trial as the trier of fact. *Id*. In addition to these requirements contained in the language of art. I, § 24, N.C.G.S. § 15A-1201(b) added the common law constitutional requirements: (1) the defendant's waiver must be "knowingly and voluntarily" made, which is a determination for the trial court, and (2) "the whole matter of law and fact, to include all factors referred to in N.C.G.S. § 20-179 and subsections (a1) and (a3) of N.C.G.S. § 15A-1340.16 [sentencing factors], *shall* be heard *and* judgment given by the court." N.C.G.S. § 15A-1201(b) (emphasis added).[2]

The 2014 amendment of N.C.G.S. § 15A-1201 left to the discretion of the trial court, guided by relevant precedent, the specific procedures necessary to ensure a defendant's waiver of the right to a jury trial was "knowing and voluntary," and that it was "in writing or on the record in the court"—as well as, of course, the requirement that the trial court "consent" to the waiver request. It is clear that a statute has to be construed, if possible, to include all constitutional requirements, even if they are not expressly included in the statute. *See State v. Summrell*, 282 N.C. 157, 167, 168, 192 S.E.2d 569, 575, 576 (1972), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989).

Therefore, under the amended version of art. I, § 24, there are two potential "properly constituted" finders of fact: (1) a single trial judge, but *only* if the defendant has waived the right to a jury trial pursuant to the requirements of art. I, § 24, and the trial court has properly "consented" to the waiver; and (2) a properly constituted jury, which is required in every case (a.) where the defendant *has not requested* waiver of the right; (b.) where the defendant has not *properly* requested waiver of the right as required by art. I, § 24 and N.C.G.S. § 15A-1201; or (c.) where the trial court has not properly "consented" to a defendant's *conforming* request for waiver pursuant to art. I, § 24 and N.C.G.S. § 15A-1201. N.C. Const. art. I, § 24; N.C.G.S. § 15A-1201. Whether a jury or the trial court acts as the trier of fact, it must be "properly constituted," and the same trier of fact must act in that capacity for all necessary stages of a trial. *See Boderick*, 258 N.C. App. at 524, 812 S.E.2d at 895 (citations omitted) ("Where the error under the previous version of Article I, Section 24 involves a verdict that was rendered by an

2. The requirement that the same judge, acting as trier of fact, preside over all material stages of a defendant's trial is, I believe, based upon the same constitutional principles requiring the same twelve jurors be present at all material stages of a trial, excluding *voir dire* examinations and certain other matters of law.

'improperly constituted' fact-finder—or in other words, anything less [or more] than twelve unanimous jurors—the error is said to be structural and automatic reversal is mandated.").

3. 2015 Amendment of N.C.G.S. § 15A-1201

The General Assembly again amended N.C.G.S. § 15A-1201 in 2015, adding sections (c) through (f) to the statute, to include more specific "procedures" as required by [] art. I, § 24. 2015 N.C. Sess. Laws 289, § 1, eff. Oct. 1, 2015; *see also Boderick*, 258 N.C. App. at 523, 812 S.E.2d at 894 ("the purpose of the statutory amendment was to supplement § 15A-1201 with additional procedures for a defendant's waiver of his right to trial by jury"). The following, more specific, procedures were added to N.C.G.S. § 15A-1201 by the 2015 amendment:

> (c) A defendant seeking to waive the right to trial by jury under subsection (b) of this section *shall* give notice of intent to waive a jury trial by any of the following methods:
>
> (1) Stipulation, which may be conditioned on each party's consent to the trial judge, *signed* by both the State and the defendant and served on the counsel for any co-defendants.
>
> (2) Filing a written notice of intent to waive a jury trial *with the court* and serving on the State and counsel for any co-defendants *within the earliest of* (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c).
>
> (3) Giving notice of intent to waive a jury trial on the record in open court *by the earlier of (i) the time of arraignment or (ii) the calling of the calendar* under G.S. 7A-49.4(b) or G.S. 7A-49.4(c).
>
> (d) Judicial Consent to Jury Waiver.—*Upon notice of waiver by the defense pursuant to subsection* (c) of this section, *the State shall schedule the matter to be heard* in open court to determine whether the judge agrees to hear the case without a jury. *The decision to grant or deny* the defendant's request for a bench trial *shall be made by the judge* who will actually preside over the trial. *Before consenting to a defendant's waiver* of the right to a trial by jury, the *trial judge shall do all of the following*:

> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.
>
> (e) Revocation of Waiver.—Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, *the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice* pursuant to subsection (c) of this section if the defendant does so in open court with the State present or in writing to both the State and the judge. In all other circumstances, the defendant may only revoke the waiver of trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted pursuant to this subsection, the decision is final and binding.

N.C.G.S. § 15A-1201 (some emphasis added). None of these procedures contemplate a defendant giving notice of waiver, or a trial court consenting to waiver, after trial has commenced. Subsection (e) allows a defendant a single opportunity to withdraw the defendant's waiver as a matter of right and have the charges determined by a jury. If, under subsection (e), a defendant withdraws a properly "consented to" waiver of the right to a jury trial, the defendant cannot "be convicted of [the charges] but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24.

C. *Statutory and Constitutional Requirements After the Amendments*

Even though the amendments created an exception, by the defendant's choice, to the requirement that all criminal trials in superior court must be tried by a jury, a defendant's right to waive the fundamental right to a jury trial is strictly limited by the "procedures" required by art. I, § 24. Further, the ultimate decision is not the defendant's—it is the duty of the trial court to ensure the defendant's requested waiver will not violate the defendant's rights, nor cause unnecessary burdens on the judicial process.

1. The Right to a Jury Trial Remains a Fundamental Constitutional Right

Art. I, § 24 mandates: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court[.]" N.C. Const. art. I, § 24. Even after the amendments, if a defendant desires a jury trial in superior court, the defendant does not have to do anything to retain that right. A defendant's constitutional right to a jury trial in superior court exists before any action is taken by the State, and attaches the moment the State commences any criminal action against the defendant. Conformity with the material "procedures" "prescribed by the General Assembly" is just as much a requirement for the constitutional waiver of the right to a jury trial as the "consent of the trial judge" to a defendant's waiver request. N.C. Const. art. I, § 24. Those "procedures" are codified in N.C.G.S. § 15A-1201. It is the trial court's duty to reject a defendant's request to waive a jury trial if the trial court is not convinced the defendant's request has been made "knowingly and voluntarily," and otherwise in accordance with art. I, § 24 and N.C.G.S. § 15A-1201. *State v. Swink*, 252 N.C. App. 218, 224, 797 S.E.2d 330, 334, *appeal dismissed and disc. review denied*, 369 N.C. 754, 799 S.E.2d 870 (2017). Therefore, while the defendant's right to a jury trial is an inviolable constitutional right, unless the trial court properly "consents" to the defendant's properly executed request to waive the right, the defendant's "right" to waive a jury trial is not a constitutional right—it is a conditional exception to the constitutional right to a jury trial. A defendant's conforming request for waiver is ultimately either granted or denied by the discretionary ruling of the trial judge. This Court also has the duty, *ex mero motu* if necessary, to ensure a defendant's right to a jury trial has not been violated. *Hudson*, 280 N.C. at 78, 185 S.E.2d at 192. This Court has no such duty to ensure a defendant's "right" to waive a jury trial has not been violated, because the "right" to a bench trial is not a fundamental constitutional right, it is a restricted "right" that may only be "consented to" by the trial court if the constitutional and statutory requirements for waiver have been met.

2. Prejudice

It is true that some errors are so minor or unlikely to be prejudicial that they are deemed "technical violations," and may not warrant review under constitutional standards. However, the mere fact that this Court finds an error is based upon a statutory violation does not mean the statutory violation cannot *also* constitute a violation of art. I, § 24, or any other constitutional right, and potentially constitute structural error requiring reversal per se. *See Thompson*, 359 N.C. at 87, 604 S.E.2d at 860; *State v. Bozeman*, 115 N.C. App. 658, 661-62, 446 S.E.2d

140, 142-43 (1994) (holding violation of N.C.G.S. § 15A-1022 was both a statutory and constitutional violation, requiring the State to prove the defendant was not prejudiced). As a general matter, when a defendant shows that a constitutionally mandated statutory requirement has been violated, the heightened review applied to constitutional violations is applied. N.C.G.S. § 15A-1443(b) (2019) ("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."). However, if the "constitutional violation necessarily rendered the criminal trial fundamentally unfair or unreliable as a vehicle for determining guilt or innocence[,]" such as a violation of the right to a jury trial decided by the same twelve jurors, the error is deemed structural, and reversal is required without any additional prejudice review. *See Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 (citations omitted); N.C.G.S. § 15A-1443(a) ("Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se."); *but see State v. Rutledge*, 267 N.C. App. 91, 97-98, 832 S.E.2d 745, 748 (2019) (citations omitted) ("N.C. Gen. Stat. § 15A-1201(d)(1) requires the trial court to: '[a]ddress the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.' No other specific inquiries are required in the statute to make the determination of Defendant's understanding and appreciation of the consequences 'to waive his trial by jury.' This Court will not read such further specifications into law.").[3]

II. Defendant's Attempted Waiver

The first statutory requirement for a constitutional waiver of a defendant's right to a jury trial under art. I, § 24 is proper notice of the defendant's intention to waive that right, as required by N.C.G.S. § 15A-1201(c). This requirement not only protects the State's right to timely notice of the defendant's request, it also protects the defendant's right to fully consider the consequences of waiver of the right before the trial court conducts a hearing in which it may accept the defendant's waiver, and ultimately bind the defendant to a trial without a jury.

The General Assembly's intent to provide defendants with a period of time to consider the serious consequences of waiver even after notice

3. The analysis in *Rutledge* does not consider that a statute allowing waiver of a constitutional right must, if possible, be read to include all elements required to constitutionally waive that right when any of these factors are not expressly included in the language of the statute. *See State v. Strickland*, 27 N.C. App. 40, 42–3, 217 S.E.2d 758, 760 (1975).

has been given is evidenced in N.C.G.S. § 15A-1201(e): "Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of this section, the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice[.]" N.C.G.S. § 15A-1201(e). The record before us does not indicate when or if Defendant was arraigned prior to trial; whether Defendant waived arraignment in superior court; when Defendant's trial date was set; when the District Attorney calendared Defendant's case; or the exact time the calling of the calendar occurred. This Court could, and possibly should, locate and take judicial notice of any relevant documents or other evidence in the lower court's files in order to determine whether Defendant properly gave notice pursuant to any of the three methods set forth in N.C.G.S. § 15A-1201(c). *Hudson*, 280 N.C. at 78, 185 S.E.2d at 192 (we must, *ex mero motu*, take notice of a fatal defect appearing upon the face of the record); *but see State v. Monk*, 132 N.C. App. 248, 254, 511 S.E.2d 332, 336 (1999) (citation omitted) (because "defendant failed to include in the record on appeal copies of the [necessary documents] . . ., . . . this Court [is prevented] from . . . effective review"). However, because this Court has not taken judicial notice of these events, I proceed on the record before us.

There are three options for notice of a defendant's intent to waive a jury trial, requirements precedent, set forth in N.C.G.S. § 15A-1201(c), at least one of which must be met before the trial court can conduct a hearing and make its discretionary decision to either grant or deny the defendant's request for waiver of the right to a jury trial. Because I do not believe, based on the record before us, that Defendant complied with any of these constitutional requirements, I would reverse and remand for a new trial.

A. *N.C.G.S. § 15A-1201(c)(1) – Stipulation*

N.C.G.S. § 15A-1201(c)(1) allows notice by "[s]tipulation, which may be conditioned on each party's consent to the trial judge, signed by both the State and the defendant and served on the counsel for any co-defendants." N.C.G.S. § 15A-1201(c)(1). The use of the word "may" suggests judicial discretion. N.C.G.S. § 15A-1201(c)(1). Although this subsection does not include any specific time requirements,[4] I read this subsection as *requiring* the stipulation be "signed by both the State and the defendant and served on the counsel for any co-defendants." The plain language of this section suggests the discretion of the trial

4. Therefore, waiver by stipulation at trial is not *specifically* precluded by the language of N.C.G.S. § 15A-1201(c)(1).

court is limited to whether it will require the defendant and the State to *verbally express* their consent to stipulation in open court—the trial court could choose to rely on the stipulation, signed by the defendant and the State, as conforming notice of the defendant's intent to waive a jury trial. *Id.* In order to ensure a proper record, filing a notice by stipulation would seem the best practice. At a minimum, the record should show that the defendant and the State timely executed a stipulation of the defendant's intent to waive a jury trial, signed by the defendant and the State, that was accepted by the trial court prior to conducting the "open court" hearing required by N.C.G.S. § 15A-1201(d).

In this case, although the State indicated in open court that Defendant had notified the State of Defendant's intent to waive, and that the State consented to a bench trial, there is no *record evidence* that a written stipulation was actually entered into, much less a stipulation signed by Defendant and the State. Therefore, on the record before us, I do not believe this Court can find that Defendant gave proper notice of his intent to waive his right to a jury trial by stipulation under N.C.G.S. § 15A-1201(c)(1).

B. *N.C.G.S. § 15A-1201(c)(2) – Filing Written Notice*

Subsection (c)(2) requires a defendant to "[f]il[e] a written notice of intent to waive a jury trial with the court and serv[e the written notice] on the State and counsel for any co-defendants[.]" N.C.G.S. § 15A-1201(c)(2). Unlike stipulation, section (c)(2) does not require the consent of the State. Defendant must serve the written notice "on the State and counsel for any co-defendants within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c)." *Id.* Although the pretrial discussion in the transcript in this case implies the existence of some form of written notice, there is no record evidence Defendant executed any document indicating his intent to waive his right to a jury trial, much less a "written notice of intent to waive a jury trial" filed with the clerk of superior court. *Id.* Therefore, on the record before us, I also do not believe this Court can find that Defendant gave proper notice of his intent to waive his right to a jury trial by filing written notice pursuant to N.C.G.S. § 15A-1201(c)(2).

C. *N.C.G.S. § 15A-1201(c)(3) – Oral Notice in Open Court*

The majority opinion recognizes that "it is unclear how Defendant first provided notice of his intent to waive his right to a jury trial pursuant to N.C. Gen. Stat. § 15A-1201(c)." However, because it does not

further address N.C.G.S. § 15A-1201(c), and focuses its analysis exclusively on N.C.G.S. § 15A-1201(d), the majority opinion apparently determines the notice provisions of N.C.G.S. § 15A-1201(c) were met in this case. Pursuant to N.C.G.S. § 15A-1201(c), oral "notice of intent to waive a jury trial on the record in open court" *must* be given "by the *earlier* of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b)[.]" N.C.G.S. § 15A-1201(c)(3) (emphasis added). Defendant was issued a citation on 12 January 2018 for violation of N.C.G.S. § 20-141(j1), driving over 80 miles per hour, a Class 3 misdemeanor, and for violation of N.C.G.S. § 20-140, reckless driving, a Class 2 misdemeanor. At Defendant's district court trial, the State voluntarily dismissed the reckless driving charge, but Defendant was found guilty of the speeding charge on 26 July 2018.[5]

From the transcript, it appears the trial judge had not been involved in Defendant's case prior to the trial in superior court. The State informed the trial court:

> [THE STATE]: Your Honor, whenever you are ready, we can address Mr. Demon Hamer, which is margin nine. He is charged with speeding 94 in a 65 and reckless driving.
>
> THE COURT: All right. So this is a bench trial; correct?
>
> [THE STATE]: Yes, sir. And I understand it –
>
> [DEFENDANT'S COUNSEL]: Yes, Your Honor.
>
> . . . .
>
> THE COURT: Okay. So first of all, just technically, the defendant is waiving a jury trial?
>
> [DEFENDANT'S COUNSEL]: That's correct, Your Honor.
>
> THE COURT: Okay. And I presume that there is a statute that allows that?
>
> [DEFENDANT'S COUNSEL]: That is correct, Your Honor. We have – the State and I have – the State has consented. We have – there is no disagreement about the bench trial.
>
> THE COURT: Is it the same statute that says that Class I felonies can be waived? Is it under that same statute?

---

5. There is conflicting evidence in the record concerning whether Defendant pleaded guilty to the speeding misdemeanor in district court or was convicted after a bench trial.

> [DEFENDANT'S COUNSEL]: If I'm not mistaken, Your Honor –
>
> THE COURT: I know that one requires the consent of the State.
>
> . . . .
>
> [THE STATE]: Your Honor, I believe it's controlled by 15A-1201 –
>
> THE COURT: Okay. Which does allow waiver of trial in a misdemeanor?
>
> [THE STATE]: That's correct, Your Honor.
>
> . . . .
>
> [DEFENDANT'S COUNSEL]: It's 15A-1201 subsection (b).
>
> THE COURT: Thank you, sir. So just as a technical matter, this is a – so that [Defendant's Counsels purported request to waive Defendant's right to a jury trial] – that's accepted by the Court under that statute since the State consents.

"Arraignment consists of bringing a defendant in open court or . . . [via "audio and video transmission," N.C.G.S. § 15A-941(b),] before a judge having jurisdiction to try the offense, advising [the defendant] of the charges pending against him, and directing him to plead." N.C.G.S. § 15A-941(a) (2019). A defendant would normally be arraigned at an administrative hearing or at other some other pretrial appearance "in open court[.]" N.C.G.S. § 15A-941(a). However, a formal arraignment is only required if the defendant files a timely "written request with the clerk of superior court[.]" N.C.G.S. § 15A-941(d). "If the defendant does not file a written request for arraignment, then the [trial] court shall enter a not guilty plea on behalf of the defendant." *Id.* The record in this case does not indicate whether Defendant timely requested a formal arraignment; if so, whether and when formal arraignment occurred; if not, whether and when the trial court "enter[ed] a not guilty plea on behalf of the defendant." *Id.* As a general matter, the lack of evidence in the record demonstrating Defendant was arraigned prior to trial does not, on its own, necessarily demonstrate error, or any prejudicial error. *State v. McCotter*, 288 N.C. 227, 234–35, 217 S.E.2d 525, 530 (1975). In this case, however, this lack of record evidence prevents this Court from determining the point during Defendant's criminal proceedings after which Defendant was prohibited by N.C.G.S. § 15A-1201 from requesting waiver of a jury trial.

Based only on the record before this Court, the first evidence that Defendant was advised of the potential consequences he faced if convicted of the speeding charge was during his trial, *after the close of the State's evidence*, when the trial court asked Defendant:

> [THE COURT]: [Y]ou understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry possibility of a 20-day jail sentence. Do you understand that?
>
> DEFENDANT: Yes, sir.

"Criminal cases in superior court shall be calendared by the district attorney at administrative settings according to a criminal case docketing plan developed by the district attorney for each superior court district[.]" N.C.G.S. § 7A-49.4(a) (2019); *but see Simeon v. Hardin*, 339 N.C. 358, 376, 451 S.E.2d 858, 870 (1994) (even though the statute gives the district attorney the authority to calendar cases for trial, the trial court has the ultimate authority over managing the trial calendar). Further, pursuant to § 7A-49.4(f):

> Order of Trial. – The district attorney, after calling the calendar and determining cases for pleas and other disposition, shall announce to the court the order in which the district attorney intends to call for trial the cases remaining on the calendar.

N.C.G.S. § 7A-49.4(f). That Defendant's trial was calendared, and the calendar was called, is evident by the fact that Defendant was tried and convicted. Absent evidence to the contrary, our Court presumes that Defendant's case was calendared, and that the calendar was called before any of the calendared cases were brought to trial. " 'Where the record is silent on a particular point, the action of the trial court will be presumed correct.' " *State v. Ali*, 329 N.C. 394, 412, 407 S.E.2d 183, 194 (1991) (citation omitted).

Therefore, if Defendant was arraigned prior to trial, he was required to give notice of his intent to waive a jury trial at or before his arraignment. N.C.G.S. § 15A-1201(c)(3). If Defendant was not arraigned prior to trial, Defendant was required to give notice of his intent to waive in open court *no later than* "the calling of the calendar under G.S. 7A-49.4(b)[,]" because the calling of the calendar would be the "earlier" event pursuant to § 15A-1201(c)(3). N.C.G.S. § 15A-1201(c)(3) (emphasis added) (a

defendant must give oral "notice of intent to waive a jury trial on the record in open court *by the earlier* of (i) the time of arraignment or (ii) the calling of the calendar under G.S. 7A-49.4(b) or G.S. 7A-49.4(c)"). There is not a method by which a defendant can first request waiver of the right to a jury trial at trial, and comport with the constitutional waiver requirements of N.C.G.S. § 15A-1201(c), as the trial can only occur *after* the calling of the calendar, which, pursuant to N.C.G.S. § 15A-1201(c)(3), is *the latest* a defendant could possibly give notice of intent to waive. N.C.G.S. § 15A-1201(c)(3). Because, on the record evidence in this case, Defendant's purported oral notice of his intent to waive a jury trial was given, if at all, after the calling of the calendar, it was untimely pursuant to N.C.G.S. § 15A-1201(c)(3), and Defendant's request should not have been considered by the trial court. *Id.*

"A defendant seeking to waive the right to trial by jury under subsection (b) of this section *shall* give notice of intent to waive a jury trial by" one of the "methods" set forth in subsections (c)(1), (c)(2), or (c)(3). N.C.G.S. § 15A-1201(c)(3). There is no record evidence that Defendant gave notice of his intent to waive a jury trial by any of the accepted methods set forth in N.C.G.S. § 15A-1201(c)(3). The majority opinion acknowledges that "it is unclear how Defendant first provided notice of his intent to waive his right to a jury trial pursuant to N.C. Gen. Stat. § 15A-1201(c)[,]" but it does not appear to find any error, including constitutional error, despite the lack of record evidence that Defendant provided any constitutionally sufficient notice of his intent to waive his fundamental right to a jury trial. N.C.G.S. § 15A-1201(c)(3).

D. *N.C.G.S. § 15A-1201(d)—Judicial Consent to Waiver*

Absent proper notice of Defendant's intent to waive a jury trial, I do not believe the trial court could constitutionally "consent" to the requested waiver. I believe Defendant's deficient request for a bench trial should have been denied by the trial court, and I would hold that allowing Defendant's trial to proceed as a bench trial constituted a denial of Defendant's right to a jury trial and, therefore, structural error.

N.C.G.S. § 15A-1201(d) states in part:

> Upon notice of waiver by the defense *pursuant to subsection (c)* of this section, the State *shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury.* The decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial.

N.C.G.S. § 15A-1201(d) (emphasis added). This subsection first requires that any notice of intent to waive must be made "pursuant to subsection (c)[.]" Therefore, Defendant's notice of intent to waive a jury trial in this case was invalid because it was not given "pursuant to subsection (c)[.]" *Id.* Defendant's request to waive should have been denied for this reason alone. N.C.G.S. § 15A-1201(d). Subsection (d) also requires the State to schedule a hearing so that, prior to the trial, the trial judge that will later preside over the trial can properly "determine whether th[at] judge agrees to hear the case without a jury[.]" *Id.*

Subsection (d)(1) also requires that the trial court:

> Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.

N.C.G.S. § 15A-1201(d)(1). Based on the record before us, I agree with the majority opinion "that the trial court erred by failing to conduct the statutorily mandated colloquy with Defendant before consenting to his waiver of the right to trial by jury, in violation of N.C. Gen. Stat. § 15A-1201(d)."

The State presented its case and rested. Defendant's counsel stated that he did not have any motions for the record at that point but asked the trial court "to take judicial notice and for me to be heard" concerning "some evidence." The trial court then interrupted the trial:

> THE COURT: Okay. Hold on just one second. And we will do that. I was just reading . . . 15A-1201, *we complied completely with that statute with the exception* of the fact that I'm supposed to *personally address the defendant and ask if he waives a jury trial and understands the consequences of that.* Would you just explain that to your client.
>
> (Pause in proceedings while [Defendant's attorney] consulted with the defendant.)
>
> [DEFENDANT'S ATTORNEY]: Okay, Your Honor.
>
> . . . .
>
> THE COURT: Mr. Hamer, I just have to comply with the law and ask you a couple of questions. That statute allows you to waive a jury trial. That's 15A-1201. Your [attorney]

> has waived it on your behalf. The State has consented to that. Do you consent to that also?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that the State has dismissed the careless and reckless driving. The only allegation against you is the speeding, and that is a Class III misdemeanor. It does carry a possible fine. And under certain circumstances it does carry possibility of a 20-day jail sentence. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: All right. Is that acceptable to you?
>
> DEFENDANT: Yes, sir. *I feel confident it was.*
>
> THE COURT: Thank you so much. You may have a seat.

(Emphasis added). I can find no precedent that would allow the waiver of the constitutional right to a jury trial after the trial has commenced; in fact, after the State had rested. Further, I do not agree that the trial court's inquiry was sufficient to meet the requirements of N.C.G.S. § 15A-1201(d) and art. I, § 24, even had it occurred prior to trial.

E. *Conclusion – Art. I, § 24 and N.C.G.S. § 15A-1201*

The record evidence[6] is that Defendant did not request waiver in compliance with the requirements of N.C.G.S. § 15A-1201(c), as constitutionally mandated by art. I, § 24. The State's duty to ensure the issue of waiver was timely considered by the trial court was not met. N.C.G.S. § 15A-1201(d). The State did not "schedule the matter to be heard in open court to determine whether the judge agree[d] to hear the case without a jury" as required by N.C.G.S. § 15A-1201(d) and art. I, § 24. The trial court did not, prior to trial, "[a]ddress [D]efendant personally and determine whether [D]efendant fully underst[ood] and appreciate[d] the consequences of [D]efendant's decision to waive the right to trial by jury" before it "consent[ed] to [D]efendant's waiver of the right to a trial by jury" as required by N.C.G.S. § 15A-1201(d)(1) and art. I, § 24.

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6. When the trial court ensures waiver of a fundamental right has been done knowingly and voluntarily, and otherwise in accordance with constitutional mandates, it "leaves a record adequate for any review that may be later sought, and forestalls the spin-off of collateral proceedings that seek to probe murky memories." *Boykin v. Alabama*, 395 U.S. 238, 243-44, 23 L. Ed. 2d 274, 280 (1969) (citations omitted).

It is not clear that the trial court conducted an inquiry to determine whether Defendant was requesting waiver of a fundamental right "knowingly and voluntarily" as required by both art. I, § 24 and N.C.G.S. § 15A-1201(b). I do not find the brief questioning of Defendant, even had it occurred at a constitutionally appropriate time, to have been sufficient to establish Defendant fully understood his fundamental right to a jury trial and the potential consequences of waiving that right. I do not believe the trial court's inquiry was sufficient under N.C.G.S. § 15A-1201, art. I, § 24, and precedent of our Supreme Court to ensure Defendant's waiver was done knowingly and voluntarily. N.C. Const. art. I, § 24; N.C.G.S. § 15A-1201; *see also State v. Hyatt*, 132 N.C. App. 697, 700, 702-03, 513 S.E.2d 90, 93-94 (1999).

Most importantly, I do not believe Defendant could constitutionally waive his right to a jury trial in the middle of the trial, nor that the trial court had the constitutional authority to "consent" to any such requested waiver after Defendant's trial had begun—absent declaring a mistrial and proceeding anew. I agree with the majority opinion that "a plain reading of N.C. Gen. Stat. § 15A-1201 'leaves no doubt that the legislature intended to place' certain responsibilities on, and require specific acts by, the presiding judge in considering a defendant's waiver of the right to a jury trial. [(*In re E.D.*, 372 N.C. 111, 121, 827 S.E.2d 450, 457 (2019) (citations and quotation marks omitted)]." The entire portion of the trial where the State presented its evidence was conducted with no jury and no constitutionally sufficient waiver of Defendant's right to a jury trial, *i.e.*, it was conducted without any constitutionally constituted trier of fact. In my opinion, it was not possible for the trial court to satisfy the requirements of N.C.G.S. § 15A-1201, art. I, § 24, and relevant precedent after more than half of Defendant's trial had already been conducted. There was structural error in Defendant's trial, and the judgment in this matter must be arrested. *Boderick*, 258 N.C. App. at 524–25, 812 S.E.2d at 895 (citations omitted) ("Because the fact-finder in the present case was 'improperly constituted' for purposes of N.C. Const. art. I, § 24 in that it consisted of a single trial judge rather than twelve unanimous jurors, 'automatic reversal is required.' ").

III. *State v. Swink* and its Progeny

The majority opinion, understandably, relies primarily on this Court's opinion in *Swink*, an opinion in which I participated as a panel member. *Swink*, 252 N.C. App. 218, 797 S.E.2d 330. For several reasons, I do not believe we are bound, on the facts before us, by the section in *Swink* analyzing N.C.G.S. § 15A-1201(d). The majority opinion states:

> In order to prove that the trial court erred by accepting his waiver of the right to a jury trial, Defendant must show (1) that the trial court violated the waiver requirements set forth in N.C. Gen. Stat. § 15A-1201, and (2) that Defendant was prejudiced by the error. *State v. Swink*, 252 N.C. App. 218, 221, 797 S.E.2d 330, 332 (2017).

(Citation omitted). Although I agree with the first part of this citation, as applied to this case, I disagree with the second.

In *Swink*, this Court held the trial court had the constitutional *authority* to consent to the defendant's waiver of a jury trial because the defendant's request was made and decided after the effective date of the 2014 amendments of both art. I, § 24, and N.C.G.S. § 15A-1201:[7]

> [T]he 2 March 2015 hearing [on the defendant's waiver request] served the same function as an arraignment. Accordingly, we conclude . . . that "because [the d]efendant's arraignment occurred after the effective date of the constitutional amendment and accompanying session law, the trial court was constitutionally authorized to accept Defendant's waiver of his right to a jury trial."
>
> . . . .
>
> Although the North Carolina Constitution as amended *now* provides that the exercise of the waiver is "subject to procedures prescribed by the General Assembly," N.C. Const. art. I, § 24, we note that *the General Assembly had not prescribed any specific procedures for waiver of jury trial that would have been effective at the time defendant's waiver was made to the trial court in this case*. A subsequent amendment to N.C. Gen. Stat. § 15A-1201 (2015) does contain further guidance on the waiver procedure that "applies to defendants waiving their right to trial by jury on or after [October 1, 2015]." We[, however,] rely upon existing law in analogous situations to resolve this case, while *acknowledging the limited scope of cases for which this may be applicable*.

Swink, 252 N.C. App. at 222, 224 n. 2, 797 S.E.2d at 333, 334 n. 2 (citations omitted) (emphasis added). Unlike in *Swink*, the case before us,

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7. But before the 2015 amendments to N.C.G.S. § 15A-1201 went into effect, so N.C.G.S. §§ 15A-1201(c) through (f) were not applicable in that defendant's case.

in part, concerns alleged violations of not only N.C.G.S. § 15A-1201(b), but also N.C.G.S. §§ 15A-1201(c) and (d), which were not in effect when this Court decided *Swink*. In addition, in *Swink we did not conduct any constitutional analysis* of the alleged violations of N.C.G.S. § 15A-1201.[8] Therefore, I do not believe *Swink* is controlling authority in this case, in which Defendant argues constitutional violations of his right to a jury trial, in part based on N.C.G.S. §§ 15A-1201(c) and (d).

However, although this Court in *Swink* had already held the trial court had not committed any error, it also included an "*arguendo*" analysis of the defendant's prejudice arguments. *Swink*, 252 N.C. App. at 222, 797 S.E.2d at 333 (citation omitted) ("even if we assumed there was a violation of the statute, defendant has not met the second prong of the standard: prejudice"). Because this Court only considered an alleged violation of the statute itself, without consideration of whether such an error would also constitute a violation of art. I, § 24, this Court's analysis was based entirely on whether the defendant could prove prejudice based upon a purely statutory error, under the regular prejudice standard set forth in N.C.G.S. § 15A-1443. N.C.G.S. § 15A-1443(a) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States[, or the constitution of this State,] when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant."); *See also Swink*, 252 N.C. App. at 222–23, 797 S.E.2d at 333. I do not believe the following reasoning in *Swink* controls the case before us:

> Defendant argues that the "denial of the right to a jury trial is a structural error requiring automatic reversal without a showing of prejudice." But the cases defendant cites involve fatal *constitutional* errors depriving the defendant of his or her *constitutional right to a jury trial*, *rather than* the intentional *waiver of a statutory right* to a jury trial, which is *what is at issue here*.

Swink, 252 N.C. App. at 222–23, 797 S.E.2d at 333 (emphasis added).

In general, if an error violates a constitutional requirement, the prejudice analysis is controlled by N.C.G.S. § 15A-1443(b). N.C.G.S.

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8. Compare this Court's analysis of the defendant's N.C.G.S. § 15A-1201(d) argument with its analysis of the defendant's "knowingly and voluntarily" argument. This Court clearly conducted a constitutional analysis based on art. I, § 24 in the latter, but not in the former. *Swink*, 252 N.C. App. at 220, 223, 797 S.E.2d at 332, 334.

§ 15A-1443(b) ("A violation of the defendant's rights under the Constitution of the United States[, or the constitution of this State,] 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."). However, as discussed above, when an error fundamentally corrupts the trial process itself, such as a violation of a defendant's right to be tried by a jury of twelve, the error is structural, and the defendant need not demonstrate any additional prejudice. *Poindexter*, 353 N.C. at 444, 545 S.E.2d at 416 (citation omitted) ("A trial by a jury that is improperly constituted is so fundamentally flawed that the verdict cannot stand." Once it is determined that such a fundamental flaw exists, the "case is not subject to harmless error analysis; and [the] defendant is entitled to a new trial."). Such structural errors are recognized in the last sentence of N.C.G.S. § 15A-1443(a): "Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se." N.C.G.S. § 15A-1443(a). In *Swink*, this Court clearly stated: "As we have concluded in this case that no constitutional error occurred, defendant's argument regarding structural error has no merit here." *Id.* at 223, 797 S.E.2d at 334. The cases relied upon for this Court's prejudice analysis in *Swink* did not involve structural error. *Swink*, 252 N.C. App. at 221, 797 S.E.2d at 332. Unlike in *Swink*, the decision now before us requires this Court to conduct a constitutional analysis involving the alleged violation of the art. I, § 24 right to a trial by jury.

Swink is cited in two subsequent opinions of this Court: *Boderick*, 258 N.C. App. 516, 812 S.E.2d 889, and *Rutledge*, 267 N.C. App. 91, 832 S.E.2d 745. I do not believe either controls the outcome of this case. In *Boderick*, the trial court "consent[ed] to a bench trial based on the written stipulation of [the defendant and the State]. The parties so stipulated, and [the] bench trial began on 18 March 2016[,]" resulting in the defendant's conviction. *Boderick*, 258 N.C. App. at 521, 812 S.E.2d at 893. This Court recognized that "[t]he trial court's *authority to consent to [a] bench trial derived from a recent amendment to Article I, Section 24[.]*" *Id.* (emphasis added). Because the defendant "was arraigned [in] February 2014" and "the constitutional amendment permitting waiver of a jury trial only applie[d] to defendants who [we]re arraigned on or after 1 December 2014[,]" *id.*, this Court held that the trial court's "consent" to the defendant's stipulation to waive the right to a jury trial constituted structural error.

> Because the fact-finder in the present case was "improperly constituted" for purposes of N.C. Const. art. I, § 24

> (2014) in that it consisted of a single trial judge rather than twelve unanimous jurors, "automatic reversal is required." Despite the trial court's patient efforts to accommodate defendant, defendant is entitled to a new trial, by jury.

Id. at 524–25, 812 S.E.2d at 895 (citation omitted). However, in distinguishing the facts before it from those in *Swink*, this Court used language, emphasized below, that could be misinterpreted if not read in context:

> In contrast to the defendant in *Swink*, at the time defendant was arraigned, amended Article I, Section 24 had not gone into effect and had not been codified. Thus, *the error that defendant asserts on appeal regarding the waiver of his right to a jury trial is constitutional in nature, rather than statutory.* The applicable version of Article I, Section 24 required that defendant not "be convicted of any crime but by the unanimous verdict of a jury in open court." However, defendant was not convicted by the unanimous verdict of a jury.

Id. at 524, 812 S.E.2d at 895 (citation omitted) (emphasis added). Initially, because this statement was not necessary to the ultimate decision in *Boderick*, it is *dicta*. Further, the Court was illuminating the distinction between the analysis done in *Swink*, which was expressly limited to a review of alleged statutory violations, and the analysis before the Court in *Boderick*, which was solely based upon the constitutional requirements of the pre-amendment version of art. I, § 24 applicable in that case. *Id.* at 523, 812 S.E.2d at 894. In the case now before this Court, the "applicable version of Article I, Section 24" "required that [D]efendant [was] not '[] convicted of any crime but by the unanimous verdict of a jury in open court' " *unless* Defendant, "in writing or on the record in the court and with the consent of the trial judge, waive[d] jury trial, subject to procedures prescribed by [N.C.G.S. § 15A-1201]." N.C. Const. art. I, § 24.

Swink was again cited in *Rutledge*, where, although the defendant couched his argument in constitutional terms, the defendant's argument was in fact limited to alleged statutory violations—the defendant did not argue the violation of his constitutional right to a jury trial pursuant to art. I, § 24, and this Court did not conduct any constitutionally based review. *Rutledge*, 267 N.C. App. at 95, 832 S.E.2d at 747 (citations omitted) ("The sole issue on appeal is whether the trial court erred in granting Defendant's request to waive a jury trial . . . in violation of N.C. Gen. Stat. § 15A-1201 (2017)." "The Court conducts a *de novo* review

of a question of law to determine whether a trial court has violated a statutory mandate."). This Court's analysis in *Rutledge* was conducted under the heading: "A. Statutory Violation." *Id.* I do not believe *Rutledge* controls this case.

I note, however, that language in *Rutledge* does not align with the statutory requirements of N.C.G.S. § 15A-1201 as I understand them. Although I do not believe *Rutledge* controls this case—because our review is of an alleged constitutional error and that in *Rutledge* was of an alleged statutory error—the majority opinion adopts the statutory analyses in *Swink*, *Boderick*, and *Rutledge* for application to the constitutional arguments in this case. Therefore, I believe it necessary to address my concerns.

In *Rutledge*, this Court appears to limit its analysis to the "filing of notice of waiver" pursuant to N.C.G.S. § 15A-1201(c)(2). *Id.* N.C.G.S. § 15A-1201(c)(2) states that the filing must be done "within the earliest of (i) 10 working days after arraignment, (ii) 10 working days after service of a calendar setting under G.S. 7A-49.4(b), or (iii) 10 working days after the setting of a definite trial date under G.S. 7A-49.4(c)." N.C.G.S. § 15A-1201(c)(2). This Court noted: "Nothing in the record before us indicates when either the calendar setting . . . or the setting of the definite trial date [both of which are relevant events for filing written notice pursuant to N.C.G.S. § 15A-1201(c)(2)] . . . occurred in this case." *Rutledge*, 267 N.C. App. at 96, 832 S.E.2d at 747.

However, because the calendar had to have been set *prior to trial*, whereas the defendant's arraignment occurred *at trial*, this Court does not have to know the exact date service of the calendar occurred to determine "the earliest of" "10 working days after service of a calendar setting under G.S. 7A-49.4(b)," or "10 working days after [the defendant's] arraignment." N.C.G.S. § 15A-1201(c)(2).

Nonetheless, at the start of the defendant's trial "[t]he court and [the d]efendant signed form AOC-CR-405 ('Waiver of Jury Trial form'). The document was not signed by the State[,]" but the State consented to waiver. *Rutledge*, 267 N.C. App. at 94, 832 S.E.2d at 746–47. "After the waiver was entered, [the d]efendant's attorney requested that [the d]efendant be arraigned. After arraignment, [the d]efendant's trial began." *Id.* at 94, 832 S.E.2d at 747. This Court reasoned that because a written request for waiver was submitted to the trial court prior to the defendant's formal arraignment,[9] which occurred at trial because

9. Even though "after service of [the] calendar setting[.]" N.C.G.S. § 15A-1201(c)(2).

"[a]pparently, a formal arraignment was not requested by [the d]efendant at any time prior to the scheduled trial date[,]" *id.* at 96, 832 S.E.2d at 748, there was no violation of the notice requirements found in N.C.G.S. § 15A-1201(c). This Court in *Rutledge* established an additional manner of complying with the notice requirements of N.C.G.S. § 15A-1201(c):

> The filing of a written notice of intent to waive a jury trial on the date of the arraignment and subsequent trial is proper where: (1) the defendant gives notice of his intent to waive his right to a jury trial at the date of trial; (2) consent is given to waive jury trial by both the trial court and the State; and (3) the defendant invites noncompliance with the timeline requirements of N.C. Gen. Stat § 15A-1201(c) by his own failure to request a separate arraignment prior to the date of trial. *See* N.C. Gen. Stat § 15A-1201.

Rutledge, 267 N.C. App. at 97, 832 S.E.2d at 748.

I am uncertain how N.C.G.S. § 15A-1201 serves as support for this additional judicially created method of giving notice pursuant to N.C.G.S. § 15A-1201(c). This new "procedure," in my opinion, serves to undermine a defendant's right to a jury trial in that it converts a defendant's failure to give the notice required by subsection (c) from a requirement precedent to the *waiver* of a defendant's fundamental right to a jury trial into a requirement precedent to the *protection* of a defendant's right to a jury trial. The *Swink* "amendment" to the requirements of N.C.G.S. § 15A-1201(c) abrogates the trial court's duty to ensure that a defendant's constitutional right to a jury trial has been properly waived; instead placing the burden on a defendant to preserve that fundamental right. I believe the relevant question is simply whether the defendant complied with N.C.G.S. § 15A-1201(c). If the defendant did comply with the notice requirements, the trial court could have then proceeded to determine whether it should "consent" to the waiver request. If a defendant fails to comply with N.C.G.S. § 15A-1201(c), I believe the "remedy" to this noncompliance, and the duty of the trial court, is to deny the defendant's waiver request, and proceed with a jury trial.

This Court also stated in *Rutledge*: "If Defendant wanted to waive his jury trial in accordance with [N.C.G.S. §] 15A-1201, he needed to request a formal arraignment prior to trial and deliver notice of intent to waive at either that arraignment time, or the time of the calling of the calendar. Defendant failed to do either." *Rutledge*, 267 N.C. App. at 100, 832 S.E.2d at 750. However, art. I, § 24 mandates that a defendant's waiver of the fundamental right to a jury trial must be done "in accordance with

[N.C.G.S. §] 15A-1201." *Id.* There is no other constitutional procedure for a defendant to waive the right to a jury trial than that set forth in art. I, § 24 and, by incorporation, N.C.G.S. § 15A-1201. These requirements are for the protection of a defendant's right to a jury trial, they are not prerequisites for a defendant's right to appeal the issue.

I must also disagree with the statement in *Rutledge*, cited by the majority opinion, implying that the General Assembly has the power to determine the inquiry necessary for constitutional waiver of a fundamental constitutional right:

> "Neither N.C. Gen. Stat. § 15A-1201(d)(1) nor applicable case law has established a script for the colloquy that should occur between a superior court judge and a defendant seeking to exercise his right to waive a jury trial." *Rutledge*, 267 N.C. App. at 97, 832 S.E.2d at 748 (citations and internal quotation marks omitted). "No . . . specific inquiries are required in the statute to make the determination of [a] [d]efendant's understanding and appreciation of the consequences" of the decision to waive his right to trial by jury. *Id.*

The fact that the General Assembly has not established minimum standards for the trial court's inquiry when a defendant seeks to waive the right to a jury trial cannot mean that there are no standards. Such an interpretation would completely contradict the purposes of N.C.G.S. § 15A-1201 and art. I, § 24. Further, it is the courts, not the General Assembly, that must determine the baseline requirements for waiving a fundamental constitutional right.

Finally, this Court in *Rutledge* stated: "Presuming, without finding, the trial court's grant of Defendant's requested waiver was error under N.C. Gen. Stat. § 1201, Defendant has failed to and cannot show prejudice under N.C. Gen. Stat. § 15A-1443." *Rutledge*, 267 N.C. App. at 100, 832 S.E.2d at 750. Because this Court in *Rutledge* was only conducting a statutory review, not a constitutional one, the application of the general harmless error standard in N.C.G.S. § 15A-1443 was not, on its face, incorrect. However, because there were constitutional issues that could not be separated from the statutory issues, it was the duty of this Court to address the constitutional issues *ex mero motu*. *Hudson*, 280 N.C. at 78, 185 S.E.2d at 192. The Court in *Rutledge* continued:

> The record is devoid of any indication tending to show a jury would have been privy to exculpatory evidence that

> this trial court did not consider. Defendant initiated and requested the waiver of a jury trial on the day of trial. Defendant made the strategic choice to request a bench trial and was informed of the potential consequences of his request and proceeded to trial. The trial court's grant of such request, even if it was shown to be in technical violation of N.C. Gen. Stat. § 15A-1201, was not prejudicial. Defendant's arguments are overruled.

Rutledge, 267 N.C. App. at 100, 832 S.E.2d at 750. As I have indicated above, I believe the violation of a defendant's right to a jury trial is structural error not requiring any showing of actual prejudice. Because *Rutledge* did not base its holdings on any constitutional analysis, I do not believe it controls this case. However, were this analysis from *Rutledge* applied to review of the fundamental art. I, § 24 right to a jury trial, the right would cease to exist in any meaningful way.

IV. Conclusion

I would hold that Defendant's right to a trial by a properly constituted jury of twelve was violated, that this violation constituted structural error, and that a new trial is required. Along with violations of N.C.G.S. § 15A-1201 and the mandates of art. I, § 24, at least half of the trial was conducted without *any* properly constituted finder of fact. Although the majority opinion does not address Defendant's argument that his waiver was not made "knowingly and voluntarily" "under our amended constitution" and N.C.G.S. § 15A-1201(b), I would hold that a waiver of the right to a jury trial cannot be "knowingly and voluntarily" made if the trial is going to proceed without any properly constituted finder of fact. I also disagree that a waiver can be "knowing and voluntary" after at least half of the trial has already been conducted. Finally, I would find the mid-trial inquiry insufficient to meet the requirements for waiver of a fundamental constitutional right.

STATE OF NORTH CAROLINA
v.
RONNIE HUTCHENS, DEFENDANT

No. COA19-787

Filed 16 June 2020

1. Appeal and Error—satellite-based monitoring order—failure to file notice of appeal—petition for certiorari

The Court of Appeals allowed defendant's petition for a writ of certiorari to review an order imposing lifetime satellite-based monitoring (SBM) where, although defendant failed to file a written notice of appeal pursuant to Appellate Rule 3, he raised a meritorious argument against the order at a time when new case law was developing with regard to parties' burdens and a trial court's role in SBM hearings.

2. Appeal and Error—jurisdiction—imposition of attorney fees—no civil judgment entered

In a satellite-based monitoring case, defendant's appeal from an order assessing attorney fees against him (as part of sentencing) was dismissed because the trial court did not enter a civil judgment for those fees, which deprived the Court of Appeals of subject matter jurisdiction to review the matter.

3. Satellite-Based Monitoring—lifetime monitoring—reasonableness—State's burden—balancing test—privacy interests—governmental interests

An order imposing lifetime satellite-based monitoring (SBM) on defendant was reversed where, under the balancing test set forth in *State v. Grady*, 372 N.C. 509 (2019), the State did not meet its burden of showing that lifetime SBM—in general or as applied to defendant—was a reasonable warrantless search under the Fourth Amendment. Following five years of post-release supervision, defendant's restored, "appreciable" privacy interests would suffer a deep intrusion under lifetime SBM, and the State failed to present evidence that SBM would advance any legitimate government interest, including the State's interest in preventing recidivism.

Appeal by Defendant from orders entered 12 July 2018 by Judge Paul C. Ridgeway in Alamance County Superior Court. Heard in the Court of Appeals 28 April 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Sarah Holladay for Defendant.

INMAN, Judge.

Ronnie Hutchens ("Defendant"), who raped his roommate and forced her to perform oral sex, was sentenced to a prison term of roughly seven to fourteen years, to be followed by five years of post-release supervision on conditions including satellite-based monitoring ("SBM"). He appeals, by petition for writ of certiorari, from an order requiring him to submit to SBM for the remainder of his life. We grant Defendant's petition in our discretion and, based on recent decisions from the Supreme Court of the United States and the North Carolina Supreme Court, reverse the trial court's order imposing lifetime SBM.

Defendant also seeks review of an order assessing attorney's fees against him as part of his sentencing, and the State concedes error under *State v. Friend*, 257 N.C. App. 516, 809 S.E.2d 902 (2018). But because no civil judgment for those attorney's fees has been entered, we dismiss this portion of Defendant's appeal.

I. FACTUAL AND PROCEDURAL HISTORY

The record on appeal discloses the following:

On 9 July 2018, Defendant entered an *Alford* plea to second degree forcible rape, second degree sex offense, and assault on a female. The trial court completed a prior record level worksheet disclosing a lengthy history of felony and misdemeanor convictions, consisting largely of larceny, breaking and entering, drug possession, and forgery convictions between 1982 and 2016. The worksheet also showed two misdemeanor convictions for assault on a female from 1997 and 2015. In conjunction with Defendant's plea and prior record level, the trial court sentenced Defendant to 110 months to 192 months imprisonment. It also ordered Defendant to have no contact with the victim.

Because Defendant pled guilty to a sexually violent offense, the trial court held a hearing on whether to impose lifetime SBM pursuant to N.C. Gen. Stat. § 14-208.40A(c) (2017). At the hearing, the State introduced testimony from Brandon Cox, a probation officer, regarding the use of SBM to track defendants. Officer Cox testified that SBM is conducted via an ankle bracelet called an ET-1 that monitors a defendant's location and speed of travel. The device is waterproof, measures roughly an

inch-and-a-half wide and three inches tall, and must be plugged into an electrical outlet to be recharged. Officer Cox also testified that his office checks the information collected from the device at least three times a week to ensure that the offender is "complying with their sex offender treatment classes or any other specific items on their judgment . . . [and that] they're not going to places they're not supposed to be going to and complying with all the conditions of the registry." If the data discloses that an offender has been in a prohibited place or attempted to remove the bracelet, a probation officer is sent to investigate. Officer Cox acknowledged that although he did not consider the "main objective" of SBM to "generate evidence for law enforcement," the data collected by his office can be used by police "to exonerate an individual and/or it could be used against them."

The State also introduced a Static-99 into evidence. Officer Cox, who completed the form for Defendant, testified that it is used to "predict[] the sexual recidivism for th[e] offender," and that Defendant scored a 1, placing him in the "low risk" category. According to Officer Cox, "[o]ffenders with the same score, in multiple routine samples, have been found to sexually recidivate at 2.5 to . . . 5.8 percent after five years."

After the State's presentation of evidence, Defendant argued that the imposition of lifetime SBM was not a reasonable warrantless search under the Fourth Amendment based on *State v. Grady*, 259 N.C. App. 664, 817 S.E.2d 18 (2018) ("*Grady II*"), *aff'd as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*"). The State argued that even though Defendant had scored in the low risk category on the Static-99, he did so only because of his advanced age. The State pointed out that when Defendant's age was removed from the Static-99 risk assessment, Defendant scored in the "moderate to high" risk level. Further, the State argued that Defendant's first violent offense, in 1997, indicated that his propensity for violence increased as he aged. It also argued that Defendant's privacy rights were appreciably diminished because Defendant is a convicted felon, a registered sex offender, and will be subject to post-release supervision for five years after his release from prison. The State argued that SBM served a legitimate governmental interest because it promoted "re-integration and positive . . . citizenship of individuals" by deterring defendants from reoffending. It also argued that SBM served a special need divorced from law enforcement but, in doing so, proceeded to restate its earlier argument: "this is . . . to help ensure that . . . they are continuing to comply with the law; they're being law-abiding citizens; that they're not engaging in further conduct that has become a risk factor[.] . . . We, as a society, have a vested interest in seeing that no further sex crimes occur." The State did not introduce

any evidence showing SBM was actually effective in accomplishing those objectives.

At the conclusion of the hearing, the trial court announced that lifetime SBM constituted a reasonable search and served a special purpose "to ensure . . . that there is not recidivism." In support of its ruling, the trial court found that the SBM device constituted "a relatively minimal intrusion upon individual privacy, particularly those individuals who are convicted of sex offenses and are required to be on the registry." It further found "that the State has met, by the preponderance of evidence, that the imposition of [SBM] does promote a governmental interest in this case; it is accurate." And it found that Defendant showed a sufficient risk of reoffending based on his prior criminal history, as it demonstrated his "propensity to commit violent offenses seems to have increased with age rather than diminished with age."

The trial court entered its SBM order and written judgment sentencing Defendant on 9 July 2018. The criminal judgment also indicated that Defendant was ordered to pay $1,200 in attorney's fees, but the record on appeal does not include a civil judgment entered in accordance with N.C. Gen. Stat. § 7A-455(b) (2017). Nor does the record disclose that Defendant was given an opportunity to be heard on the issue as required by *Friend*.

Defendant did not seek to appeal any orders entered in his case until he sent a letter dated 17 February 2019 to the Alamance County Clerk of Superior Court, in which he requested an appeal of his second degree rape conviction "on the grounds of conflict of interest and ineffective assistance of counsel." After the filing of appellate entries and appointment of counsel, Defendant filed a petition for writ of certiorari on 15 November 2019 requesting review of the SBM order.

II. ANALYSIS

A. Appellate Jurisdiction

1. SBM Order

[1] "A defendant must file a written notice of appeal from an SBM order pursuant to Rule 3 of the Rules of Appellate Procedure because of the civil nature of SBM proceedings." *State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019). However, this Court has granted a defendant's petition for writ of certiorari to review a meritorious challenge to an SBM order notwithstanding his failure to file a written notice of appeal—timely or otherwise. *Id.* at 504. We have done so even when the defendant failed to give oral notice of appeal. *See State v. Simmons*, 253

N.C. App. 239, 798 S.E.2d 441, 2017 WL 1381810, *3 (2017) (unpublished) (granting certiorari to review and reverse an SBM order when the defendant filed a written appeal from his underlying convictions but did not appeal the SBM order orally or in writing). Further, we have allowed certiorari review of an SBM order when the defendant filed a defective *pro se* written notice of appeal that was not served on the State " '[i]n the interest of justice, and to expedite the decision in the public interest.' " *State v. Robinson*, 249 N.C. App. 568, 572, 791 S.E.2d 862, 865 (2016) (quoting *State v. Brooks*, 204 N.C. App 193, 195, 693 S.E.2d 204, 206 (2010)). Given the meritorious nature of Defendant's argument, and the current "tumultuous time in our case law regarding the parties' burdens and the role of the trial court in hearings on SBM," *Lopez*, 264 N.C. App. at 513, 826 S.E.2d at 509, we allow his petition for writ of certiorari to review the SBM order in our discretion.

2. Attorney's Fees

[2] Defendant acknowledges in his principal brief that the lack of a civil judgment for fees deprives this Court of subject matter jurisdiction. *State v. Jacobs*, 361 N.C. 565, 565, 648 S.E.2d 841, 842 (2007). Defendant asks this Court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to review the order on the merits or, in the alternative, issue an extraordinary writ compelling entry of a civil judgment or preventing collection of any attorney's fees. We lack subject matter jurisdiction to review an appeal from an order for attorney's fees not entered as a civil judgment. Defendant will not be prejudiced unless and until a civil judgment is entered. So we decline to suspend the rules to review the order or issue either of the requested extraordinary writs. *See State v. Walker*, 204 N.C. App. 431, 450, 694 S.E.2d 484, 497 (2010) (declining to review an indigent defendant's appeal of a trial court's "recommendation" for attorney's fees at sentencing when no civil judgment was entered because "proceeding to rule on [the d]efendant's challenge would put us in the position of evaluating the validity of a judgment that might, for all we know, have never been entered"). This portion of Defendant's appeal is dismissed.

B. Analysis

[3] This Court has faced no shortage of SBM appeals in the years since the Supreme Court of the United States held in *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015) ("*Grady I*"), that its imposition constitutes a warrantless search within the meaning of the Fourth Amendment and necessitates an inquiry into reasonableness under the totality of the circumstances. 575 U.S. at 310, 191 L. Ed. 2d at 462. Our Supreme Court has since addressed the question in *Grady III*,

holding that the imposition of mandatory lifetime SBM "is unconstitutional in its application to all individuals in the same category as defendant—specifically, 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[.]" *Grady III*, 372 N.C. at 522, 831 S.E.2d at 553. Although the Supreme Court limited the facial aspect of its holding to that singular category of defendants, it did so after engaging in a reasonableness analysis under the totality of the circumstances as required by the United States Supreme Court in *Grady I*.

Defendant is not a recidivist, so the order requiring Defendant to submit to lifetime SBM is not facially unconstitutional under *Grady III*. We must conduct a reasonableness analysis anew. As recognized by both Defendant and the State,[1] *Grady III*—the most recent decision from our Supreme Court applying a reasonableness analysis under the Fourth Amendment to an SBM order—provides us with guidance as to the facts and factors to be included in the totality of the circumstances we consider. This approach is consistent with this Court's reconsideration of other non-recidivist SBM appeals following *Grady III*. *See State v. Griffin*, No. COA 17-386-2, slip op. at 13, 270 N.C. App. 98, 106, 840 S.E.2d 267, 273, 2020 WL 769356 (Feb. 18, 2020) ("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. . . . *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances."), *temp. stay allowed*, 374 N.C. 265, 838 S.E.2d 460; *State v. Gordon*, No. COA 17-1077-2, slip op. at 11-12, 270 N.C. App. 468, ___, 840 S.E.2d 907, ___ (March 17, 2020) (applying the reasonableness analysis employed in *Grady III* to a defendant convicted of an aggravated offense and subject to lifetime SBM as a result), *temp. stay allowed*, 374 N.C. 430, 839 S.E.2d 351.

We note that, following the Supreme Court's orders temporarily staying this Court's decisions in both *Griffin* and *Gordon*, the precedential value of those decisions is in limbo. While they are not controlling, neither have they been overturned. They are instructive as the most recent published decisions of this Court addressing *Grady III*'s application outside the recidivist context, particularly in light of the parties' agreement that *Grady III* provides guidance in this case.

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1. Defendant argues that "the rationale of *Grady [III]* requires relief for [Defendant,]" while the State acknowledges that "[b]oth the United States Supreme Court in *Grady I*, and the North Carolina Supreme Court in *Grady III*, have made clear that the test for constitutionality of SBM searches 'includes' certain factors."

In accordance with *Grady III*, we must consider the totality of the circumstances to determine "whether the warrantless, suspicionless search here is reasonable when 'its intrusion on the individual's Fourth Amendment interest' 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 v. Acton*, 515 U.S. 646, 652-53, 132 L. Ed. 2d 564, 574 (1995)). The State bears the burden of showing the reasonableness of the search under this test. *Id.* at 543, 831 S.E.2d at 568.

1. SBM's Intrusion into Defendant's Recognizable Privacy Interests

Defendant's SBM order was entered at the same time as his sentence, so he will not be subject to SBM until he serves his prison term of roughly seven-and-a-half to fourteen-and-a-half years.[2] This Court addressed a similar situation in *Gordon*, after the trial court imposed lifetime SBM on a defendant—convicted, as here, of an aggravated offense—at sentencing, with monitoring set to begin on his release from prison roughly fifteen to twenty years later. *Gordon*, slip op. at 11, 270 N.C. App. at ___, 840 S.E.2d at ___. We noted that "the State's ability to demonstrate reasonableness is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis." *Id.*, slip op. at 12, 270 N.C. App. at ___, 840 S.E.2d at ___. We continued:

> 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. The State . . . has [not] 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.
>
> . . . .
>
> The State . . . provides no indication that the monitoring device currently in use will be the same as—or even similar to—the device that will be employed approximately two decades from now.

Id. at 12-13 (quoting *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557) (additional citations omitted). Here, as in *Gordon*, the State presented no evidence showing "that the nature and extent of the monitoring that is

2. Defendant was sentenced to 110 to 192 months imprisonment, with credit for 514 days served.

currently administered, and upon which the present order is based, will remain unchanged by the time that Defendant is released from prison." *Id.* at 12. Likewise, the State has not shown that the ET-1 monitoring device about which Officer Cox testified will be the device Defendant will ultimately be required to wear once his lengthy prison sentence has run.

Setting aside the above concerns does not meaningfully tilt this portion of the analysis in favor of lifetime SBM. The Supreme Court in *Grady III* addressed the intrusiveness of the ET-1, holding that its physical restrictions, coupled with its ability to constantly track the defendant's location, constituted "a deep, if not unique, intrusion[.]" 372 N.C. at 538, 831 S.E.2d at 564. In *Griffin*, this Court considered the constitutionality of an order imposing thirty years of SBM on a defendant who, like Defendant here, was also subject to a term of post-release supervision. Slip op. at 16, 270 N.C. App. at ___, 840 S.E.2d at ___. We acknowledged that the defendant's "rights to privacy in his person, his home, and his movements . . . may be appreciably diminished *during his five-year term of post-release supervision*." *Id.* (emphasis added). By that same token, however, we held that the "[d]efendant'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. [The d]efendant, then, will enjoy appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of the thirty-year term." *Id.* (quoting *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561).

Here, while Defendant will have diminished privacy interests arising from his offense for five years of post-release supervision, he will have no such diminished interest for the remaining years of his natural life during which he must submit to SBM. And while Defendant has an opportunity to seek relief from the SBM order by petitioning the Post-Release Supervision and Parole Commission, N.C. Gen. Stat. § 14-208.43(c) (2017), such a procedure does not amount to "judicial review of the continued need for SBM [and] is contrary to the general understanding that judicial oversight of searches and seizures, in the form of a warrant requirement, is an important check on police power." *Grady III*, 372 N.C. at 535, 831 S.E.2d at 562.

2. The State's Interest in and the Efficacy of SBM

The State argued before the trial court that although Defendant was assessed as a "low risk" by the Static-99, his propensity for violence and reoffending had increased as he aged—and that SBM would discourage

such recidivism. Defendant was 56 years old when he was sentenced to prison for roughly seven to fourteen years and SBM would not begin until his release. Thus, the State's argument regarding Defendant's increasing propensity for violence with age assumes he will likely continue his upward trajectory of violence even beyond age 70—his age upon release if imprisoned for the maximum sentence—until his death. The State presented no evidence to support such an assumption, which is contrary to the STATIC-99, an instrument developed based upon statistical data and research regarding sex offenders. Assuming *arguendo* that Defendant poses such a risk, we recognize that the State's interest in reducing recidivism is "without question legitimate." *Id.* at 543, 831 S.E.2d at 568. And yet, the State introduced no evidence before the trial court showing that SBM will actually prevent or reduce recidivism–either generally or on the part of Defendant. Although counsel for the State argued at trial that "knowing that this device is on you . . . is a deterrent[,]" it did so without introducing any supporting testimony or other evidence. Our Supreme Court has made clear that such bald assertions cannot support the imposition of SBM. *See id.*, 372 N.C. at 543-44, 831 S.E.2d at 567-68 ("[T]he State has not presented any evidence demonstrating that the SBM program is effective at deterring crime. Thus, the State's deterrence argument, like the other arguments it has advanced with respect to the efficacy issue, fails for lack of evidentiary support. . . . We cannot 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 it." (citation omitted)); *see also State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996) ("[I]t is axiomatic that arguments of counsel are not evidence." (citations omitted)).

On appeal, the State apparently acknowledges the immateriality of the special needs doctrine to this case, writing in its brief that if the hearing had been conducted after *Grady III*, "the words 'special needs' would have been absent from the trial court's holding." The State instead argues that "the special need" identified below was merely a different interest served by SBM to be considered under the totality of the circumstances, namely "the State's stated purpose [in] ensuring Defendant stays away from places he should not be, *e.g.*, exclusion zones[.]" Although the State referenced this interest, it did so only in the context of reducing recidivism:

> [THE STATE]: . . . The purpose of [SBM] is not solely to investigate crimes. As Officer Cox said, law enforcement cannot just sit there . . . and check all the times to see if

> they can catch a sex offender on a premise to which they cannot be.
>
> This is not something that [law enforcement] share[s] in probation and parole in looking at; this is something probation and parole is doing to help ensure that, as offenders are coming out of jail or having just been sentenced on probation on a device, that they are continuing to comply with the law; they're being law-abiding citizens; that they're not engaging in further conduct that has become a risk factor either from a previous conviction or has occurred since.
>
> And for these reasons, I think that . . . [SBM] does satisfy the special needs doctrine. We, as a society, have a vested interest in seeing that no further sex crimes occur.

Consistent with this argument, the "special need" identified by the trial court in announcing its decision to impose SBM was "to ensure that . . . there is not recidivism."

The State also argues that its interest in keeping Defendant out of "exclusion zones" is another method of ensuring "public safety" and "[p]rotecting the public by monitoring the whereabouts of aggravated sex offenders." However, the State fails to identify any record evidence showing that SBM of Defendant will serve such an interest. As a registered sex offender, Defendant is statutorily excluded from schools, nurseries, and other "place[s] intended primarily for the use, care, or supervision of minors," N.C. Gen. Stat. § 14-208.18(a)(1) (2017), but the State presented no evidence showing Defendant will be inclined to violate that prohibition. Defendant committed a sexual offense against his adult roommate and he has no history of sexual offenses or violence against children.

The State also argues on appeal that SBM is reasonable in this case because in sentencing Defendant, the trial court ordered him have no contact with his victim. The no-contact order was entered *prior to* the SBM hearing. The State presented no evidence or argument to the trial court that SBM would or could monitor Defendant's location relative to that of his victim. Officer Cox testified that in monitoring Defendant's entry into prohibited areas, he would be checking "to ensure that they're not *in a school zone or near a daycare or any other place [with] the primary purpose of childcare*[,]"and did not mention the no-contact order.

The same lack of evidence plagues the State's argument that "offenders who are in places they should not be[ ] are more likely to offend."[3] Our Supreme Court has held that the bald assertions of counsel regarding the function of SBM, even those that appeal to general common sense, are no substitute for competent evidence. *Cf. Grady III*, 372 N.C. at 544-45, 831 S.E.2d at 568 (holding the State failed to show SBM was reasonable under the totality of the circumstances "without any showing by the State that the program furthers its interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public").

Ultimately, the State failed to introduce evidence that SBM would be effective to prevent Defendant from reoffending, and, while not dispositive of our analysis, the "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." *Id.* at 543, 831 S.E.2d at 567.

3. Totality of the Circumstances

Considering the factors discussed above under the totality of the circumstances gleaned from the record evidence before us, we hold that the State has failed to satisfy its burden of showing that generally, or with respect to Defendant, lifetime SBM is reasonable, as the Fourth Amendment requires for warrantless searches. While it is true that Defendant will be subject to post-release supervision for five years, that supervisory interest will already be served through mandatory SBM imposed as a condition of his release. *See* N.C. Gen. Stat. § 15A-1368.4(b1)(6) (2017) (requiring persons convicted of an aggravated sexual offense to submit to SBM as a mandatory condition of post-release supervision). Thus, in addition to outlasting that supervisory interest, the lifetime SBM order imposed here is unnecessary to satisfy that aim for five years after Defendant's release from prison. Defendant will enjoy appreciable privacy interests following his term of post-release supervision, and those interests will suffer "a deep, if not unique, intrusion[,]" *Grady III*, 372 N.C. at 538, 831 S.E.2d at 564, as a result of monitoring with an ET-1 bracelet—assuming that is, in fact, how Defendant will be monitored several years from now. As noted in *Grady III*, the intrusion includes the physical imposition of a device connected to Defendant's body at all times to monitor Defendant's location and travel 24 hours a day. *Id.*

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3. If anything, this suggests that this purported alternative basis for SBM is simply a restatement of the State's interest in combatting recidivism.

Weighing the State's failure to introduce any evidence showing that lifetime SBM monitoring will advance its interest in reducing recidivism—or any other argued interest—against Defendant's constitutional privacy interests, we cannot conclude that the State's legitimate governmental concerns outweigh Defendant's cognizable Fourth Amendment privacy rights.

III. CONCLUSION

We eagerly await further guidance from our Supreme Court regarding the parameters of *Grady III*. Until then, we must find our way using established principles of appellate review and *stare decisis*. Because the State has not met its burden of showing lifetime SBM constitutes a reasonable warrantless search based on the record below, the trial court's order imposing SBM is reversed.

Because no civil judgment has been entered imposing the attorney's fees which Defendant seeks to challenge, we dismiss that portion of Defendant's appeal.

REVERSED IN PART; APPEAL DISMISSED IN PART.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
DMARLO LEVONNE FAULK JOHNSON, DEFENDANT

No. COA19-191

Filed 16 June 2020

1. Homicide—felony murder—rebuttal evidence to diminished capacity defense—continuance denied—not a defense to general intent crime

In a prosecution for first-degree murder and armed robbery, there was no prejudicial error from the trial court's denial of defendant's motion to continue, which was made after the State informed defendant a day before trial that it intended to introduce recordings of defendant's jailhouse calls in order to rebut defendant's expert, who planned to testify that defendant had diminished capacity at the time of the offenses. The testimony was not relevant to the felony murder conviction because the underlying felony (assault on

a law enforcement officer) was a general intent crime for which diminished capacity provided no defense.

2. Robbery—armed robbery—rebuttal evidence to diminished capacity defense—continuance denied—prejudice analysis

In a prosecution for first-degree murder and armed robbery, the trial court did not violate defendant's constitutional rights by denying defendant's motion to continue—made after the State informed defendant a day before trial that it intended to introduce recordings of defendant's jailhouse calls in order to rebut defendant's expert, who planned to testify that defendant had diminished capacity at the time of the offenses—or by allowing the admission of the evidence over defendant's objection. The phone calls were previously known to defense counsel, who could have determined earlier whether they were relevant to the diminished capacity defense, and defendant failed to show any prejudice where the calls did not contradict his expert's testimony and other evidence was presented regarding defendant's state of mind at the time of the crimes.

Judge STROUD dissenting.

Appeal by Defendant from judgment entered 12 May 2017 by Judge Rebecca W. Holt in Durham County Superior Court. Heard in the Court of Appeals 16 October 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sandra Wallace-Smith, for the State.

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

DILLON, Judge.

Defendant Dmarlo Johnson appeals from a final judgment entered in superior court finding him guilty of first degree (felony) murder and robbery with a dangerous weapon. After careful review, we conclude that Defendant received a fair trial, free from reversible error.[1]

I. Background

On 4 July 2015, Defendant robbed a convenience store, fatally shot the store clerk, and then assaulted a law enforcement officer with his

1. We note that Defendant, himself, filed a Motion for Appointment of Counsel with our Court. But since he is represented by counsel and his appointed counsel had already filed briefs and a record with this Court, we dismiss his motion.

gun as he was exiting the store. There is no dispute that Defendant was the perpetrator or that Defendant was legally sane that day. Rather, Defendant claims he acted with diminished capacity.

Prior to the 2015 robbery/shooting, Defendant was identified as a man of below-average intelligence, who suffered from bipolar disorder and depression.

On 3 July 2015, the day before the robbery/shooting, Defendant drove recklessly by "doing donuts" near a crowd of people and then eluding police. He was cited later that day for the incident.

On 4 July 2015, in the early morning hours, Defendant entered a convenience store with his face covered. Much of what transpired while he was there was recorded by security cameras. Defendant threatened the customers inside, ordering them to leave. The store clerk, Amer Mahmood, remained in the store. Defendant stole money from the cash register, items from the store, and Mr. Mahmood's wallet. At some point Mr. Mahmood recognized Defendant, calling him "Marlo." Shortly after being recognized by Mr. Mahmood, Defendant shot Mr. Mahmood six times, mortally wounding him.

Defendant exited the store and placed stolen items in his car. He then returned to shoot out surveillance cameras. As Defendant was returning to his car, he encountered police officers. He refused orders to drop his gun, pointing the gun at one of the officers. A series of gunshots from Defendant and the officers ensued. Defendant was subdued after being struck. Defendant was taken to the hospital, where he was treated for his wounds.

Days later, Defendant was formally arrested and held in custody while awaiting trial.

On 13 August 2015, about six weeks after the robbery/shooting, Defendant was first examined by a Dr. Corvin, his expert who would testify at trial concerning his diminished capacity. Over the course of the next several months, Dr. Corvin developed his diagnosis that Defendant suffered from bipolar disorder, which caused Defendant to act with diminished capacity when Defendant killed Mr. Mahmood.

On 23 April 2017, the day before the trial was to begin, the State informed Defendant of its intent to introduce certain evidence to rebut Dr. Corvin's testimony. This rebuttal evidence consisted of recordings of certain jailhouse calls made by Defendant around the time he first met with Dr. Corvin in August 2015, which the State contended demonstrated that Defendant showed no signs of diminished capacity.

The next day, on the first day of trial, Defendant's counsel sought a continuance to allow time to review the rebuttal evidence or, in the alternative, a ruling not to allow the State to introduce the recordings as rebuttal evidence. The trial court denied Defendant's requests.

The trial lasted several weeks. On 9 May 2017, after Dr. Corvin testified concerning Defendant's bipolar disorder, the State introduced the recordings in rebuttal to Dr. Corvin's testimony over Defendant's objection.

On 12 May 2017, the jury returned guilty verdicts for felony murder and for armed robbery. The trial court sentenced Defendant to life without parole on the murder conviction and a term of years on the robbery conviction, to run consecutively with his life sentence.

Defendant timely appealed.

II. Argument

On appeal, Defendant argues that the trial court erred in denying his request for a continuance made at the start of trial. Further, Defendant argues that the trial court's error was a *constitutional* error in that Defendant's trial counsel was denied the opportunity to prepare an adequate defense to respond to the State's rebuttal evidence:

> Finally, the gravity of harm [Defendant] would suffer without the continuance was substantial. He faced a sentence of life without parole. His capacity at the time of the crimes was central to the case. The telephone calls were introduced to undermine [Defendant's] mental health defense. Denying counsel time to prepare to deal with these telephone calls was untenable.

We address Defendant's argument as it pertains to each of his convictions in turn.

A. Felony Murder Conviction

[1] As explained below, based on controlling jurisprudence, we must conclude that Defendant is not entitled to a new trial on his felony murder conviction. Specifically, because the underlying felony supporting the jury's felony murder conviction was a "general intent" crime, Dr. Corvin's testimony concerning Defendant's diminished capacity was not relevant to this conviction.

The jury was presented with three theories by which they could convict Defendant of first degree murder for fatally shooting Mr. Mahmood. The jury rejected the State's theory that Defendant killed

Mr. Mahmood based on *premeditation and deliberation*. However, the jury found Defendant guilty based on the two other theories, each of which is based on the felony murder rule. First, the jury determined that Mr. Mahmood's death was sufficiently associated with Defendant's commission of armed robbery. Second, the jury determined that Mr. Mahmood's death was sufficiently associated with Defendant's assault on a law enforcement officer with a deadly weapon as he was exiting the convenience store.

The trial court sentenced Defendant to a term of life imprisonment for felony degree murder based on the jury's finding that the killing was sufficiently associated with Defendant's assault on a law enforcement officer with a deadly weapon. The jury separately convicted Defendant of this underlying felony; however, since that felony was used to elevate the killing to felony murder, the trial court arrested judgment on that underlying conviction.

Our Supreme Court has held that the felony of assault with a firearm upon a law enforcement officer is a *general intent* crime for which the diminished capacity defense[2] is not available:

> [A]ssault with a firearm upon a law enforcement officer in the performance of his duties . . . may be described as a general-intent offense.
>
> * * *
>
> Accordingly, we now hold that the diminished-capacity defense is not available to negate the general intent required for a conviction of assault with a deadly weapon on a government officer.

State v. Page, 346 N.C. 689, 700, 488 S.E.2d 225, 232 (1997). And our Supreme Court further held that diminished capacity is not a defense to a felony murder conviction based on that underlying general intent felony:

> We allow defendants to assert diminished mental capacity as a defense to a charge of premeditated and deliberate

2. We note that the jury was not instructed on the defense of insanity, which would be a complete defense to all the charges for which Defendant was convicted, even a conviction for general intent crimes. Indeed, Defendant made no argument before the jury nor makes any argument on appeal that he was legally insane when he killed Mr. Mahmood and stole from him and the store. Defendant merely asserts that he acted with diminished capacity when he committed those acts, and it was this defense on which the jury was instructed.

> murder because we recognize that some mental conditions may impede a defendant's ability to form a specific intent to kill. This reasoning is not applicable to the knowledge element of the felony of assault with a deadly weapon on a government officer.

Id. at 699, 488 S.E.2d at 232 (citation omitted).

Here, Defendant makes no argument on appeal concerning his conviction for the felony of assault with a deadly weapon on a law enforcement officer or the use of *that* felony to support his felony murder conviction. Therefore, based on Supreme Court precedent, we must conclude that any error by the trial court in not allowing Defendant time to prepare for the State's rebuttal of his defense is non-prejudicial, no matter our standard of review.

B. Armed Robbery Conviction

[2] The jury convicted Defendant of armed robbery. The trial court sentenced Defendant to a term of imprisonment to run consecutively to his life sentence for the felony murder conviction.

Armed robbery is a specific intent crime. *See State v. Lunsford*, 229 N.C. 229, 231, 49 S.E.2d 410, 412 (1948) (explaining that the State must prove that the defendant had the specific intent to steal). Therefore, diminished capacity is a defense to this felony. Accordingly, Defendant's arguments on appeal regarding the State's rebuttal evidence to Dr. Corvin's testimony are relevant to his armed robbery conviction, and we address them below.

On appeal, Defendant argues that he was prejudiced when the State was allowed to introduce recordings of nine (9) jailhouse phone calls he made around the time he met with Dr. Corvin. Defendant also argues that he was prejudiced when the trial court denied his motion for a continuance to allow his counsel time to prepare to respond to those nine (9) calls. For the reasoning stated below, we conclude that the trial court did not err in denying Defendant's motion to continue or in overruling Defendant's objection to the State's rebuttal evidence.

The circumstances regarding the introduction of the State's rebuttal evidence are as follows:

Dr. Corvin first met with Defendant on 13 August 2015, weeks following the killing, while Defendant was in custody. During that time, Defendant had made a number of jailhouse phone calls, some to his girlfriend, who would be a witness for him at trial. Defendant and his counsel were aware that these calls were being recorded. In any event,

many months prior to trial, Defendant's counsel noticed their intent to assert various diminished capacity defenses.

Shortly before trial, the State came into possession of the 835 recorded phone calls Defendant had been a party to while in custody. These calls were made available to Defendant's counsel. The State considered using some of the jailhouse calls made by Defendant to his girlfriend, but then decided against it. Defendant's defense team decided not to review any of the calls or ask for a continuance for more time to review the calls to see if there was evidence helpful to Defendant's diminished capacity defense.

However, just before the day of trial, after previously telling Defendant's counsel that they did not intend to use any of the recordings, the State prosecutors determined that they did intend to use some of the calls as rebuttal to any testimony Dr. Corvin might give; specifically, certain calls made the day before, the day of, and the day after Dr. Corvin's first examination of Defendant. The prosecution indicated that the calls were relevant to show Defendant's mental capacity during the time Defendant was examined by Dr. Corvin. Upon learning of the State's intent to use these calls (fewer than thirty) as rebuttal evidence, Defendant's counsel sought a continuance on the first day of trial to be allowed to listen to all 835 calls made by Defendant over the period of several months. The trial court denied the motion.

The trial began and centered largely on Defendant's state of mind around the time he killed Mr. Mahmood. The State put on evidence of Defendant's theft and killing at the convenience store, including video evidence from the surveillance cameras that caught much of Defendant's actions. This evidence tended to show that Defendant ordered customers out of the store, he ordered the store clerk Mr. Mahmood to remain behind the counter, he shot Mr. Mahmood when Mr. Mahmood called Defendant by name, and he shot out a surveillance video camera.

Defendant put on evidence which tended to show Defendant had below average intelligence, that he had suffered and had been treated for mental disorders, that he was acting rashly in the days and hours leading up to the killing, and that he was under the influence of alcohol and drugs at the time of the killing.

Defendant called Dr. Corvin, who testified concerning his evaluation of Defendant, including his initial meeting with Defendant on 13 August 2015. Dr. Corvin testified that Defendant was very moody during their first encounter. He testified that this initial meeting alone did not reveal to him a man who suffered from bipolar disorder, but rather a man with

> an antisocial personality disorder, the kind of guy who takes advantage of people, et cetera[.] Not that much we can really do about that. And trust me, as a forensic psychiatrist, I spend a lot of my time in prison. We see plenty of those folks, and it is what it is, and knowing nothing more other than what I saw of him in August of 2015, that's kind of what I [and the other doctors treating Defendant] thought[.]

He testified that over time after his initial meeting and after reviewing Defendant's medical records, he opined that Defendant suffered from bipolar disorder. He testified that Defendant's disorder combined with Defendant's ingestion of alcohol and drugs on the day of the shooting caused Defendant to act with diminished capacity.

The State, in rebuttal, presented a court-appointed expert, who testified that Defendant had below average intelligence; that Defendant was not bipolar but rather suffered from alcohol and cocaine substance abuse disorder; that though Defendant was intoxicated during the shooting, he was not impaired (based on her viewing of the surveillance video); and that Defendant had the ability to form the specific intent to kill during the shooting.

The State, in rebuttal, also introduced nine (9) jailhouse calls – the calls which are the subject matter of Defendant's arguments on appeal – that Defendant made around the time he first met with his expert Dr. Corvin. The State introduced these calls to show Defendant's mental ability around the time he met with Dr. Corvin. Quoting Defendant's brief, "[t]he calls indicated he was planning things, such as trying to make bond. He discussed a bond with his mother. He spoke to a bondsman. He added up money correctly."

The case was given to the jury, which found Defendant guilty of felony murder, felony assault on an officer with a deadly weapon, and armed robbery.

Ordinarily, "a motion for a continuance is . . . addressed to the sound discretion of the trial judge" and will not be disturbed on appeal "absent gross abuse." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981) (citations omitted). However, "when such a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case." *Id.* at 153, 282 S.E.2d at 433 (citation omitted). And "the constitutional guarantees . . . include the right of a defendant to have a reasonable time to investigate and prepare his case." *Id.* at

153-54, 282 S.E.2d at 433 (citations omitted). *See State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (stating that defense counsel "shall have a reasonable time to investigate, prepare, and present his defense"); *see also State v. Tunstall*, 334 N.C. 320, 328, 432 S.E.2d 331, 336 (1993).

Here, we conclude that the trial court's denial of a continuance did not deprive Defendant of his constitutional right to present his defense for a number of reasons.

First, Defendant's counsel knew for quite a while that recordings of these calls existed. Counsel had plenty of time to request the recordings if they thought there was any evidence contained therein tending to bolster their defense that Defendant suffered from bipolar disorder. Such evidence (if it exists) did not suddenly become relevant to Defendant's case when the State informed Defendant's counsel that they planned to use some of the calls as rebuttal to Dr. Corvin's testimony. Such evidence was relevant all along in Defendant's case. If Defendant's counsel thought there might be evidence on those calls, recordings which involved Defendant and Defendant's family and which Defendant's counsel knew existed for many months, they should have been more diligent in seeking a continuance, not waiting until the eve of trial. *See Tunstall*, 334 N.C. at 328, 432 S.E.2d at 336.

Second, Defendant has failed to show any prejudice. *See Searles*, 304 N.C. at 153, 282 S.E.2d at 433 ("Denial of a motion for a continuance, [even a motion raising a constitutional issue], is, nevertheless, grounds for a new trial only upon a showing by defendant that [he] was prejudiced thereby.").

Here, Dr. Corvin testified that he did not pick up on Defendant's bipolar disorder during his meeting in August 2015, but initially thought Defendant was antisocial and also a person who takes advantage of others. He only later concluded that Defendant was bipolar, indicating that Defendant suffered from mood swings that, at times, caused him to act impulsively or without specific intent. But the State's introduction of the phone calls made around the day Dr. Corvin met with Defendant did not contradict what Dr. Corvin testified he saw of Defendant during their initial meeting, a person who could plan. And these calls do not contradict Dr. Corvin's testimony that Defendant suffers from bipolar disorder and could act with diminished capacity at times, especially during extreme manic periods heightened by being under the influence of impairing substances. That is, Dr. Corvin did not testify that Defendant's bipolar disorder caused Defendant to act with legal diminished capacity at the time

he first met him in August. He testified that due to his bipolar disorder and being under the influence of impairing substances, Defendant acted with diminished capacity, unable to form a specific intent, when he shot and stole from Mr. Mahmood.

Also, the State's focus during its closing focused more on the evidence concerning Defendant's state of mind when he was in the convenience store, *as exhibited on the surveillance tapes*, rather than on what Defendant's mental capacity was on the day of his meeting with Dr. Corvin. That is, the jury made its finding that Defendant did not act with diminished capacity based on what they saw on the surveillance tapes of the crime rather than how Defendant sounded on some phone calls six weeks later.

And finally, Defendant has not made any showing that any of the 835 calls would have actually been helpful in addressing the State's rebuttal evidence. Indeed, in *Searles*, our Supreme Court held that the trial court did not constitutionally err in denying a motion to continue to allow the defendant's counsel to review newly-discovered evidence where the defendant failed to show on appeal what this evidence would show and how it would, in fact, be material. *See Searles* 304 N.C. at 154, 282 S.E.2d at 434. *See also State v. Phillip*, 261 N.C. 263, 267, 134 S.E.2d 386, 390 (1964) (stating that "a postponement is [only] proper where there is a belief that material evidence will come to light and such belief is reasonably grounded on known facts").

III. Conclusion

We conclude that Defendant received a fair trial, free from reversible error. Defendant fails to make any argument showing reversible error in his conviction for felony murder where the underlying felony is a general intent crime.

As to Defendant's conviction for armed robbery, a specific intent crime, we conclude that the trial court did not commit reversible error in denying Defendant's motion for a continuance or otherwise allowing the State to offer its rebuttal evidence. There was strong contradictory evidence offered by both the State and Defendant's counsel as to whether Defendant acted with diminished capacity. The jury heard the evidence and made their decision.

NO ERROR.

Judge BERGER concurs.

Judge STROUD dissents, writing separately.

STROUD, Judge, dissenting.

I respectfully dissent because the majority fails to apply the correct standard of review, and, under that standard, Defendant is entitled to a new trial. Defendant asserted both at trial and on appeal constitutional arguments to support his motion to continue. "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." N.C. Gen. Stat. § 15A-1443(b) (2017). The majority shifts this burden to Defendant and finds the phone calls used by the State were merely "rebuttal evidence." But the importance of evidence is not determined by whether it is in the case in chief or rebuttal; indeed, rebuttal evidence can be the most significant, particularly when a defendant has no opportunity to respond to it. As Defendant's brief accurately noted, by using the phone calls as rebuttal, "the state made sure the disputed telephone calls were the very last items of evidence the jury heard and considered before it began its deliberations." And because Defendant presented evidence at trial, the State also had the benefit of the final argument to the jury, leaving Defendant with no opportunity to respond to the State's arguments regarding the jail calls. *See* Gen. Rules of Practice for the Super. & Dist. Ct., R. 10, 276 N.C. 735, 738 (1970) ("In all cases, civil and criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him.").

The issue at trial, and in this appeal, is not whether Defendant was the person who robbed the convenience store and fatally shot the clerk. The only real issues at trial were Defendant's capacity and state of mind at the time of the shooting, 4 July 2015. Those issues are relevant to the jury's determination of his intent and the exact crimes for which he could be convicted. Even assuming the jury would have convicted Defendant of some crime, the difference between a sentence for first degree murder and second degree is not insignificant.[1] The jury found Defendant not guilty of first degree murder based on malice, premeditation, and deliberation, but guilty of first degree murder based on the

1. Based upon Defendant's intellectual disability, mental illness, and impairment by alcohol and drugs, his trial counsel argued at trial that Defendant should be convicted only of second degree murder.

felony murder rule based upon robbery with a firearm and assault with a firearm on a law enforcement officer.

I. Factual Background on State's Intent to Use Jail Calls as Evidence and Defendant's Objections

The majority glosses over the actual timing of the production of the phone calls and the State's repeated assurances it did not intend to use *any* of the phone calls. The majority also relies upon the State's evidence of Defendant's commission of the crimes, especially the video surveillance tapes, which it states show "Defendant's state of mind when he was in the convenience store[.]" The majority does not explain how a *video* can show a "state of mind" as relevant to this case. A video of a person shooting in a convenience store would not necessarily look any different whether the shooting was committed by a person suffering from a severe mental illness or incapacity as opposed to a person of average intelligence and unimpaired mental capacity. But even if the video may show indications of "state of mind" as relevant to Defendant's alleged incapacity, the video surveillance from the convenience store *was* interpreted differently by the two expert witnesses testifying about their evaluations of Defendant. The video surveillance alone does not weaken or eliminate Defendant's arguments. The differing interpretations of the video by Defendant's expert and the State's expert actually strengthens Defendant's arguments on appeal, since the State used the phone calls solely to attack the evaluation by Defendant's expert.

Around 6:00 PM on the Sunday evening before trial was to begin, the State notified Defendant's counsel it would be using twenty-three phone calls as evidence. Before the trial began, Defendant moved to exclude the phone calls or continue the trial so his counsel would have an opportunity to prepare for trial by listening to the phone calls. Defendant's "first request" was that the trial court "exclude those phone calls and allow us to proceed[;]" in the alternative, he requested "to continue the matter so that I can prepare this case like it should be prepared. It's a first-degree murder case, and we're dealing with a lot of complicated mental health issues here." Defendant's counsel argued, "My client's right to due process will be violated by the admission of these phone calls. He has a right to an effective assistance to counsel is [sic] going to be affected. His right to confront witnesses is going to be affected." Defendant's counsel invoked his right under both the United States and North Carolina Constitutions. *See* U.S. Const. amends. V, VI, XIV; N.C. Const. art. I, §§ 19, 23. He raised his constitutional objections and motion to continue both before trial and again after jury selection. He also renewed the objections when the phone call evidence was presented.

A full understanding of the relevance of the phone calls used by the State and the potential prejudice to Defendant requires some background information regarding Defendant's psychiatric evaluation. Defendant was evaluated by Dr. George Corvin, a general forensic psychiatrist, on 13 August 2015, about a month and a half after the shooting. At this time, Defendant was not yet on medication for his mental illness, although he had previously been diagnosed and treated prior to the shooting.[2] Dr. Corvin diagnosed Defendant with Bipolar I disorder; cannabis, alcohol, and cocaine use disorders; mild intellectual developmental disorder; and neurodevelopmental disorder (fetal alcohol syndrome) related to his mother's known use of alcohol during her pregnancy with Defendant. On 19 July 2016, Defendant filed his notice of defense under North Carolina General Statutes §§ 15A-905, 959:

> 1) Mental infirmity and diminished capacity under GS 15A-959 (b); and
>
> 2) Mental infirmity and insanity under GS 15A-959 (a); and
>
> 3) Voluntary intoxication
>
> These defenses are based upon the defendant's state of mind at the time of the offense including a mood disorder, his use of alcohol and drugs, and his impaired neurocognitive functioning and intellectual disabilities.

Around the same time, Defendant also provided the State with Dr. Corvin's report.

Almost a year after the State received Dr. Corvin's report, trial was set to begin on 24 April 2017. On Thursday, 13 April 2017, the State disclosed to Defendant's counsel written summaries of interviews with some potential new witnesses it intended to call to testify and a disc which the prosecutor "represented . . . were jail phone calls allegedly from [Defendant] to various people." Neither Defendant's counsel nor his investigator were able to open the disc due to the file format. 14 April 2017 was Good Friday, a state holiday.

On Monday, 17 April, Defendant's counsel contacted the prosecutor and got a disk with a different file format. His investigator opened the disk and discovered it contained approximately 335 recorded telephone

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2. By the time the State's expert witness evaluated Defendant, he had been on medication for months. At trial, Dr. Laney, a psychologist, testified that she did not believe Defendant was actually suffering from bipolar disorder, despite his prior diagnosis by other psychiatrists and continued treatment for the disorder.

calls Defendant made from jail. At 9:28 AM on Tuesday, 18 April, Defendant's counsel emailed the prosecutor regarding the phone calls:

> Yesterday afternoon we received a copy of the jail call disc in a format that we could open and I will not have time to listen to them and do not think I have anyone in my office that can assist. Please let me know if there are any calls which you believe are somehow relevant to your case.

At 12:50 PM the same day, the prosecutor responded to the email, assuring Defendant's counsel "I haven't listen [sic] to most of [the phone calls]" and "*[a]t this time I do not intend to use any of those calls, and I am no longer requesting anyone to continue listening to the calls*." (Emphasis added.)

On Thursday, 20 April 2017, the State provided to Defendant's counsel another disc with "550 +" *additional* phone calls. At 11:13 AM, Defendant's counsel emailed the prosecutor again:

> My office just picked up the disc with 550 + phone calls. I am assuming that your earlier email applies and these were just more calls from your earlier request. Let me know if my assumption is incorrect.

At 6:25 PM the same day, the prosecutor responded, confirming his prior email stating that the State did not intend to use any of the phone calls:

> *I do not intend to introduce any of the jail calls.* These calls were requested at a different time from the other calls; however, the delay in receiving the calls was even greater than the delay related to the prior calls that were delivered to you.

Based upon this assurance, Defendant's counsel and his investigator stopped listening to the phone calls to focus on other information provided by the State that same week. Along with the phone calls, the prosecutor also provided to Defendant's counsel information regarding a new witness, Mr. Saeed, the decedent's former roommate. Defendant's counsel determined he would need to talk to Mr. Saeed and "spent a good part of [the week prior to trial] . . . maybe even a day and a half, two days, looking for Mr. Saeed." Then later in the week, the State provided yet another more detailed statement from Mr. Saeed and a statement from another new witness, Mr. Chaudry. Police officers had talked to Mr. Chaudry, the owner of the convenience store, the night of the shooting. Defendant's counsel noted that although the police "had plenty of contact with Mr. Chaudry 20 some months ago, and now we're getting

statements from Mr. Chaudry."[3] In his argument to the trial court, Defendant's counsel noted that

> all these statements came about approximately 21 to 22 months after this offense occurred, statements by a witness that people knew but nobody ever bothered to talk to. . . . and that's kind of going on the same time as these phone calls being given to me.

Thursday, 20 April 2017, was the last day Defendant's investigator, Mr. McGough, was available to assist with trial preparation "because he was pretty sick and didn't come to work the next day." He was out with pneumonia until "sometime after trial began."

On Sunday, 23 April 2017, the prosecutors[4] were working on the case and as Assistant District Attorney Dornfried explained to the trial court, he suddenly had an idea of a way to attack Dr. Corvin's evaluation of Defendant:

> it just had dawned on me we do have recordings or we might. I didn't know if we did or not, but we might have recordings of the defendant, which is the jail calls that had been pulled not for the purposes of determining what is condition was like around the time Dr. Corvin was interviewing him and evaluating him[.5]

At 5:50 PM, the prosecutor emailed Defendant's counsel to inform him that contrary to his prior email, he now intended to use some of the phone calls. The email also explained the potential relevance and importance of the particular phone calls the State intended to use.

> After we confirmed yesterday that Dr. Corvin did not make any recordings of the Defendant on the day that he saw him exhibiting unusual behaviors, we didn't think more of the issue. *Today, it occurred to us that there are recordings of the Defendant on that day, although not with Dr. Corvin. The recordings are of the jail calls. We have listened to some jail calls and decided that they*

3. The State identified 45 potential witnesses at the start of the trial, and 21 witnesses testified for the State.

4. The State had two attorneys working on the case and both were present for the entire trial. Defendant had only one court-appointed attorney.

5. The State had gotten the recordings to see if Defendant had discussed the events with his girlfriend but were unable to find any such conversations.

> *are relevant material to his state of mind as well as his memory of the night of the murder.*
>
> The jail calls that are from August 12 - August 14, 2015 are calls numbered 251 - 274. We do not intend to use the calls that only constitute phone sex or involve the Defendant's child. You can tell the call numbers by clicking on the icon and going to properties and index. You can print the call log at the very bottom of the folder to line the call numbers up with the phone numbers date and time.

(Emphasis added.) The twenty-three phone calls the prosecutor initially identified as calls which may be used as evidence lasted approximately three and a half hours.

In the hearing before trial, after arguments from Defendant and the State, the trial court denied Defendant's motion to continue and ordered the State could introduce only the twenty-three phone calls identified in the Sunday night email but only during rebuttal and not as part of its case-in-chief, in accord with how the State had announced it intended to use the calls. The trial court did not limit the Defendant in using the phone calls, but since Defendant's sole attorney was representing him in trial, his counsel had no meaningful opportunity to listen to even twenty-three phone calls—and certainly not over 800 calls—or to prepare to use them. Based upon the estimates of the average length of each call, it would take between 95 and 140 hours to listen to all the phone calls.

Jury selection ended on Friday 28 April at 11:28 AM. Defendant's counsel requested to adjourn until Monday so he could have an opportunity to listen to the phone calls over the weekend before opening statements. He wanted a chance to consult with his "mental health professionals" about the calls as well. The State opposed Defendant's request because it had a witness from out of state and hoped to complete the witness's testimony so he could take a flight home that afternoon. The trial court denied Defendant's motion, immediately empaneled the jury, and proceeded to opening statements.

Defendant again renewed his objections to the State's use of the jail phone calls before the State's presentation of the evidence on rebuttal. Defendant's counsel noted that he had still not had time to prepare for the State's use of the calls on rebuttal or to prepare any surrebuttal. He had listened to some of the calls but had no opportunity to go over the calls with his expert witnesses or to determine how to use any calls.

Although the majority does not appreciate the significance of Defendant's need to listen to the calls and to prepare for the rebuttal

evidence identified by the State the evening before trial, the State's brief does, and the State attempts to explain why Defendant was not prejudiced by his counsel's inability to prepare. The State argues others assisting Defendant's counsel could have listened to the calls *during* the trial. The State's brief repeatedly refers to the "defense team" but cites to only one portion of the transcript in support of this assertion. For example, the State argues, "Where the record shows that the defense team consisted of two investigators and three attorneys, there was ample time for his team to review the telephone calls in question and confer with their mental health expert about them." But the record does not show a "defense team" with several attorneys available to provide assistance during trial. Defendant accurately points out that "the record belies this argument. Defense counsel did not have co-counsel. The other attorneys who were periodically in court with him were either new to the office or just observing. The lead investigator had been sidelined by pneumonia and the other investigator was merely providing rote assistance."[6]

The State also argues that "Defendant was personally aware of the content of the calls he made." The State seeks to compare Defendant's awareness of his phone calls to the defendant's knowledge of two brief oral statements in *State v. Tunstall*:

> The record does show that the defendant's counsel received tardy notice—less than a week before the defendant's trial began—of two oral statements made by the defendant. These statements consisted of (1) the defendant's statement to Deputy J.A. McCowan, "I shot the mother f——er, he's over there dead" and (2) the defendant's statement to Auxiliary Deputy Ronnie Baskett, "I hope I killed the mother f——er." The defendant's counsel had at least three days between notification of these statements and the beginning of jury selection in the defendant's trial in

6. During Defendant's argument renewing his objections prior to the State's presentation of rebuttal evidence, the trial court inquired about other members of the "defense team" in the courtroom during portions of the trial. Defendant's counsel explained that one attorney sat in "helping me with voir dire" but did not "know anything about the case." Another attorney was a "brand-new lawyer in our office" who was only there to observe. Mr. McGough was the primary investigator for Defendant's counsel, and his absence due to pneumonia had already been noted at the beginning of the trial. The other investigator was Ms. Winston, who "had very limited involvement in this case. Really last week was probably -- she got involved helping me when Mr. McGough came down with pneumonia." The State did not refute any of Defendant's arguments regarding the nonexistence of a "defense team" at trial. The transcript and record confirm that only one attorney appeared as trial counsel for Defendant, from appointment of counsel until his notice of appeal.

> which to investigate the circumstances under which the statements were made. The defendant has not shown that additional time would have enabled his counsel to better confront the witnesses who testified that the defendant made these statements.

334 N.C. 320, 332, 432 S.E.2d 331, 338 (1993). There was no need for an expert witness to address the relevance of those two brief statements. In addition, the two statements in *Tunstall* were presented during the State's evidence—not during rebuttal—so the defendant's counsel had the opportunity to address the late disclosure of the statements and "reveal the weaknesses" in the testimony of the officers, as noted by the Supreme Court:

> On cross-examination, both McCowan and Baskett admitted that they had not told the prosecutor about the defendant's statements until the week before his trial. Both witnesses also admitted that they had not reduced the defendant's statements, made nearly eleven months earlier, to writing. Far from being unprepared to confront these witnesses, the defendant's attorney skillfully revealed to the jury the weaknesses in their testimony.

Id.

Tunstall is inapposite to this case. The State's argument assumes Defendant, despite his uncontested intellectual disability and illiteracy, could recall over 800 phone calls *and* could also appreciate and explain to his counsel the potential relevance of the particular calls identified by the State in the context of Dr. Corvin's psychiatric evaluation of his mental capacity.[7] Defendant's counsel had no co-counsel to assist during the trial by listening to the calls or developing any additional evidence based upon the calls and his primary investigator was sick during the times he might have been able to provide meaningful assistance. But again, the trial court denied all of Defendant's objections to the State's use of the phone calls on rebuttal.

In summary, the State had notice of Dr. Corvin's report, and the dates of his evaluations of Defendant, for over a year before trial. The State assured Defendant's counsel—who was trying to prepare for a murder trial where the State had identified 45 potential witnesses—it

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7. The State's expert witness agreed with Defendant's expert witnesses as to his intellectual disability. Defendant never learned to read or write and functioned at second-grade level.

would not use any of the jail phone calls during the trial. The prosecutor specifically stated, "I am no longer requesting anyone to continue listening to the calls" on the Tuesday before trial and confirmed this again on Thursday evening. But on the very eve of trial, the State changed its position and stated it would use some of the phone calls as evidence.

I also note I am baffled by one the majority's arguments which states, "If Defendant's counsel thought there might be evidence on those calls, recordings which involved Defendant and Defendant's family and which Defendant's counsel knew existed for many months, they should have been more diligent in seeking a continuance, not waiting until the eve of trial." The State does not dispute the timeline described above. Certainly, Defendant was aware he made phone calls while he was in jail, but even the State had been unable to get access to these recordings until shortly before trial. Actually, the *State* waited until Sunday evening—the day before trial—to advise Defendant it planned to use some of the approximately 800 phone calls, after specifically advising his counsel, twice, it would *not* use any of the calls. Defendant could not have requested a continuance based upon the State's intended use of the phone calls a moment sooner than he did, as he made his motion immediately upon the inception of the case on Monday morning.

II. Standard of Review

The majority states "any error by the trial court by not allowing Defendant time to prepare to address the State's rebuttal of his diminished-capacity defense is non-prejudicial, no matter our standard of review." Our Supreme Court has established the correct standard of review for this issue:

> It is well established that a motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing that he abused that discretion. However, *when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law.* The denial of defendant's motion in this case presents constitutional questions.

State v. McFadden, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977) (emphasis added) (citations omitted).

In this situation, the trial court's ruling on the motion to continue is reviewed as a "question of law that is fully reviewable on appeal by examination of the particular circumstances presented in the record."

State v. Blakeney, 352 N.C. 287, 301-02, 531 S.E.2d 799, 811 (2000). The majority fails to review the ruling as a question of law or to examine the "particular circumstances presented in the record." *Id.* Our Courts have also noted the "particular importance" of the "reasons for the requested continuance presented to the trial judge at the time the request is denied." *State v. Barlowe*, 157 N.C. App. 249, 254, 578 S.E.2d 660, 663 (2003) (quoting *State v. Roper*, 328 N.C. 337, 349, 402 S.E.2d 600, 607).

III. Analysis

Because Defendant preserved his constitutional arguments regarding his right to effective assistance of counsel, due process, and confrontation of witnesses, I will analyze the trial court's denial of his motion to continue *de novo*. First, the reason for the request was the *State's* last-minute decision to use evidence it had until the eve of trial assured Defendant's counsel it would not use. *See id.*

Where Defendant's motion to continue raised constitutional issues of confrontation and effective assistance of counsel, "the trial court's ruling is 'fully reviewable by an examination of the particular circumstances of each case.' " *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 675 (2000) (quoting *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981)). The Supreme Court in *State v. Rogers* explained the proper analysis for this motion to continue:

> In most circumstances, a motion to continue is addressed to the sound discretion of the trial court, and absent a manifest abuse of that discretion, the trial court's ruling is not reviewable. However, when a motion to continue raises a constitutional issue, as in the instant case, the trial court's ruling is "fully reviewable by an examination of the particular circumstances of each case." Generally, the denial of a motion to continue, whether a constitutional issue is raised or not, is sufficient grounds for the granting of a new trial only when the defendant is able to show that the denial was erroneous and that he suffered prejudice as a result of the error.
>
> The rights to effective assistance of counsel, to confrontation of accusers and witnesses, and to due process of law are guaranteed in the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and Sections 19 and 23 of Article I of the Constitution of North Carolina. "It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's

accusers and witnesses against him that an accused and his counsel shall have a reasonable time to investigate, prepare and present his defense." A defendant must "be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony." This Court has previously recognized and discussed the United States Supreme Court's analysis of these claims:

> In addressing the propriety of a trial court's refusal to allow a defendant's attorney additional time for preparation, the Supreme Court of the United States has noted that the right to effective assistance of counsel "is recognized . . . because of the effect it has on the ability of the accused to receive a fair trial." While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed "without inquiry into the actual conduct of the trial" when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify" this presumption of ineffectiveness.
>
> "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense."

Id. at 124-25, 529 S.E.2d at 674-75 (alteration in original) (citations omitted).

The majority opinion assumes no prejudice to Defendant from the trial court's denial of continuance or disallowing use of the jail calls by the State, again failing to apply the proper standard. It is correct that even when the defendant raises a constitutional basis for the motion to continue, a new trial may be granted only if "denial was erroneous and that [defendant] suffered prejudice as a result of the error." *Id.* at 124, 529 S.E.2d at 675. But the *Rogers* court then explains that prejudice is *presumed* if

> "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. A trial

> court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify" this presumption of ineffectiveness.

Id. (citation omitted) (quoting *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336).

Here, no lawyer of any level of competence could listen to the approximately three and a half hours of phone calls, and certainly not all 90 to 140 hours of calls, during a fifteen day murder trial, and then do any needed investigation based on the calls, and discuss the relevance of particular calls with expert witnesses to prepare for the rebuttal evidence. There are not enough hours in a day, and even competent counsel must sleep occasionally. Prejudice must be presumed because there was no likelihood Defendant's counsel could provide effective assistance. But Defendant does not rely just on a presumption of prejudice. His argument demonstrates the particular prejudice based upon the jury's verdict:

> Absent the inadmissible evidence from the nine telephone calls,[8] which the prosecutor played as its last evidence and emphasized in its closing argument, the jury might well have rejected robbery with a firearm and felony murder based on this underlying felony. In this way, the admission of the nine telephone calls, over defendant's continuous objections, likely prejudiced the jury on these other issues. The state certainly cannot show this error was harmless beyond a reasonable doubt.

In *State v. Barlowe*, this Court held the trial court erred by denying the defendant's motion to continue based upon his constitutional right to effective assistance of counsel where the State disclosed evidence of blood spatter and an expert report of bloodstain pattern analysis nine days before trial, 10 September 2001. 157 N.C. App. 249, 578 S.E.2d 660. Trial was to begin on 19 September 2001. Id. at 255, 578 S.E.2d at 664. Defendant's counsel made a motion to continue on 13 September 2001, noting his substantial but unsuccessful efforts to find a qualified expert available to review the blood-spattered pants and report before trial.[9] *Id.* This Court explained the correct analysis:

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8. The State limited the number of phone calls it would be using in rebuttal from twenty-three to nine on Monday May 8, which was day eleven of Defendant's fifteen-day trial.

9. The defendant's counsel's effort to have expert review was also impaired because there was at the relevant time "no commercial air traffic in the United States [due to the

> The North Carolina Supreme Court has summarized the analysis applied by federal courts in reviewing refusals to grant a continuance where a constitutional right is implicated:
>
> > Courts have discussed numerous factors which are weighed to determine whether the failure to grant a continuance rises to constitutional dimensions. Of particular importance are the reasons for the requested continuance presented to the trial judge at the time the request is denied.

Id. at 253-54, 578 S.E.2d at 663 (quoting *State v. Roper*, 328 N.C. 337, 349, 402 S.E.2d 600, 607 (1991)).

> North Carolina courts have followed suit in analyzing similar alleged violations under our state constitution. Some of the factors considered by North Carolina courts in determining whether a trial court erred in denying a motion to continue have included (1) the diligence of the defendant in preparing for trial and requesting the continuance, (2) the detail and effort with which the defendant communicates to the court the expected evidence or testimony, (3) the materiality of the expected evidence to the defendant's case, and (4) the gravity of the harm defendant might suffer as a result of a denial of the continuance.

Id. at 254, 578 S.E.2d at 663.

Thus, this Court has a duty to consider the factors as noted in *Barlowe*. First is the "the diligence of the defendant in preparing for trial and requesting the continuance." *Id.* The State informed Defendant's counsel on the evening before trial of its intent to use evidence it had twice assured him it would not use to attack Defendant's only defense, his mental capacity at the time of the shooting. Defendant's counsel had reasonably relied upon the State's repeated written assurances it would not be using the phone calls and continued instead to prepare for the 45 witnesses the State had identified, including several disclosed just before trial. Defendant was diligent in preparing for trial and requested

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events of 11 September 2001] by which evidence and documents may be delivered to and from the expert that defendant selects." *Barlowe*, 157 N.C. App. at 255, 578 S.E.2d at 664 (alteration in original).

continuance as soon as humanly possible, when trial started. Defendant also requested in the alternative that the State not be permitted to use the phone calls; this would have allowed the trial to proceed with all of the evidence the State had planned to use until the Sunday evening before trial and with no disadvantage to Defendant. Defendant's counsel then requested additional time after jury selection to review the calls before opening statements; this request was also denied. Defendant then renewed his objections before presentation of the rebuttal evidence and explained why he was still not prepared to address the evidence.

The second factor is "the detail and effort with which the defendant communicates to the court the expected evidence or testimony." *Id.* Defendant's counsel went into great detail and effort in his objections to the jail calls, as noted above. But Defendant's counsel could not possibly have listened to over 100 hours of calls while also representing Defendant in a murder trial continuously for fifteen days, nor could he arrange to have an expert listen to them, discuss the issues with the expert, and be prepared to respond. Defendant could not inform the court of what evidence he may discover based on the phone calls or what his expert witness's response would be, just as the defendant in *Barlowe* could not inform the court of what opinion another expert may have upon reviewing the blood spatter and the State's report. But the defendant in *Barlowe* was entitled to have time to get a review by a blood spatter expert so he could prepare for trial. *Barlowe* did not require the defendant to demonstrate the requested review by a blood spatter expert would be favorable to his case; such a standard would be impossible.

The third factor is "the materiality of the expected evidence to the defendant's case." *Id.* On the Sunday evening before trial, the State recognized that one of the most effective ways to rebut Dr. Corvin's testimony regarding Defendant's lack of capacity would be to attack the evaluation itself. The State could not legitimately refute that Defendant was intellectually disabled; its own expert agreed. The State attempted to refute Defendant's diagnosis of bipolar disorder, despite the fact that he had been diagnosed and treated for bipolar disorder before the shooting and his treatment resumed while he was in jail and continued through the time of trial.[10] The State could not refute that Defendant was impaired by alcohol, cocaine, and Benzodiazepine at the time of the shooting. The State could refute only the credibility and reliability of Dr. Corvin's

10. At sentencing, the trial court also recommended that Defendant "receive the benefit of mental healthcare treatment within the Department of Adult Corrections."

report and his opinion on effects of these factors on Defendant's mental capacity. By attacking Dr. Corvin's evaluation with jail calls Dr. Corvin never had an opportunity to hear or respond to, the State sought to attack Defendant's only defense. The fact that the calls were used only as rebuttal evidence entirely eliminated Defendant's ability to respond.

The last factor is the "the gravity of the harm defendant might suffer as a result of a denial of the continuance." *Id.* Defendant was unable to respond to the jail calls used to attack Dr. Corvin's evaluation. Because the evidence was presented in rebuttal, and Defendant's counsel had no opportunity to prepare any surrebuttal evidence, the State was able to attack his only defense. The majority does not appear to appreciate the potential significance of Defendant's inability to respond.

Prejudice is presumed if the likelihood that " 'any lawyer, even a fully competent one, could provide effective assistance' is remote." *Rodgers*, 352 N.C. at 124, 529 S.E.2d at 675 (quoting *Tunstall*, 334 N.C. at 329, 432 S.E.2d at 336). Defendant's counsel was fully competent, but he could not listen to over 100 hours of jail calls while he was the sole counsel of record representing Defendant in a jury trial. Nor could he do any investigation those calls may require or discuss the calls with Dr. Corvin or any other expert. No attorney could provide effective assistance under these circumstances. The only thing Defendant's attorney could do was preserve the issue for appellate review by objecting strenuously to the State's use of the jail calls, stating the constitutional basis for those objections, and renewing those objections at every opportunity during the trial. He did exactly that.

Under the correct standard of review, reviewing *de novo* the legal issue based upon all of the circumstances presented, I would hold the trial court erred in denying Defendant's motion to bar the State from using the jail calls identified as evidence the evening before the trial started, or, in the alternative, to continue the trial. Defendant was denied his right to effective assistance of counsel by his counsel's inability to review the jail calls or prepare for their use as needed for all stages of the trial: jury selection, opening arguments, examination of witnesses, preparing for the rebuttal evidence, and potential surrebuttal evidence. Because "the error amounts to a violation of defendant's constitutional rights, it is prejudicial unless the State shows the error was harmless beyond a reasonable doubt." *Barlowe*, 157 N.C. App. at 253, 578 S.E.2d at 662-63 (citing N.C. Gen. Stat. § 15A-1443(b) (2002)). "The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b).

The State has not even attempted to address its burden of showing the error was harmless beyond a reasonable doubt. Instead, the State argues that "[u]nless defense can show that the prosecution acted in bad faith in not providing the phone calls earlier, such 'failure to preserve potentially useful evidence does not constitute a denial of due process of law.' *State v. Graham*, 200 N.C. App. 204, 209, 683 S.E.2d 437, 441 (2009)." Defendant has not argued the State acted in bad faith, and *State v. Graham* deals with an issue of sanctions for an alleged discovery violation where the State impounded the defendant's car in 1996 but "lost" it at some point before trial.

Here, the State candidly admitted it did not obtain the jail calls for the purpose of addressing incapacity but instead was attempting to find information regarding a particular witness, Defendant's girlfriend. Once the prosecutor determined that "we were not going to get any useful information" regarding the girlfriend, he "instructed people to stop listening to them" and informed Defendant's counsel he did not intend to use the jail calls. But on the Sunday before trial, it "dawned on" the prosecutor that "we do have recordings or we might" of Defendant on the day of his evaluation by Dr. Corvin. It took "quite a while" for the prosecutors to "figure out these jail calls as far as the dates that they were made" because the calls were in a different format than they have previously received. The State is correct there is no indication it acted in "bad faith" in changing its position as to use of the jail calls at the last minute, but the absence of bad faith does not change Defendant's counsel's ability to provide effective representation. In *Barlowe*, there was no indication of bad faith by the State in its failure to provide the blood-spattered pants or report regarding the evidence to defendant a few days before trial. 157 N.C. App. 249, 578 S.E.2d 660. The relevant inquiry was not why the State failed to produce the evidence earlier but the defendant's "lack of opportunity to refute this evidence by informed cross-examination of Agent Garrett, rebuttal of his testimony by someone qualified to express an opinion, or to provide other explanations for the presence of blood spatter on the pants[.]" *Id.* at 257, 578 S.E.2d at 665.

I therefore respectfully dissent and would hold the trial court erred in denying Defendant's motion to bar the State's use of the jail calls or in the alternative to continue the trial to allow counsel time to prepare for the use of the jail calls. I would grant Defendant a new trial.

STATE OF NORTH CAROLINA
v.
DEVONTA OZELL SMITH, DEFENDANT AND INTERNATIONAL FIDELITY INSUR., SURETY, CHRYSTAL M. MYERS, AGENT

No. COA19-790

Filed 16 June 2020

Bail and Pretrial Release—setting aside of bond forfeiture—necessity of grounds under G.S. 15A-544.5(b)

In a case involving a motion to set aside a bond forfeiture, where defendant failed to appear due to his incarceration out-of-state and the bail agent had marked the wrong box on the pre-printed form stating that defendant was incarcerated within North Carolina, the Court of Appeals vacated and remanded the trial court's order setting aside the bond forfeiture (drafted by the attorney for the school board) because it omitted the undisputed fact that defendant was incarcerated out-of-state and failed in its sole conclusion of law to list any grounds under N.C.G.S. § 15A-544.5(b) allowing for setting aside a bond forfeiture.

Appeal by Cumberland County Board of Education from Order entered 31 May 2019 by Judge James F. Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 18 February 2020.

Cumberland County Board of Education, by Nickolas J. Sojka, Jr., for plaintiff-appellant Cumberland County Board of Education.

The Richardson Firm, PLLC, by Matthew H. Richardson, for third-party defendant-appellee Chrystal M. Myers.

Tharrington Smith, L.L.P., by Stephen G. Rawson, and North Carolina School Boards Association, by Allison B. Schafer, for amicus North Carolina School Boards Association.

HAMPSON, Judge.

Factual and Procedural Background

The Cumberland County Board of Education (Board)[1] appeals from the trial court's Order Granting Motion to Set Aside Forfeiture (Order)

1. "The Board's status as appellant in the instant case is due to its status as the ultimate recipient of the 'clear proceeds' of the forfeited appearance bond at issue herein,

under N.C. Gen. Stat. § 15A-544.5. The Record before us tends to show the following:

On 31 October 2018, Devonta Ozell Smith (Defendant) failed to appear in Cumberland County Superior Court on two criminal charges. On 15 November 2018, the trial court issued a Bond Forfeiture Notice ordering the forfeiture of an appearance bond for Defendant in the amount of $25,000.00 posted by Chrystal M. Myers (Myers) as Bail Agent on behalf of International Fidelity Insurance Company (Surety). The Bond Forfeiture Notice set a final judgment date of 20 April 2019, on or before which a motion to set aside forfeiture could be filed. The Bond Forfeiture Notice was served on Myers and Surety on 21 November 2018.

On 15 April 2019, Myers filed a Motion to Set Aside Forfeiture utilizing the pre-printed form, Form AOC-CR-213. The form lists the seven exclusive statutory reasons—under N.C. Gen. Stat. § 15A-544.5(b)—for which a bond forfeiture may be set aside and includes corresponding boxes for a movant to mark the specific reason(s) alleged for setting aside the forfeiture. *See* N.C. Gen. Stat. § 15A-544.5(b) (2019). On this form, Myers checked Box 6 comporting with N.C. Gen. Stat. § 15A-544.5(b)(6):

> The defendant was incarcerated in a unit of the Division of Adult Correction and Juvenile Justice and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the state at the time of the failure to appear as evidenced by a copy of an official court record or copy of a document from the Division of Adult Correction and Juvenile Justice or Federal Bureau of Prisons, including an electronic record.

Myers attached to her Motion a letter from a United States probation officer from the Eastern District of North Carolina, stating: "Our records show that [Defendant] is currently in U.S. Marshal's custody, and being housed at Piedmont Regional Jail in Farmville, VA. The records further show that he has been in federal custody since March 6, 2018."

On 3 May 2019, the Board filed an Objection to the Motion to Set Aside Forfeiture. In its Objection, the Board pointed out Myers's Motion, on behalf of Surety, established Defendant was incarcerated in Virginia. The Board further alleged, "[o]ur research has indicated that the Defendant has been in the Piedmont Regional Jail in Farmville, VA since September 12,

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pursuant to Article IX, § 7 of the North Carolina Constitution." *State v. Chestnut*, 255 N.C. App. 772, 772 n.1, 806 S.E.2d 332, 333 n.1 (2017) (citation and quotation marks omitted).

2018, and he is still currently incarcerated at this jail." The Board claimed Myers's Motion should be denied because Defendant was incarcerated in Virginia and not North Carolina and thus the specific requirements of N.C. Gen. Stat. § 15A-544.5(b)(6) for setting aside Defendant's bail forfeiture—including requiring Defendant be incarcerated "within the borders of the State"—were not met. *Id.* § 15A-544.5(b)(6).

The trial court held a hearing on Myers's Motion and the Board's Objection on 13 May 2019. At this hearing, the attorney for the Board reasserted that while Myers's Motion alleged Defendant was incarcerated within the borders of North Carolina, Defendant was, in fact, incarcerated in Virginia and therefore Myers's Motion was deficient and should be denied. The Board's attorney acknowledged the separate statutory ground for setting aside the bond forfeiture under N.C. Gen. Stat. § 15A-544.5(b)(7)—lining up with Box 7 on Form AOC-CR-213—in the circumstance a defendant is "incarcerated in a local, state, or federal detention center, jail or prison located anywhere within the borders of the United States at the time of the failure to appear[.]"[2] *Id.* § 15A-544.5(b)(7). However, the Board's attorney contended this ground was not met because it contains a separate 10-day notice provision to the District Attorney's Office and "there is no evidence that, that was ever done." The Board's attorney summarized his argument:

> So, our objection is that the basis for the set-aside that was claimed in the motion is just factually incorrect. If they had gotten the correct basis, then they would have been up against that ten days. And there's no way to do that on the very last day when the judgment became final.

In response, Myers, proceeding *pro se*, argued she had, in fact, timely served notice on the District Attorney's Office of Defendant's

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2. Box 7 on Form AOC-CR-213 provides:

> The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear or between the failure to appear and the final judgment date, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

incarceration in Virginia. Myers further stated she intended to check Box 7 but instead "checked the wrong box." She requested the trial court allow her to amend her Motion to reflect the correct ground for the set-aside.

Responding to questions from the trial court, the Board's attorney agreed he did not dispute the fact Defendant was (and remained) in federal custody and agreed there was no way for Defendant to be in court for his court date. The Board's attorney, however, continued to assert there was no evidence of the requisite notice being delivered to the District Attorney's Office under N.C. Gen. Stat. § 15A-544.5(b)(7). Myers again argued she had provided timely notice 10 days prior to filing her Motion and submitted to the trial court a letter[3] dated and file-stamped 5 April 2019, stating:

> I, [Myers], posted the attached bond for [Defendant] on 8/11/17. . . . [Defendant] was taken into Federal Custody on 3-06-18 and is currently being held in the Piedmont Regional Jail in V.A. I received the attached Bond Forfeiture notice indicating [Defendant] failed to appear in Superior Court on 10/31/18 for case 17CRS060527. Since [Defendant] was in Federal Custody at the time of the failure to appear, Per G.S. 15A-544.5, I must service Notice on the D.A. at least 10 days prior to the filing of a Motion to Set Aside with documentation attached. This notice will be clocked in on today's date 4/5/19 and served by placing a copy in the District Attorney's box by hand delivery. I will file the Motion to Set Aside on 4/15/19 with a copy of this notice given and required documentation.

The trial court then turned apparently to a member of the District Attorney's Office—a Mr. Paschal—and asked if the District Attorney's Office understood Defendant was in federal custody, and Mr. Paschal

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3. On 30 October 2019, Myers filed a Rule 9(b)(5) Supplement to the Printed Record on Appeal to include this letter in the Record on Appeal. *See* N.C.R. App. P. 9(b)(5)(a) (2019) (allowing a responding party to supplement the record on appeal "with any items that could otherwise have been included pursuant to this Rule 9"). On 4 November 2019, the Board filed a Motion to Strike this letter from the Record on Appeal, which was referred to this panel on 8 November 2019. Because the letter at issue was submitted for consideration at the hearing on Myers's Motion—and thus could "otherwise have been included" in the Record—we deny the Board's Motion to Strike the letter from the Record. *Id.*; *cf. id.* 11(c) (providing items "not filed, served, *submitted for consideration*, admitted, or for which no offer of proof was tendered, shall not be included" in the record on appeal (emphasis added)).

responded: "Yes, sir."[4] Following argument, the trial court rendered its ruling:

> THE COURT: All right. I find as a fact that the Defendant did not show up for Court on the day he was supposed to, but everybody agrees he was in federal court custody. It was impossible for him to do so. He was in Virginia. Apparently the wrong paperwork was filed. In an effort to be equitable, fair, and just, the forfeiture is set aside. Will you draw that up for us?
>
> [BOARD'S ATTORNEY]: I'd be happy to, Your Honor.
>
> THE COURT: Thank you. Make it sound good, too. Make it sound better than I just said it.
>
> (Laughter.)

The Board's attorney, however, prepared a proposed Order that failed to reflect the trial court's key findings, including no mention of the fact Defendant was in federal custody in Virginia and unable to appear and that these facts were not disputed. In addition, the proposed Order contained no reference to the fact Myers had filed the wrong paperwork or the potential existence of grounds to set aside the bond forfeiture under N.C. Gen. Stat. § 15A-544.5(b)(7). Instead, the proposed Order prepared by the Board's attorney merely recited the Board's grounds for objecting to Myers's Motion under Section 15A-544.5(b)(6) and included only the following Findings of Fact and Conclusions of Law:

> **FINDINGS OF FACT**
>
> 1. [Myers], Agent for Surety filed a "Motion To Set Aside Forfeiture for this case on April 15, 2019, pursuant to N.C.G.S. §15A-554.5(6) stating that "*The defendant was incarcerated in a unit of the Division of Adult Correction and Juvenile Justice and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the state at the time of the failure to appear as evidenced by a copy of an official court record or copy of*

4. The Record before us does not make it expressly clear Mr. Paschal was a member of the District Attorney's Office and does not include any appearance on behalf of the State. At this criminal session of court, however, in the context of the hearing, it is not unreasonable to infer the trial court was seeking the State's position. In any event, what is clear is that the Record before us discloses no objection or dispute by the District Attorney's Office to the fact Defendant was in federal custody and unable to appear for his criminal trial or complaint the State did not have sufficient notice of this fact.

> *a document from the Division of Adult Correction and Juvenile Justice or Federal Bureau of Prisons, including an electronic record*," and properly served by personal deliver on April 18, 2019.
>
> 2. The [Board] filed an Objection and Notice of Hearing for this case on May 3, 2019 on the basis that the documentation attached to Surety's motion and filed with the Court in fact confirmed that the Defendant was not incarcerated in the State of North Carolina at the time of the failure to appear, and set this matter for hearing on May 13, 2019.
>
> **CONCLUSIONS OF LAW**
>
> The Court having received the Surety's Motion to Set Aside Forfeiture, the [Board's] Objection thereto, and the other contents of the Court's file along with arguments of counsel and the surety's representative in open court, and in an effort to be equitable, fair, and just, hereby ORDERED, ADJUDGED AND DECREED that the Surety's Motion to Set Aside Forfeiture is GRANTED.

The trial court signed this proposed Order—submitted on the personalized ruled legal stationery of the Board's attorney—on 29 May 2019, and it was filed and entered on 31 May 2019.[5] The Board timely filed Notice of Appeal from this Order on 27 June 2019.

Issue

The dispositive issue on appeal is whether the trial court's Findings of Fact and Conclusions of Law in its written Order support its decision to set aside the bond forfeiture.

Analysis

I. Standard of Review

"In an appeal from an order setting aside a bond forfeiture, the standard of review for this Court is whether there was competent evidence

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5. We acknowledge it is a well-accepted practice for a trial court to request counsel for a party to draft a proposed order and there are good reasons for this practice. This Court has, however, also emphasized in employing this practice, "[i]t is important that our trial courts not only be impartial, but also have every appearance of impartiality. We strongly discourage judges from signing orders prepared on stationery bearing the name of any law firm." *In re T.M.H.*, 186 N.C. App. 451, 455-56, 652 S.E.2d 1, 3 (2007); *see also Heatzig v. MacLean*, 191 N.C. App. 451, 461, 664 S.E.2d 347, 355 (2008) (citations omitted).

to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Chestnut*, 255 N.C. App. at 773, 806 S.E.2d at 334 (citations and quotation marks omitted); *see also* N.C. Gen. Stat. § 15A-544.5(h) (providing in part that "[a]n order on a motion to set aside a forfeiture is a final order or judgment of the trial court for purposes of appeal. Appeal is the same as provided for appeals in civil actions."). "Questions of law, including matters of statutory construction, are reviewed *de novo*." *Chestnut*, 255 N.C. App. at 774, 806 S.E.2d at 334 (citation omitted).

II. Motion to Set Aside Bail Bond Forfeiture

Sections 15A-544.1 through 15A-544.8 of our General Statutes govern bail bond forfeitures in North Carolina.

> If a defendant who was released . . . upon execution of a bail bond fails on any occasion to appear before the court as required, the court shall enter a forfeiture for the amount of that bail bond in favor of the State against the defendant and against each surety on the bail bond.

N.C. Gen. Stat. § 15A-544.3(a) (2019). "A forfeiture entered under [Section] 15A-544.3 becomes a final judgment of forfeiture 'on the one hundred fiftieth day after notice is given under [Section] 15A-544.4 if (1) no order setting aside the forfeiture under [Section] 15A-544.4 is entered on or before that date; and (2) no motion to set aside the forfeiture is pending on that date.' " *Chestnut*, 255 N.C. App. at 774, 806 S.E.2d at 334 (alterations omitted) (quoting N.C. Gen. Stat. § 15A-544.6 (2015)).

"The exclusive avenue for relief from forfeiture of an appearance bond (where the forfeiture has not yet become a final judgment) is provided in [Section] 15A-544.5." *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 9 (2012) (citation and quotation marks omitted). Under Section 15A-544.5(a), "[t]here shall be no relief from a forfeiture except as provided in this section. The reasons for relief are those specified in subsection (b) of this section." N.C. Gen. Stat. § 15A-544.5(a); *see also State v. Rodrigo*, 190 N.C. App. 661, 664, 660 S.E.2d 615, 617 (2008) ("Relief from a forfeiture, before the forfeiture becomes a final judgment, is exclusive and limited to the reasons provided in N.C. Gen. Stat. § 15A-544.5." (citations omitted)); *State v. Knight*, 255 N.C. App. 802, 810, 805 S.E.2d 751, 756 (2017) (recognizing "the plain language used in [Section] 15A-544.5 and the statute's legislative history demonstrate that the General Assembly intended to limit a trial court's authority in setting aside a bond forfeiture before the entry of a final judgment").

Relevant to this appeal, Section 15A-544.5(b) in turn provides:

> Except as provided by subsection (f) of this section, a forfeiture shall be set aside for any one of the following reasons, and none other:
>
> . . . .
>
> (6) The defendant was incarcerated in a unit of the Division of Adult Correction and Juvenile Justice of the Department of Public Safety and is serving a sentence or in a unit of the Federal Bureau of Prisons located within the borders of the State at the time of the failure to appear as evidenced by a copy of an official court record or a copy of a document from the Division of Adult Correction and Juvenile Justice of the Department of Public Safety or Federal Bureau of Prisons, including an electronic record.
>
> (7) The defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, or any time between the failure to appear and the final judgment date, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat. § 15A-544.5(b)(6)-(7). A party seeking to set aside a forfeiture must make a timely written motion "stat[ing] the reason for the motion and attach[ing] to the motion the evidence specified in subsection (b) of this section." *Id.* § 15A-544.5(d)(1)(d). Our Court has previously held a trial court lacks authority to allow a motion to set aside that is "not premised on any ground set forth in [Section] 15A-544.5." *State v. Sanchez*, 175 N.C. App. 214, 218, 623 S.E.2d 780, 782 (2005).

The Board, tracking the written Order, argues because Myers's Motion only listed Subsection (6) as grounds for setting aside the bond

forfeiture, and as there is no dispute Defendant was not incarcerated in North Carolina, there is no competent evidence to support the trial court's decision to set aside the forfeiture. The Board further asserts the trial court lacked any discretionary authority to set aside a bond forfeiture for a reason other than one provided in Section 15A-544.5(b) and therefore the trial court's written conclusion—setting aside the forfeiture "in an effort to be equitable, fair, and just"—was error. Generally speaking, the Board is correct. The Record establishes Defendant was not incarcerated in North Carolina. It is also well established a trial court lacks discretionary authority to set aside a bond forfeiture for a reason not listed in Section 15A-544.5(b). *See id.* (explaining a trial court lacks authority to allow a motion to set aside that is "not premised on any ground set forth in [Section] 15A-544.5").

Indeed, Myers does not contest these points. Rather, Myers argues the trial court did not intend to set aside the forfeiture under Subsection (6) or for general concepts of equity, fairness, and justice. Myers contends the trial court instead intended to—in an effort to be equitable, fair, and just—treat her Motion as one under Subsection (7) and to grant relief under that statutory subsection. It seems apparent from the context of the hearing and the trial court's orally rendered ruling this may well have been the trial court's intent.

During the course of the hearing, Myers acknowledged she had checked the wrong box but requested the trial court allow her to amend her Motion and to proceed under Subsection (7). Myers submitted to the trial court a file-stamped document providing some evidence indicating she provided notice under Subsection (7) to the District Attorney's Office. Counsel for the Board agreed Defendant had been and remained in federal custody and that it was impossible for Defendant to appear for his court date. In orally rendering its ruling, the trial court stated:

> I find as a fact that the Defendant did not show up for Court on the day he was supposed to, but everybody agrees he was in federal court custody. It was impossible for him to do so. He was in Virginia. Apparently the wrong paperwork was filed. In an effort to be equitable, fair, and just, the forfeiture is set aside.

It seems evident the basis for the trial court's ruling was that where everyone agreed Defendant was in federal custody in Virginia and unavailable for his court appearance, the trial court would not deny the Motion because the wrong paperwork was filed. Instead, because the fact of Defendant's incarceration in Virginia was known and not disputed, the trial court likely intended to allow Myers's Motion

to be amended out of fairness to reflect the correct ground under Subsection (7) and, in turn, grant the corrected and amended Motion.[6]

Even though we agree Myers more likely rightly captures the trial court's intended ruling based on the trial court's orally rendered findings and ruling, the trial court's written Order, as drafted by the Board's attorney, does not reflect the trial court's oral findings, and it is the written Order that controls for purposes of appeal. *See*, *e.g.*, *Durham Hosiery Mill Fltd. P'ship v. Morris*, 217 N.C. App. 590, 593, 720 S.E.2d 426, 428 (2011) ("The general rule is that the trial court's written order controls over the trial judge's comments during the hearing." (citation omitted)); *Fayetteville Publ'g Co. v. Advanced Internet Techs.*, *Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008) ("The trial judge's comments during the hearing as to its consideration of the entire case file, evidence and law are not controlling; the written court order as entered is controlling." (citation omitted)).

The written and entered Order, drafted by the Board's attorney, omits entirely the undisputed facts—and the trial court's oral findings—Defendant was in custody in Virginia and that there was no dispute, as a result, it was not possible for Defendant to appear for his court date. It also contains no mention of Myers's filing the wrong paperwork, her request for amendment, her submission of the file-stamped letter referencing service of notice on the District Attorney's Office, or even N.C. Gen. Stat. § 15A-544.5(b)(7).

To the contrary, the written Order contains only two findings merely reciting the Board's basic argument: Myers's Motion checked Box 6 requiring Defendant be incarcerated within the borders of North Carolina and Defendant was not incarcerated in North Carolina. In its sole Conclusion of Law, the trial court's Order does not mention any of the grounds listed under Section 15A-544.5(b) allowing for setting aside a bond forfeiture. S*ee* N.C. Gen. Stat. § 15A-544.5(b)(1)-(7). Instead, the Order simply concludes, "in an effort to be equitable, fair, and just . . . the Surety's Motion to Set Aside Forfeiture is GRANTED." Because the Order as entered fails to identify any permissible ground for setting aside the forfeiture under Section 15A-544.5(b), the trial court's Order cannot

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6. The Board takes issue with the notion the trial court could grant amendment of the Motion, arguing Myers did not technically make a formal motion to amend and the trial court did not technically state it was granting a motion to amend. However, it is clear on the Record Myers was making a request for amendment to the trial court and, in gist, the trial court spent the hearing trying to ascertain why it should not treat Myers's Motion as filed under Subsection (7) when there was little to no dispute on the facts.

stand.[7] *See Sanchez*, 175 N.C. App. at 218, 623 S.E.2d at 782 (explaining a trial court lacks authority to allow a motion to set aside that is "not premised on any ground set forth in [Section] 15A-544.5").

Moreover, our Supreme Court has explained, "[o]rdinarily when there is a failure to make a material finding of fact, the case must be remanded for a proper finding." *State v. Bryant*, 361 N.C. 100, 104, 637 S.E.2d 532, 535 (2006) (alterations, citation, and quotation marks omitted). Whether remand is a proper remedy depends on whether sufficient evidence in the record exists to support such a finding. *Cf. id.* at 104, 637 S.E.2d at 535-36 (concluding "remand is not a proper remedy . . . because the record lacks sufficient evidence to support such a finding"); *but see State v. Morgan*, 372 N.C. 609, 618, 831 S.E.2d 254, 260 (2019) (remanding "to the Court of Appeals for further remand to the trial court for a finding of whether good cause exists to revoke defendant's probation despite the expiration of his probationary period and—assuming good cause exists—to make a finding in conformity with [N.C. Gen. Stat.] § 15A-1344(f)(3)").

Review of the transcript from the hearing in this case shows the trial court was asked to consider Myers's request under Subsection (7). It is undisputed Defendant was in federal custody in Virginia. Myers contended she provided proper notice and submitted to the trial court file-stamped documentation weighing on whether she, in fact, provided proper notice under Subsection (7) to the District Attorney's Office. However, the trial court's Order failed to make material findings of fact, conclusions of law, or any ruling as to whether (1) Myers's Motion should properly be considered under N.C. Gen. Stat. § 15A-544.5(b)(7) and (2) the bond forfeiture should be set aside under N.C. Gen. Stat. § 15A-544.5(b)(7). Thus, the trial court's written Order fails to address the key material issues at issue in this case. Consequently, we vacate the trial court's Order and remand this matter to the trial court for additional findings and, fundamentally, a determination of whether the bond forfeiture should be set aside under Subsection 15A-544.5(b)(7). *See Morgan*, 372 N.C. at 618, 831 S.E.2d at 260.

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7. It bears mentioning Form AOC-CR-213 actually contains a separate section in which the trial court may simply enter its order on an objection to a motion to set aside the bond forfeiture, providing the trial court the option of checking boxes finding or not finding "the moving party has established one or more of the reasons specified in [Section] 15A-544.5 for setting aside that forfeiture" and either allowing or denying the motion to set aside the forfeiture. Here, the trial court entered a separate order, and we leave aside the question of whether the trial court could simply have utilized the form.

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order and remand this matter to the trial court for entry of a new order determining whether the bond forfeiture should be set aside under N.C. Gen. Stat. § 15A-544.5(b)(7).

VACATED AND REMANDED.

Chief Judge McGEE and Judge BRYANT concur.

STATE OF NORTH CAROLINA
v.
BILLY RAY WILLIAMSON, DEFENDANT

No. COA19-692

Filed 16 June 2020

1. Appeal and Error—preservation of issues—motion to dismiss—new grounds asserted on appeal

At a trial where defendant moved to dismiss a charge of attempted robbery with a dangerous weapon based solely on grounds of insufficiency of the evidence, defendant failed to preserve for appellate review his argument that his motion should have been granted because of a fatal variance between the indictment against him and the evidence presented at trial.

2. Robbery—attempted—dangerous weapon—sufficiency of evidence

The trial court improperly denied defendant's motion to dismiss a charge of attempted robbery with a dangerous weapon for insufficiency of the evidence, where neither the air pistol nor the pellet gun that defendant used when trying to rob a tire shop are considered "firearms" or "dangerous weapons" as a matter of law, and where the State failed to present evidence of the guns' capability to inflict death or great bodily harm.

3. Robbery—attempted common law robbery—trial court's expression of opinion—prejudice analysis

In an appeal from a conviction for attempted robbery with a dangerous weapon, which was reversed and remanded for resentencing on the lesser included offense of attempted common law

robbery, defendant could not show that the trial court committed prejudicial error by instructing a defense witness not to describe the guns used during the robbery of a tire shop as "airsoft pistols." Even if the trial court's instruction had been an improper expression of judicial opinion, it had no bearing on defendant's theory of defense (that he had a claim of right to the tire machine he tried to take), and there already was sufficient evidence to support an attempted common law robbery conviction.

4. Stipulations—to achieving habitual felon status—colloquy with defendant—required

During sentencing at a trial for robbery and attempted robbery, the trial court erred in accepting defendant's stipulation to achieving habitual felon status without first addressing defendant personally regarding the stipulation and conducting the required guilty plea colloquy set forth in N.C.G.S. § 15A-1022.

Appeal by Defendant from judgment entered 27 February 2019 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 14 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Neal T. McHenry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Candace Washington, for Defendant.

BROOK, Judge.

Billy Ray Williamson ("Defendant") appeals from judgment entered upon jury verdicts for common law robbery, attempted robbery with a dangerous weapon, and having attained the status of habitual felon. On appeal, Defendant argues the trial court erred in denying Defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon based on both fatal variance and insufficiency of the evidence. Defendant further argues that the trial court impermissibly expressed its opinion during witness testimony and jury instructions and that those remarks prejudiced him and infringed his right to a fair trial. Lastly, Defendant argues the trial court erred in accepting his stipulation to habitual felon status because it did not conduct the requisite guilty plea colloquy, nor did it submit the issue to the jury.

We conclude that Defendant's fatal variance argument is not preserved for our review. We agree with Defendant, however, that the trial

court erred in denying Defendant's motion to dismiss the attempted robbery with a dangerous weapon charge based on insufficiency of the evidence and in accepting his stipulation as to having attained the status of habitual felon. For the following reasons, we also hold that Defendant has not demonstrated that any allegedly improper opinions expressed by the trial court amounted to prejudicial error.

I. Factual and Procedural Background

In February 2018, Blaise Gamua opened a tire shop in Greensboro, North Carolina, and Defendant and Defendant's fiancée, Erin Saunders, supplied Mr. Gamua with tires to sell at his shop. Defendant and Ms. Saunders would bring used tires to Mr. Gamua, and Mr. Gamua would select the tires he wanted and pay Defendant and Ms. Saunders between $2 and $5 a tire. On or around 25 June 2018, Defendant and Mr. Gamua agreed that Defendant could buy a used tire machine that was "sitting in" the shop unused in exchange for $900 worth of used tires. They agreed that the value of the tires Defendant delivered to Mr. Gamua each day would go toward payment for the tire machine.

On the afternoon of 28 June 2018, Defendant and Ms. Saunders went to Mr. Gamua's tire shop to drop off tires. However, a dispute arose between Mr. Gamua and Ms. Saunders over the value of tires they had provided to Mr. Gamua. Ms. Saunders claimed they had already put $500 toward the tire machine, and Mr. Gamua argued that there was "no way. It's not been $500." Mr. Gamua testified that Ms. Saunders started yelling at him and accused him of "trying to play" them. Defendant did not argue and instead stated, "Babe, don't worry. I know what to do. Let's go."

Later that evening, Defendant and Ms. Saunders returned to Mr. Gamua's tire shop with their son and their son's girlfriend. Mr. Gamua was not there; another employee, Tyrone McNeill, had started his overnight shift. Mr. McNeill testified that when Defendant arrived at the tire shop, Defendant stated, "I have a gun. I come to get my tire machine." Mr. McNeill testified that Defendant had a gun holstered on his pants and then put it on the dashboard of his truck. Defendant then walked away from the gun to load the tire machine. It took Defendant 30 minutes to load the tire machine onto his truck, and Mr. McNeill testified that, though he felt threatened by Defendant and was scared during this time, Defendant did not directly threaten him. Security footage that was played for the jury showed that during the 30 minutes Defendant was loading the tire machine, Mr. McNeill talked with Ms. Saunders, smoked a cigarette she had given him, and stood by watching as they loaded the tire machine. Mr. McNeill also helped Defendant load the tire

machine. Defendant, Ms. Saunders, their son, and their son's girlfriend then left with the tire machine.

Around 8:00 p.m., Mr. Gamua returned to the tire shop and noticed that the tire machine was gone. Mr. McNeill told Mr. Gamua that Defendant had taken the machine and to "be careful. [Defendant] has a gun." Mr. Gamua testified that he went to get some gas while he waited for Defendant to return. When Mr. Gamua came back to the tire shop, Defendant had returned to take another machine. Ms. Saunders testified that Mr. Gamua drove into the shop at a very fast speed, jumped out of his car, and immediately asked about the tire machine they had taken. She testified that she told Mr. Gamua that they had already paid for the tire machines, and Mr. Gamua called her a liar.

Defendant then walked towards Mr. Gamua's car with what appeared to be a small pistol in his waist. Mr. Gamua told Defendant he could not take the tire machine, and Defendant pulled out the gun and pointed it at his head. Mr. Gamua testified that he raised his hands up and stated, "[Defendant], please don't shoot me. Do not do this." Defendant proceeded to yell at Mr. Gamua. Mr. Gamua testified that Defendant then went to his truck and pulled out another gun that Mr. Gamua testified looked like a sniper rifle and pointed it at Mr. Gamua from a farther distance. Mr. Gamua testified he believed both of the guns Defendant pointed at him were real firearms. Mr. Gamua called 911, and Defendant left with Ms. Saunders, their son, and their son's girlfriend.

On 29 June 2018, Detective C.F. Holliday served arrest warrants on Defendant and obtained Defendant's consent to search his residence. The search team found a handgun revolver, a holster, and a "long gun type rifle with a scope." The search team also found what appeared to be a gun magazine but actually held BBs or pellets. Detective Holliday also testified that they recovered six pellets[1] that "appeared to go with" the revolver. However, she acknowledged she did not "understand the whole makeup" of the pellets. Detective Holliday further testified that the handgun found in Defendant's home that she believed was used on 28 June 2018 had a C02 cartridge. Detective Holliday did not testify how either weapon worked or what their capabilities were, and both she and the State subsequently conceded that she was not a firearms expert.

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1. These projectiles are referred to as "ammunition" in the evidence log, "BBs or pellets or something" and "bullets" by Detective Holliday, and "pellets" in the trial transcript. For the sake of consistency and clarity, we refer to the projectiles in question as pellets throughout this opinion. As discussed below in greater detail, the exact nomenclature used for the projectiles is not outcome determinative.

Defendant was charged with robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and having attained the status of habitual felon. The robbery with a dangerous weapon and attempted robbery with a dangerous weapon charges pertained, respectively, to the initial interaction between Defendant and Mr. McNeill and the subsequent interaction between Defendant, Mr. Gamua, and Mr. McNeill.

Defendant was tried before a jury on 25 February 2019. At the close of the State's evidence, Defendant moved to dismiss for insufficient evidence. Defendant argued that the State failed to show that the weapons used during the commission of the offenses were dangerous weapons and failed to show that they were capable of threatening human life since the evidence showed that one of the weapons operated with C02 and not gun powder and the other was a pellet rifle. The trial court denied Defendant's motion, stating,

> THE COURT: I have a pellet rifle and I use it to hunt squirrels. And from a distance of 30 to 35 feet, I can put that pellet plumb through a squirrel and it - - squirrels have tough hi[d]es, so, you know. . . . making my point, though. It's not a BB gun. It's not an air-soft. In fact, neither of these are BB guns.
>
> The pistol is an intriguing thing to me[] because I've never seen anything like it. It has a - - it has a cartridge and a jacket, a hollow-point jacket on the end of it; that while that hollow-point would probably mushroom out and not kill you, it might very well penetrate the skin and it would hurt like the dickens, much more than a BB would or certainly more than an air-soft.
>
> . . .
>
> Now the jury instructions, as I have them, tell the jury that they can infer from the evidence that it appeared to be a dangerous weapon; therefore - - and *there's been no testimony in the evidence. A lot of what I'm talking about, these guns, comes from my own personal observations of them [] because I [] have a working knowledge of how a pellet rifle works. But the detective did not profess to know anything about these weapons and . . . how they work or what they shot or anything else. And Mr. Gamua certainly did not, because he said he's not familiar with guns.*

(Emphasis added.)

Defendant then called his only witness, Ms. Saunders. Ms. Saunders testified that "[Mr. Gamua] had called us in prior days to come get those machines, otherwise we would not have went and got them." Ms. Saunders testified that prior to driving to Mr. Gamua's tire shop on 28 June 2018, she and Defendant were with their son and their son's girlfriend at the park playing with "air-soft pistols." She testified that was the reason Defendant had the two weapons when they went to Mr. Gamua's tire shop later that evening. The trial court then interrupted her and stated:

> THE COURT: Okay. Let me - - let me stop for just a minute. I want to instruct [Ms.] Saunders that these are not air-soft pistols. They are in no way to be characterized as that[] because they're simply not. So you can call them whatever else, pellet . . . whatever, but not airsoft.

At the close of all evidence, Defendant renewed his motion to dismiss, and the trial court again denied the motion. The trial court then instructed the jury on robbery with a dangerous weapon, attempted robbery with a dangerous weapon, common law robbery, and attempted common law robbery.

During jury deliberations, the trial court put on the record that Defendant was "willing to stipulate to having achieved the status of habitual felon, so that it will not be necessary to put on evidence or any testimony" if Defendant was convicted of the felony.

The jury returned verdicts of guilty of common law robbery for the offense against Mr. McNeill and of attempted robbery with a dangerous weapon for the subsequent offense against Mr. Gamua and Mr. McNeill. The trial court consolidated the convictions and sentenced Defendant as a habitual felon to 102 to 135 months' active imprisonment. Defendant timely noticed appeal.

II. Analysis

On appeal, Defendant raises three arguments. First, that the trial court erred in denying Defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon based on both fatal variance and insufficiency of the evidence. Second, that the trial court impermissibly expressed its opinion (1) during witness testimony such that it discredited the witness and "undercut" Defendant's theory that "he had provided enough used tires to have a claim of right to the tire machines," and (2) when it instructed the jury on the charge of attempted robbery with a dangerous weapon and whether the State had proved that the

weapon was dangerous. And third, that the trial court erred in accepting Defendant's stipulation as to attaining the status of habitual felon without conducting the requisite colloquy per N.C. Gen. Stat. § 15A-1022.

We hold that Defendant's fatal variance argument is not preserved for our review. We agree with Defendant that the trial court erred in denying Defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon based on insufficient evidence. Given our reversal of the denial of the motion to dismiss, we do not reach Defendant's argument as to any alleged improper statements during jury instructions on this offense and hold that Defendant has failed to show that he was prejudiced by any alleged improper statement during witness testimony. Finally, the State concedes, and we agree, that the trial court erred in accepting Defendant's stipulation to habitual felon status without complying with N.C. Gen. Stat. § 15A-1022.

A. Standard of Review

This Court reviews the sufficiency of an indictment and a trial court's denial of a motion to dismiss de novo. *State v. Hooks*, 243 N.C. App. 435, 441-42, 777 S.E.2d 133, 138 (2015) (citation omitted). Because the prohibition on the trial court expressing any opinion in the presence of the jury on any question of fact to be decided by the jury and the requirements for accepting a defendant's stipulation to habitual felon status are statutory mandates, *State v. Young*, 324 N.C. 489, 494, 380 S.E.2d 94, 97 (1989) (prohibition on expression of opinion); *State v. Marzouq*, ___ N.C. App. ___, ___, 836 S.E.2d 893, 898 (2019) (guilty plea requirements), they are also subject to de novo review, *State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017). "Under a *de novo* review, th[is C]ourt 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 marks omitted).

B. Motion to Dismiss for Fatal Variance

[1] Briefly, we address Defendant's argument that his motion to dismiss should have been granted because the variance between the evidence presented at trial and the allegation of a firearm in the indictments was fatal.

"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). "In order to preserve a fatal variance argument for

appellate review, a defendant must specifically state at trial that a fatal variance is the basis for his motion to dismiss." *State v. Scaturro*, 253 N.C. App. 828, 833-34, 802 S.E.2d 500, 505 (2017).

Here, Defendant based his motion to dismiss solely on insufficiency of the evidence. Defendant therefore "has waived his right to appellate review of this issue because he failed to properly preserve it at trial." *Id.* at 834, 802 S.E.2d at 505. Though Defendant requests that we review this issue pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, in our discretion we decline to do so.

C. Motion to Dismiss for Insufficiency of the Evidence

[2] Defendant next argues that the trial court erred in denying his motion to dismiss the charges of robbery and attempted robbery with a dangerous weapon because there was insufficient evidence of the use of a dangerous weapon.

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652 (internal marks and citation omitted). "In deciding a motion to dismiss, the evidence should be viewed in the light most favorable to the State." *State v. Mucci*, 163 N.C. App. 615, 618, 594 S.E.2d 411, 414 (2004).

North Carolina General Statutes § 14-87 defines robbery with a firearm or dangerous weapon as the unlawful taking, or attempted taking, of personal property while "having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened[.]" N.C. Gen. Stat. § 14-87(a) (2019). A firearm is defined as "[a] handgun, shotgun, or rifle which expels a projectile by action of an explosion." *Id.* § 14-409.39(2). If a weapon is not a firearm, then "to be considered dangerous under this statute, the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." *State v. Westall*, 116 N.C. App. 534, 538, 449 S.E.2d 24, 27 (1994) (emphasis in original) (internal marks and citation omitted).

"Our Supreme Court has established rules with which to resolve sufficiency of evidence questions in armed robbery cases where the instrument used appears to be[] but may not in fact be a dangerous weapon capable of endangering or threatening life." *State v. Summey*, 109 N.C. App. 518, 528, 428 S.E.2d 245, 251 (1993). Those rules are:

> (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be.
>
> (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened.
>
> (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

State v. Allen, 317 N.C. 119, 124-25, 343 S.E.2d 893, 897 (1986). Our Supreme Court summarized its holdings in this area as follows:

> In an armed robbery case[,] the jury may conclude that the weapon is what it appears to the victim to be in the absence of any evidence to the contrary. If, however, there is any evidence that the weapon was, in fact, not what it appeared to the victim to be, the jury must determine what, in fact, the instrument was. *Finally, if other evidence shows conclusively that the weapon was not what it appeared to be, then the jury should not be permitted to find that it was what it appeared to be.*

Id. at 125, 343 S.E.2d at 897 (emphasis added).

Whether or not the case merits submission to the jury, and if it does then which instruction the jury receives, is dependent on the evidence presented. If a defendant uses "a dangerous weapon *per se*[,] . . . there is a mandatory presumption that the victim's life was *in fact* endangered

or threatened." *State v. Wiggins*, 78 N.C. App. 405, 407-08, 337 S.E.2d 198, 199-200 (1985) (emphasis in original) (upholding instruction that a box cutter was a dangerous weapon as a matter of law where its "sharply pointed razor blade [was] clearly capable of producing death or great bodily harm" and was held "a couple of inches from [the victim's] side[.]"). Where there is "contradictory testimony . . . as to the nature of the weapon used[,]" the jury is permitted, but not required, to infer that the weapon used was what it reasonably appeared to the victim to be. *State v. Duncan*, 136 N.C. App. 515, 516-18, 524 S.E.2d 808, 809-10 (2000) (holding "resolution of this factual dispute within the province of the jury" where the victim testified the defendant used a "two barreled, silver handgun[,]" and the defendant testified that the gun "was incapable of firing a bullet."). The jury, however, should not be so instructed "if other evidence shows conclusively that the weapon was not what it appeared to be," *Allen*, 317 N.C. at 125, 343 S.E.2d at 897, and the State fails to introduce evidence of the weapon's "capability to inflict death or great bodily injury[,]" *State v. Fleming*, 148 N.C. App. 16, 22, 557 S.E.2d 560, 564 (2001).

Pellet guns, BB guns, and air guns (or airsoft guns), "are [not] firearms[] because they do not use gunpowder explosions to propel their projectiles." Jeff Welty, *Air Guns*, UNC School of Government Criminal Law Blog (9 November 2011), https://nccriminallaw.sog.unc.edu/air-guns/ (last visited 4 June 2020); *see also* N.C. Gen. Stat. § 14-409.39(2) (2019) (firearm "expels a projectile by action of an explosion"). In dealing with these non-firearm weapons, our appellate courts have declined to hold that these instruments are dangerous as a matter of law. *See*, *e.g.*, *Fleming*, 148 N.C. App. at 24-25, 557 S.E.2d at 565; *State v. Chapman*, 244 N.C. App. 699, 715-16, 781 S.E.2d 320, 331-32 (2016). Instead, if "a weapon such as a BB gun is determined to be the weapon used in a particular case, the record must contain evidence to support the jury's finding that the instrument was a dangerous weapon." *Fleming*, 148 N.C. App. at 26, 557 S.E.2d at 566. If there is such evidence, then the jury is permitted to determine whether it is a dangerous weapon. *Id.* at 22, 557 S.E.2d at 564. If not, then a defendant is entitled to dismissal of the robbery with a dangerous weapon charge. *Id.* at 26, 557 S.E.2d at 566.

In prior cases involving pellet or BB guns and the like where the defendant did not inflict a serious injury with the weapon, we have held that the State presented adequate evidence to establish the dangerousness of the weapon to merit submission of the charge to the jury.[2] For

2. If such a weapon does inflict serious bodily injury, then the inquiry is resolved. *See*, *e.g.*, *State v. Pettiford*, 60 N.C. App. 92, 99, 298 S.E.2d 359, 393 (1982) ("The victim

example, in *State v. Hall*, 165 N.C. App. 658, 665-66, 599 S.E.2d 104, 108-09 (2004), we held that the State presented sufficient evidence of the dangerous nature of a BB gun that was used during the commission of a robbery by demonstrating that "it was capable of denting a quarter-inch piece of cedar plywood at distances up to two feet" and that the defendant had pointed the weapon at the victim's face from a distance of six to eight inches. Similarly, "there was clearly sufficient evidence to permit the jury to decide whether [the] defendant committed robbery with a dangerous weapon" where evidence showed that (1) the defendant had placed a pellet gun directly against the victim's back; and (2) the pellet gun was capable of "totally penetrating a quarter-inch of plywood[.]" *Westall*, 116 N.C. App. at 540-41, 449 S.E.2d at 28. And, in *Chapman*, the defendant was convicted of robbery with a dangerous weapon after he had aimed an air pistol at a cashier's head and upper body and then pressed the air pistol into the clerk's ribs. 244 N.C. App. at 701, 781 S.E.2d at 323. The State introduced videotaped experiments of a detective shooting the air pistol at a quarter-inch plywood target, and the pistol's user manual which stated that the air pistol was capable of firing projectiles at a speed of 440 feet per second and was dangerous from a distance of 325 yards in order to demonstrate that it was a dangerous weapon for purposes of N.C. Gen. Stat. § 14-87. *Id.* at 716, 781 S.E.2d at 332.

In contrast, in *Fleming*, we concluded that the trial court erred in denying a defendant's motion to dismiss the armed robbery charge where there was no "evidence in the record of the BB gun's capability to inflict death or great bodily injury." 148 N.C. App. at 25, 557 S.E.2d at 565. The only evidence the State presented in support of the charged offense was that the defendant walked into a store, showed the cashier what appeared to be a gun in his waistband, and ordered her to fill a bag with cash. *Id.* at 18, 557 S.E.2d at 561-62. A search incident to arrest revealed that the weapon in the defendant's waist was a BB gun. *Id.*, 557 S.E.2d at 562. While "[the] defendant's case could" have been submitted to the jury for determination of whether the weapon in fact posed a grave danger "[h]ad the State presented" some evidentiary support thereof, dismissal was necessary where it did not. *Id.* at 22, 557 S.E.2d at 564.

The same is true in the instant case. Though Mr. Gamua testified he believed both of the guns were real firearms, and Mr. McNeill testified that he felt threatened by Defendant's gun, the evidence "conclusively"

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was shot [with a pellet gun] at close range and a metal slug lodged in his head[,]" clearly demonstrating that the weapon "was likely to cause death or great bodily harm[.]").

showed "that the weapon[s] w[ere] not what [they] appeared to be[.]" *Allen*, 317 N.C. at 125, 343 S.E.2d at 897. More specifically, the weapons used during the commission of these offenses were not firearms but instead an air pistol powered by a C02 cartridge and a pellet rifle. Accordingly, the State needed to introduce evidence of the weapons' "capability to inflict death or great bodily injury" to merit submission to the jury. *See Fleming*, 148 N.C. App. at 22, 557 S.E.2d at 564. The trial court summarized the evidence on this point best, stating,

> [T]here's been no testimony in the evidence. A lot of what I'm talking about, these guns, comes from my own personal observations of them or because I [] have a working knowledge of how a pellet rifle works. But the detective did not profess to know anything about these weapons . . . how they work or what they shot or anything else. And Mr. Gamua certainly did not, because he said he's not familiar with guns.[3]

Though Detective Holliday testified that she recovered pellets that "appear[ed] to go with the . . . handgun revolver[,]" she also testified that she did not understand their "whole makeup[.]" She acknowledged and the State later underlined that Detective Holliday "wasn't an expert [on firearms] and she really didn't know" how either weapon worked. And, though the trial court professed to "have a working knowledge of how a pellet rifle works," it noted that "[t]he pistol is an intriguing thing to me, because I've never seen anything like it." In fact, the only testimony that was presented on how the weapons worked came from Ms. Saunders, who testified that she and her family had been "at the park playing" with them on the day in question, and that, though she had been shot by a pellet from the air gun before, they typically "shoot at targets."

In short, and unlike in the cases cited above, where there was evidence in the record of the instruments' capability to inflict death or great bodily injury, there was no such evidence here. The State presented no evidence whatsoever regarding the respective instruments' ability to cause injury, if any, at the distance from which they were brandished. *See Hall*, 165 N.C. App. at 665-66, 599 S.E.2d at 108. The only testimony

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3. The capabilities of a pellet rifle and air gun, as is plain from our above discussion of our case law, are not "matter[s] of common knowledge," *Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 458 (1998), and thus the State was required to introduce evidence of how they worked, *id.* at 837, 509 S.E.2d at 458 (holding whether an area was a "high crime area" was not a fact subject to judicial notice but should have been established through testimony and "[t]here [was] no indication in the record about whether the trial court actually heard evidence regarding the criminal activity at the Country Manor Inn.").

that was presented on how the weapons worked suggested they had a rather limited capacity, as Ms. Saunders indicated both were used at a park and she had been shot with a pellet from the air gun, with no reported grave injury therefrom. Though the trial court submitted the charge to the jury, instructing them they were permitted to infer that the weapon used was what it appeared to the victim to be, there were no contradictions to resolve nor anything from which to infer—these were not firearms and there was absolutely no testimony or evidence suggesting they posed a grave danger. *See Duncan*, 136 N.C. App. at 517-18, 524 S.E.2d at 810.

Relying on *Westall* and *Pettiford*, the State contends that there was sufficient evidence to submit the charges of robbery and attempted robbery with a dangerous weapon to the jury because "there was testimony from both victims that [] [D]efendant pointed his handgun/revolver pellet gun at them" and that Defendant "pointed the handgun/revolver at [Mr. Gamua's] head at close range."

While these statements are certainly true—that, most notably, Mr. Gamua testified that Defendant pointed a "handgun/revolver" at his head at close range and a "sniper rifle" from farther away—they are not evidence that demonstrates the dangerous character of the weapons. Instead of supporting the State's position, *Pettiford* and *Westall* merely reinforce the principle that there must be evidence in the record of the weapons' capability to inflict death or serious bodily injury. *See Pettiford*, 60 N.C. App. at 99, 298 S.E.2d at 393 (pellet gun actually inflicted serious injury); *Westall*, 116 N.C. App. at 540-41, 449 S.E.2d at 28 (testimony that pellet gun could shoot through plywood). Had the evidence not conclusively established that the weapons used were an air pistol and a pellet rifle, the testimony of Mr. McNeill and Mr. Gamua certainly would have been sufficient to support a mandatory presumption or permissive inference instruction. *See Allen*, 317 N.C. at 125, 343 S.E.2d at 897. However, "all the evidence" showed that they *were* an air pistol and a pellet rifle and, thus, in order to submit the armed robbery charge to the jury, there must have been evidence of the weapons' "capability to inflict death or seriously bodily injury." *See Fleming*, 148 N.C. App. at 22, 557 S.E.2d at 564. Indeed, the State ventures in the realm of conjecture by assuming that the weapons used here could have inflicted death or serious bodily injury. *See Allen*, 317 N.C. at 122, 343 S.E.2d at 896 ("[T]he law does not transform [] an instrument into a dangerous weapon merely because it appears to be one.").

As we concluded in *Fleming*, because there was "evidence that the implement used was not a firearm or other dangerous weapon[,]"

148 N.C. App. at 22, 557 S.E.2d at 564, "the record must contain evidence to support the jury's finding that the instrument was a dangerous weapon[,]" *id.* at 26, 557 S.E.2d at 566. "Such evidence is lacking in the case at bar." *Id.* at 25, 557 S.E.2d at 565. The trial court therefore erred in denying Defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon, and we must remand the case to the trial court for resentencing on the lesser included offense of attempted common law robbery. *Id.* at 26, 557 S.E.2d at 566.[4]

D. Improper Opinion

[3] We next consider whether the trial court impermissibly expressed its opinion in violation of N.C. Gen. Stat. § 15A-1222.

A trial court is prohibited from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C. Gen. Stat. § 15A-1222 (2019). Whether a trial court's comment constitutes an improper expression of opinion "is determined by its probable meaning to the jury, not by the judge's motive." *State v. McEachern*, 283 N.C. 57, 59-60, 194 S.E.2d 787, 789 (1973). In determining whether the remark was improper, "a totality of the circumstances test is utilized" under which the defendant has the burden of showing prejudice. *State v. Anthony*, 354 N.C. 372, 402, 555 S.E.2d 557, 578 (2001) (citation omitted).[5] A defendant is not entitled to a new trial "if the statement,

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4. After we "conclude[] that a defendant's conviction was not supported by sufficient evidence[,] . . . our long-standing practice has been to determine whether the evidence presented was sufficient to support a lesser included offense of the convicted crime." *State v. Stokes*, 367 N.C. 474, 474, 756 S.E.2d 32, 33 (2014). Common law robbery is a lesser included offense of armed robbery, *State v. Harris*, 91 N.C. App. 526, 527, 372 S.E.2d 336, 337 (1988), since "[t]he critical and essential difference between armed robbery and common law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a firearm or other dangerous weapon, implement or means[,]" *State v. Thompson*, 297 N.C. 285, 287, 254 S.E.2d 526, 527 (1979) (internal marks and citation omitted). Though we have concluded that there was not sufficient evidence to support the attempted armed robbery charge, and as discussed below in further detail, there is sufficient "evidence to support . . . the lesser included [] offense[]." *State v. Adams*, 187 N.C. App. 676, 683, 654 S.E.2d 711, 716 (2007).

5. Defendant argues that the trial court's alleged violation of N.C. Gen. Stat. § 15A-1222 here is structural error and therefore does not require a showing of prejudice, pointing to *Williams v. Pennsylvania*, ___ U.S. ___, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016). Assuming without deciding that this issue is preserved for our review, *Williams* is plainly distinguishable. *Williams* involved an appellate judge who participated in the adjudication of a case on which he had been involved as a prosecutor. *Id.* at 1903, 195 L. Ed. 2d at 138. The confidentiality of appellate court proceedings made a prejudice assessment impossible in those circumstances. *Id.* at 1909, 195 L. Ed. 2d at 145. The concerns here center on comments readily reviewable by our Court. Our Courts have reviewed such

considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial." *State v. Teasley*, 31 N.C. App. 729, 732, 230 S.E.2d 692, 694 (1976).

In order to demonstrate prejudice, the defendant must show that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2019). If "the judge's statement went to the heart of the trial, assuming [the] defendant's guilt[,]" then it will be considered prejudicial. *State v. Guffey*, 39 N.C. App. 359, 361, 250 S.E.2d 96, 97 (1979). In *State v. Springs*, 200 N.C. App. 288, 293, 683 S.E.2d 432, 435-36 (2009), we held that the trial court's remark that "Greer had 'no involvement with these charges' " constituted prejudicial error warranting a new trial where the defense's theory was that "Greer" had placed contraband in the defendant's apartment. "A reasonable interpretation of the statement [wa]s that Greer was not involved" in the offense, and "this topic was of utmost important to [the] defendant's defense." *Id.*

Defendant argues that the following exchange amounted to an improper expression of judicial opinion during Ms. Saunders' testimony:

> [DEFENSE COUNSEL]: Okay. So when did y'all decide to head over to the tire shop on the 28th?
>
> [MS. SAUNDERS]: On the 28th, we were with our son and our son's girlfriend and we had been at the park playing with the air-soft pistols. That's why we had them. And we came straight from the park to Mr. Gamua's shop.
>
> [DEFENSE COUNSEL]: What time was that?
>
> THE COURT: Okay. Let me - - let me stop for just a minute.
>
> I want to instruct [Ms.] Saunders that these are not air-soft pistols. They are in no way to be characterized as that[] because they're simply not. So you can call them whatever else, pellet . . . whatever, but not airsoft.

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comments not through the lens of structural error but instead have required a showing of prejudice. *See, e.g.*, *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984) ("A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case.").

Immediately prior, Ms. Saunders testified that the tire machine had been paid for, and Mr. Gamua told her and Defendant that they could pick it up.

Defendant argues that the trial court's interjection served to discredit Ms. Saunders's testimony and therefore undercut the defense theory "that [Defendant] had provided enough used tires to have a claim of right to the tire machines."[6] Assuming without deciding that error occurred, we hold that Defendant has failed to demonstrate that he was prejudiced by the allegedly improper expression of opinion.

Attempted common law robbery consists of "(1) [the] defendant's specific intent to commit the crime of common law robbery," which includes that the defendant knew he was not entitled to take the property, and "(2) a direct but ineffectual act by defendant leading toward the commission of this crime." *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982); *see also* N.C.P.I. 217.30 (2018) (common law robbery jury instructions). The evidence at trial tended to show that Mr. Gamua, Defendant, and Ms. Saunders had an agreement that Mr. Gamua would credit the value of the tires Defendant and Ms. Saunders brought toward the tire machine that belonged to Mr. Gamua. Mr. Gamua testified that they had all agreed that the tire machine would be considered paid in full once Mr. Gamua received $900 worth of tires. Mr. Gamua testified that as of 28 June 2018, he had not received the agreed-upon amount nor had he permitted Defendant to take the machine on that date. Both Mr. Gamua and Mr. McNeill testified that Defendant threatened them with what appeared to be a gun if they did not allow him to take the tire machine.

Considering the trial court's statement "in the light of all the facts and attendant circumstances," it was "not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial." *Teasley*, 31 N.C. App. at 732, 230 S.E.2d at 694. The trial court's instruction to Ms. Saunders to refrain from using the term "air-soft pistols" had no direct bearing on whether Defendant was entitled to take the machine. And it certainly did not assume his guilt for the charges we hold were sufficiently supported by the evidence: common law robbery and attempted common law robbery. Even if we were to accept that the trial court's interjection negatively impacted the jury's view of Ms.

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6. Defendant also argues that the trial court's comments undercut his defense as to the dangerous character of the weapon. Having concluded that the trial court should have granted his motion to dismiss the armed robbery charges, Defendant's argument on this point is moot.

Saunders's testimony generally, we hold that there is not "a reasonable possibility that, had the error in question not been committed, a different result would have been reached" by the jury in light of the above evidence. N.C. Gen. Stat. § 15A-1443(a) (2019).

E. Stipulation as to Habitual Felon Status

[4] Lastly, Defendant argues that the trial court erred in accepting his stipulation to habitual felon status because it did not first conduct the required guilty plea colloquy, and the State concedes this error. For the following reasons, we agree.

This Court has held that the proceedings as to whether a defendant is a habitual felon should be treated by the trial court "as if the issue of habitual felon were a principal charge." *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 698 (2001) (citation omitted). Whether a defendant is a habitual felon can either be submitted to the jury or a defendant can enter a guilty plea to the charge. *Id.* at 471, 542 S.E.2d at 699. If a defendant chooses to plead guilty to the charge of being a habitual felon "in the absence of an inquiry by the trial court to establish a record of a guilty plea, [it] is not tantamount to a guilty plea." *Id.* Further, this Court has held that "a defendant's mere stipulation to predicate felonies is insufficient." *State v. Wilkins*, 225 N.C. App. 492, 497, 737 S.E.2d 791, 795 (2013). Also, in accordance with N.C. Gen. Stat. § 15A-1022, "a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally[,]" assessing whether the plea is an informed choice, and finding a factual basis for the charge. N.C. Gen. Stat. § 15A-1022(a), (c) (2019).

Here, there is no indication in the record that the trial court addressed Defendant personally regarding his stipulation to the status of habitual felon. Rather, the trial court, prior to announcing the jury verdict, stated:

> THE COURT: [I] want to state for the record that [defense counsel] had indicated that his client is willing to stipulate to having achieved the status of habitual felon, so that it will not be necessary to put on evidence or testimony that in the event that the verdict is one which reflects the finding of guilty of a felony, which would then cause the habitual felon status to attach.

The trial court then confirmed with Defendant's attorney that Defendant was willing to make the stipulation. The record does not reflect that any additional discussions between the trial court and Defendant occurred

regarding Defendant's stipulation to the status of habitual felon. Thus, the trial court did not establish a record of a guilty plea.

Since nothing in the record indicates that a guilty plea colloquy was conducted by the trial court regarding Defendant's stipulating to being a habitual felon, we must reverse Defendant's habitual felon conviction and remand to the trial court for further proceedings consistent with this opinion.

III. Conclusion

For the reasons stated above, we hold that Defendant's fatal variance argument is not preserved. We also hold that the trial court erred in denying Defendant's motion to dismiss the charge of attempted robbery with a dangerous weapon and remand for resentencing on the lesser included offense of attempted common law robbery and that the trial court erred in accepting Defendant's stipulation as to habitual felon status. Consistent with the reversal of the denial of Defendant's motion to dismiss, we further hold that Defendant has failed to demonstrate that the trial court's remarks prejudiced him.

NO PREJUDICIAL ERROR IN PART; REVERSED IN PART AND REMANDED.

Chief Judge McGEE and Judge MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 JUNE 2020)

CAYMUS CONSTR. CO., INC. v. JANOWIAK No. 19-890	Watauga (17CVS16)	No Error in Part; Vacated and Remanded in Part
IN RE N.S. No. 19-711	Alamance (18JA100)	Affirmed
IN RE T.R.B. No. 19-764	Alamance (18JA10)	Affirmed
MOUNTAIN CLUB ASS'N, INC. v. MOUNTAIN CLUB AT CASHIERS, LLC No. 19-379	Jackson (16CVS112)	Affirmed
STATE v. BROWN No. 19-452	Iredell (15CRS56083-84)	Reversed
STATE v. BUCHANAN No. 19-919	Yancey (15CRS271) (15CRS50081)	Affirmed
STATE v. CHAVIS No. 19-1101	Gaston (17CRS65868)	No Error
STATE v. DICKENS No. 19-722	Edgecombe (16CRS53227) (16CRS803)	No Error
STATE v. GETER No. 19-846	Buncombe (14CRS81108) (14CRS81109) (14CRS81110) (14CRS90034)	Reversed and Remanded
STATE v. GRANTHAM No. 19-903	Randolph (13CRS56964) (18CRS1692)	No Error
STATE v. HARDIN No. 19-920	Buncombe (18CRS89608)	Remanded
STATE v. HOUSE No. 19-539	Montgomery (15CRS51395)	Affirmed
STATE v. MITCHELL No. 20-39	Wake (15CRS225511-12)	Affirmed

STATE v. SHACKLEFORD No. 19-771	Wake (17CRS212338-40) (17CRS3667)	Affirmed
STATE v. SWINDELL No. 19-527	Wake (17CRS201983)	No Error
STATE v. TUCKER No. 18-1295-2	Rowan (15CRS55421-22)	Reversed
STATE v. WHITE No. 19-1017	Lincoln (17CRS052768)	No Error
STATE v. WYATT No. 19-990	Moore (17CRS050775) (17CRS661)	Affirmed

BARTLEY v. CITY OF HIGH POINT

[272 N.C. App. 224 (2020)]

BRUCE ALLEN BARTLEY, Plaintiff
v.
CITY OF HIGH POINT and MATT BLACKMAN in his Official Capacity as a Police Officer with the City of High Point, and Individually, Defendants

No. COA19-1127

Filed 7 July 2020

Immunity—public official immunity—police officer—individual capacity—malice

The trial court properly denied defendant police officer's motion for summary judgment on the defense of public official immunity on plaintiff's tort claims against him in his individual capacity where the evidence gave rise to genuine issues of material fact regarding whether defendant acted with malice, including whether he used unnecessary and excessive force when arresting plaintiff and whether plaintiff knew defendant was a police officer when ignoring his commands, since defendant drove an unmarked car, was not in uniform, and did not identify himself as a police officer or state the reason for his presence in plaintiff's driveway.

Judge TYSON dissenting.

Appeal by defendant-Matt Blackman from order entered 21 October 2019 by Judge Eric C. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 13 May 2020.

The Deuterman Law Group, by Seth R. Cohen, for plaintiff.

Poyner Spruill LLP, by David L. Woodard and Brett A. Carpenter, for defendant-Matt Blackman.

ARROWOOD, Judge.

Officer Matt Blackman ("Officer Blackman" or "defendant") appeals from order partially denying defendants' motion for summary judgment as to the claims for malicious prosecution, false imprisonment/arrest, and assault and battery filed against Officer Blackman in his individual capacity. Officer Blackman contends the trial court erred in denying summary judgment based on the defense of public official immunity. He further requests that this Court address the merits of the claims against him. For the following reasons, we affirm the trial court's order denying defendant's

motion for summary judgment based upon the public official immunity defense and decline to reach the merits of the underlying claims.

I. Background

On 23 August 2017, Officer Blackman, a police officer with defendant-City of High Point, was driving in an unmarked car when he observed plaintiff pass a slow-moving truck over a double yellow line in violation of N.C. Gen. Stat. § 20-146(a). Officer Blackman believed the truck was not moving so slow as to impede the flow of traffic, and decided to initiate a traffic stop of plaintiff's vehicle. Though Officer Blackman's official job duty is as a detective in the Violent Crimes Unit, he occasionally engages in traffic enforcement as well. As he began to follow after plaintiff's vehicle, Officer Blackman testified that he activated his blue strobe lights and siren. Officer Blackman believed he was soon able to draw near enough to plaintiff such that plaintiff should have reasonably been able to see his blue lights and hear his sirens. However, he was unable to get close enough to plaintiff's vehicle to initiate a traffic stop. He observed plaintiff make a left turn onto a street leading to a residence at a speed which made him become concerned that plaintiff was aware he was behind him and was attempting to make it to the residence. Officer Blackman further testified that, based on his training and experience, it is not uncommon for people to try to get to a driveway and park their vehicle.

Plaintiff pulled into the driveway of a residence and Officer Blackman pulled in behind him. Officer Blackman had deactivated his siren shortly before pulling into the driveway, but left his blue strobe lights on. Plaintiff, who was 60-years old at the time, testified he exited his vehicle and was headed towards the back of it when he first noticed Officer Blackman. Officer Blackman got out of his vehicle and twice ordered plaintiff to get back into his car. Officer Blackman did not identify himself as a police officer or state the reason for his traffic stop, and though his blue strobe lights were reportedly on, he was driving an unmarked car and dressed in plainclothes. In addition, plaintiff testified that Officer Blackman was initially standing behind the front door of his vehicle, which blocked the police badge at his waist from plaintiff's view. Plaintiff, who testified he was unaware Officer Blackman was a police officer and also did not notice the blue strobe lights on Officer Blackman's vehicle, told Officer Blackman that he was on private property and refused to get back into his car. He then proceeded to move towards the back of his car to retrieve his sick cat from the back seat, closer to Officer Blackman.

Following plaintiff's refusal to follow his orders, Officer Blackman used his radio to request that a backup unit be sent to his location because he believed there might be an officer safety issue. Plaintiff testified that as his back was turned, Officer Blackman "body slammed" him against the trunk of his car, handcuffed him, and informed him that he was being detained. Officer Blackman testified that, due to plaintiff ignoring his commands and the manner in which he approached him, he believed that the safest course of action was to handcuff plaintiff. After plaintiff was handcuffed, he turned and noticed the badge and service weapon on Officer Blackman's belt. Officer Blackman charged plaintiff with resisting, delaying, or obstructing an officer in violation of N.C. Gen. Stat. § 14-233 for ignoring his commands and tensing his arm while being handcuffed. He also charged plaintiff for passing the double yellow line in violation of N.C. Gen. Stat. § 20-146(a). Plaintiff was patted down and detained for 20-25 minutes at his residence. At one point, he asked Officer Blackman to loosen the handcuffs because they were too tight, but Officer Blackman refused. Officer Blackman released plaintiff after he finished conducting the traffic stop and wrote him a citation.

Plaintiff completed driving school and community service and the two charges against him were dropped. On 20 December 2018, plaintiff filed a complaint against the City of High Point and Officer Blackman in both his official and individual capacity, alleging assault and battery, false imprisonment/ false arrest, and malicious prosecution. In his complaint, plaintiff alleged that he was forcibly thrown against the trunk of his car, handcuffed, and charged with resisting an officer. In response, defendants asserted the defenses of governmental and public official immunity. On 19 September 2019, defendants filed a motion for summary judgment. On 21 October 2019, the trial court dismissed plaintiff's claims against the City of High Point and Officer Blackman in his official capacity on the grounds that sovereign immunity barred those claims. The trial court denied the motion with respect to the claims against Officer Blackman in his individual capacity. On 23 October 2019, Officer Blackman filed a notice of appeal of the trial court's order partially denying his motion.

II. Discussion

On appeal, Officer Blackman contends the trial court erred in partially denying his motion for summary judgment on the defense of public official immunity and on the claims against him in his individual capacity. Defendant further requests that this Court address the merits of the claims against him.

Defendant appeals from an interlocutory order, from which "a party [generally] has no right to immediate appellate review[.]" *Tise v. Yates Const. Co., Inc.*, 122 N.C. App. 582, 584, 471 S.E.2d 102, 105 (1996) (citation omitted). However, "this Court has previously held that a public official . . . may immediately appeal from an interlocutory order denying a summary judgment motion based on public official immunity." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012) (citing *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008)). "Immediate appeal of such interlocutory orders is allowed because 'the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.' " *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (quoting *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (1996)).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019). The moving party bears the burden of proving that no genuine issue of material fact exists. *Thompson*, 142 N.C. App. at 654, 543 S.E.2d at 904.

"We review a trial court order granting or denying a summary judgment motion on a *de novo* basis, with our examination of the trial court's order focused on determining whether there is a genuine issue of material fact and whether either party is entitled to judgment as a matter of law." *Beeson v. Palombo*, 220 N.C. App. 274, 277, 727 S.E.2d 343, 346-47 (2012) (quoting *Cox v. Roach*, 218 N.C. App. 311, 321, 723 S.E.2d 340, 347 (2012). In doing so, we view the evidence in the light most favorable to the nonmoving party and draw all inferences of fact against the movant and in favor of the nonmovant. *Showalter v. N.C. Dep't of Crime Control & Pub. Safety*, 183 N.C. App. 132, 137, 643 S.E.2d 649, 652 (2007) (citations omitted).

A. Public Official Immunity

Officer Blackman contends that, because he was a public official conducting his duty, he is entitled to the protection of public official immunity. "Public official immunity is 'a derivative form' of governmental immunity, which precludes suits against public officials in their individual capacities[.]" *Wilcox*, 222 N.C. App. at 288, 730 S.E.2d at 230 (internal citation omitted). "Police officers engaged in performing their duties are public officials for the purposes of public official immunity

[and] . . . 'enjoy[] absolute immunity from personal liability for discretionary acts done without corruption or malice.' " *Lopp v. Anderson*, 251 N.C. App. 161, 168, 795 S.E.2d 770, 776 (2016) (quoting *Campbell v. Anderson*, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003)). Thus, a police officer is generally "immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox*, 222 N.C. App. at 288, 730 S.E.2d at 230 (citing *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)).

Here, plaintiff alleges Officer Blackman acted with malice by body slamming him into the trunk of his car and charging and arresting him for resisting an officer without probable cause, and is therefore not entitled to public official immunity. " 'A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.' " *Showalter*, 183 N.C. App. at 136, 643 S.E.2d at 652 (quoting *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984)). Thus, "a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox*, 222 N.C. App. at 289, 730 S.E.2d at 230.

1. Wantonly and Contrary to Duty

Plaintiff's claims stem from his allegations that Officer Blackman assaulted and battered him when he slammed him against the trunk of his car and handcuffed him, and that Officer Blackman falsely imprisoned or falsely arrested him. We therefore consider whether Officer Blackman acted with malice in the course of arresting plaintiff such that he is not entitled to the defense of public official immunity with respect to plaintiff's claims of assault and battery, false imprisonment/false arrest, and malicious prosecution. We first consider whether Officer Blackman acted wantonly and contrary to his duty. " 'An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Brown v. Town of Chapel Hill*, 233 N.C. App. 257, 269, 756 S.E.2d 749, 758 (2014).

It is well established that "a law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties." *Lopp*, 251 N.C. App. at 172, 795 S.E.2d at 778 (quoting *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496 (1988)). "[H]e may not act maliciously in the wanton abuse of his authority or use unnecessary and excessive force." *Id.* Thus, a police officer may be held liable for assault and battery in the course of an arrest if they used unnecessary or excessive force to effect that arrest.

Here, there is a question of material fact as to whether Officer Blackman used unnecessary and excessive force in the course of detaining plaintiff after plaintiff ignored commands to get back into his car, such that Officer Blackman acted contrary to his duty. While Officer Blackman testified he told plaintiff he was being detained, "took him by the left arm and went to extend his arm and then to put it behind his back," plaintiff testified Officer Blackman approached him from behind without warning and body slammed him against the trunk of his car. Viewing the evidence in the light most favorable to the non-movant, there is also a question of fact as to whether Officer Blackman's alleged conduct was wanton, such that it was done "needlessly, manifesting a reckless indifference to the rights of others." *Brown*, 233 N.C. App. at 269, 756 S.E.2d at 758.

Regarding plaintiff's claim for false imprisonment or false arrest, he alleges that Officer Blackman did not have probable cause to charge or arrest him, and thus acted contrary to his duty. " 'False imprisonment is the illegal restraint of a person against his will. A restraint is illegal if not lawful or consented to. A false arrest is an arrest without legal authority and is one means of committing a false imprisonment.' " *Lopp*, 251 N.C. App. at 173, 795 S.E.2d at 779 (quoting *Marlowe v. Piner*, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995)).

Here, Officer Blackman did not have a warrant to arrest plaintiff. However, Officer Blackman, citing to our decision in *State v. Carrouthers*, 200 N.C. App. 415, 419, 683 S.E.2d 781, 784 (2009), argues that, during a stop, "in order to 'maintain the status quo' or to ensure officer safety," police are authorized "to engage in conduct and use 'forms of force typically used during [a formal] arrest." This "may include 'placing handcuffs on suspects,' " which "remained the least intrusive means reasonably necessary to carry out the purpose of the stop." *Id*. at 419-20, 683 S.E.2d at 784-85 (quoting *State v. Campbell*, 188 N.C. App. 701, 709, 656 S.E.2d 721, 727 (2008)). Because plaintiff ignored Officer Blackman's commands to get back into his car, Officer Blackman believed the best course of action was to restrain plaintiff by placing him in handcuffs. However, there is a genuine issue of material fact as to whether body slamming plaintiff in the course of arrest was a necessary use of force such that Officer Blackman did not act contrary to, or outside the bounds of, his duty.

In addition, while it is true that " 'an officer may make a warrantless arrest for a misdemeanor committed in his or her presence[,]' " he must have probable cause to do so. *Adams v. City of Raleigh*, 245 N.C. App. 330, 336, 782 S.E.2d 108, 113 (2016) (quoting *State v. Brooks*, 337

N.C. 132, 145, 446 S.E.2d 579, 588 (1994)). " 'Probable cause is defined as those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.' " *Id.* at 336-37, 782 S.E.2d at 114 (quoting *State v. Biber*, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011)). Here, Officer Blackman believed plaintiff violated N.C. Gen. Stat. § 14-223 by refusing to follow commands to get back into his car. Pursuant to N.C. Gen. Stat. § 14-223, "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2019). This statute essentially has five elements:

1) that the victim was a public officer;

2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;

3) that the victim was discharging or attempting to discharge a duty of his office;

4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and

5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2003).

Here, plaintiff testified he was unaware that the individual standing in his driveway and ordering him to get back into his car was a police officer. Officer Blackman did not identify himself or the reason for his stop, was driving an unmarked car, was dressed in plainclothes, and had turned off his sirens. While Officer Blackman contends he believed plaintiff was aware he was an officer because he thought that plaintiff should have noticed the sirens and blue strobe lights on his vehicle when he was following behind plaintiff and he later used a radio in his presence, we must view the evidence in the light most favorable to plaintiff. There is thus a material issue as to whether the second and fifth elements of the statute are met; that is, whether it was reasonable for Officer Blackman to believe plaintiff was aware that he was a police officer when plaintiff decided to ignore his commands. If not, Officer Blackman acted wantonly and contrary to his duty when he arrested plaintiff for violating N.C. Gen. Stat. § 14-223.

2. Intent to injure

We lastly consider whether the third element of malice is met—whether Officer Blackman acted with intent to injure. With respect to this element, malice can be proven by a showing of actual or implied intent to injure. To satisfy implied intent, a plaintiff must show that the officer's conduct was " 'so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of wilfulness [sic] and wantonness equivalent in spirit to an actual intent.' " *Hart v. Brienza*, 246 N.C. App. 426, 431, 784 S.E.2d 211, 215-16 (2016) (quoting *Foster v. Hyman*, 197 N.C. 189, 192, 148 S.E. 36, 38 (1929)).

In *Lopp*, we found the defendant police officers were not entitled to summary judgment on the issue of public official immunity where the plaintiff presented evidence they used unnecessary and excessive force during an arrest. 251 N.C. App. at 170, 795 S.E.2d at 777. There, the plaintiff alleged that four officers came to his home and informed him they were going to take his children away and arrest him. *Id.* The plaintiff insisted that there was an agreement with the children's mother which allowed him to keep the children for a few extra days, and said that he would call his attorney to explain the situation to them. The officers then "took [him] down and assaulted [him]," punching and kicking him before handcuffing him and placing him in the back of a police vehicle. *Id.* The plaintiff further alleged the officers attempted to use a stun gun while placing him in the vehicle. Though there was evidence from other witnesses contradicting the plaintiff's account of the events surrounding his arrest, considering the evidence in the light most favorable to the plaintiff, this Court held that "the record evidence raises an issue of material fact concerning whether Defendant Officers acted with malice." *Id.*

In *Thompson*, an officer placed the plaintiff under arrest for speeding while she was transporting her grandson to the hospital for treatment of a head injury. 142 N.C. App. at 652, 543 S.E.2d at 902-903. The plaintiff alleged that though she did not resist, the officer threatened her with chemical mace, handcuffed her behind her back, and treated her in a "rough and callous manner." *Id.* at 652, 543 S.E.2d at 903. After the plaintiff's son informed the officer that the plaintiff suffered from heart problems and had previously suffered a heart attack, the officer proceeded to take the plaintiff to the magistrates office and charge her with speeding and failing to stop for a blue light. *Id.*

Plaintiff later filed several tort claims against the officer, alleging that she suffered additional heart problems as a result of the officer's conduct. *Id*. The trial court partially denied the officer's motion for summary judgment based on the defense of public official immunity as to the plaintiff's claims for negligence and punitive damages. *Id*. at 653, 543 S.E.2d at 903. This Court noted plaintiff's allegations were "sufficiently egregious, if proved, to support a finding that [the defendant's] conduct was willful, and either intentionally or recklessly indifferent to foreseeable consequences." *Id*. at 657, 543 S.E.2d at 905. Though the defendant denied the plaintiff's allegations, we held the trial court properly denied summary judgment on the matter because there existed a genuine dispute as to whether the defendant acted with malice. *Id*.

Similar to *Lopp* and *Thompson*, in the present case, plaintiff alleges Officer Blackman used unnecessary and excessive force when he arrested plaintiff. Specifically, plaintiff testified in his deposition that Officer Blackman ordered him back into his car while standing in the driveway of his private residence without first identifying himself as a police officer or explaining the reason for his presence. In addition, Officer Blackman was wearing plainclothes, driving an unmarked vehicle, plaintiff did not notice any sirens or strobe lights on the vehicle, and Officer Blackman's police badge was initially hidden from plaintiff's view. Plaintiff was thus unaware that the individual in his driveway was an officer, and decided to ignore his commands. Plaintiff further testified that when he walked around the back of his car to retrieve his sick cat from the back seat, Officer Blackman "body slammed" him onto the trunk of his car and handcuffed him. Officer Blackman testified that though he was alarmed by plaintiff's movement towards him, plaintiff did not verbally or physically threaten him or attempt to run away. Officer Blackman also observed plaintiff was unarmed.

Though Officer Blackman alleges he believed plaintiff should have reasonably known he was a police officer and contests plaintiff's assertion that he "body slammed" plaintiff, on motion for summary judgment we must view the facts in the light most favorable to plaintiff, as the non-movant. *Showalter*, 183 N.C. App. at 136, 643 S.E.2d at 652. Viewing the facts in the light most favorable to plaintiff, Officer Blackman body slammed a 60-year old unarmed man who was not being threatening or attempting to run away. In keeping with our reasoning in *Thompson*, Officer Blackman's rough use of force in arresting an elderly, non-threatening man in an attempt to cite him for a traffic offense raises a genuine dispute as to whether Officer Blackman acted with malice. In addition, our holding in *Lopp* concerning the defendant officers' conduct of kicking and punching a non-threatening individual in order to

arrest him further lends support to our holding that body slamming an individual against a car may indicate malice.

Officer Blackman contends plaintiff cannot prove malice because this Court held in another case that facts more egregious than those alleged here did not show malice. Specifically, Officer Blackman directs our attention to our holding in *Brown*. There, the plaintiff was walking home when a police officer who mistakenly believed the plaintiff was the subject of several arrest warrants ordered the plaintiff to stop. *Brown*, 233 N.C. App. at 258-59, 756 S.E.2d at 751. When the plaintiff asked why he was being told to stop, the officer grabbed the plaintiff's hand, spun him around, pushed him against the back of a police vehicle, pulled the plaintiff's other arm behind his back, and tightly fastened handcuffs on his wrists. *Id.* at 258, 756 S.E.2d at 751. The officer then pushed the plaintiff against the vehicle a second time and patted him down. *Id.* at 259, 756 S.E.2d at 751. While doing so, the plaintiff alleged the officer tried to "inflict great pain" and made condescending and racist remarks. *Id.* at 269, 756 S.E.2d at 758. After verifying the plaintiff's identity and confirming there were no warrants for his arrest, the officer let the plaintiff go. *Id.* at 270, 756 S.E.2d at 758. This Court held that the officer was entitled to the defense of public official immunity on the claim of false imprisonment because, under those facts, the plaintiff could not establish malice. *Id.* at 271, 756 S.E.2d at 759.

The present case is readily distinguishable from *Brown*. This Court found that it was reasonable for the defendant in *Brown* to arrest the plaintiff because he reasonably believed the plaintiff was a wanted man with several warrants out for his arrest, even though the defendant later learned he was mistaken. *Id.* at 270, 756 S.E.2d at 758. In addition, the *Brown* plaintiff merely vaguely alleged that the defendant "tried to inflict great pain" on him during the arrest and made disparaging comments. We thus held that "[w]ithout more, [the] plaintiff's bare contention that the handcuffs were painful is not enough to rise to the level of wanton[ness] or show an intent to injure." *Id.* In contrast, plaintiff here was detained on his private property for refusing to follow an unidentified individual's commands for him to get back into his car. The reason for Officer Blackman's stop was not based on suspicion that plaintiff had warrants out for his arrest, like the plaintiff in *Brown*, but rather in order to cite plaintiff for a traffic infraction. Nevertheless, without first identifying himself as a police officer and the reason for his presence, Officer Blackman allegedly slammed plaintiff against his car and handcuffed him tightly. The facts of this case thus differ markedly from those of *Brown*, and are sufficient to raise an issue of genuine fact as to whether Officer Blackman acted with malice.

Defendant is only entitled to review on his claim of public official immunity. Because he has no right to interlocutory review on the other issues he attempts to raise, we decline to consider them. *See Brown*, 233 N.C. App. at 263, 756 S.E.2d at 754 (declining to exercise discretion to address non-immunity issues).

III. Conclusion

For the foregoing reasons, we affirm the trial court's partial denial of summary judgment.

AFFIRMED.

Judge DIETZ concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

I vote to reverse the trial court's partial denial of summary judgment and remand for entry of an order granting Officer Blackman's motion. The majority's opinion erroneously asserts purported genuine issues of material fact exist and affirms the trial court's partial denial of summary judgment on Officer Blackman's claim of public official immunity. The majority's opinion fails to recognize the burden plaintiff carries on this issue and defendant's presumptive entitlement to judgment. I respectfully dissent.

I. Standard of Review

"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." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 211-12, 580 S.E.2d 732, 735 (2003) (citation omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004).

> 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.

Id. at 212, 580 S.E.2d at 735 (citation and internal quotation marks omitted).

> 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.

Id. (citations and internal quotation marks omitted). This Court reviews rulings on motions for summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

II. Analysis

The Supreme Court of North Carolina held:

> It is well settled that absent evidence to the contrary, it will always be presumed that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. This presumption places *a heavy burden* on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence.

Leete v. Cty. of Warren, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995) (emphasis supplied) (citations and internal quotation marks omitted). Plaintiff has not carried his "heavy burden" to show any genuine issue of material fact exists "to overcome this presumption." *Id.*

The majority's opinion correctly notes, "a public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Brown v. Town of Chapel Hill*, 233 N.C. App. 257, 264, 756 S.E.2d 749, 754 (2014). The only exception plaintiff asserts to prevent summary judgment for defendant under public official immunity in this case is defendant's actions were done with malice. As applicable here, "a malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Id.* at 264, 756 S.E.2d at 755 (citation omitted).

Here, as in *Brown*, "the only issue is whether plaintiff sufficiently forecasted evidence for each element of malice." *Id.* at 265, 756 S.E.2d at 755. To survive Officer Blackman's motion for summary judgment,

plaintiff "must have alleged and forecasted evidence demonstrating [Officer Blackman] acted . . . with malice." *Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000). Plaintiff has failed to forecast "competent and substantial evidence" to show any genuine issue of material fact exists that Officer Blackman acted with malice to invalidate the "public officials' actions to overcome this presumption." *Leete*, 341 N.C. at 119, 462 S.E.2d at 478.

A. Contrary to Duty

The majority's opinion asserts purportedly genuine questions of fact exist to show Officer Blackman's alleged conduct was contrary to duty. To determine that issue, "we must decide whether plaintiff's seizure constituted an investigatory stop or an arrest." *Brown*, 233 N.C. App. at 265, 756 S.E.2d at 755 (citation omitted). "Generally, a person can be 'seized' in two ways for the purposes of a Fourth Amendment analysis: by arrest or by investigatory stop." *State v. Carrouthers*, 200 N.C. App. 415, 419, 683 S.E.2d 781, 784 (2009) (citation omitted).

> [A police] officer may detain an individual for an investigatory stop upon a showing that the officer has reasonable, articulable suspicion that a crime may be underway. . . . The characteristics of the investigatory stop, including its length, the methods used, and any search performed, should be the least intrusive means reasonably available to effectuate the purpose of the stop.

Id. (citations and internal quotation marks omitted).

This Court has held, "when conducting investigative stops, police officers are 'authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop.' " *State v. Campbell*, 188 N.C. App. 701, 708-09, 656 S.E.2d 721, 727 (2008) (quoting *U.S. v. Hensley*, 469 U.S. 221, 235, 83 L. Ed. 2d 604, 616 (1985)).

"A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation." N.C. Gen. Stat. § 15A-1113 (2019). During an investigatory stop, "to maintain the status quo or to ensure officer safety, officers are permitted to engage in conduct and use forms of force typically used during a formal arrest. Such permissible conduct may include placing handcuffs on suspects, placing the suspect in the back of police cruisers, or drawing weapons." *Carrouthers*, 200 N.C. App. at 419, 683 S.E.2d at 784, (citations, alterations, and internal quotation marks omitted).

Here, undisputed evidence shows Officer Blackman handcuffed plaintiff because: (1) plaintiff ignored his commands, creating an "officer safety issue"; (2) Officer Blackman "ha[d] no way of knowing what [plaintiff's] intentions [we]re to [him] or any other aspect of the stop;" and, (3) plaintiff's refusal to comply with his commands to get back into his vehicle constituted probable cause to charge plaintiff with resisting, delaying, or obstructing a public officer.

Plaintiff acknowledges and agrees it is unusual for a driver to get out of his vehicle during an investigatory stop and, after being told to return and re-enter his vehicle, to start walking towards the police officer making the stop. He agrees police officers are rightfully wary of this movement, because it presents a potential danger to the safety of the officer.

Plaintiff further agreed he could not ignore Officer Blackman's directives just because he had continued to drive after Officer Blackman had activated his blue lights and siren and did not stop until after he had entered his driveway. Plaintiff also agreed there was nothing unlawful or inappropriate about a police officer telling him to return to and remain in his car during the course of a traffic stop. Along with the admitted lawful validity of the investigatory stop, these four admissions are sufficient to defeat plaintiff's claims. *Id.*

The majority's opinion purportedly finds a genuine issue of material fact exists of "whether it was reasonable for Officer Blackman to believe plaintiff was aware that he was a police officer when plaintiff decided to ignore his commands." The majority's opinion asserts: "While Officer Blackman contends he believed plaintiff was aware he was an officer because he thought that plaintiff should have noticed the sirens and blue strobe lights on his vehicle when he was following behind plaintiff and he later used a radio in his presence, we must view the evidence in the light most favorable to plaintiff."

Presuming this is true and viewing the evidence in the light most favorable to the non-moving party, plaintiff has not met his "heavy burden" "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." *Leete*, 341 N.C. at 119, 462 S.E.2d at 478; *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735.

The majority's opinion also misapplies the standard of review and purports to shift the "heavy burden" plaintiff must carry to Officer Blackman. Our Supreme Court has held whether it was reasonable for Officer Blackman to believe plaintiff was aware he was a police officer

must be viewed from Officer Blackman's perspective. *See State v. Biber*, 365 N.C. 162, 168-69, 712 S.E.2d 874, 879 (2011) ("Probable cause is defined as those facts and circumstances *within an officer's knowledge and of which he had reasonably trustworthy information* which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." (emphasis supplied)).

B. No Forecast or Showing of Malice

An officer "acts with malice when he wantonly does that which a man of *reasonable* intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) (citation omitted) (emphasis supplied).

The majority's opinion erroneously concludes plaintiff carried his burden to show, with specific facts "as opposed to allegations," a person of reasonable intelligence would believe Officer Blackman behaved maliciously, unreasonably, or contrary to duty. *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. "To hold otherwise would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment." *Id.*

C. Wantonly and Intended to Be Injurious

The majority's opinion also erroneously asserts a genuine issue of material fact exists of whether Officer Blackman's alleged conduct was wanton, such that it was done "needlessly, manifesting a reckless indifference to the rights of others." *Brown*, 233 N.C. App. at 269, 756 S.E.2d at 758.

The majority's opinion invents a purported issue by asserting: "Officer Blackman's rough use of force in arresting an elderly, non-threatening man in an attempt to cite him for a traffic offense raises a genuine dispute as to whether Officer Blackman acted with malice." The majority's opinion accepts plaintiff's mere allegation and self-characterization that Officer Blackman "body slammed" him as a material issue of fact in the light most favorable to him. This characterization erroneously disregards the plaintiff's "heavy burden" and the presumption otherwise, and the distinction between facts forecast and mere allegations.

Plaintiff repeatedly alleges Officer Blackman "body slammed" him, but he has failed to forecast specific facts, "as opposed to allegations" that would establish a *prima facie* showing at trial. *Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. Besides his repeated, conclusory allegation and characterization that Officer Blackman "body slammed" him,

plaintiff only stated "all of the sudden I was against the trunk lid of my vehicle and he had my hand behind my back and he said you're being obtained[.]" [sic] Plaintiff could not describe how this act was wanton or malicious, except by repeatedly answering: "By his force."

Asked to describe how Officer Blackman "got [him] into that position," plaintiff answered, "I don't know what procedure he used other than coming behind me and putting me on the trunk lid of my car. My back is turned. How am I going to know that?"

The only injury or harm plaintiff alleged he suffered was redness on his wrists, which he ascribed to the handcuffs being secured "way too tight." Plaintiff specifically alleged no harm or injury whatsoever from the alleged "body slam." Plaintiff received no medical treatment for the redness on his wrists and could not remember whether it was apparent the following day.

Even when plaintiff's allegations are viewed in the light most favorable to him, he has not shown any specific facts to establish his allegation that Officer Blackman "body slammed" him to overcome his "heavy burden" to prove Officer Blackman's actions were malicious, wanton, or were done with any intent to injure him.

Plaintiff has failed to allege any facts to forecast Officer Blackman's conduct was wanton or done with a reckless indifference to plaintiff's rights, when compared to what any reasonable police officer would have done in Officer Blackman's position, given plaintiff's admitted conduct. *See Brown*, 233 N.C. App. at 270, 756 S.E.2d at 758.

Plaintiff's conclusory allegation that Officer Blackman "body slammed" him by a "rough use of force" does not create a genuine issue of material fact. Officer Blackman is entitled to summary judgment as plaintiff's forecast of evidence failed to carry his "heavy burden" to show he acted maliciously, in order to overcome Officer Blackman's presumption and entitlement to public officer immunity. *See Leete*, 341 N.C. at 119, 462 S.E.2d at 478; *Schlossberg*, 141 N.C. App. at 446, 540 S.E.2d at 56.

III. Conclusion

Plaintiff has failed to forecast any evidence demonstrating specific facts, as opposed to mere unsupported allegations, showing a *prima facie* case for trial. *See Draughon*, 158 N.C. App. at 212, 580 S.E.2d at 735. Plaintiff also failed to forecast evidence for each element of malice, wantonness, or breach of duty, and did not carry his "heavy burden" to survive Officer Blackman's motion for summary judgment on the issue

of his individual liability under public official immunity. *See Schlossberg*, 141 N.C. App. at 446, 540 S.E.2d at 56.

No genuine issues of material fact exist in the pleadings, depositions, and affidavits served and entered in this matter to overcome defendant's motions and to deny summary judgment. The trial court's ruling is properly reversed and remanded for entry of summary judgment for Officer Blackman. I respectfully dissent.

CAROLINA MULCHING CO. LLC, PLAINTIFF
v.
RALEIGH-WILMINGTON INVESTORS II, LLC;
SHALIMAR CONSTRUCTION, INC., DEFENDANTS

No. COA20-47

Filed 7 July 2020

Contracts—breach of contract—judgment—necessity of findings of ultimate fact

In a breach of contract action where plaintiff was contracted to cut down and mulch all trees less than eight inches in diameter located on defendant's property, there was conflicting evidence regarding whether plaintiff measured the trees by circumference or diameter and, therefore, whether the trees left behind after plaintiff's work were subject to the terms of the contract. The trial court's findings were simply recitations of the evidence and the court did not make ultimate findings of fact necessary to resolve the conflicts in the evidence, requiring the judgment in favor of plaintiff to be reversed and remanded.

Judge DILLON dissenting.

Appeal by Defendants from judgment entered 21 May 2019 by Judge C. Ashley Gore in Brunswick County District Court. Heard in the Court of Appeals 27 May 2020.

Law Offices of Timothy Dugan, by Timothy Dugan, for the Plaintiff-Appellee.

Hodges Coxe & Potter, LLP, by Bradley A. Coxe, for the Defendant-Appellant.

BROOK, Judge.

Shalimar Construction, Inc. ("Defendant" or "Defendant Shalimar") appeals from the trial court's judgment after a bench trial finding in favor of Carolina Mulching Co. LLC ("Plaintiff"). On appeal, Defendant argues that the trial court's conclusion that Plaintiff satisfactorily completed the terms of a contract is not supported by the findings of fact, and that we must reverse the trial court's order. For the following reasons, we agree with Defendant.

I. Background

A. Factual Background

Defendant is a construction company that does site work and land development for large construction projects. In 2018, Raleigh-Wilmington Investors II, LLC, ("Investors") entered into a contract with Defendant to clear approximately 27 acres of land in Navassa, North Carolina ("the Lena Springs Project"). Defendant's work consisted of clearing and grading the land, building roads, installing water, sewer, and storm drains, and excavating retention ponds over an area of 8.43 acres. Defendant subcontracted the initial clearing of the trees and brush to Plaintiff. After reviewing the plans and visiting the job site, Plaintiff's agent Shane Stevenson prepared a proposal. The proposal read as follows: "Service—Clearing overgrown land. Mulching trees and brush up to 6"-8" in diameter in the 8.5 acres of land for development on Main Street in Navassa, NC. Cost $15,000.00." The proposal was directly incorporated into the contract, which the parties signed.

Cameron Hall worked for Plaintiff in performing the mulching work. Plaintiff worked on the Lena Springs Project from 12 to 23 March 2018. Defendant's president and agent David Edwards was present on the job site during the days Mr. Hall was working. Mr. Hall and Defendant discussed Plaintiff's job performance while working together, and Defendant told Mr. Hall that Defendant would hire a logging company to remove the large trees once Plaintiff finished mulching the small trees on the property.

After clearing 8.5 acres and leaving the job site, Plaintiff sent Defendant an invoice for $15,000.00, but Defendant did not pay Plaintiff. On 13 April 2018, Defendant sent a notice to Plaintiff to complete the Lena Springs Project. At trial, Mr. Edwards testified that Plaintiff did not complete work specified in the contract because Plaintiff left behind trees under eight inches in diameter. Mr. Stevenson, however, testified that he and Mr. Hall completed the work specified in the contract and

that the remaining trees were larger than eight inches in diameter and outside their scope of work. On 18 July 2018, Defendant sent Plaintiff a change order revising the amount due to $2,650.00 for 1.5 acres cleared by Plaintiff and refusing to pay for the remainder of the contract, claiming that Plaintiff had not fulfilled its obligations. Defendant hired D&L Timber to cut the remaining trees on the 8.5 acres of the Lena Springs Project.

B. Procedural History

Plaintiff filed a complaint on 26 September 2018 asserting claims of breach of contract and unjust enrichment against Defendant Shalimar and requesting enforcement of a lien pursuant to Chapter 44A of the North Carolina General Statutes against Investors. Defendant Shalimar responded on 27 November 2018 with an answer and a counterclaim for breach of contract against Plaintiff. Plaintiff voluntarily dismissed all claims against Investors prior to trial.

The parties waived trial by jury, and the case was tried before the Honorable C. Ashley Gore at the 2 May 2019 session of the Civil District Court for Brunswick County. Plaintiff presented evidence that it mulched all the trees under eight inches in diameter, and Defendant presented evidence that Plaintiff was measuring the trees by circumference instead of diameter, resulting in Plaintiff's leaving behind trees that fell within the scope of the contract.

The trial court entered an order at the conclusion of the trial on 21 May 2019 in favor of Plaintiff, including the following pertinent findings of fact:

> 7. In March 2018, Defendant contacted Plaintiff about mulching 8.5 acres of the Lena Springs Project. Plaintiff sent Defendant a proposal for $15,000.00, and Defendant sent Plaintiff a contract with Plaintiff's attached proposal.
>
> 8. The specific terms of the proposal included the type of service Plaintiff would complete, and the exact price Defendant would pay. The service provided was "[c]learing overgrown land[and m]ulching trees and brush up to 6"-8" in diameter in the 8.5 acres of land for . . . [the Lena Springs Project]. The cost was "$15,000.00."
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> 9. The industry standard of clearing trees and underbrush is measured by the diameter, not circumference, of trees.

. . .

11. The parties signed the contract and Plaintiff began working on the Lena Springs Project on March 12, 2018.

12. Plaintiff worked on the job site until on or about March 23, 2018. Defendant was also present on the job site during the days Plaintiff was working, but he was performing his own duties as General Contractor.

13. Plaintiff and Defendant discussed Plaintiff's job performance while working together[,] and Defendant seemed pleased with Plaintiff's progress. Defendant told Plaintiff he would have to hire a logging company to remove the large trees once Plaintiff finished mulching the property.

14. Plaintiff mulched the 8.5 acres of the Lena Springs Project; however, a controversy arose over the trees left standing after Plaintiff left the job site.

15. The contract between the parties specified Plaintiff would mulch all trees 6"-8" in diameter or less. Defendant contends the trees left standing on the property after Plaintiff left were smaller than 8" in diameter and should have been cleared by Plaintiff. Defendant was only satisfied with 1.5 acres of the 8.5 acre job.

16. After leaving the job site, Plaintiff sent Defendant an invoice for the $15,000.00, but Defendant did not pay any money to Plaintiff.

17. On April 13, 2018, Defendant sent a notice to Plaintiff to complete the Lena Springs Project, and on July 18, 2018, Defendant sent Plaintiff a Change Order.

18. The Change Order revised the amount Defendant was to pay Plaintiff under the original contract. The parties originally agreed to the amount of $15,000.00 for the job, and the Change Order revised that amount to $2,650.00. This amount of pay was for the 1.5 acres that was completely cleared by Plaintiff.

19. Several months later, Defendant hired D&L Logging to clear the rest of the trees left on the Lena Springs Project. The logging company hauled off approximately 13 loads of wood from the project.

> 20. Plaintiff continued to demand Defendant pay the $15,000.00 for the services rendered, and Defendant refused to pay any money.

The order contained the following conclusions of law:

> 1. This Court has jurisdiction over the parties and the subject matter of this action.
>
> 2. Plaintiff and Defendant entered into a written contract for Plaintiff's tree mulching services. There was a meeting of the minds between the two parties when they entered into the essential terms of the written contract. The Defendant even included Plaintiff's proposal in the body of the contract.
>
> 3. Both parties signed the written contract, and the terms of the contract were clear and unambiguous; Plaintiff would provide the mulching services for the Lena Springs Project[,] and Defendant would pay Plaintiff $15,000.00. Plaintiff's services included mulching trees 6"-8" in diameter[,] and Plaintiff satisfied those terms of the contract.
>
> 4. Plaintiff worked with Defendant on the job site for approximately 10 days[,] and Plaintiff satisfactorily complied with the terms of the contract. Plaintiff mulched the 8.5 acres of land specified in the contract, and therefore should be paid for the completed work. There was no material breach of the contract by Plaintiff.
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> 5. Defendant did not suffer any damages from Plaintiff's performance of services rendered under their written contract. Defendant planned on hiring a logging company to remove the larger trees on the job site before Plaintiff finished the job[] and therefore did not incur any unreasonable expenses by hiring D&L Logging months after Plaintiff left the job site.

The trial court ordered Defendant to pay Plaintiff the $15,000.00 specified in the contract plus any interest accrued. Defendant filed timely notice of appeal on 17 June 2019.

II. Standard of Review

We review an order entered by a trial court sitting without a jury to determine whether competent evidence supports the findings, whether the findings support the conclusions, and whether the conclusions

support the judgment. *Quick v. Quick*, 305 N.C. 446, 454, 290 S.E.2d 653, 659 (1982). "Unchallenged findings of fact are presumed correct and are binding on appeal." *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008). The trial court's findings of fact, even if challenged, shall not be disturbed if there is evidence to support those findings, but its conclusions of law are reviewable de novo. *Hanson v. Legasus of North Carolina, LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010). "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).

III. Analysis

Defendant argues that the trial court's findings do not support Conclusions 3 and 4 that Plaintiff mulched all trees under six to eight inches in diameter and therefore satisfied the terms of the contract. Defendant also argues that there are no findings to support Conclusion 5 that Defendant did not suffer any damages and did not incur unreasonable expenses from the Plaintiff's performance of services. Defendant further argues that even if there were such findings, there exists no competent evidence to support them.

On the other hand, Plaintiff argues that the trial court's findings support Conclusions 3 and 4 that the Plaintiff satisfied the terms of the contract. Plaintiff contends that these findings are supported by the testimony of Messrs. Hall and Stevenson, who testified that they mulched the entire 8.5 acres, took down all trees under eight inches in diameter, and that Defendant was present at the job site for the 10 days they were working there and was satisfied with the work. Plaintiff argues that Conclusion 5 is supported by the trial court's conclusion that Plaintiff satisfied the terms of the contract and by the unchallenged finding that "Defendant told Plaintiff he would have to hire a logging company to remove the large trees once Plaintiff finished mulching the property."

For the following reasons, we agree with Defendant that the trial court's findings do not support its conclusion that Plaintiff fully performed under the contract.

Rule 52(a) of the North Carolina Rules of Civil Procedure requires a trial judge sitting without a jury to specifically find facts and state separately its conclusions of law. N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2019). The trial court is required to set forth the "specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached." *Gilbert v. Guilford*

County, 238 N.C. App. 54, 56, 767 S.E.2d 93, 95 (2014) (emphasis in original omitted). "Evidence must support findings; findings must support conclusions; conclusions must support the judgment. . . . [E]ach link in the chain of reasoning must appear in the order itself." *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

"Where the evidence is conflicting . . . , the judge must resolve the conflict. He sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth." *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971). The trial court must determine "the weight to be given [the] testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, [the trial court] determines which inferences [to] draw[ ] and which [to] reject[ ]." *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). "[O]nly the trial court can draw these inferences or any other potential inferences based on the evidence." *In re J.C.D.*, ___ N.C. App. ___, ___, 828 S.E.2d 186, 193 (2019). "This Court does not resolve issues of credibility" or conflicting evidence. *Id.*

Therefore, it is crucial that "the [trial] court [ ] make its own determination as to what pertinent facts are actually established by the evidence[.]" *Davis v. Davis*, 11 N.C. App. 115, 117, 180 S.E.2d 374, 375 (1971). Where a trial court "merely recit[es] what the evidence may tend to show[,]" it fails to make the ultimate findings of fact required for resolving any disputed issues. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 366 (2000). And when "[t]he trial court's order [does] not resolve the conflicts in the evidence and [does] not fully state the facts upon which its conclusions rested, [ ] we must remand for additional findings of fact." *In re J.C.D.*, ___ N.C. App. at ___, 828 S.E.2d at 193; *see also In re Gleisner*, 141 N.C. App. at 481, 539 S.E.2d at 366 (noting the need to "make ultimate findings of fact resolving the numerous disputed issues").

Here, the trial court's findings fail to state all of the necessary inferences it drew from the evidence, and several of the findings instead merely restate testimony. In Finding 14, the trial court states, "Plaintiff mulched the 8.5 acres of the Lena Springs Project; however, a controversy arose over the trees left standing after Plaintiff left the job site." Then Finding 15 states,

> [t]he contract between the parties specified Plaintiff would mulch all trees 6"-8" in diameter or less. Defendant contends the trees left standing on the property after Plaintiff left were smaller than 8" in diameter and should have been

> cleared by Plaintiff. Defendant was only satisfied with 1.5 acres of the 8.5 acre job.

These findings merely recount the key dispute between the parties. While the parties presented conflicting evidence regarding how Plaintiff measured the trees it mulched, neither here nor elsewhere in the findings did the trial court resolve this conflict such that it could support any assessment as to whether Plaintiff left standing trees that were smaller than eight inches in diameter. And yet the trial court concluded—without any findings bearing out Plaintiff's compliance with its obligation in dispute—that "Plaintiff satisfactorily complied with the terms of the contract." Because the trial court failed to resolve the conflicts presented by the testimony, this conclusion is not supported by the findings.

Plaintiff argues that what the trial court labeled conclusions of law are on occasion factual findings sufficient to support the trial court's ultimate legal conclusion. Specifically, Plaintiff asserts that the statements in Conclusions 3 and 4 that "Plaintiff's services included mulching trees 6"-8" in diameter and Plaintiff satisfied those terms of the contract" and that "Plaintiff satisfactorily complied with the terms of the contract" are findings that support the legal conclusion that "[t]here was no material breach of the contract by Plaintiff." But this assertion elides the shortcoming addressed above: these statements do not resolve, much less state the basis upon which they resolve, the controversy the trial court identified—whether, due to measuring based on circumference instead of diameter, the trees that Plaintiff left behind fell within the scope of the contract. Moreover, Conclusion 5 states,

> Defendant did not suffer any damages from Plaintiff's performance of services rendered under their written contract. Defendant planned on hiring a logging company to remove the larger trees on the job site before Plaintiff finished the job[] and therefore did not incur any unreasonable expenses by hiring D&L Logging months after Plaintiff left the job site.

The scope of D&L Logging's labor, of course, turned on the number of trees left on the property. Conclusion 5 thus depends on the court's conclusion that Plaintiff fulfilled its contractual obligations and is therefore, as explained above, also unsupported by the findings of fact. In short, the order is missing essential links in its chain of reasoning to support its conclusion that Plaintiff fulfilled its contractual obligations.[1]

1. The dissent characterizes the trial court's shortcoming not as a failure to show how it arrived at its conclusion but instead as arriving at an untenable conclusion, thus

IV. Conclusion

We conclude that the trial court failed to make ultimate findings of fact necessary to resolve conflicts in the evidence, and that therefore the findings do not support the conclusions of law. We therefore reverse and remand the judgment of the trial court "with instructions to make ultimate findings of fact based on the evidence and to enter clear and specific conclusions of law based on the findings of fact."[2] *In re Gleisner*, 141 N.C. App. at 481, 539 S.E.2d at 366.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

Shalimar Construction, Inc. ("Shalimar") subcontracted with Carolina Mulching Company, LLC, ("Carolina Mulching") to mulch all the trees and brush "up to 6"-8" in diameter" on a construction site for $15,000.

Carolina Mulching performed mulching work on the site pursuant to the contract. Shalimar, however, refused to pay Carolina Mulching the entire $15,000, claiming that Carolina Mulching removed only a fraction of the trees which were under 8" in diameter.

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requiring a straight reversal instead of a reverse and remand with instructions. The dissent is certainly right that there is evidence that Plaintiff measured by circumference, not diameter. And it is certainly possible that the trial court might not be able to marshal sufficient evidentiary support to justify ruling for Plaintiff on remand. But, in the dissent's efforts to argue that it is clear that Plaintiff measured by circumference, no such clarity emerges. The dissent instead merely highlights the contradictory nature of the testimony. It is not our place to resolve these conflicts. The trial court, having heard the evidence and seen the witnesses, is much better situated to do so.

2. The dissent argues we are actually vacating the trial court judgment. This is, at some level, an academic debate, as the disposition line of our opinion is not as significant as the clear "instructions to make ultimate findings of fact" on remand immediately above. That being said, the reverse and remand, as opposed to vacate, nomenclature is most appropriate under these circumstances. *Compare* 1-16 North Carolina Appellate Practice and Procedure § 16.02 (2018) ("REVERSED. The appellate court has determined, usually in a civil case, that the trial tribunal committed reversible error. If the reversal requires additional proceedings in the trial tribunal, the disposition may read REVERSED AND REMANDED."), *with* 1-16 North Carolina Appellate Practice and Procedure § 16.02 (2018) ("VACATED. The order or judgment under consideration by the appellate court is rendered void. A case may be VACATED AND REMANDED when the matter must return to the trial tribunal for additional proceedings or for any other reason set out in the opinion.").

Carolina Mulching sued. A bench trial followed. At the trial, there was evidence that Carolina Mulching cut only the trees that were 8" or less in *circumference*, (which would only include trees with a diameter of 2.55" or less[1]).

The trial court entered its written decision, determining that the contract provided that Carolina Mulching mulch trees up to "6"-8" in diameter and that [Carolina Mulching] satisfied those terms of the contract." In other words, the trial court *found* that Carolina Mulching mulched all the trees under 6"-8" in diameter.

The majority has determined that the trial court erred, entering a mandate of "reversed and remanded." I agree with the majority that the trial court erred and that the mandate should be "reversed and remanded." However, in my view, the majority is simply directing that the trial court's order be "vacated" rather than "reversed and remanded," and, accordingly, I dissent.

The majority holds that the trial court did not enter sufficient findings to support its judgment in favor of Carolina Mulching, but does not otherwise hold that judgment should have been entered for Shalimar. Specifically, the majority concludes that the trial court failed to enter a finding to resolve the conflict in the evidence regarding whether Carolina Mulching, indeed, cut down only the trees under 8" in circumference rather than 8" in diameter. The majority, therefore, directs the matter be remanded for the trial court *to resolve the conflict* and enter judgment accordingly, a judgment that could still be in favor of Carolina Mulching. Accordingly, I believe that the majority is simply "vacating" the trial court's judgment.

I conclude, however, that the trial court *has* made a finding resolving the conflict. The order expressly states that the contract called for Carolina Mulching to mulch all trees up to 8" in diameter and that Carolina Mulching "satisfied those terms of the contract." It is true that this statement is included in the "Conclusions of Law" section. But this statement is clearly a "finding" that resolves any conflict in the evidence, no matter how it is labeled in the order.

I conclude further, though, that *the evidence* was insufficient to submit the issue to the fact-finder. Carolina Mulching failed to meet its burden to reach the fact-finder (the trial judge in this case) to put on

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1. The equation for finding the diameter of the tree is the circumference of the tree divided by π. Here, 8" divided by π is approximately 2.55".

evidence that it mulched the trees up to 8" in *diameter*. Accordingly, the trial court's order should be "reversed" and judgment should be entered for Shalimar.

My vote to reverse differs from the majority's mandate which essentially vacates the order.[2] *See Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 12, 18 (D.D.C. 1998) ("Although the word reverse shares vacate's meanings of to [annul] and to set aside, it has an additional, more extensive definition: 'To reverse a judgment means to overthrow it by contrary decision[.]' "); *see also Mickens v. Taylor*, 535 U.S. 162, 170 n.3; 152 L. Ed. 2d 291, 303 n.3 (2002) (emphasizing that a prior ruling had only "vacated" the judgment, remanding for further proceedings, rather than "reversed" and overturned a conviction.").

Regarding my vote to reverse, I note that it is not appropriate for us to reweigh the evidence on appeal. But here I conclude that there was insufficient evidence to support the trial court's finding that Carolina Mulching mulched all the trees up to 8" in *diameter*. Admittedly, there is testimony from Carolina Mulching's witnesses that they mulched the trees that were 8" in diameter or less. However, the evidence is uncontradicted that Carolina Mulching's witnesses thought "diameter" meant "circumference." Its first witness was its owner who worked the site. He testified on direct by Carolina Mulching's own attorney that he measured the circumference:

> Q: What is the significance of six to eight inches in diameter?
>
> A: . . . If you put a tape measure around [a tree], that would be eight inches, give or take. . . .
>
> Q: So we're talking eight inches around it?
>
> A: Yeah, but wouldn't do oak trees eight inches.

Later, he described how he determined whether a tree in a photograph of the site was 8" in diameter, by again describing how a tree's circumference would be measured:

> Q: All right, can you estimate the sizes of those trees?

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2. Admittedly, judges often use "vacate" and "reverse" interchangeably. *See In re IBM Credit Corp.*, 222 N.C. App. 418, 426, 731 S.E.2d 444, 449 (2012) (stating that "[a]s a practical matter, the terms 'vacate' and 'reverse' are synonymous as used in most cases"); *Lauziere v. Stanley Martin Cmtys., LLC*, 2020 N.C. App. LEXIS 352 *15 n. 2 (discussing the difference between "reverse" and "vacate") (J. Dillon dissenting).

> A: Well, it's bigger than what we typically take, which would be bigger than eight inches. If you put a tape measure on this, it's probably eight to ten inches.

Carolina Mulching's other fact witness was an employee of that company who worked on the job. He confirmed his boss's erroneous definition of "diameter":

> A: I would not have left the trees if they were under eight inches in diameter.
>
> Q: And again, we're talking about how [your boss] described it as take a tape measure around it and measure that tree and it's eight inches [ ] or smaller, right?
>
> A: Say that again.
>
> Q: Sure; [your boss] said if you take a tape measure around that tree and measure it, and if it's eight inches or less, that's –
>
> A: That's correct.

After Carolina Mulching's case in chief, Shalimar put on a defense, calling a number of witnesses who testified that Carolina Mulching left enough trees under 8" in diameter to fill over 11 truck loads.

After Shalimar rested, Carolina Mulching recalled the employee who had described "diameter" as measuring *around* the tree, hoping his testimony would strike a different chord this second time around. When recalled, the employee did state that they were cutting trees based on "diameter."

> Q: Were you doing eight-inch circumference trees?
>
> A: Diameter.

However, the testimony went off on a tangent regarding whether a tree was measured from a thick part of the trunk (near the bottom) or a thinner part. The employee never demonstrated during his rebuttal testimony that he now understood what the term "diameter" actually meant or the process by which he calculated the diameter. The only evidence as to what he thought "diameter" meant was from his earlier testimony, the distance *around* a tree.

Accordingly, I conclude that Carolina Mulching, as the plaintiff in this case, failed to meet its burden of showing that it cut down all of

the trees under 8" in diameter, the basis of the trial court's judgment. The trial court, otherwise, did not enter judgment based on some other theory, *e.g.* mistake.

KARLA DUNN AND RONALD DUNN, PLAINTIFFS
v.
KEIR COVINGTON AND COURTNEY COLE, DEFENDANTS, PATRICIA ANNE SCHWEISTHAL AND THOMAS B. SCHWEISTHAL, INTERVENORS

No. COA18-1177

Filed 7 July 2020

Child Custody and Support—custody awarded to grandparents—best interest analysis conflated with fitness analysis—standard not articulated—evidentiary support

An order granting custody of a child to her paternal grandparents was vacated based on multiple errors. The trial court made a determination as to the best interests of the child prior to conducting the required constitutional analysis regarding whether respondent-mother was unfit or acted contrary to her rights as a parent, conflated the best interest analysis with its analysis of the mother's fitness as a parent by improperly focusing on socioeconomic factors, failed to clearly state and apply the correct standard of proof for the constitutional analysis (clear and convincing evidence), and made numerous findings of fact that either were not supported by the evidence or did not support the court's conclusions.

Appeal by Courtney Cole from an order and judgment entered 29 January 2018 by Judge Peter Mack, Jr. in District Court, Carteret County. Heard in the Court of Appeals 1 October 2019.

Michael Lincoln, P.A., by Michael Lincoln, for Plaintiff-Appellees.

Ward, Smith & Norris, P.A., by Kirby H. Smith, III, for Defendant-Appellant.

McGEE, Chief Judge.

Courtney Cole ("Defendant" or "Ms. Cole") appeals a final order and judgment awarding full custody of her daughter to Karla Dunn and Ronald Dunn ("Plaintiffs" or "Dunns"), the child's paternal grandparents.

I. Factual and Procedural Background

Ms. Cole is the mother and Keir Covington ("Mr. Covington") is the father of Tracy. Ms. Cole was born in Arizona to Thomas and Patricia Schweisthal ("the Schweisthals"), who still live there. Ms. Cole met Mr. Covington in 2011 and, on 9 October 2012, she gave birth to Tracy in Phoenix, Arizona. Mr. Covington is the son of the Dunns, who reside in Emerald Isle, North Carolina.

Ms. Cole was charged with conspiring to sell firearms without a license in federal court on 27 August 2013, based on an incident that occurred in 2009. As a result of the charge, Ms. Cole was fired from her job. Consequently, she lost her house to foreclosure. While awaiting sentencing, Ms. Cole, Mr. Covington, and Tracy moved into an extended stay motel for about three weeks or a month because, as Ms. Cole testified, "[they] didn't want to sign a lease . . . if [she] was going to be sentenced to prison." Ms. Cole was convicted and sentenced to four years of probation, with six months on house arrest, on 28 March 2014.

After Ms. Cole was sentenced, she asked her parents, the Schweisthals, if she, Mr. Covington, and Tracy could move into their home in Arizona. The Schweisthals agreed Ms. Cole and Tracy could reside with them, but refused to allow Mr. Covington to do so. Ms. Cole testified she had a conversation with Ms. Dunn about moving to North Carolina and testified "[the Dunns] offered to . . . help . . . us to get our feet on the ground . . . ." Mr. Covington testified the Dunns "[o]ffered [him and Ms. Cole] a place to stay and then they came and helped us move." Ms. Dunn testified Ms. Cole and Mr. Covington had moved into the Dunns' residence in Emerald Isle by May 2014.

Ms. Cole testified that she began looking for a job once she moved to North Carolina. Ms. Dunn testified Ms. Cole worked cleaning vacation condos for about six weeks from June to July 2014. Ms. Cole testified that two weeks after moving to Emerald Isle, she got a job at Emerald Grill, a restaurant on the island. Ms. Cole testified that, after realizing wages were being withheld unfairly, she began looking for other employment. She looked for another job and soon started working at Santorini's Grill in Swansboro, North Carolina. Ms. Cole stayed at that job from July to late October 2014. Ms. Dunn testified Ms. Cole also worked at a diner called Mike's during this time. Ms. Cole chose to leave food service to seek a more permanent job in the medical field, her profession, and she testified she got a job at an Urgent Care in Jacksonville, North Carolina, and started working there around the end of December 2014. However, after Ms. Cole learned she would have a background check, she revealed

her felony conviction to her employer and was terminated from that job after working there for about two and a half weeks.

The Dunns filed a complaint against Ms. Cole and Mr. Covington seeking custody of Tracy on 29 January 2015. They also moved for and obtained an *ex parte* emergency custody order entered the same day. The complaint was served on Ms. Cole by the Carteret County Sheriff's Department on 30 January 2015. In the complaint, the Dunns alleged Ms. Cole was a felon "convicted . . . for selling guns to Mexican Drug Cartel members"; "is also a drug addict and an alcoholic"; she was taking a list of seven prescribed medications "but not as prescribed for the most part and supplements them with extra drugs . . ."; she "is not a fit parent, in that she has been unable and unwilling to be the caretaker of the minor child, and upon information and belief, she has expressed a desire to terminate her own life"; and she and Mr. Covington "have not acted, nor are they now acting, consistent with their Constitutional rights as biological parents, in that they have deferred the care and support of the minor child to the Plaintiffs." The Dunns further allege "[they] are preparing to evict [Ms.] Cole because she has made no effort to become gainfully employed or to substantially participate in the care of her daughter." The *ex parte* emergency custody order merely incorporated the Dunns' allegations as findings of fact.

Ms. Cole testified she did not learn the Dunns were seeking custody of Tracy until the complaint and the *ex parte* emergency custody order were served on her. Once the custody order was obtained and served, the Dunns asked Ms. Cole to move out of the house. Ms. Dunn testified Ms. Cole moved out "in the middle of February [2015]" when the Dunns "asked her to leave." Ms. Cole, however, testified the Dunns "didn't . . . verbally tell [her] . . . themselves'—that she "read it on the paper [(i.e., the complaint)] that they wanted [her] out." She testified "as soon as [she] read the Order . . . [she] was fairly upset about it[,]" and she packed up her things and moved in with a friend who she had worked with at Santorini's, who had an extra room in the house where she and her husband lived "on base" in Jacksonville. She soon moved into an extended stay motel room in Jacksonville with money from jobs she was working at Golden Corral and Crystal Coast Retina Center.

A hearing was held on 9 March 2015 before Judge Peter Mack, Jr. on whether to grant a temporary custody order in the case. The trial court concluded that Ms. Cole "is an unfit person to have the care, custody and control of the minor child," although the court did not specify which facts supported that conclusion, nor did it indicate the standard of proof by which it found those facts. The trial court awarded temporary custody

of Tracy to the Dunns but did not find that Mr. Covington, Tracy's other natural parent, was unfit or had otherwise acted inconsistent with his constitutionally-protected status.[1] The trial court also provided for visitation with Tracy by Ms. Cole and Mr. Covington, "at such times and under such circumstances as set out in a consent agreement between ALL the parties." Ms. Cole filed an answer to the Dunns' complaint and a counterclaim seeking temporary and permanent custody of Tracy on 31 March 2015, to which the Dunns filed a reply on 6 May 2015.

After the *ex parte* emergency custody order was entered, Ms. Cole visited with Tracy, attending around seven visitations in a two-month period. After the temporary custody order was entered, the parties reached a written visitation schedule they all consented to, as instructed by the trial court, which was filed with the trial court on 12 May 2015. Ms. Cole abided by the visitation schedule, but on 21 May 2015, the Dunns moved to suspend visitation, alleging that on 19 May 2015, Ms. Cole "was using a controlled substance and/or a narcotic while having visitation with the minor child at the Defendant's room at the extended stay motel at which she resides in Jacksonville, North Carolina." The Dunns also alleged that the Onslow County Department of Social Services ("DSS") "pursuant to a third party report, arrived at the Defendant's room and immediately escorted her to a drug test." The trial court entered an order on 11 June 2015 restricting Ms. Cole's time with Tracy to supervised visitation for two hours on Wednesdays weekly, basing the order on the "positive drug test," "[l]ack of cooperation with Carteret County DSS," and "[r]ecent discharge from the Port Program in Jacksonville, N.C."

Ms. Cole testified that, in early 2015, she was prescribed prescription opiates by a dentist to treat pain stemming from a procedure to treat tooth decay and she developed a dependency on the prescription opioid medication. She said that, at the end of January 2015, she sought help at Port Human Services ("Port"), a drug addiction rehabilitation hospital in Jacksonville, that included a Suboxone clinic. She also testified she was attending classes at Port when the complaint in this case was filed. She testified she did not successfully complete the Suboxone program, but that she entered the program out of her own volition as "a way to

1. Unlike Ms. Cole, the trial court did not find that Mr. Covington was unfit or acted inconsistent with his constitutionally-protected status as parent to Tracy in the temporary custody order. Instead, the trial court concluded in the order that "it is in the best interest of the minor child . . . to maintain the *status quo* by continuing the care, custody and control of the minor child with the Plaintiffs pending further hearings in the matter, and to allow for Defendant Covington's filing of responsive pleadings in this matter." This finding contradicts and supplants the trial court's prior oral finding that Mr. Covington was "unfit" because he was "homeless."

get off prescription opiates . . . .” On cross-examination of Ms. Dunn, she conceded she had no evidence that Ms. Cole was abusing drugs at the time the Dunns filed the complaint. Ms. Cole also testified that, as part of the court-sanctioned visitation schedule, she had to submit to drug tests once a week, and she complied with those drug tests that showed she was only taking Adderall to treat Attention Deficit Disorder and the Suboxone prescribed by Port. At some point during Spring of 2015, Ms. Cole went from prescription opiates to heroin. DSS responded to a claim that Ms. Cole was using drugs while visiting with Tracy on 19 May 2015 and DSS required her to take a drug test. Statements from the trial court judge in the transcript indicate the urinalysis performed on Ms. Cole came back positive. Ms. Cole testified her drug addiction soon came to the attention of her parole officer and he had a conversation with her, after which he had her transferred back to Arizona and charged with a probation violation for the drug use. Ms. Cole was flown back to Arizona in August 2015.

In Arizona, Ms. Cole appeared before the district court on her probation violation and the court agreed to permit her to remain on probation if she completed treatment at The Meadows drug rehabilitation center in Wickenburg, Arizona. Ms. Cole subsequently spent forty-five days at The Meadows, successfully completing the rehabilitation program on 11 November 2015. She then moved into Sober Living, a halfway house in Chandler, Arizona. Ms. Cole testified the halfway house was not the best environment because some residents were actively using drugs and she relapsed after about a week there. Ms. Cole moved into a motel where her probation officer visited her, determined that she had relapsed, and told her she needed to seek treatment or have her probation revoked.

Ms. Cole was initially sent to Chandler Valley Hope to detox, but subsequently entered the rehabilitation program at Desert Cove Rehabilitation Center on 15 or 16 December 2015 and stayed there for seven months, until the end of June 2016, successfully completing the rehabilitation program. Ms. Cole testified she had maintained her sobriety after graduating from the Desert Cove program and had been sober for eighteen months as of 13 June 2017.

After the trial court entered its 11 June 2015 order modifying Ms. Cole’s visitation, Ms. Cole’s parents, the Schweisthals, moved to intervene in the case on 12 June 2015. They also filed an answer and counterclaim seeking custody of Tracy. The trial court granted the Schweisthals’ motion to intervene on 20 August 2015 *nunc pro tunc* for 12 May 2015. On 5 October 2015, the Dunns moved to dismiss the Schewisthals’ counterclaim for failure to state a claim upon which relief can be granted

and moved for appropriate relief for the trial court "to correct the 'nunc pro tunc' date from May 12, 2015 to June 19, 2015 on the Order Allowing Intervention." The Dunns also replied to the Schweisthals' answer and counterclaim.

The Schweisthals filed an emergency motion for visitation on 9 November 2015, after Ms. Cole had been required to returned to Arizona and just prior to her successful graduation from the rehabilitation program at The Meadows. The trial court issued an order on 27 April 2016 holding the Schweisthal's motion in abeyance pending the appointment of and investigation by a guardian ad litem, Missy Blackerby ("the guardian ad litem"). The trial court entered an order setting a consent visitation schedule on 12 August 2016. In addition to telephone, FaceTime, or Skype contacts three times a week, the order provided for trips for Tracy to visit the Intervenors in Arizona in October 2016, December 2016, April 2017, and July 2017, as well as visitation any time the Schweisthals would be in North Carolina, provided they gave Plaintiffs thirty days advance notice. The visitation order also provided Ms. Cole five supervised telephone visits with Tracy per week, and that, after the fifth visit, if the supervisor determines they were appropriate, Ms. Cole could move to unsupervised telephone visits. After review of the supervisor's report by the guardian ad litem and Dr. Amy James ("Dr. James"), a counselor appointed for Tracy, Ms. Cole could move to supervised in-person visitation.

The Dunns took Tracy to Arizona to visit the Schweisthals for the agreed-upon October 2016 visitation, but the Dunns moved to suspend visitation on 8 December 2016. The trial court entered an *ex parte* order suspending the Schweisthals' visitation, adopting the allegations in the Plaintiffs' motion as findings of fact, including an allegation made by the guardian ad litem and the Dunns that the Schweisthals had retained an attorney and, on the December 2016 visit, intended to prevent Tracy from returning home and obtain an *ex parte* custody order from an Arizona court. However, in the order, the trial court noted the order "in no way adversely affects [Ms. Cole] in her future phone visitations and eventual visitation."

The Dunns moved to limit electronic communications between the Schweisthals and Tracy on 26 March 2017. Ms. Cole moved for review by the court and to expand her visitation on 12 April 2017. In the motion, Ms. Cole argued that, although she had complied with every requirement of the agreed-to visitation schedule, the report of her supervisor had not been accepted. The trial court found in an order regarding electronic communications and expert recommendations entered on

20 April 2017 that "[t]he past telephone calls of the [Schweisthals] have been, for the most part, distracting and over burdensome for the minor child" and that Tracy "actually does not wish to talk to [them] except on rare occasions." The trial court also found that Ms. Cole and Tracy "have positively interacted in their phone conversation" and that "[t]he minor child misses her mother, [Ms.] Cole." The trial court found that Ms. Dunn, who "[wa]s not an expert," believed the calls with Ms. Cole caused "some adverse residual effect [in Tracy] afterward" and that both the Schweisthals and Ms. Cole should only be able to call Tracy every other week. The trial court limited the Schweisthals to calls every other week, but expanded Ms. Cole's visitation to permit unsupervised calls every other week and allowed the possibility of a supervised visit, based on the recommendations of the experts and advocates involved.

On 30 March 2017, the trial court entered an order peremptorily setting the case for trial on 12 June 2017, as "there are issues remaining to be heard regarding permanent custody." The trial court heard the trial on the merits in this case on 12 and 13 June 2017. Ms. Cole testified she was engaged to be married and employed in Arizona at two jobs: working as a behavioral health technician at a recovery center and as a phlebotomist at a doctor's office. She testified she would complete her federal probation in March 2018. Ms. Cole further testified she had been sober for eighteen months as of 13 June 2017, having successfully completed the program at Desert Cove, and testified she attended up to five Narcotics Anonymous meetings per week. Her testimony was corroborated by her sponsor in Narcotics Anonymous, Timoree Branson ("Ms. Branson"), who travelled with Ms. Cole to North Carolina to testify on her behalf.

Ms. Cole's counsel moved to dismiss the case for failure to state a claim, cited several precedents of our courts, and argued there was insufficient evidence to show Ms. Cole acted inconsistent with her constitutional rights. The trial court said it would decide the motion to dismiss at the close of the hearing; however, the court did not rule on the motion. The trial court said it would issue an order by the following Friday and said "I can tell you whatever the Order is, it's going to be a temporary Order because I'm going to see how everybody does in the transition and the stability." The trial court did not issue a subsequent temporary custody order.

During the hearing, Ms. Cole also testified she had unsupervised calls with Tracy every other week and that she never misses a call, exercising her rights to the fullest extent permitted under the 20 April 2017 electronic communications order. She further testified she sent gifts and

clothes to Tracy, but was "kind of walking on egg shells" because the guardian ad litem told her in an email "[she] was not allowed to say those gifts were from [her]." Ms. Cole testified that, in her conversations with Tracy, Tracy would refer to her as "mommy" and "Mama Courtney." In its electronic communications order, the trial court found—and no party challenges the finding—that Tracy and Ms. Cole "have positively interacted in their phone conversations" and that Tracy "misses her mother, the Defendant, [Ms.] Cole."

Ms. Cole filed a motion on 20 December 2017 for the Dunns to show cause why they should not be held in contempt for failure to abide by the trial court's 20 April 2017 electronic communications order. She alleged that, on 21 October 2017, she "placed her regularly bi-weekly call to the minor child at the regularly schedule time[,]" but "[t]here was no answer at the [Dunns'] home number or their cell phone numbers[,]" and that "[a]fter a year of regularly scheduled telephone visitation, this was the first time she was not able to contact the [Dunns] to talk to her daughter." Ms. Cole alleged the Dunns had not answered any of Ms. Cole's regularly scheduled calls since that date and Ms. Dunn had blocked her phone number. The trial court entered a show cause order finding "[p]robable cause exists to believe that Plaintiffs are [] in contempt of Orders of this Court" and scheduled a contempt hearing for 29 January 2018. The Dunns responded to the motion to show cause alleging: Ms. Cole had not retained an appropriate licensed counselor to facilitate reunification with Tracy; Ms. Cole asked Tracy to call her "mother" and not Ms. Dunn; Ms. Cole and the Schweisthals had asked the police to conduct welfare checks on Tracy; Ms. Cole had mailed Tracy pictures for Tracy's birthday in October 2018; and Ms. Dunn "is the best person to determine what is harmful to the minor child."

On 29 January 2018, the date the trial court had set for the contempt hearing sought by Ms. Cole, the trial court entered a permanent custody order granting permanent custody of Tracy to the Dunns.[2] Ms. Cole filed her notice of appeal of the custody order on 22 February 2018.

II. Analysis

Defendant argues three issues on appeal: (1) the trial court "erred by failing to require the Dunns to prove by clear and convincing evidence that [Ms.] Cole had 'not acted consistent with her constitutionally protected rights as a parent' "; (2) the trial court's "findings of fact do

2. On 27 March 2018, the trial court found the Dunns were not in contempt of court and dismissed Ms. Cole's motion to show cause.

not support its conclusion of law that [Ms.] Cole 'forfeited her constitutionally protected right as a biological parent to have care, custody and control' of Tracy by clear, cogent and convincing evidence"; and (3) the trial court "erred by making Findings of Fact that were not supported by competent evidence, and in some situations were contradicted by the evidence." We hold the trial court erred by failing to require the movants to show by clear and convincing evidence that Ms. Cole forfeited her constitutionally-protected status as the biological parent of Tracy prior to applying the best interest of the child analysis. The trial court also made findings of fact that were not supported by competent evidence. Therefore, we vacate the custody order and remand the case to the trial court.

A. Analysis under *Petersen* and its progeny

Defendant argues the trial court "erred by failing to require the Plaintiffs to prove by clear and convincing evidence that [Ms.] Cole had 'not acted consistent with her constitutionally protected rights as a parent[.]" Specifically, Defendant argues the trial court erred in its oral findings and written order by not announcing the standard of proof it applied. Defendant also argues the trial court erred by not applying the proper standard of proof: clear and convincing evidence. Plaintiffs, in turn, argue the trial court is not required to announce the standard of proof it applies, so long as the findings are supported by evidence that satisfies the standard. Furthermore, Plaintiffs argue, relying on a law professor's article, that "biology does not beget rights," and that the "best interest of the child" analysis should control, even where the parent is not shown to be unfit.

Following United States Supreme Court precedent, our Courts have long recognized "a natural parent's liberty interest in the companionship, custody, care, and control of his or her child" arising under the Fourteenth Amendment Due Process Clause. *Price v. Howard*, 346 N.C. 68, 74, 484 S.E.2d 528, 531 (1997); *see Troxel v. Granville*, 530 U.S. 57, 66, 147 L.Ed.2d 49, 57 (2000) (reaffirming a parent's fundamental right "to make decisions concerning the care, custody, and control" of the parent's children). In *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901, our Supreme Court held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their child must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). In so holding, our Supreme Court in *Petersen* "expressly disavowed" language to the contrary in *Best v. Best*, 81 N.C. App. 337, 344 S.E.2d 363 (1986), on which the *Petersen* plaintiffs relied

to argue that the welfare of the child "is paramount to all common law preferential rights of the parents."[3] *Id.* Our Supreme Court in *Petersen* reasoned that the defendants' "paramount right" as natural parents "had to prevail" over the plaintiffs' position as unlawful adoptive parents of the child, where "there was no finding that [the] defendants had neglected their child's welfare in any way." *Id.* at 404, 447 N.C. at 905.

Our Supreme Court reaffirmed and extended its analysis of the rights of natural parents in *Price v. Howard*. In *Price*, the defendant was the natural mother who gave birth to the child at issue and had represented that the plaintiff was the father. *Id.* at 70-71, 484 S.E.2d at 529. However, when the plaintiff and defendant separated, the child remained with the plaintiff for six years. *Id.* at 71, 484 S.E.2d at 529-30. A court-ordered blood test established the plaintiff was not the child's natural father and thus was a non-parent third party. *Id.* In *Price*, the key issue was "whether, under the facts of th[e] case, the trial court was required to hold that [the] defendant's constitutionally protected interest in the companionship, custody, care and control of her child must prevail or whether the statutorily prescribed 'best interest of the child' test should have been applied to determine custody." *Id.* at 74, 484 S.E.2d at 531.

Our Supreme Court reaffirmed that a natural parent has a "liberty interest in the companionship, custody, care and control of his or her child[,]" *id.* at 74, 484 S.E.2d at 531, but it further noted that while a fit and suitable parent is " 'entitled to the custody of his child, it is equally true that where fitness and suitability are absent he loses this right.' " *Id.* at 75, 484 S.E.2d at 532 (quoting *Wilson v. Wilson*, 269 N.C. 676, 677, 153 S.E.2d 349, 351 (1967)). Our Supreme Court then adopted the following test for determining when the "best interest of the child" analysis could apply without infringing a natural parent's constitutional rights:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent

3. The Plaintiffs' argument citing to a law professor's article for the proposition that "biology does not beget rights" is, therefore, not supported by North Carolina law; nor is their assertion that "North Carolina Courts have routinely deferred to the child's best interests in resolving custody disputes" when it comes to disputes between a natural parent and a non-parent third-party.

> with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. 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. However, conduct inconsistent with the parent's protected status . . . would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Id. at 79, 484 S.E.2d at 534-35 (citations omitted). The Court reversed and remanded with instructions to remand to the trial court "for a determination of whether defendant's conduct was inconsistent with the constitutionally protected status of a natural parent," *id.* at 84, 484 S.E.2d at 537, as the facts included "a period of voluntary nonparent custody rather than unfitness or neglect," *id.* at 82, 484 S.E.2d at 536.

In a subsequent case, *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499, our Supreme Court held that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citing *Santofsky v. Kramer*, 455 U.S. 745, 747-48, 71 L.Ed.2d 599, 603 (1982)). However, the Court in *Adams* affirmed the trial court's conclusions of law and application of the "best interest of the child" standard on the record before it because the intervenor-natural father did not argue the trial court erred in its findings of fact, and the "evidence of the record constitutes clear and convincing proof that [the intervenor]'s conduct was inconsistent with his right to custody of the child." *Id.* at 66, 550 S.E.2d at 505.

In *David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751, our Supreme Court reversed and remanded a trial court judgment awarding custody to a non-parent over a natural parent and held that the trial court, in finding that the natural father of the child acted in a way inconsistent with

his constitutionally-protected status, "failed to apply the clear and convincing evidence standard as set forth in *Adams* in making this determination[.]" *David N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 754 (2005).

When read together, these cases

> protect a natural parent's paramount constitutional right to custody and control of his or her children. The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child. As a result, the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, or where the parent's conduct is inconsistent with his or her constitutionally protected status.

Adams, 354 N.C. at 62, 550 S.E.2d at 503 (citation omitted). In making the determination that a natural parent is unfit or has otherwise acted in a manner inconsistent with her constitutionally-protected status, the trial court must apply the clear and convincing evidence standard. *David N.*, 359 N.C. at 307, 608 S.E.2d at 754. In a custody dispute between a natural parent and a non-parent third-party, only after the trial court has determined by clear and convincing evidence that the natural parent has lost her paramount right as a result of unfitness or acting in a manner inconsistent with her constitutionally-protected status may the trial court proceed to the "best interest of the child" analysis. As our Supreme Court summarized in *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264:

> [T]he Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child. Until, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the "best interest of the child" test is simply not implicated. In other words, the trial court may employ the "best interest of the child" test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited her constitutionally protected status.

Owenby, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003) (internal citations omitted).

In the present case, the trial court, in its conclusions of law in the permanent custody order, stated as follows:

> 2. It is in the best interest of the minor child to be in the permanent custody, care and control of the Plaintiffs.
>
> . . .
>
> 4. Also, based on the foregoing Findings of Fact the Court concludes that the Defendant Cole, based on her conduct, as set forth herein, has forfeited her Constitutionally protected right as a biological parent to have the care, custody and control [of] her minor child.

The trial court erred in applying the "best interest of the child" analysis to grant custody to the Dunns prior to determining whether Ms. Cole lost her paramount right by acting inconsistent with her constitutionally-protected status.

The trial court also failed to apply the clear and convincing evidence standard as set forth in *David N.* in making this determination, *David N.*, 359 N.C. at 307, 608 S.E.2d at 754, because it failed to state which standard of proof it used. "Clear and convincing evidence" is a higher evidentiary standard than the "greater weight of the evidence" standard used in ordinary child custody cases between natural parents where the "best interest of the child" is the sole test. *See Everette v. Collins*, 176 N.C. App. 168, 173, 625 S.E.2d 796, 799 (2006). As the trial court did not state which standard it used, an appellate court cannot review the record to determine whether the trial court complied with this requirement. *Cf. In re Church*, 136 N.C. App. 654, 657, 525 S.E.2d 478, 480 (2000) (holding trial court erred in termination-of-parental-rights case when it failed to affirmatively state clear, cogent and convincing evidentiary standard because "without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized"); *accord David N.*, 359 N.C. at 307, 608 S.E.2d at 754 (reversing trial court order where it stated parent's conduct was "tantamount to abandonment, neglect, abuse or other acts inconsistent with [a] natural parent's constitutionally protected interest[,]" but did not state clear and convincing evidentiary standard).

The trial court also conflated the "best interest of the child" analysis with the independent and prior question of whether Ms. Cole, the natural parent, was unfit or acted inconsistent with her constitutionally-protected status. While "[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy[,]" other conduct "can also rise to this level" but "must be viewed

on a case-by-case basis[.]" *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35. Our Courts have long held that a parent's "socioeconomic status is irrelevant to a fitness determination." *Raynor v. Odom*, 124 N.C. App. 724, 731, 478 S.E.2d 655, 659 (1996) (citing *Jolly v. Queen*, 264 N.C. 711, 713-14, 142 S.E.2d 592, 595 (1965)). Indeed, in *Jolly v. Queen*, our Supreme Court specifically contrasted the question of the relevance of socioeconomic status to a parent's fitness with its role in the "best interest of the child" standard. *See Jolly v. Queen*, 264 N.C. 711, 715, 142 S.E.2d 592, 596 (1965) ("Conceivably, a judge might find it to be in the best interest of a legitimate child of poor but honest, industrious parents . . . that his custody be given to a more affluent . . . relative who had no child and desired him. Such a finding, however, could not confer a right as against such parents who had not abandoned their child, even though they had permitted him to spend much time in the [relative]'s home.").

Socioeconomic factors that this Court has held do not show a parent's unfitness or acts inconsistent with constitutionally-protected status include the propriety of the parent's place of residence, that the parents move frequently, that their house at times lacked heat or was not cleaned regularly, their choice in spouse or babysitter, that the parent did not have relatives nearby to assist in caring for the child, a history of being unable to maintain stable employment, and loss of a job. *See Perdue v. Fuqua*, 195 N.C. App. 583, 587, 673 S.E.2d 145, 149 (2009); *Myers v. Myers*, 148 N.C. App. 716, 562 S.E.2d 117, 2002 WL 275956 at *8 (2002) (unpublished); *Penland v. Harris*, 135 N.C. App. 359, 363, 520 S.E.2d 105, 108 (1999); *Rhodes*, 14 N.C. App. at 408, 188 S.E.2d at 567. While socioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation would be relevant to the determination of whose custody is in the best interest of the child, those factors have no bearing on the question of fitness.

In the present case, the findings the trial court relied on to conclude Ms. Cole acted inconsistent with her constitutionally-protected status included that she was temporarily "homeless"; that she had "removed herself from the [Dunns'] home"; that she "not until recently, maintained gainful and continuous employment"; and that she previously "only worked sporadically." All of these are socioeconomic factors that may be relevant to a "best interest of the child" analysis but have no relevance to the preliminary question of whether Ms. Cole is unfit or has acted inconsistent with her constitutionally-protected status. The trial court also incorporated "all Findings of Fact in its previous orders to further bolster the issuance of [its permanent custody o]rder," but those factual findings in the original temporary custody order have the same

defect. Indeed, the trial court's oral finding at the March 2015 temporary custody hearing focusing on Ms. Cole's lack of "a proper permanent residence for the child," as well as its finding that "she makes just enough money now to be able to afford to pay the hotel and that's it" shows that, from the beginning, the trial court improperly considered Ms. Cole's socioeconomic status in determining that she was unfit or had acted inconsistent with her constitutionally-protected status.

We hold the trial court failed to first determine whether Ms. Cole forfeited her paramount right before conducting a "best interest of the child" test, failed to articulate the clear and convincing standard of evidence, and conflated the question of whether Ms. Cole acted inconsistent with her constitutionally-protected status with the "best interest of the child" test. As our Supreme Court held in *Owenby*, "the trial court may employ the 'best interest of the child' test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited [] her constitutionally protected status." *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268. In this case, the trial court conducted a "best interest of the child" analysis without requiring that constitutionally-mandated preliminary showing in both the March 2015 temporary custody order and the January 2018 permanent custody order on appeal and thus failed to protect Ms. Cole's paramount constitutional right to the custody and control of her child under the Due Process Clause.

B. The Trial Court's Findings of Fact

The trial court also made findings of fact that are not supported by competent evidence.

> [W]e first note that in custody cases, the trial court sees the parties in person and listens to all the witnesses. This allows the trial court to "detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." Accordingly, the trial court's findings of fact " 'are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' "

Adams, 354 N.C. at 63, 550 S.E.2d at 503 (internal citations omitted). "Findings of fact made in the custody proceeding, when supported by competent evidence, are conclusive on appeal." *In re Orr*, 254 N.C. 723, 726, 119 S.E.2d 880, 882 (1961) (citation omitted).

In the present case, the trial court made the following findings of fact in its 29 January 2018 permanent custody order that are challenged by Defendant:

a. [Ms. Cole] abdicated her daily nurturing, daily care and all the necessary activities related to child-rearing of the minor child to the paternal grandparents, [the Dunns].

b. Both the Defendants, [Mr.] Covington and [Ms.] Cole, were homeless in Arizona until taken in by the Plaintiffs in Emerald Isle, North Carolina in 2015. The Plaintiff's traveled to Arizona, returning to their residence with both Defendant's and the minor child after the Defendant Intervenors refused to allow them to reside in their residence in Arizona.

c. The Defendant Cole, not until recently, maintained gainful and continuous employment and as of the date of this hearing and [(sic)] she was still on federal probation in Arizona for trafficking in firearms to Mexico, having been convicted in 2009.

d. In early 2015, Defendant Cole removed herself from the Plaintiff's home and eventually the Plaintiff's [(sic)] evicted the Defendant Covington as he refused to leave voluntarily.

e. As a result of the Onslow County Department of Social Services conducting an investigation in 2015, the minor child was removed from the care, custody and control of the mother, Courtney Cole, and was placed with the Plaintiffs.

. . .

j. Defendant testified she went to another detox facility December 2015 from which she was discharged in June 2016 and had been "clean" for seven (7) months as of the date of this hearing, June 2017. Defendant testified she would be on supervised probation until March, 2018. Also, as of the date of this hearing, [t]he Defendant has obtained a residence and now lives with her boyfriend whom she met in a drug rehabilitation facility.

The trial court also expressly incorporated the factual findings made in its previous orders in the permanent custody order at issue "to further bolster the issuance of this [o]rder[.]" In addition to the above challenged findings of fact, Defendant also challenged the following factual findings from the trial court's 19 March 2015 temporary custody order:

14. That during the time the Defendants resided with the Dunns, they did not assist with the daily care, feeding or

> clothing of their minor child, and said care was provided to the minor child by Plaintiff Karla Dunn.
>
> 15. The Defendants provided no monetary support for their minor child while living with the Plaintiffs, and said support for the minor child was provided by Plaintiffs alone.
>
> . . .
>
> 21. That Defendant Cole testified that she was asked to leave Plaintiffs' residence about mid February, 2015, as the Plaintiffs stated she had made little to no efforts to become employed.
>
> . . .
>
> 29. That neither Defendant sought assistance from any agency for housing, food or daycare.

After reviewing the record, we agree with Defendant and hold that none of the challenged statements are supported by competent evidence and are often contradicted by evidence in the record. As Defendant notes in her reply brief, Plaintiffs "cite no evidence, competent or otherwise, in either the transcript []or record to support any of the trial court's eight [] findings of fact identified by [Defendant] in her Brief." We consider the challenged statements in turn.

1. Daily Care of Tracy

In Finding of Fact 7(a), the trial court found that Ms. Cole "abdicated her daily nurturing, daily care and all the necessary activities related to child-rearing of [Tracy] to the [Dunns.]" However, Defendant argues that "it was uncontradicted that Tracy slept with [Ms. Cole] and [Mr. Covington] in the upstairs bedroom[,]" and, [a]s a result, [Ms. Cole] provided some daily care for Tracy, at a minimum putting her down to go to sleep and getting her up in the mornings." Plaintiffs, however, do not point to any particular competent evidence to support this factual finding.

Ms. Cole testified that, while living with the Dunns, she cared for Tracy on a daily basis when she did not work. She testified that, although she suffered from anxiety attacks in the mornings, "if someone from the Dunn family hadn't already made breakfast for [Tracy] [she] would make breakfast for her"; she would "let her play a little bit, watch cartoons, there would be times where [she]'d go out in the pool with [Tracy]"; she would "take her out on her little bike around the block"; and "ma[k]e sure she had snacks, lunch." Ms. Cole further testified that she, Tracy, and Mr. Covington slept in the same upstairs bedroom, and she would

put Tracy to bed at night "[t]o the best of [her] ability," because "it was kind of hard to get Tracy to sleep."

Ms. Dunn testified on direct examination that "before [when Ms. Cole had custody of Tracy,] she stayed up in the bedroom a lot if they were there, if they could keep up there." She also testified that, after Ms. Cole left the residence, Tracy did not sleep in her own room, but "she sleeps with . . . [Mr. Covington]." She also testified that, while Ms. Cole was living with the Dunns, Ms. Cole would feed Tracy breakfast around five times per month. Also, Plaintiffs' counsel at trial had Mr. Covington confirm that "[Ms. Cole's] interaction with the child was to take her in the room and have her go to sleep with her." After reviewing this evidence, we agree with Defendant that the evidence in the record does not support the trial court's factual finding that she "abdicated her daily nurturing, daily care and all the necessary activities related to child-rearing of [Tracy] to the [Dunns.]" At a minimum the uncontradicted evidence shows Ms. Cole put Tracy to bed and helped her get to sleep at night, which is a necessary activity in caring for a child, particularly since Tracy had trouble sleeping, and also that Ms. Cole would feed Tracy breakfast about five times per month. This finding is therefore not supported by competent evidence and is contradicted by evidence in the record.

2. Ms. Cole's financial assistance and government aid for Tracy

Finding of Fact 15 of the temporary custody order, which was incorporated by reference into the findings of fact of the permanent custody order, states "[t]hat the Defendants provided no monetary support for their minor child while living with the Plaintiffs, and said support for the minor child was provided by Plaintiffs alone." Also, in Finding of Fact 29 of the temporary custody order, similarly incorporated by reference, the trial court states "[t]hat neither Defendant has sought assistance from any agency for housing, food or daycare."

Although the trial court found Defendants "said support for the minor child was provided by Plaintiffs alone[,]" Ms. Cole actually testified that the Dunns paid for everything regarding Tracy "except for food." This finding is therefore contradicted by the evidence. Moreover, Defendant argues in her brief "it was uncontradicted that [Ms. Cole] obtained an ADT (EBT or food stamps) card while in the Dunns[‘] home and that it was used for the benefit of Tracy." Although when asked on redirect examination "who pays the expenses for the child, while the child's been in your home[,]" Ms. Dunn said "[w]e pay for all of her stuff[,]" she then admitted "[Ms. Cole] got a ADT [(i.e., EBT)] card, I think for a few months and we used that to buy uhm, food for the house but that didn't buy diapers and the uhm, the baby stuff." Furthermore, in

their brief, Plaintiffs do not point to any particular competent evidence that supports these challenged findings. Therefore, the trial court's findings that "Defendants provided no monetary support for their minor child while living with the Plaintiffs," and "that neither Defendant ha[d] sought assistance from any agency for housing, food or daycare[,]" are both contradicted by the evidence because, at a minimum, the record shows Ms. Cole provided for Tracy's food by acquiring an EBT card, which constitutes substantial financial support for the child.

3. Ms. Cole's Employment History

In Finding of Fact 7(c) of its permanent custody order, the trial court found that "[Ms. Cole], not until recently, maintained gainful and continuous employment[.]" Also, in its oral factual findings for the temporary custody order, the trial court found that "[Ms. Cole had] only recently become stably employed[,]" and, in paragraph 21 of the temporary custody order, the trial court found that "[Ms. Cole] had made little to no efforts to become employed[.]" Defendant argues in her brief that the record contradicts the trial court's statements because, during the seven months she lived with the Dunns, she had seven jobs; she had two jobs at the time of the temporary custody hearing in March 2015; and she had two jobs at the time of the permanent custody hearing in June 2017. Moreover, Defendant notes that Ms. Dunn "admitted that allegation 16 in her complaint, that [Ms. Cole] had made no effort to become gainfully employed, was not true[,]" and that "[i]f a plaintiff testifies that an allegation in her Complaint is not true, then it should be error for the trial [court] to find that allegation to be true and rely upon that allegation as a basis to deny [Ms. Cole] custody of Tracy."

The record shows that two weeks after Ms. Cole arrived in Emerald Isle in April 2014 to live with the Dunns, she got a job at Emerald Grill. She also worked with Mr. Covington cleaning beach condos during that time. Ms. Cole testified that she soon got frustrated with her employer taking money back from all the employees for shortages, even if particular employees were not responsible for them. She worked at Emerald Grill for about two weeks and, as a result of her dissatisfaction, sought and obtained employment elsewhere after one or two weeks of searching. Ms. Cole obtained a job at Santorini's Grill and "liked it there for the most part[,] so [she] ended up staying there for a little bit." She worked there for about three months, from July to October 2014. Ms. Cole testified she left around Halloween and "tried finding jobs in medical positions, [and] didn't really have any luck because of [her prior criminal] background." She testified she got a job at an Urgent Care in Jacksonville around the end of December 2014. However, she testified at

both the 9 March 2015 temporary custody hearing and the 13 June 2017 custody hearing that her work ended after two and a half weeks, when she learned there would be a background check and she informed her employer that she had a felony on her record and was on probation. She further testified that, just prior to the filing of the complaint in January 2015, she was first prescribed opiates by a dentist and sought treatment for her opioid dependency at Port.

Ms. Cole testified that, at the time of the temporary custody hearing on 9 March 2015, she was employed at two jobs. She "work[ed] three to four days a week [at Crystal Coast Retina Center] and then [she was] trying to make it where [she] work[ed] the rest of the days at Golden Corral."

At the time of the 13 June 2017 custody hearing, Ms. Cole testified she lived in Phoenix, Arizona, and worked two jobs: "at a rehab center at Fountain Hills Recovery and . . . for a doctor's office as a Medical Assistant, Phlebotomist at Regenesis in Scottsdale[, Arizona.]" She testified she had her job at Fountain Hills Recovery since 4 January 2017 and it was a full-time job, working forty hours every week for $13.50 per hour. At the same time, she worked at the doctor's office as a medical assistant around thirty or thirty-five hours a week for $17 per hour. Ms. Cole testified she was working about seventy to seventy-five hours a week at the time of the 13 June 2017 custody hearing.

After reviewing the record and the transcripts, we find no competent evidence to support—and substantial evidence that contradicts—the trial court's Finding of Fact 7(c) that "[Ms. Cole], not until recently, maintained gainful and continuous employment[.]" The record clearly shows that Ms. Cole obtained gainful employment immediately upon moving to North Carolina and remained employed throughout her seven months living with the Dunns, despite some periods of unemployment between jobs. Moreover, during those periods between jobs, the record shows Ms. Cole actively looked for new employment and even sought more advanced and steady employment to the extent her circumstances as a person with a felony record permitted.

Plaintiffs do not cite to any competent evidence that supports the factual findings at issue. Instead, Plaintiffs argue that "[Ms. Cole's] idea of gainful employment was having several jobs in a short period of time while maintaining none of them for any length of time." Merriam-Webster's defines "gainful" as "productive of gain: profitable." *Gainful*, Merriam Webster's New Collegiate Dictionary 511 (11th ed. 2003). Leaving a job that, as Ms. Cole testified, is withholding money owed is itself "productive of gain" if it leads to obtaining more remunerative

employment, such as Ms. Cole's move from one restaurant to another and is leaving a job in the food service industry to pursue a career in a medical field, as Ms. Cole did in seeking and obtaining the Urgent Care job after having worked in a restaurant for three months. Neither the trial court nor Plaintiffs cite any case supporting a holding that working *too many* jobs supports a finding that a parent is unfit or has acted inconsistent with their constitutionally-protected status. While Ms. Cole may not have had the opportunities available to others, such as Plaintiffs, particularly as a collateral consequence of her felony conviction, our Courts have held such socioeconomic factors are not relevant to finding that a parent has acted inconsistent with their constitutionally-protected status.

We further note that the trial court dismissed as irrelevant the two jobs Ms. Cole was working at the time of the March 2015 temporary custody hearing at Crystal Coast Retina Center and Golden Corral by making the oral finding that "[Ms. Cole had] only recently become stably employed." Similarly, the trial court wrongly dismissed the two demanding jobs Ms. Cole was working for seventy or more hours a week at the time of the June 2017 custody hearing and her over five months of full-time employment leading up to that hearing by finding "[Ms. Cole], *not until recently*, maintained gainful and continuous employment[.]" In both instances, Ms. Cole's employment at the time of the hearing contradicts the trial court's primary factual finding and the trial court cannot ignore competent contradictory evidence by merely discounting it. For these reasons, the trial court's factual findings that "[Ms. Cole], not until recently, maintained gainful and continuous employment[,]" and "[Ms. Cole had] only recently become stably employed[,]" are not supported by competent evidence and contradicted in the record.

The trial court's finding in the 2015 temporary custody order that "[Ms. Cole] had made little to no efforts to become employed[,]" is also not supported by competent evidence and contradicted by evidence in the record. The Plaintiffs made the following allegation in their original complaint, which was discussed at the 25 March 2015 temporary custody hearing: "The Plaintiffs are preparing to evict [Ms.] Cole because she has made no effort to become gainfully employed or to substantially participate in the care of her daughter." After reading this allegation in court, Ms. Dunn admitted it was untrue on cross-examination because, as Ms. Dunn testified, "[Ms. Cole] was making an effort to be gainfully employed." Ms. Dunn's admission directly contradicts the trial court's factual finding and no other competent evidence supports this finding; indeed, the record shows Ms. Cole has made and continues to make efforts to find and maintain gainful employment, even maintaining

multiple jobs. Therefore, the trial court's findings regarding Ms. Cole's employment history are not supported by competent evidence and contradicted by evidence in the record. The trial court erred in relying on Ms. Cole's employment history in finding she was unfit.

4. The finding that Ms. Cole had been "homeless" and her housing history

In Finding of Fact 7(b) of the permanent custody order, the trial court found that "[b]oth the Defendants, [Mr.] Covington and [Ms.] Cole, were homeless in Arizona until taken in by the Plaintiffs in Emerald Isle, North Carolina in 2015." In its oral findings for the temporary custody order hearing, the trial court stated "[s]he, in the Court's opinion, is still basically homeless because she still lives in a hotel room at a Main Stay Suites[.]" Counsel for Ms. Cole challenged the trial court's description of Ms. Cole's living situation, but the trial court persisted, saying she was homeless because she lacked "a proper permanent residence for the child" and that "[the trial court] considers her homeless. People living in hotel rooms whether they're Extended Stays with suites or not, in my opinion, are homeless." The trial court further orally characterized 'homelessness' in addressing Mr. Covington's fitness in the temporary custody order hearing:

> Mr. Covington, the way I think, I find you're unfit is because you're homeless. You live with your parents at their, what would I say, if they told you to go, you'd have to go, so basically you're homeless. And you know, I sympathize with you. You know, I can't put a child in the street.

Merriam-Webster's defines "homeless" as "having no home or permanent place of residence" and "home" as "one's place of residence: domicile[.]" *Homeless*, *home*, Merriam-Webster's New Collegiate Dictionary 594 (11th ed. 2003). Also, the McKinney-Vento Homeless Assistance Act ("the Act"), 42 U.S.C. § 11301 *et seq.*, defines "homeless" as an "individual or family who lacks a fixed, regular, and adequate nighttime residence[.]" 42 U.S.C. § 11302(a)(1) (2015). The record shows that Defendants did "reside" overnight with Tracy in the extended-stay motel for a month; however, an extended-stay motel is "fixed, regular, and adequate" and is clearly meant for human habitation and Defendants were therefore not homeless under that definition. Another definition in the Act is "an individual or family who . . . will imminently lose their housing, including . . . rooms in hotels or motels not paid for by [government assistance programs,]" as evidenced by "the individual or family having a primary nighttime residence that is a room in a hotel or motel and where they lack the resources necessary to reside there for more than 14 days"; "has no subsequent residence identified" and "lacks the

resources or support networks needed to obtain other permanent housing." *Id.* § 11302(5)(A)-(C). However, the evidence shows Defendants were able to pay for their own stay for a month and that Ms. Cole and Tracy (although not Mr. Covington) had the "support network[]" in the Schweisthals to obtain a subsequent permanent residence in their home. Moreover, the Defendants, including Mr. Covington, had support from the Dunns through their offer to move into their residence in North Carolina. Therefore, at no time was Ms. Cole "homeless," either in an ordinary sense or as defined by our federal statutes. That she chose to live with the Dunns, who would ultimately seek to evict her, over her own parents for the sake of Mr. Covington does not mean that she was ever "homeless," particularly since she had subsequent housing after eviction from the Dunns with her friend from the restaurant and, later, in a motel which she paid for herself, and during which time she still had the support of her parents. We hold this finding of fact was not supported by competent evidence and was contradicted by evidence in the record. The trial court erred in relying on Ms. Cole's housing history in finding she was unfit.

5. The finding that Ms. Cole "removed herself" from Plaintiffs' home

In Finding of Fact 7(d) of the permanent custody order, the trial court found that Ms. Cole "removed herself from the Plaintiff's home . . . ." Defendant challenges this finding and argues that, contrary to Ms. Cole "removing herself" from the Dunns' house, "[i]t was uncontradicted at trial that the Dunns did not tell [Ms. Cole] to get out of their house, until after they had received an ex parte temporary custody order for Tracy. [Ms. Cole] was told to get out of the Dunns' house, the same day the Dunns' complaint and *ex parte* temporary custody order were served on her." We agree with Defendant. The evidence shows the Dunns evicted Ms. Cole after filing the complaint stating their plan to evict her and asking her to leave. There is no evidence to suggest that leaving the Dunns' residence and her daughter was Ms. Cole's choice. This finding is not supported by competent evidence.

6. The Length of Ms. Cole's Sobriety

Finding of Fact 7(j) of the trial court's permanent custody order states that "[Ms. Cole] had been 'clean' for seven [] months as of the date of this hearing, June, 2017." However, Defendant argues this finding is contradicted by evidence in the record, because Ms. Cole testified she had been clean and sober for 18 months as of June 2017. Her testimony was corroborated by her Narcotics Anonymous sponsor and no evidence was offered to contradict this testimony. We agree. Ms. Cole testified she "actually ha[d] eighteen months today" on 13 June 2017. We

note she testified she was sober for seven months while in the Desert Cove recovery program, but she then testified she was sober for nearly a year after completing the program. Thus all competent evidence in the record shows Ms. Cole was sober for 18 months as of 13 June 2017, not the seven months found by the trial court. This finding was not supported by competent evidence. We note that, given the multiple factual findings relating to Ms. Cole's prior drug use, the court inappropriately discounts her sobriety by minimizing its duration in comparison.

7. The finding that Ms. Cole was convicted of "trafficking firearms to Mexico"

In Finding of Fact 7(c) of the permanent custody order, the trial court found "as of the date of this hearing and [(sic)] she was still on federal probation in Arizona for trafficking in firearms to Mexico, having been convicted in 2009." Ms. Cole contends this finding is not supported by competent evidence because "[Ms. Cole] testified that she had been convicted in federal court in Arizona of conspiring to sell firearms without a license, and there was no evidence offered to contradict this." After reviewing the record, we agree. The evidence shows Ms. Cole was convicted of conspiracy to sell firearms without a license and no other offense. The trial court's mislabeling of the offense is not supported by competent evidence. We further note that, at the time the order issued on 29 January 2018, Ms. Cole only had just over a month of federal probation remaining.

8. The findings that Ms. Cole "had no face to face contact with [Tracy] in two years"

Finally, in Finding of Fact 11 of the permanent custody order, the trial court states "as of the date of this hearing [Ms. Cole] has had no face to face contact with [Tracy] in two (2) years." Also, in Finding of Fact 13, it states "Dr. James testified the minor child suffers from severe 'Reactive Attachment Disorder' as a result of having no contact with the biological mother in two (2) years . . . ." Defendant does not challenge the veracity of these findings, but instead argues "it was not the fault of [Ms. Cole], and should not be used as grounds for awarding permanent custody of Tracy to the Dunns." Defendant cites numerous instances where her contact with Tracy was restricted not by her own choice or based on neglect, but by the actions of Plaintiffs and the orders of the trial court. Although Defendant's arguments regarding these particular factual findings are couched as challenges based on lack of competent evidence, Defendant essentially argues that the factual findings that she has not seen her daughter face-to-face for two years does not support

the legal conclusion that she has acted inconsistent with her parental rights. We agree.

In early 2015, the Dunns filed their complaint and the trial court gave emergency and then temporary custody of Tracy to the Dunns. During that time, Ms. Cole visited with Tracy frequently. In June 2015, her in-person visitation was restricted by the trial court after her positive drug test. Just as Ms. Cole was about to graduate from The Meadows drug rehabilitation program in Arizona, the Schweisthals moved for expanded visitation and the court established a visitation schedule that included four opportunities for in-person visitation with Ms. Cole and the Schweisthals in October 2016, December 2016, April 2017, and July 2017. Tracy did visit Ms. Cole and the Schweisthals for the October 2016 trip. However, the Dunns soon sought, and the trial court chose to grant, an *ex parte* emergency order canceling the December 2016 trip and future in-person visitation to Arizona on the bare allegation by the guardian ad litem that the Schweisthals would seek to keep Tracy in Arizona. Subsequently, the trial court instructed the Dunns to work with the experts and arrange in-person visitation with Ms. Cole and the Schweisthals while they were in North Carolina for the 12 June 2017 hearing. They did not do so.

The record shows Ms. Cole, on her own initiative, sought and obtained expanded FaceTime and Skype visitation in the 20 April 2017 electronic communications order approved by the trial court. The record shows Ms. Cole complied with all the requirements of that order, and took every opportunity to have contact with Tracy. However, beginning on 21 October 2017, the Dunns unilaterally stopped taking her calls as required by the order and Ms Dunn blocked Ms. Cole's phone number, ending all communication between Ms. Cole and Tracy. Ms. Cole filed her motion to show cause and, in the Dunns' reply, they stated that Ms. Dunn "is the best person to determine what is harmful to the minor child." At the 29 January 2018 show cause hearing, Ms. Dunn testified she made the decision to stop the phone calls with Ms. Cole. Although, during the hearing, the trial court made a last-minute effort to contact a therapist for a supervised in-person visitation, the therapist replied to the Dunns' counsel by phone that she did not have time to prepare.

The record shows that Ms. Cole exercised her rights for in-person visitation and to communicate with and develop her relationship with Tracy to the greatest extent permitted. That she has been unable to visit her daughter in-person in two years is attributable to the actions of the Dunns and the order of the trial court, with which she has fully complied. "When examining a legal parent's conduct to determine whether it

is inconsistent with his or her constitutionally-protected status, . . . the gravamen of 'inconsistent acts' is the *volitional* acts of the legal parent that relinquish otherwise exclusive parental authority to a third party." *Mason v. Dwinnell*, 190 N.C. App. 209, 228, 660 S.E.2d 58, 70 (2008) (emphasis added). In these circumstance, Ms. Cole's inability to see her daughter face-to-face for two years did not show volition on her part. To hold that Ms. Cole is unfit because she has not seen her daughter in-person in two years under these circumstances would be, as the trial court characterized this portion of its own order at the contempt hearing, "a catch 22 situation." We hold her inability to see or communicate with her daughter does not support a finding that Ms. Cole was unfit or acted inconsistent with her constitutionally-protected status.

III. Conclusion

In the permanent custody order on appeal before us, as well as the original temporary custody order, the trial court failed to determine whether Ms. Cole forfeited her paramount right by acting inconsistent with her constitutionally-protected status prior to applying the "best interest of the child" analysis. In both orders, the trial court conflated the "best interest of the child" analysis with the separate analysis of Ms. Cole's constitutional status under *Petersen* and its progeny. It also failed to articulate and apply the "clear and convincing" standard of proof required by *David N.* We also hold that many of the trial court's factual findings are not supported by competent evidence or do not support a finding that Ms. Cole acted inconsistent with her constitutionally-protected status. Therefore, we vacate the permanent custody order granting custody to the Dunns in its entirety. We remand this case to the trial court with instructions to enter a new permanent custody order and first conduct the proper constitutional analysis, consistent with this opinion and the precedents of our courts, employing the "best interest of the child" test only if the movant first establishes, by clear and convincing evidence, that Ms. Cole acted inconsistent with her constitutionally-protected status as Tracy's natural parent.

Undoubtedly, Ms. Cole was in a precarious position in 2015 when she chose to take the Dunns' offer and move her family from an extended-stay motel in Arizona to the Dunns' residence in Emerald Isle and, once there, took multiple jobs that paid little money. Her felon status made obtaining work more difficult and becoming dependent on opioids compounded her problems. However, her situation was primarily based on socioeconomic factors our courts have long held are irrelevant to the question of a natural parent's fitness. Despite substantial positive changes in Ms. Cole's life in the intervening years, the trial court found

in its permanent custody order that Ms. Cole had acted inconsistent with her constitutionally-protected status while conflating the "best interest of the child" standard with the question of whether she was unfit or acted inconsistent with her constitutionally-protected status, failing to apply a clear and convincing standard of proof, and relying on factual findings not supported by competent evidence. We vacate the trial court's permanent custody order awarding custody to the Dunns and remand for proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges COLLINS and HAMPSON concur.

STEVEN C. GEORGE, PLAINTIFF
v.
LOWE'S COMPANIES, INC.; LOWE'S HOME CENTERS, LLC; AND
LOWE'S HOME IMPROVEMENT, LLC, DEFENDANTS

No. COA19-958

Filed 7 July 2020

Civil Procedure—nonresident plaintiff—claim arising in other state—N.C.G.S. § 1-21—borrowing provision

After an Indiana resident (plaintiff) stepped on a nail and injured his foot at a home improvement store in Kentucky, the trial court properly dismissed plaintiff's negligence action filed in North Carolina against the store and its North Carolina-based parent companies (defendants) as barred under the "borrowing provision" of N.C.G.S. § 1-21, which provides that a claim arising in another jurisdiction will be barred in North Carolina if it is already barred in the other jurisdiction and the claimant is not a North Carolina resident. Plaintiff's claim was time-barred under Kentucky's one-year statute of limitations, and the fact that defendants were subject to personal jurisdiction under North Carolina's long-arm statute did not mean that North Carolina's three-year statute of limitations applied to plaintiff's claim.

Appeal by plaintiff from order entered 2 July 2019 by Judge Julia L. Gullett in Iredell County Superior Court. Heard in the Court of Appeals 18 March 2020.

Hausler Law Firm, PLLC, by Kurt F. Hausler, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Todd A. King, for defendants-appellees.

ZACHARY, Judge.

Plaintiff Steven C. George, a resident of Indiana, was injured when he stepped on a nail in a Lowe's Home Improvement store in Kentucky. He subsequently commenced a negligence action in North Carolina against Lowe's Companies, Inc.; Lowe's Home Centers, LLC; and Lowe's Home Improvement, LLC (collectively "Defendants" or "Lowe's"). The trial court granted Defendants' motion to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm the trial court's order.

Background

The relevant facts are few. Plaintiff is a resident of Indiana. On 28 April 2016, while shopping at a Lowe's Home Improvement store in Kentucky, Plaintiff stepped on a nail that "penetrated the sole of [his] shoe . . . and was driven into his left foot." "[T]he nail lodged a foreign substance in his left foot and caused [Plaintiff] to sustain serious and prolonged injuries[.]" On 23 April 2019, Plaintiff filed a complaint against Defendants in Iredell County, North Carolina, Lowe's principal place of business. Plaintiff alleged, *inter alia*, that Lowe's had a duty to maintain the premises of the Lowe's store in Kentucky at which he was injured "in a reasonably safe condition," and that Lowe's failure to do so was "the direct, proximate and reasonably foreseeable cause of" Plaintiff's injuries. On 24 June 2019, Defendants filed a motion to dismiss Plaintiff's complaint, asserting that Plaintiff's negligence claim was barred by N.C. Gen. Stat. § 1-21. The trial court entered its order granting Defendants' motion to dismiss on 2 July 2019. Plaintiff timely appealed.

Standard of Review

"In considering a motion to dismiss under Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citations and internal quotation marks omitted). On appeal, we review de novo a trial court's grant of a motion to dismiss pursuant to Rule 12(b)(6). *Id.*

Discussion

The dispositive issue on appeal is whether the trial court erred in construing the borrowing provision of N.C. Gen. Stat. § 1-21 as a bar to Plaintiff's negligence claim.

"Our traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by lex loci, the law of the situs of the claim, and remedial or procedural rights are determined by lex fori, the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988). "Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover." *Id.* at 340, 368 S.E.2d at 857.

Our General Assembly provided a legislative exception to the traditional rule by enacting a statute containing a limited "borrowing provision." *Laurent v. USAir, Inc.*, 124 N.C. App. 208, 211, 476 S.E.2d 443, 445 (1996), *disc. review denied*, 346 N.C. 178, 486 S.E.2d 205 (1997). Pursuant to N.C. Gen. Stat. § 1-21, where a claim arising in another jurisdiction is barred by the laws of that jurisdiction, and the claimant is not a resident of North Carolina, the claim will be barred in North Carolina as well:

> Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.

N.C. Gen. Stat. § 1-21 (2019).

In addition to the borrowing provision, section 1-21 contains a "tolling provision," which suspends the running of the relevant statute of limitations during the period in which a defendant is absent from this state and not subject to service:

> If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited

> for the commencement of the action or the enforcement of the judgment.

Id.

After the enactment of section 1-21, however, it became evident that where a defendant was subject to jurisdiction under the "long-arm statute," N.C. Gen. Stat. § 1-75.4, there was no need to toll the statute of limitations. *See Duke Univ. v. Chestnut*, 28 N.C. App. 568, 572, 221 S.E.2d 895, 898 ("[T]he application of a tolling statute when [the] defendant has at all times been subject to the service of process by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations."), *appeal dismissed*, 289 N.C. 726, 224 S.E.2d 674 (1976); *see generally* N.C. Gen. Stat. § 1-75.4 (setting forth the bases for a North Carolina court's assertion of personal jurisdiction). The General Assembly subsequently modified the statute to reflect this realization by adding a second paragraph: "The provisions of this section shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of [N.C. Gen. Stat. §] 1-75.4." N.C. Gen. Stat. § 1-21.

This newly added language gave rise to the argument that, where applicable, the second paragraph invalidated both the tolling and the borrowing provisions. *See, e.g.*, *Laurent*, 124 N.C. App. at 211, 476 S.E.2d at 446. However, this Court has recognized that "what the legislature intended was for the second paragraph to nullify the *tolling* provision of N.C. Gen. Stat. § 1-21, not to nullify the *borrowing provision* of the statute." *Id.* at 211, 476 S.E.2d at 445 (internal quotation marks omitted).

In the instant case, it is undisputed that Plaintiff is not a resident of North Carolina; that his claim arose in Kentucky; and that Plaintiff's action is barred by Kentucky's one-year statute of limitations, Ky. Rev. Stat. Ann. § 413.140(1)(a) (LexisNexis 2019). Nevertheless, Plaintiff contends that N.C. Gen. Stat. § 1-21 does not bar pursuit of his negligence claim in the North Carolina courts, in that Defendants were subject to long-arm jurisdiction under the provisions of section 1-75.4, and therefore, "the timeliness of Plaintiff's claim against Defendants is controlled by North Carolina's three[-]year statute of limitations," N.C. Gen. Stat. § 1-52(16), rather than Kentucky's one-year statute of limitations. Plaintiff's argument lacks merit.

As Plaintiff correctly observes, Defendants were, at all relevant times, subject to the jurisdiction of the courts of this state. Nonetheless, "[p]ersonal jurisdiction over [D]efendants under [N.C. Gen. Stat.] § 1-75.4, standing alone, . . . is not sufficient to place [P]laintiff's action

outside [N.C. Gen. Stat.] § 1-21." *Glynn v. Stoneville Furn. Co.*, 85 N.C. App. 166, 169, 354 S.E.2d 552, 553, *disc. review denied*, 320 N.C. 512, 358 S.E.2d 518 (1987); *accord Laurent*, 124 N.C. App. at 211-12, 476 S.E.2d at 446. Indeed, it is well settled that "Plaintiff must also be a resident of this State at the time his action originally accrued in order to maintain an action in the courts of this State which is barred by the laws of the jurisdiction in which it arose." *Glynn*, 85 N.C. App. at 169, 354 S.E.2d at 553 (citation omitted); *see also Laurent*, 124 N.C. App. at 211-12, 476 S.E.2d at 446 ("In the present case [the] plaintiff asserts, pursuant to N.C. Gen. Stat. § 1-21, that, because North Carolina has long-arm jurisdiction over [the] defendant by virtue of the second paragraph of N.C. Gen. Stat. § 1-21, the statute does not apply to the case at bar. This is the precise argument made by the plaintiff in *Glynn* which argument was rejected by this Court.").

After careful review of our precedent, the instant case is straightforward. Plaintiff, an Indiana resident, was injured when he stepped on a nail in a Lowe's store in Kentucky. Under Kentucky law, he had one year within which to commence his negligence action against Lowe's. Ky. Rev. Stat. Ann. § 413.140(1)(a). Plaintiff failed to timely file his action, and his inaction bars his claim not only in Kentucky, but also in North Carolina. *See Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 113, 323 S.E.2d 470, 475 (1984) ("[A]fter the cause of action has been barred in the jurisdiction where it arose, only a plaintiff, who was a resident of this State at the time the cause of action originally accrued, has the right to maintain an action in the courts of this State."), *disc. review denied*, 313 N.C. 612, 332 S.E.2d 83 (1985).

Thus, because Plaintiff was not "a resident of this State at the time [his] cause of action originally accrued," *id.*, and his claim is barred in Kentucky, the jurisdiction in which the claim arose, Plaintiff's claim is also barred in this state pursuant to N.C. Gen. Stat. § 1-21.

Conclusion

Accordingly, we affirm the trial court's order dismissing Plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

AFFIRMED.

Judges INMAN and YOUNG concur.

IN RE M.H.

[272 N.C. App. 283 (2020)]

IN RE M.H.

No. COA19-1132

Filed 7 July 2020

Child Abuse, Dependency, and Neglect—dependency—lack of suitable and stable housing—alternative care arrangement—findings of fact

The trial court's adjudication of a child as dependent based on respondent-mother's lack of suitable and stable housing was reversed because the findings of fact did not include findings related to the availability and suitability of alternative care and did not establish that respondent was unable to provide for the child's care or supervision where respondent had made arrangements for her and the child to live with a friend and there was no evidence they could not continue to live with the friend for the foreseeable future.

Appeal by Respondent from orders entered 16 July 2019 and 9 September 2019 by Judge Tiffany M. Whitfield in Cumberland County District Court. Heard in the Court of Appeals 10 June 2020.

Cumberland County Department of Social Services, by Michael A. Simmons, for the Petitioner.

Leslie Rawls for the Respondent.

Parker Poe Adams & Bernstein LLP, by Stacy S. Little, for the Guardian ad Litem.

BROOK, Judge.

Olivia Howard ("Respondent") appeals from orders adjudicating her minor child dependent. We reverse the trial court's adjudication of dependence.

I. Factual and Procedural Background

Near the end of March 2019, about a month before Madeline[1] was born, Respondent contacted Laquanda Henry, her friend of over thirty years and the daughter of her godparents, to inquire about an

1. We refer to the child by this pseudonym to protect her privacy.

alternative child care arrangement for Madeline after she was born. Respondent reached out to Ms. Henry because Respondent and her husband had a history with the Cumberland County Department of Social Services ("the Department"). Two of Respondent's children were in the Department's custody at that time. Ms. Henry agreed to take care of Madeline "if anything happen[ed]" because of the Department's involvement with Respondent's family, volunteering to share her home with both Respondent and Madeline for "[a]s long as she needs to until she gets on her feet."

Madeline was born on 28 April 2019. Two days later, while she was still in the hospital, the Department received a Child Protective Services ("CPS") referral concerning her safety.

On 10 May 2019, the Department filed a petition alleging that Madeline was abused and neglected. Specifically, the Department alleged that Respondent had failed to correct the conditions that gave rise to the adjudications of neglect of Respondent's other children and that Respondent continued to lack employment and stable housing, having only lived at her current place of abode "for a brief period." Madeline's older siblings had been adjudicated neglected the previous November based on domestic violence and unstable housing in Respondent's household when she was still living with her husband. Although Respondent was no longer living with her husband in May of 2019, the Department sought custody of Madeline upon her release from the hospital. The trial court did not grant this request, however.

The Department's petition came on for adjudication before the Honorable Tiffany M. Whitfield in Cumberland County District Court on 16 July 2019. At the adjudication hearing, Respondent elected not to testify, but noted her objection to any suggestion that her living situation with Ms. Henry was unstable. Regarding the stability of Respondent's housing, Ms. Henry testified that Respondent and Madeline were "more than welcome" to live in her home in Fayetteville; that she had been living there for about three years; and that while Respondent was not on the lease, "If I have to put [Respondent] on my lease it wouldn't be a problem." "I think she would be more than welcome," Ms. Henry added.

In an order entered on 6 August 2019, the trial court dismissed the allegations of neglect but adjudicated Madeline dependent based on Respondent's lack of employment and stable housing. The court denied the Department's request for custody of Madeline, however, ordering that legal and physical custody of Madeline remain with Respondent until the disposition hearing.

The matter came on for disposition on 13 August 2019. Social Worker Anne Saleeby testified that Madeline had been doing very well since the adjudication hearing. Social Worker Saleeby testified further that Madeline had received all appropriate medical and other care since the adjudication hearing and that Respondent and Ms. Henry had all the necessary baby items for Madeline in the home, including adequate food and clothing. Ms. Saleeby reported that she had no concerns about Respondent's interactions with Madeline, and denied that Respondent's housing was unstable, testifying that there had not been any indication that Respondent would not be able to continue living with Ms. Henry for an extended period of time. While noting that Respondent's lack of employment was a source of concern, Ms. Saleeby testified that Respondent's lack of income had not affected her ability to provide for Madeline because of assistance she had been receiving from family and friends.

Following the dispositional hearing, the trial court entered an order on 9 September 2019 maintaining physical and legal custody of Madeline with Respondent and determining that continuing to live with Respondent was in the best interests of Madeline. The trial court's dispositional order incorporated the prior adjudication of dependence of Madeline.

Respondent entered timely notice of appeal.

II. Analysis

On appeal, Respondent contends that the trial court erred in adjudicating Madeline dependent because Respondent had adequate resources to care for Madeline and Madeline was flourishing in her mother's care. We hold that the trial court erred in adjudicating Madeline dependent.

A. Overview

> The first stage [of a juvenile abuse, neglect, and dependency case] is the adjudicatory hearing. If [the Department] presents clear and convincing evidence of the allegations in the petition, the trial court will adjudicate the child as an abused, neglected, or dependent juvenile. If the allegations in the petition are not proven, the trial court will dismiss the petition with prejudice and, if the juvenile is in [the Department's] custody, return[] the juvenile to the parents.

In re A.K., 360 N.C. 449, 454-55, 628 S.E.2d 753, 757 (2006) (internal citations omitted).

> Immediately following adjudication, the trial court must conduct a dispositional hearing. At the hearing, the trial court receives evidence and enters a written order specifying an appropriate plan to meet the needs of the juvenile. If the trial court finds it is in the juvenile's best interests, it may place the juvenile in out-of-home care. If custody of the child is removed from the parent, the trial court must hold a custody review hearing within ninety days and then again within six months.

Id. at 455, 628 S.E.2d at 757 (internal citations omitted).

B. Standard of Review

We review an adjudication under N.C. Gen. Stat. § 7B-807 to determine whether the trial court's findings of fact are supported by "clear and convincing competent evidence" and whether the court's findings support its conclusions of law. *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997). The "clear and convincing" standard "is greater than the preponderance of the evidence standard required in most civil cases." *In re Smith*, 146 N.C. App. 302, 304, 552 S.E.2d 184, 186 (2001) (citation and marks omitted). Clear and convincing evidence is "evidence which should fully convince." *Id.* (citation and marks omitted). Whether a child is dependent is a conclusion of law, *see In re V.B.*, 239 N.C. App. 340, 341, 768 S.E.2d 867, 868 (2015), and we review a trial court's conclusions of law de novo, *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

C. Dependence

North Carolina General Statutes § 7B-101(9) defines a dependent juvenile in relevant part as "[a] juvenile in need of assistance or placement because . . . the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2019). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in reversal of the court." *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007). While "it has been consistently held that in order for a parent to have an appropriate alternative child care arrangement, the parent must have taken some action to identify viable alternatives[,]" *In re C.B.*, 245 N.C.

App. 197, 211, 783 S.E.2d 206, 216 (2016) (internal marks and citation omitted), "[w]here . . . the . . . findings of fact indicate that the juveniles are living with a parent who is willing and able to provide for their care and supervision, the juveniles simply cannot be adjudicated dependent[,]" *In re H.H.*, 237 N.C. App. 431, 439, 767 S.E.2d 347, 352 (2014).

D. The Adjudicatory and Dispositional Orders

In the adjudicatory order dated 16 July 2019, the trial court found in relevant part as follows:

> 14. That the [Department], the Guardian ad Litem, and Respondent Mother made certain admissions of fact after having ample opportunity to consult with their respective counsel. That a written copy of those admissions was tendered to the Court. Respondent Father did not sign the stipulation; however, he agreed to the allegations as read into the record. Respondent Mother did not agree with the unstable housing allegation. That those admissions are as follows:
>
> > *a. The [Department] . . . received a Child Protective Services (CPS) referral on 04/30/2019 concerning the safety of the juvenile.*
> >
> > . . .
> >
> > *f. Respondent Mother is currently unemployed.*
> >
> > *g.* ***Amended:*** *Respondent Mother does not have stable housing. Respondent Mother is living with a friend; however, Respondent Mother is not a lawful occupant on the lease for the premise* [sic].
> >
> > *h.* ***Amended:*** *The child was born* [sic] *has been hospitalized since her birth with medical issues unrelated to Respondent Mother's pregnancy. The child will be released from the hospital on May 11, 2019.*
>
> 15. That the Court made the additional findings of fact by clear, cogent, and convincing evidence as it relates to the verified Petition filed on May 10, 2019 BASED ON sworn testimony provided before the Court on today's date and documentary evidence submitted to the Court on today's date:
>
> > . . .

> *d. Respondent Mother does not have stable housing and was living with a friend. However, Respondent Mother was not lawfully on the premises as she is not listed on the occupant's lease.*
>
> *e. The child was born* [sic] *has been hospitalized since her birth with medical issues unrelated to Respondent Mother's pregnancy. Respondent Mother was acting accordingly with getting that medical treatment for the juvenile after her birth.*
>
> *f. Respondent Mother is unemployed. Respondent Father was also unemployed at the filing of the petition due to his incarceration.*
>
> . . .
>
> 17. Based on the foregoing findings of fact, the Court finds that the competent evidence presented and admitted supports a finding that the juvenile was dependent, within the meaning of N.C. Gen. Stat. § 7B-101(9), in that at the time of the filing of the Petition, the juvenile's parent, guardian, or custodian is unable to provide for the care or supervision of the juvenile and lacks an appropriate alternative child care arrangement because at the time of the filing of the petition Respondent Parents did not have suitable and stable housing for the juvenile inasmuch as she was residing with a friend but is not lawfully on the lease. Respondent Father . . . was incarcerated at the time. Therefore, the Court finds that the juvenile is a dependent juvenile.

(Emphasis in original.)

The trial court then in its 9 September 2019 dispositional order found in relevant part as follows:

> 3. That the Court entered an order on July 16, 2019 adjudicating the juvenile dependent. Said Order being filed on August 6, 2019. The Court incorporates the findings from that order as if fully set forth herein.
>
> . . .
>
> 6. That among the issues which led to the removal of the juvenile from the home were the following: Respondent Parents did not have suitable and stable housing for the

juvenile inasmuch as she was residing with a friend but is not lawfully on the lease. Respondent Father . . . was incarcerated at the time.

. . .

10. The juvenile was last seen by the Social Worker on August 5, 2019. The juvenile appeared to be physically fit and emotionally well.

11. The juvenile is three (3) months old. That the juvenile receives [her] routine medical care from KidzCare Pediatrics. The juvenile is up to date on all immunizations. There are no concerns for the juvenile at this time.

. . .

16. The Court finds that Respondent Mother should obtain and maintain stable housing and employment.

17. Respondent Mother is not employed. Respondent Mother stays home to care for the juvenile. Respondent Mother is diligently searching for employment. Respondent Mother has re-engaged with therapy at KV Consultants. Respondent Mother maintains contact with the Department and makes herself available to the Department.

18. Respondent Mother provided sworn testimony on today's date. Based on her testimony, the Court finds the following: Respondent Mother had a job interview at Publix yesterday. She is making attempts to obtain employment.

19. Ms. Henry was present on today's date and provided sworn testimony. Based on her testimony, the Court finds the following: Respondent Mother resides in her home; however, Respondent Father does not reside in [] the home. Respondent Mother is actively searching for her own residence. The dog that was previously at issue has been given to a family member and is no longer in the home.

. . .

24. The Court finds that Respondent Parents and the juvenile are bonded. There are no safety concerns with the juvenile remaining with Respondent Parents.

. . .

> 26. Pursuant to N.C. Gen. Stat. § 7B-903, the Guardian ad Litem requested custody of the juvenile be granted to the Department due to safety concerns of the Respondent Mother's home. Said motion was denied. The Court finds that there is [sic] no immediate safety concerns for the minor child and the Respondent Mother continues to provide care for this minor child appropriately.
>
> 27. That the Court finds that legal and physical custody of the juvenile should remain with the Respondent Parents at this time. The juvenile should remain placed in the home with Respondent Parents.

Although the court found that the Department "ha[d] made reasonable efforts to identify and notify relatives as potential resource [sic] for placement or support of the juvenile[,]" the court made no findings related to Ms. Henry's availability or suitability as an alternative child care arrangement.

E. The Trial Court's Dependence Adjudication

As the trial court's findings demonstrate, the primary basis for the trial court's adjudication of Madeline as dependent was Respondent's lack of "suitable and stable housing[.]" Indeed, the court's repeated references to the stable housing issue in its findings demonstrate that Respondent's lack of employment was at most a secondary basis for the trial court's dependence adjudication. As noted previously, the court made no findings related to Ms. Henry's availability or suitability as an alternative child care arrangement despite Ms. Henry's testimony that Respondent had contacted her one month prior to Madeline's birth to ask Ms. Henry "if anything happens because of my other two kids will you be able to take my child[,]" and Ms. Henry "said yes."[2] The absence of findings related to the availability and suitability of alternative care arrangements for Madeline, such as with Ms. Henry, the alternative care arrangement sought out by Respondent before Madeline's birth, by itself requires that the trial court's adjudicatory and dispositional orders be reversed. *See In re B.M.*, 183 N.C. App. at 90, 643 S.E.2d at 648.

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2. By contacting Ms. Henry and moving into her home before Madeline was born, Respondent took the requisite action to identify a viable appropriate alternative child care arrangement for Madeline. *See*, *e.g.*, *In re L.H.*, 210 N.C. App. 355, 364, 708 S.E.2d 191, 197 (2011) ("parent must have taken some action to identify viable alternatives," such as by identifying a relative willing and able to care for the child, "in order for a parent to have an appropriate alternative child care arrangement").

The question then becomes whether remand is necessary in this case, which turns on whether Respondent's housing situation, coupled with her lack of employment, rendered Respondent *unable* to provide for Madeline's care or supervision, thus meeting the first part of the two-part definition of dependence under N.C. Gen. Stat. § 7B-101(9). We hold that it did not. The trial court's findings of fact did not support the adjudication of neglect because there was no finding, nor was there the requisite "clear and convincing competent evidence," *In re Helms*, 127 N.C. App. at 511, 491 S.E.2d at 676, to support a finding that Respondent would not be able to continue living with Ms. Henry for an extended period of time. Merely because Respondent was not a party to or identified as an occupant in Ms. Henry's lease, the trial court inferred that Respondent's living situation was unstable, despite Mses. Henry and Saleeby's testimony to the contrary.[3] In the absence of any indication that Respondent was unlikely to be able to continue living with Ms. Henry for the foreseeable future, the trial court's conclusion that Madeline was dependent was not supported by the court's findings of fact related to her lack of employment and unstable housing because these findings did not establish that Respondent was "unable to provide for [] [Madeline's] care or supervision[.]" N.C. Gen. Stat. § 7B-101(9) (2019). "Thus, the trial court failed to find the ultimate facts essential to support its conclusions of law." *In re V.B.*, 239 N.C. App. at 343, 768 S.E.2d at 869 (internal marks and citation omitted). Because "all of the evidence and findings of fact indicate that the juvenile[] [is] living with a parent who is willing and able to provide for [her] care and supervision, the juvenile[] simply cannot be adjudicated dependent." *In re H.H.*, 237 N.C. App. at 439, 767 S.E.2d at 352 (emphasis in original omitted).

III. Conclusion

We reverse the orders of the trial court because they did not include findings related to the availability and suitability of alternative care arrangements for the minor child and because the findings related to Respondent's unstable housing and lack of employment did not support the court's adjudication of dependence.

REVERSED.

Judges ZACHARY and BERGER concur.

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3. If, for example, evidence had been presented that the owner of Ms. Henry's home had refused to allow Respondent and Madeline to live in the home, or that the owner did not intend to agree to renew Ms. Henry's lease at some point in the near future, and findings to this effect were made by the trial court, the conclusion that Respondent was *unable* to provide for Madeline's care or supervision could have followed from the fact that Respondent was "residing with a friend but [was] not lawfully on the lease."

LAMBERT v. TOWN OF SYLVA

[272 N.C. App. 292 (2020)]

CURTIS LAMBERT, PLAINTIFF
v.
TOWN OF SYLVA, DEFENDANT

No. COA19-727

Filed 7 July 2020

1. Civil Rights—42 U.S.C. § 1983—firing for political activity—two appeals—law of the case doctrine

In a case involving a 42 U.S.C. § 1983 claim alleging that defendant town improperly fired plaintiff police officer for running for sheriff, where the issue in plaintiff's first appeal was whether he presented sufficient evidence to survive a motion for directed verdict, the law of the case doctrine did not control the analysis in plaintiff's second appeal (filed after a jury found in favor of defendant on remand) because the second appeal involved a completely different issue (whether the trial court's jury instructions adequately encompassed the law governing plaintiff's section 1983 claim).

2. Civil Rights—42 U.S.C. § 1983—firing for political activity—jury instruction—harmless error analysis

At a trial involving a claim under 42 U.S.C. § 1983 alleging that defendant town improperly fired plaintiff police officer for running for sheriff, the trial court did not commit prejudicial error by instructing the jury to determine whether "plaintiff's participation in conduct protected by law was a substantial or motivating factor in the defendant's decision" to terminate him. Although plaintiff argued the court's instruction inaccurately stated his burden of proof under section 1983, the instruction—in effect, though not in substance—asked the jury to consider whether a "direct causal link" existed between defendant's decision to fire plaintiff and the alleged constitutional harm to plaintiff (the proper inquiry for a section 1983 claim), and the jury's implicit finding that plaintiff did not suffer constitutional harm rendered any error harmless.

Appeal by Plaintiff from Judgment entered 31 July 2018 by Judge William H. Coward in Jackson County Superior Court. Heard in the Court of Appeals 5 February 2020.

David A. Sawyer for plaintiff-appellant.

Ridenour & Goss, P.A., by Eric Ridenour and Kelly Langteau-Ball, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

In *Lambert v. Town of Sylva* (*Lambert I*), 259 N.C. App. 294, 307, 816 S.E.2d 187, 197 (2018), this Court granted Curtis Lambert (Plaintiff) a new trial on his claims alleged under 42 U.S.C. § 1983 for violations of his state and federal constitutional rights and for wrongful termination in violation of public policy arising from his termination from employment with the Town of Sylva (Defendant). On remand and following the new trial, a jury returned a verdict in favor of Defendant. Plaintiff appeals from the trial court's Judgment entered on 31 July 2018 consistent with the jury verdict. The Record reflects the following:

In January 2013, Plaintiff was hired as a Patrol Officer with the Sylva Police Department. Plaintiff had previously worked for the Sylva Police Department on two occasions, and prior to returning in 2013, Plaintiff was employed by the Jackson County Sheriff's Office as a patrol deputy. Upon Plaintiff's return to the Sylva Police Department in 2013, he was supervised by Chief Davis Woodard (Chief Woodard). Chief Woodard reported to the Town Manager, Paige Dowling (Dowling).

On 17 February 2014, Plaintiff filed his Notice of Candidacy for Jackson County Sheriff. Plaintiff alleged he was subsequently ridiculed by Chief Woodard and suffered adverse consequences in the workplace as a result of announcing his candidacy. On 3 March 2014, Chief Woodard requested a meeting with Plaintiff. The same afternoon, Plaintiff, Chief Woodard, then-Assistant Chief Tammy Hooper, and Dowling met in Chief Woodard's office. Chief Woodard offered Plaintiff the option to resign or be terminated. Plaintiff declined to sign the pre-printed resignation letter; however, Plaintiff signed a Personnel Action Form reflecting his "separation." At that time, Plaintiff turned in his badge and gun. The next day, Plaintiff met with Dowling. Plaintiff expressed his intent to appeal his termination; however, Dowling informed Plaintiff she was the final-decision-maker. Plaintiff requested his personnel file from Dowling, which he did not receive until 11 March 2014.

On 2 March 2015, Plaintiff filed a Complaint and Jury Demand (Complaint) against Defendant. Plaintiff's Complaint alleged three claims. Count one—at issue in the present case—alleged Defendant, "acting under color of state law, and local ordinances, regulations, customs or usages of Town of Sylva," deprived Plaintiff of his right to free speech and association under the United States Constitution, thereby violating 42 U.S.C. § 1983. Plaintiff's Complaint also alleged violations of

free speech and association under the North Carolina Constitution and wrongful termination in violation of North Carolina's public policy pursuant to N.C. Gen. Stat. § 160A-169. Defendant filed its Answer on 7 April 2015, admitting in part and denying in part portions of Plaintiff's factual allegations, yet ultimately denying Plaintiff was terminated on the basis of his political activity but instead terminated as an at-will employee for performance-related issues.

On 23 May 2016, Plaintiff's case came on for the first trial. At the close of Plaintiff's evidence, the trial court granted a directed verdict in favor of Defendant. *See Lambert I*, 259 N.C. App. at 296-97, 816 S.E.2d at 191. Plaintiff appealed, and this Court held the trial court erroneously granted Defendant's directed verdict "upon a misapprehension of the law regarding plaintiff's claims under 42 U.S.C. § 1983 . . . ." *Id.* at 307, 816 S.E.2d at 197. This Court reversed the trial court's directed verdict in favor of Defendant and remanded Plaintiff's case for a new trial on all claims and consistent with this Court's opinion. *Id.*

Defendant's new trial began on 16 July 2018, and this time, both parties presented evidence. The trial court held a charge conference at which both parties presented the trial court with requested jury instructions. Plaintiff requested the trial court instruct the jury according to each count of his Complaint. Specifically, for count one—Plaintiff's Section 1983 Claim—Plaintiff requested the trial court instruct the jury according to model instructions derived from the United States Court of Appeals for the Third Circuit for municipal liability arising from official policy or custom, which state in relevant part:

> If you find that [plaintiff] was deprived of [describe federal right], [municipality] is liable for that deprivation if [plaintiff] proves by a preponderance of the evidence that the deprivation resulted from [municipality's] official policy or custom – in other words, that [municipality's] official policy or custom caused that deprivation.

Defendant proposed to frame the first issue for the jury as "[d]id the Sylva Police Department have a policy that its officers could not run for Sheriff?"

The trial court considered the instructions submitted by both parties and ultimately instructed the jury:

> Was the plaintiff's filing to run for sheriff of Jackson County a substantial or motivating factor in the defendant's decision to terminate him from employment with

> the Town of Sylva? On this issue the burden of proof is on [Plaintiff.] This means that the plaintiff must prove by the greater weight of the evidence, two things:
>
> First, that the plaintiff participated in conduct protected by law. Now, I instruct you that filing to run for public office is conduct protected by law.
>
> And second, that the plaintiff's participation in conduct protected by law was a substantial or motivating factor in the defendant's decision to terminate the plaintiff. Now, an employer may terminate an employee with or without cause and even for an arbitrary or irrational reason. Even so, no employee may be terminated because of his participation in conduct protected by law.
>
> Finally, as to this first issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff's participation in conduct protected by law was a substantial or motivating factor in the defendant's decision to terminate the plaintiff, it would be your duty to answer this issue yes, in favor of the plaintiff.

The jury returned its verdict finding "the plaintiff's filing to run for sheriff of Jackson County" was *not* "a substantial or motivating factor in the defendant's decision to terminate him from employment with the Town of Sylva[.]" Because the jury found for Defendant on this first issue, it did not proceed further. On 31 July 2018, the trial court entered Judgment for Defendant consistent with the jury verdict. On 24 August 2018, Defendant timely filed written Notice of Appeal.

Issue

The sole issue on appeal is whether the trial court reversibly erred when it instructed the jury that for Plaintiff to prevail, they must first find "the plaintiff's filing to run for sheriff of Jackson County [to be] a substantial or motivating factor in the defendant's decision to terminate him from employment[,]" thereby deviating from Plaintiff's proposed jury instructions.

Analysis

I. Standard of Review

"It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in

their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citations omitted).

> A specific jury instruction should be given when (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury.

Outlaw v. Johnson, 190 N.C. App. 233, 243, 660 S.E.2d 550, 559 (2008) (citations and quotation marks omitted); *see Erie Ins. Exch. v. Bledsoe*, 141 N.C. App. 331, 335, 540 S.E.2d 57, 60 (2000) ("[W]hen a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error." (citation and quotation marks omitted)). Consequently, "[f]ailure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *Outlaw*, 190 N.C. App. at 243, 660 S.E.2d at 559.

II. Jury Instructions

On appeal, Plaintiff specifically contends the trial court reversibly erred when it instructed the jury on count one[1] of Plaintiff's Complaint arguing the jury instructions as given failed to accurately state the law for Plaintiff's Section 1983 Claim and prejudiced Defendant by "impos[ing] a burden not required by the Civil Rights Act." Plaintiff also argues under the law of the case as established by this Court in *Lambert I*, the trial court was required to instruct the jury in accordance with the United States Supreme Court decision in *Monell v. Dept. of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 692-94, 56 L. Ed. 2d 611, 636-37 (1978).

A. The Law of the Case

[1] The procedural posture of *Lambert I* provides important context for this Court's prior holding and Plaintiff's contention Plaintiff stated a *Monell* Claim under the law of the case in *Lambert I*.

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1. In brief, Plaintiff refers to count one of his Complaint as a "*Monell* Claim"; however, as discussed *infra*, referring to the claim in count one as a *Monell* Claim presupposes that it was a valid claim under Section 1983. We refer to Plaintiff's claim in count one instead as his Section 1983 Claim.

> [A]s a general rule when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, *provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.*

Hayes v. Wilmington, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (emphasis added).

In *Lambert I*, the trial court "granted directed verdict based upon the defendant's argument that the doctrine of respondeat superior does not apply to plaintiff's claims under 42 U.S.C. § 1983 . . . ." *Lambert I*, 259 N.C. App. at 302, 816 S.E.2d at 194. On appeal, this Court, considering whether Plaintiff "presented sufficient evidence to survive a motion for directed verdict[,]" reversed the trial court and held, "the trial court granted directed verdict based upon a misapprehension of the law regarding plaintiff's claims under 42 U.S.C. § 1983." *Id.* at 305, 307, 816 S.E.2d at 194, 197. This Court clarified, "[P]laintiff did not need to prove that the Town had a policy that Town employees could not run for political office." *Id.* at 302-04, 816 S.E.2d at 194-95 (quoting at length the United States Supreme Court's decision in *Pembaur v. Cincinnati*, 475 U.S. 469, 478-83, 89 L. Ed. 2d 452, 462-65 (1986), which analyzed and expanded upon *Monell*). In discussing Plaintiff's claims, this Court emphasized, "[D]efendant's evidence may present a very different picture of defendant's policies and procedures . . . , but unfortunately, since this case was dismissed after plaintiff's evidence, we do not have the benefit of that evidence." *Id.* at 305, 816 S.E.2d at 195.

In the new trial giving rise to the present appeal, Defendant presented evidence in its defense, and Plaintiff's claims were presented to a jury that ultimately found in favor of the Defendant. The issue before us is not a question of the sufficiency of the evidence to survive a motion for directed verdict but instead is whether the trial court erred when it declined to give Plaintiff's requested jury instructions. Therefore, under the law of the case doctrine as outlined by our North Carolina Supreme Court, the "same facts and the same questions which were determined in the previous appeal" are not the same in Plaintiff's second appeal. *Hayes*, 243 N.C. at 536, 91 S.E.2d at 681-82. Thus, the law of the case doctrine, in and of itself, does not control our analysis of whether the trial court's jury instructions and issues submitted to the jury adequately encompassed the law of Plaintiff's Section 1983 Claim.

B. Plaintiff's Section 1983 Claim

[2] "To state a claim under 42 U.S.C. § 1983, a plaintiff must show that an individual, acting under color of law, has subjected [him] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Copper v. Denlinger*, 363 N.C. 784, 789, 688 S.E.2d 426, 428 (2010) (alterations in original) (citation and quotation marks omitted); *see* 42 U.S.C. § 1983 (2020). The United States Supreme Court expressly extended Section 1983 liability to municipalities in *Monell*. *See Pembaur*, 475 U.S. at 478, 89 L. Ed. 2d at 462 ("In the first part of the [*Monell*] opinion, we held that local government units could be made liable under [Section] 1983 for deprivations of federal rights, overruling a contrary holding in *Monroe v. Pape*, [365 U.S. 167, 5 L. Ed. 2d 492] (1961).").

"[O]ur first inquiry in any case alleging municipal liability under [Section] 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Canton v. Harris*, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 424 (1989). "[N]either *Monell*[ ] nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Los Angeles v. Heller*, 475 U.S. 796, 799, 89 L. Ed. 2d 806, 810-11 (1986) (per curiam). Indeed, Plaintiff's proposed jury instructions recognize this, stating "*[i]f you find that [plaintiff] was deprived of [describe federal right]*, [municipality] is liable for that deprivation if [plaintiff] proves by a preponderance of the evidence that the deprivation resulted from [municipality's] official policy or custom . . . ." (emphasis added). Thus, even if the trial court adopted verbatim Plaintiff's proposed instructions, the jury would still have been required to find Plaintiff was deprived of a federal right before answering if "the deprivation resulted from [municipality's] official policy or custom[.]"

On Plaintiff's Section 1983 Claim, the trial court ultimately submitted the issue to the jury: "Was the plaintiff's filing to run for sheriff of Jackson County a substantial or motivating factor in the defendant's decision to terminate him from employment with the Town of Sylva?" and the jury returned a verdict of "No." The instruction given by the trial court was adapted from this Court's opinion in *Ginsberg v. Bd. of Governors of Univ. of N.C.*, which the trial court characterized as a retaliatory discharge case. 217 N.C. App. 188, 190, 718 S.E.2d 714, 716 (2011). In *Ginsberg*, the plaintiff appealed a grant of summary judgment in favor of the Board of Governors of the University of North Carolina after the plaintiff alleged constitutional violations in that she was "not considered for [a] tenure-track position as a result of her [speech]." *Id.*

During the charge conference in this case, counsel for Plaintiff and the trial court discussed the instructions, and the trial court conceded *Ginsberg* was not brought under Section 1983. However, the trial court still indicated its intent to instruct the jury accordingly. The trial court directed the jury "that filing to run for public office is conduct protected by law" and continued "if you find by the greater weight of the evidence that the plaintiff's participation in conduct protected by law was a substantial or motivating factor in the defendant's decision to terminate the plaintiff, it would be your duty to answer this issue yes, in favor of the plaintiff." Plaintiff argues this instruction prejudiced him because it "imposed a burden not required by the Civil Rights Act."

It is true the trial court likely could have more clearly delineated Plaintiff's Section 1983 Claim for violation of his federal constitutional rights from Plaintiff's additional claims sounding in North Carolina law and policy. In effect if not in substance, however, the trial court's instruction asked the jury to consider if there is a "direct causal link" between Defendant's termination of Plaintiff and the alleged constitutional deprivation. *Harris*, 489 U.S. at 385, 103 L. Ed. 2d at 424. Implicit in the jury verdict here is the finding there was no constitutional harm to Plaintiff, a requisite for a violation of Section 1983 and for municipal liability under *Monell*. *See Heller*, 475 U.S. at 799, 89 L. Ed. 2d. at 810-11. Thus, even assuming it was error for the trial court to decline to instruct the jury on the question of whether Defendant's alleged constitutional "deprivation resulted from [municipality's] official policy or custom[,]" the jury verdict finding Plaintiff's filing to run for sheriff was not a substantial or motivating factor in his termination renders any error harmless. *Outlaw*, 190 N.C. App. at 243, 660 S.E.2d at 559 ("Even assuming *arguendo* that the trial court erred by failing to give Defendants' requested jury instruction, we find that any such error was harmless error in light of the jury verdict."). Therefore, the trial court's jury instruction did not amount to reversible error.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no reversible error at trial and affirm the trial court's Judgment.

NO PREJUDICIAL ERROR.

Judges BRYANT and COLLINS concur.

LORETTA NOBEL, PLAINTIFF
v.
FOXMOOR GROUP, LLC, MARK GRIFFIS, DAVE ROBERTSON, DEFENDANTS

No. COA19-506

Filed 7 July 2020

1. Contracts—breach—promissory note—sealed instrument—no actual seal—parties' intent—statute of limitations

Plaintiff's breach of contract claim against the two sole co-owners of a company (defendants)—who refused to repay plaintiff's $75,000 loan to the company—was not time-barred because the ten-year statute of limitations for claims involving a sealed instrument applied rather than the three-year limitations period for breaches of contracts not under seal. Although the promissory note for repayment of the loan did not include a seal after the principal's signature, the note was properly deemed a sealed instrument where the defendant who drafted it included language above the signature line saying the note "shall take effect as a sealed instrument."

2. Corporations—piercing the corporate veil—instrumentality rule—business co-owners as alter egos—failure to repay loan

In plaintiff's lawsuit for breach of contract, fraudulent misrepresentation, and other claims against the two sole co-owners of a company (defendants), who encouraged plaintiff to loan the company $75,000 and then refused to repay her, the trial court correctly determined that the instrumentality rule allowed for piercing the corporate veil because defendants were alter-egos of the company. Defendants had complete domination over the company's finances, policy making and business practices when they induced plaintiff to loan the money—so that the company had no existence of its own at the time—and then used their control over the company to drain corporate funds for personal use so the company could not repay its debt to plaintiff.

3. Damages and Remedies—lawsuit against company co-owners—appeal of fraud claim—no effect on ultimate award of monetary damages

After a trial court awarded money damages to plaintiff on claims for breach of contract, fraud, and unfair and deceptive trade practices against the two sole co-owners of a company, the Court of Appeals declined to review an argument by defendant (one of

the co-owners) challenging plaintiff's fraud claim where vacating the trial court's ruling on that claim would have no effect on the trial court's ultimate award of damages, which the Court of Appeals upheld in part and reversed in part on other grounds.

4. Unfair Trade Practices—Unfair and Deceptive Trade Practices Act—applicability—soliciting funds to raise business capital

In plaintiff's lawsuit against the two sole co-owners of a company (defendants), who encouraged plaintiff to loan the company $75,000 to provide the business with additional capital and then refused to repay her, an award of trebled damages on her unfair and deceptive practices claim was reversed because soliciting funds to build up capital is not a business activity (or action "in or affecting commerce") subject to the Unfair and Deceptive Trade Practices Act.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Defendant Robertson from judgment entered 30 November 2018 by Judge Charles H. Henry in New Hanover County Superior Court. Heard in the Court of Appeals 5 February 2020.

Mason & Mason, by Amanda B. Mason and Sarah C. Thomas, for plaintiff-appellee.

The Lea Schultz Law Firm, P.C., by James W. Lea, III, for defendant-appellant.

MURPHY, Judge.

A contract under seal is subject to a ten-year statute of limitations for its breach, as opposed to a three-year statute of limitations for a contract not under seal. A promissory note stating it shall take effect as a sealed instrument, with no seal following the principal's signature, may be deemed "sealed" where evidence demonstrates that the parties intended the promissory note to be a sealed instrument. To be entitled to judgment on a claim that a party has violated the Unfair and Deceptive Trade Practices Act ("the UDTPA"), a plaintiff must establish, among other things, that the defendant's action in question was in or affecting commerce, namely business activities. However, soliciting funds to build up capital is not a business activity, even when it is unfair or deceptive, and is therefore not subject to the UDTPA.

BACKGROUND

This case arises from Plaintiff Loretta Nobel's ("Nobel") loan to Foxmoor Group, LLC, which did not repay the loan and subsequently dissolved. Mark Griffis ("Griffis") and Dave Robertson ("Robertson") were the sole members and managers of Foxmoor Group, LLC (collectively "Defendants"), and actively encouraged Nobel to invest in the company.[1]

Nobel met Griffis and Robertson in 2003 through social and charitable functions in which all three participated. Nobel contributed articles to a lifestyle magazine that Robertson co-owned and managed, and Griffis and Robertson assisted Nobel with custody litigation expenses and medical bills. After facing financial difficulties and divorcing her spouse, Nobel moved from North Carolina to Ecuador with her grandson, although she later returned to North Carolina. Griffis and Robertson knew about Nobel's difficulties.

Griffis founded Foxmoor Group, LLC in 2010 while Nobel was in Ecuador. On 9 December 2011, the Secretary of State sent "Notice of Grounds for Administrative Dissolution" to Foxmoor Group, LLC due to the company's failure to file an annual report. After the company was dissolved due to its failure to file an annual report in 2011, Robertson helped Griffis obtain Foxmoor Group, LLC's reinstatement. Foxmoor Group, LLC obtained reinstatement in 2012. Griffis and Robertson told Nobel throughout this time period the business was performing very well and asked Nobel to provide financial capital to Foxmoor Group, LLC.

Despite the 9 December 2011 notice of pending dissolution from the Secretary of State, Griffis advised Nobel in a 12 December 2011 email of an investment opportunity in the company and proposed potential investment amounts of $75,000.00 or $150,000.00. Nobel responded that she could only invest $25,000.00 at that time, and after Griffis agreed that amount was acceptable, she subsequently sent a $25,000.00 check to Griffis on 9 January 2012 for "a buy in of 4 years and a renewal of [$]10,000[.00] for an additional 4 years." Defendants made three payments to Nobel toward repaying the $25,000.00 investment on 1 March 2012, 1 April 2012, and 1 May 2012.

After moving back to North Carolina in February of 2012, and in response to Griffis's and Robertson's continued representations

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1. Only Robertson filed a timely notice of appeal, and, to the extent the other two Defendants intended to appeal the trial court's judgment, their appeal of this matter was dismissed by our *Order* on 31 January 2020.

concerning the strength and growth of the company, and a corresponding financial opportunity for her, Nobel loaned an additional $75,000.00 to Foxmoor Group, LLC. To convince Nobel to make the loan, Griffis also offered her four years of health insurance as an employee of Foxmoor Group, LLC, and included that promise in an additional written agreement. Griffis and Nobel signed the 24 May 2012 additional written agreement. The additional written agreement also provided that the contract would renew "at a wage of $3[,]500[.00] per month for as long as such time [Nobel] continues in her desire for employment." On 24 May 2012, a promissory note ("the promissory note") was executed for repayment of Nobel's $75,000.00 loan. Robertson prepared the promissory note, and Griffis signed the promissory note as "CEO" of Foxmoor Group, LLC. The promissory note contained the language "[t]his note shall take effect as a sealed instrument and is made and executed under, and is in all respects governed by, the laws of: [] the State of North Carolina." However, the promissory note did not contain a seal following Griffis's signature. According to the terms of the promissory note, in exchange for the $75,000.00 "value received" from Nobel, Foxmoor Group, LLC would make monthly payments of $3,500.00 to Nobel from 1 July 2012 to 1 July 2016. Nobel was initially hesitant to make the loan. On 24 May 2012, the same day the promissory note and additional written agreement were executed, Defendants cashed and deposited the $75,000.00 check.

Nobel later received a $7,000.00 check, dated 10 June 2012, from Foxmoor Group, LLC, executed by Robertson. Only $3,500.00 was for repayment of the promissory note, and the other half of the check was a fourth installment payment toward her prior investment of $25,000.00. After the 10 June 2012 payment, Nobel received no further payments from Defendants. Additionally, she was never covered by any health insurance policy in connection with Foxmoor Group, LLC. When she contacted Griffis asking why she was not receiving payments, he responded that if she tried to get the money owed to her, he would declare bankruptcy, and she would lose everything. Instead of repaying Nobel for her $25,000.00 investment, and $75,000.00 loan under the terms of the promissory note, Griffis and Robertson used their position in Foxmoor Group, LLC to access corporate funds and use those funds for personal use.

After obtaining reinstatement in 2012, Foxmoor Group, LLC did not file an annual report in 2013, and was dissolved on 4 March 2014.

In December 2015, Nobel sued Defendants for breach of contract, piercing the corporate veil, fraudulent misrepresentation, money owed,

and unfair and deceptive trade practices. Defendants argued that the promissory note was not a sealed instrument, meaning the statute of limitations had expired, and denied Nobel's allegations. The trial court, sitting without a jury, found that the promissory note was an instrument under seal, determined Foxmoor Group, LLC was an alter ego of Griffis and Robertson, meaning the instrumentality rule allowed for the piercing of the corporate veil, and held Defendants liable for breach of contract, fraud in the inducement, and unfair and deceptive trade practices.

ANALYSIS

A. Statute of Limitations and Breach of Contract

[1] The first issue on appeal is whether the trial court erred in finding and concluding the promissory note was an instrument under seal. Nobel's breach of contract cause of action regarding the $25,000.00 investment was barred by the statute of limitations. N.C.G.S. § 1-52(1) (2019). If the 24 May 2012 promissory note, with monthly payments beginning 1 July 2012, was not deemed to be a sealed instrument, Nobel's December 2015 breach of contract cause of action regarding the $75,000.00 loan would likewise be barred by the statute of limitations. *Miller v. Randolph*, 124 N.C. App. 779, 781, 478 S.E.2d 668, 670 (1996) ("[N.C.G.S. § 1-52(1)] begins to run when the claim accrues; for a breach of contract action, the claim accrues upon breach."). The statute of limitations for actions "[u]pon a sealed instrument . . . against the principal thereto" is ten years. N.C.G.S. § 1-47(2) (2019). In contrast, the statute of limitations for actions upon an unsealed contract or liability arising out of an unsealed contract is three years. N.C.G.S. § 1-52(1) (2019). Here, the promissory note includes language directly preceding the principal's signature that states: "[t]his note shall take effect as a sealed instrument . . . [,]" but does not include a seal following the principal's signature. Since the instrument lacks a seal, Robertson argues it is not a sealed instrument and does not fall under the ten-year statute of limitations.

Robertson does not contest any of the trial court's findings of fact on the issue of whether the promissory note was, in fact, sealed. Instead, he argues the trial court erred as a matter of law in concluding the instrument was sealed and that, therefore, Nobel's claims related to the promissory note fall under the three-year statute of limitations. Conclusion of Law 2 concludes the promissory note is a sealed instrument and the ten-year statutory period applies as to Nobel's breach of contract claim.

Our Supreme Court has advised, "the determination of whether an instrument is a sealed instrument, commonly referred to as a specialty, is a question for the court." *Square D Co. v. C.J. Kern Contractors, Inc.*,

314 N.C. 423, 426, 334 S.E.2d 63, 65 (1985) (citing *Security Nat'l Bank v. Educator's Mut. Life Ins. Co.*, 265 N.C. 86, 143 S.E.2d 270 (1965)). However, we have treated the issue of the parties' intention to seal the document as an issue of fact: "We are constrained to hold that a material issue of fact remains as to the intent of the parties to enter into a sealed instrument, and accordingly [N.C.]G.S. [§] 1-47(2) is not necessarily applicable to the present action." *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 267, 261 S.E.2d 145, 150 (1979) (holding "the trial court erred in concluding as a matter of law that the statute of limitations did not bar [the] plaintiff's action against [the] defendant . . . , and summary judgment against [the defendant] was improvidently granted").

In *Square D Co.*, the question for the court was "whether [a] corporate seal transforms the party's contract into a specialty[.]" *Square D Co.*, 314 N.C. at 428, 334 S.E.2d at 66. Our Supreme Court held the determinative factor in reaching such a decision "is *whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty* or whether extrinsic evidence would demonstrate such an intention." *Id.* (emphasis added). "[A]bsent any evidence . . . indicat[ing] that the parties intended that the contract was to be a sealed instrument, . . . the contract in this case was not a specialty and [] the ten-year period of limitation contained within [N.C.]G.S. [§] 1-47(2) would be inapplicable to [the] plaintiff's action." *Id.*

Although the instrument here does not contain a seal—corporate or otherwise—there is convincing evidence within the four corners of the promissory note that the parties intended the instrument to be sealed, which allows it to be treated as such. Our holding in *First Citizens Bank & Trust Co. v. Martin* supports the premise that the parties' intent to file the instrument under seal is relevant to the determination of whether the document was, in fact, filed under seal. *First Citizens Bank & Trust Co.*, 44 N.C. App. at 267, 261 S.E.2d at 150. The trial court did not make such a finding of fact here, but still noted the language "this note shall take effect as a sealed instrument" in the promissory note in Finding of Fact 16.

Based on our caselaw, an instrument will be deemed "sealed" where it appears on its face or through extrinsic evidence that the parties intended it to be a sealed instrument. In rare instances, as here, this clearly-stated intent will result in an instrument being treated as though it was filed under seal even where the principal(s) to the contract do not include a seal after their name. The trial court concluded that

the promissory note was to be "strictly construed against [Robertson and Griffis]" because it was "generated and drafted by [Robertson] and signed by [Griffis] as a sealed contract." Additionally, "[Robertson and Griffis] had the best opportunity to protect their own interests thus any doubt as to its interpretation will be resolved against them." Each of these sub-conclusions is supported by unchallenged findings of fact, and the trial court's conclusion that the ten-year statute of limitations applies to the promissory note is affirmed.[2]

B. Instrumentality Rule

[2] Robertson argues that "the trial court erred in ruling that the individual Defendants were the alter-egos of Defendant Foxmoor," and the corporate veil should not have been pierced.

"In North Carolina, what has been commonly referred to as the 'instrumentality rule,' forms the basis for disregarding the corporate entity or 'piercing the corporate veil.' " *Glenn v. Wagner*, 313 N.C. 450, 454, 329 S.E.2d 326, 330 (1985). The corporate form may be disregarded, and the corporation and the shareholder treated as the same entity, if "the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State[.]" *Estate of Hurst ex rel. Cherry v. Moorehead I, LLC*, 228 N.C. App. 571, 577, 748 S.E.2d 568, 573–74 (2013). There are three elements of a successful "instrumentality rule" claim:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest

2. Robertson also argues, in Section V of his *Appellant's Brief*, that the trial court "erred as a matter of law by entering judgment against [him] for breach of contract[.]" This argument is two sentences long: the first sets out the two elements of a breach of contract claim under North Carolina law, and the second states, "[t]he trial court erred in concluding that [Robertson] executed a sealed promissory note with [Nobel] . . . ." Given our conclusion that the promissory note was filed under seal, we hold the trial court did not err in entering judgment against Robertson for breach of contract.

and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Glenn, 313 N.C. at 454-55, 329 S.E.2d at 330.

Here, in Finding of Fact 28, the trial court made the following unchallenged finding:

> The individual defendants had complete domination over the finances, policy making and business practices of Foxmoor with respect to the events which injured [Nobel] so that Foxmoor had at the time no existence of its own. Griffis and Robertson used their control over the company to siphon and drain the corporation of funds for personal use so that it could not satisfy its legal obligations under the promissory note delivered to the plaintiff.

As this finding of fact is not challenged by Robertson, it is binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). This finding independently supports the trial court's Conclusion of Law 5 that Nobel proved all three elements of an "instrumentality rule" claim—indeed, the trial court used the exact language from *Glenn* in entering this finding of fact. *See Glenn*, 313 N.C. at 454-55, 329 S.E.2d at 330.

Conclusion of Law 5 is supported by Finding of Fact 28, which is supported by competent evidence. The trial court heard the following testimony: that Griffis and Robertson were the only members of Foxmoor Group, LLC; that both Griffis and Robertson told Nobel that business was thriving; that Robertson prepared the promissory note; that Robertson signed the 10 June 2012 check from Foxmoor, LLC toward repaying the promissory note; and, that Nobel never received further payment, other than the 10 June 2012 check, toward the promissory note. Although Robertson points us to testimony to the contrary, it is the factfinder's duty to determine the credibility of testimony. *GEA, Inc. v. Luxury Auctions Marketing, Inc.*, 259 N.C. App. 443, 455, 817 S.E.2d 422, 432 (2018); *see also Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983) (noting that "the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence"). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and

credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980). The trial court's conclusion that the instrumentality rule applies is affirmed.

C. False Representation/Fraud

[3] Robertson next argues "the trial court erred as a matter of law in concluding the Defendants made false representations to induce [Nobel] to invest in Foxmoor." Although he does not use the word "fraud" here, Robertson's argument is that the trial court erred in concluding he committed fraud in the inducement. In relevant part, the trial court concluded:

> 7. The [D]efendants made false representations to induce [Nobel] to loan the [D]efendants the sum of $75,000[.00]. [Nobel] did, in fact, rely on this misrepresentation in reaching her decision to loan this money. The [D]efendants demonstrated no intention on providing health insurance to [Nobel] or repaying fully their obligation established by the promissory note.
>
> 8. [Nobel] has suffered a financial injury, and the [D]efendants' conduct was the proximate cause of that injury.

These two conclusions of law do not include a specific monetary award. However, Conclusion of Law 10 is an award that corresponds with the breach of contract, fraud, and UDTPA violation claims. Specifically, Conclusion of Law 10 states: "[Nobel] is to recover as damages from the [D]efendants for breach of contract the sum of $164,500[.00]. That same amount is also the amount of damages for the unfair and deceptive trade practices. Pursuant to N.C.G.S. § 75-16 those damages are trebled." In light of our holdings that (1) the promissory note was not erroneously determined to be a sealed instrument, and our affirming the trial court's conclusion that Defendants breached their contract with Nobel, and (2) the corporate veil could be pierced as to Robertson, we need not address the fraud issue because vacating the trial court's conclusion regarding fraud would not make an impact on the trial court's ultimate award of monetary damages.

D. Unfair and Deceptive Trade Practices Act

[4] To be entitled to judgment on a claim that a party has violated the UDTPA, a plaintiff must have established that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001).

In challenging the trial court's conclusion that Robertson violated the UDTPA, he does not take issue with elements one or three; instead, he argues the acts in question were not "in or affecting commerce" and therefore do not fall within the protections of the UDTPA. N.C.G.S. § 75-1.1 (2019). On this issue, the trial court concluded that "[t]he [D]efendants['] conduct involved a regular business activity of the [D]efendants that affected commerce."

"For [the] purposes of [the UDTPA], 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b) (2019). " 'Business activities' is a term which connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). However, "any unfair or deceptive practices occurring in the conduct of extraordinary events of, or solely related to the internal operations of, a business will not give rise to a claim under the [UDTPA]." *White v. Thompson*, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010).

In *HAJMM Co.*, our Supreme Court addressed a situation where a corporate defendant had issued a corporate plaintiff a number of "fund certificates," or, "in essence, corporate securities." *HAJMM Co.*, 328 N.C. at 593, 403 S.E.2d at 493. The defendant's "bylaws provide[d] that the purpose of issuing the certificates was to 'build up . . . capital.' " *Id.* Our Supreme Court held that the sale of such instruments was not a business activity, but an "extraordinary event done for the purpose of raising capital in order that the enterprise can either be organized for the purpose of conducting its business activities or, if already a going concern, to enable it to continue its business activities." *Id.* at 594, 403 S.E.2d at 493. Our Supreme Court reasoned "[s]ecurities transactions are related to the creation, transfer, or retirement of capital. Unlike regular purchase and sale of goods, or whatever else the enterprise was organized to do, they are not 'business activities' as that term is used in the [UDTPA]." *Id.* Therefore, "[t]hey are not . . . 'in or affecting commerce,' even under a reasonably broad interpretation of the legislative intent underlying these terms." *Id.*

Our Supreme Court affirmed this interpretation of the UDTPA in *White*, and described the central holding of *HAJMM Co.* as standing for the proposition that "any unfair or deceptive practices occurring in the conduct of extraordinary events of, or solely related to the internal

operations of, a business will not give rise to a claim under the [UDTPA]." *White*, 364 N.C. at 52, 691 S.E.2d at 679. Further, our Supreme Court reasoned that the General Assembly's intent in passing the UDTPA was to regulate "two types of interactions in the business setting: (1) interactions between businesses, and (2) interactions between businesses and consumers." *Id.* "As a result, any unfair or deceptive conduct contained solely within a single business is not covered by the [UDTPA]." *Id.* at 53, 691 S.E.2d at 680.

Here, Robertson's unfair or deceptive practices all relate to inducing an investment from Nobel for the purpose of funding Foxmoor Group, LLC, i.e. providing a loan for the purpose of giving the business additional capital with which to operate. Based on our Supreme Court's interpretation of the UDTPA, soliciting funds to build up capital, as occurred here, was an extraordinary act and not a business activity of Foxmoor Group, LLC. It is not a "regular purchase and sale of goods, or whatever else the enterprise was organized to do[.]" *HAJMM Co.*, 328 N.C. at 594, 403 S.E.2d at 493. Instead, the alleged unfair or deceptive act here is almost directly equivalent to the sale of fund certificates by the defendant in *HAJMM Co.*, as the promissory note signed by Griffis is a "capital-raising device[]." 328 N.C. at 595, 403 S.E.2d at 493. In following our binding precedent from *HAJMM Co.* and *White*, we conclude the trial court erred as a matter of law in concluding Robertson's acts were "in or affecting commerce," and therefore subject to the UDTPA. The trial court's conclusions to the contrary—and the related monetary award and trebling of the same—are reversed.[3]

CONCLUSION

The trial court did not err in concluding the promissory note was an instrument under seal, Nobel could pierce the corporate veil, and Robertson was liable for breach of contract as to the promissory note. However, Defendants' soliciting funds to raise capital were not a business activity, and the trial court erred in concluding that the proven acts violated the UDTPA.

AFFIRMED IN PART; REVERSED IN PART.

Judge ZACHARY concurs.

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

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3. As the appeals of Foxmoor Group, LLC and Griffis were dismissed, the judgments against them remain undisturbed.

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 trial court's holding that the promissory note was an instrument under seal, and plaintiff's claims are thus not barred by the statute of limitations. I also concur with that portion of the opinion concerning defendant's liability for breach of contract and fraud.

However for the reasons set forth below, I dissent from that portion of the majority's opinion which reverses the trial court's award of damages on plaintiff's claim under the Unfair and Deceptive Trade Practices Act.

I. Discussion

Pursuant to the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2019). The majority correctly notes that to be entitled to judgment on a claim that a party has violated the UDTPA, a plaintiff must establish that: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citing *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991)). The Act clarifies that "[f]or purposes of this section, 'commerce' includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b). "Business activities" refers to "the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991). The Act thus does not cover all wrongs in a business setting: it does not cover ordinary employer-employee disputes, *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E.2d 118 (1982), securities transactions, *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 333 S.E.2d 236 (1985), or those wrongs committed by and against partners within the same company, where the wrongs committed only affected that company and or its co-owners, *White v. Thompson*, 364 N.C. 47, 691 S.E.2d 676 (2010).

For instance, in *White*, three partners formed Ace Fabrication and Welding ("ACE") to provide specialty construction and fabrication

services for a plant operated by Smithfield Packing Company, Inc. ("Smithfield"). *Id.* at 48, 691 S.E.2d at 677. The partners agreed that they would divide up the contracts ACE won among themselves and receive hourly wages from ACE for the hours each of them actually worked. *Id.* One of the partners, the defendant, later violated this agreement by hiring several people not affiliated with ACE to help him perform certain Smithfield jobs that had been awarded to ACE. In addition, he formed a new company, called PAL, and used it to compete for Smithfield jobs. *Id.* at 49-50, 691 S.E.2d at 677-78. As a result of the defendant's actions, ACE ultimately went out of business. *Id.* at 50, 691 S.E.2d at 678. The defendant's former business partners sued him for unfair and deceptive trade practices, among other claims. *Id.*

Our Supreme Court held that "[b]ecause [the] defendant . . . unfairly and deceptively interacted only with his partners, his conduct occurred completely within the ACE partnership and entirely outside the purview of the [UDTPA]." *Id.* at 54, 691 S.E.2d at 680. In reaching its decision, our Supreme Court emphasized that the UDTPA "is not focused on the internal conduct of individuals within a single market participant, that is, within a single business[,]" but rather "the General Assembly intended the Act's provisions to apply to interactions between market participants." *White*, 364 N.C. at 53, 691 S.E.2d at 680. *See also Alexander v. Alexander*, 250 N.C. App. 511, 516-17, 792 S.E.2d 901, 905 (2016) (quoting *Id.* at 53-54, 691 S.E.2d at 680) (holding that, where the " 'unfairness of [Defendant's] conduct did not occur in his dealings with [other market participants]' " but rather only with the plaintiff, his co-owner, his conduct fell " 'entirely outside the purview of the [UDTPA].' ").

In the present case, unlike the plaintiff in *White*, plaintiff here is neither a partner nor has any ownership stake in Foxmoor Group, LLC ("Foxmoor"). Instead, plaintiff acted as an outside investor, and is therefore better viewed as a separate market participant. Moreover, though part of the repayment agreement for plaintiff's second loan included an agreement that Foxmoor would pay for her insurance as an employee of the company, she was not an employee in any real sense of the term. Rather, as the agreement between the parties made clear, plaintiff was to be treated as an employee for health insurance purposes only, as part of the consideration for, and repayment of, her $75,000.00 loan. Because defendant did not "unfairly and deceptively interact[] only with his partners," *White*, 364 N.C. at 54, 691 S.E.2d at 680, or employee, I would hold that his conduct does not fall outside the scope of the UDTPA.

The majority argues that the present case is analogous to that of *HAJMM*. There, the plaintiff was an LLC engaged in agricultural

marketing, and the defendant was an agricultural cooperative engaged in the business of processing turkeys and other poultry. 328 N.C. at 580, 403 S.E.2d at 485. The defendant was formed and partially capitalized with the plaintiff's sale of all of its stock in Raeford Turkey Farms, Inc. In consideration for the sale, the plaintiff received revolving fund certificates issued by the defendant which became part of the defendant's capital structure. *Id.* The defendant's bylaws specified that the certificates could be retired at the discretion of the board and "[f]unds arising from the issue of such certificates shall be used for creating a revolving fund for the purpose of building up such an amount of capital as may be deemed necessary by the board of directors from time to time and for revolving such capital." *Id.* at 581, 403 S.E.2d at 486. The plaintiff's certificate continued to be listed on the defendant's books as part of its capital structure. When the plaintiff later demanded payment on the certificate, the defendant refused without good reason. *Id.*

Our Supreme Court, relying on its decision in *Skinner*, held the plaintiff was not entitled to recover under the UDTPA because corporate securities were outside the scope of the Act. *Id.* at 593, 403 S.E.2d at 492-93. In *Skinner*, that Court held that securities transactions are beyond the scope of the UDTPA. Specifically, it reasoned that it's holding

> is consistent with [N.C. Gen. Stat.] § 75-1.1's purpose to protect the consuming public, the North Carolina cases holding that other federal or state statutes may limit the scope of [N.C. Gen. Stat.] § 75-1.1, the absence of any other state court decision holding that securities transactions are subject to a similar Unfair Trade Practices Act, and the absence of any federal court decision holding that securities transactions are subject to § 5(a)(1) of the FTC Act. We do not believe that the North Carolina legislature would have intended [N.C. Gen. Stat.] § 75-1.1, with its treble damages provision, to apply to securities transactions which were already subject to pervasive and intricate regulation under the North Carolina Securities Act, N.C. Gen. Stat. § 78A-1 *et seq.* (1981), as well as the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1982), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982). Furthermore, to hold that [N.C. Gen. Stat.] § 7-51.1 applies to securities transactions could subject those involved with securities transactions to overlapping supervision and enforcement by both the North Carolina Attorney General, who is charged with enforcing [N.C.

> Gen. Stat.] § 75-1.1, and the North Carolina Secretary of State, who is charged with enforcing the North Carolina Securities Act.

314 N.C. at 275, 333 S.E.2d at 241 (quoting *Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 167-68 (1985)). Our Supreme Court in *HAJMM* thus further extended its holding in *Skinner* to include corporate securities, noting that "the legislature simply did not intend for the trade, issuance and redemption of corporate securities or similar financial instruments to be transactions 'in or affecting commerce' as those terms are used in N.C. [Gen. Stat.] § 75-1.1(a)." *Id.* at 594, 403 S.E.2d at 493. Because "revolving fund certificates are, in essence, corporate securities[,]" whose "purpose is to provide and maintain adequate capital for enterprises that issue them," the Court held that the plaintiff's claim did not fall under the purview of the UDTPA. *Id.* at 593, 403 S.E.2d at 493.

The majority asserts the same reasoning applies to the current case. However, there is a significant distinction between the two cases: *HAJMM* involved corporate securities, while the present case notably does not. While the plaintiff's claim in *HAJMM* fell outside the purview of the UDTPA precisely because it involved corporate securities, the same reasoning cannot apply here because no securities transactions or corporate securities are at issue. Rather, the present dispute arose due to nonpayment of a promissory note (along with certain other considerations), whose funds were misappropriated. Because, in my view, plaintiff, as an outside investor, was a separate market participant and her promissory note was not the equivalent of a corporate security or similar instrument, I would affirm the judgment of the trial court and hold that her claim does not fall outside the scope of the UDTPA.

PRICE v. BIGGS

[272 N.C. App. 315 (2020)]

SHEILA HOLBROOK PRICE, PLAINTIFF
v.
ALEXANDER GRAHAM BIGGS, III, DEFENDANT

No. COA19-914

Filed 7 July 2020

1. Child Custody and Support—contempt order—required findings of fact—burden of proof

The trial court's order holding defendant in contempt for overdue child support was reversed and remanded where the court did not make required findings regarding whether defendant's failure to pay the overdue support was willful or addressing defendant's present ability to comply with the support order and, because the proceeding was not initiated by a judicial official, the court improperly placed the burden of proof on defendant.

2. Child Custody and Support—child support modification order—adequate time to present case—abuse of discretion analysis

The trial court's order modifying defendant's child support obligations was reversed and remanded where the court abused its discretion by not allowing defendant adequate time to present his defense. Plaintiff was allowed nearly two hours and five minutes over two hearings to present her case but defendant was only allowed twenty-five minutes.

Appeal by defendant from orders entered 11 September 2017 by Judge Jane V. Harper and 2 April 2019 by Judge Sean P. Smith in Mecklenburg County District Court. Heard in the Court of Appeals 27 May 2020.

Collins Family Law Group, by Rebecca K. Watts, for defendant.

No appearance for plaintiff.

ARROWOOD, Judge.

Alexander Graham Biggs, III, ("defendant") appeals from the trial court's order modifying his child support obligations and establishing a payment schedule for child support arrearages for which he was found in contempt. For the following reasons, we reverse and remand.

I. Background

This case arises from orders governing defendant's child support obligations after his divorce from Sheila Holbrook Price ("plaintiff"). On 27 September 2010, the trial court entered a judgement for divorce that incorporated the provisions of the parties' separation agreement detailing defendant's financial obligations to plaintiff for care of their children. On 6 July 2017, plaintiff filed a contempt motion against defendant pursuant to N.C. Gen. Stat. § 5A-23(a1) (2019), seeking enforcement of allegedly overdue child support payments pursuant to that judgment. The trial court heard plaintiff's motion on 31 August 2017.

On 11 September 2017, the court entered an order finding defendant in contempt for overdue child support and awarded plaintiff attorney's fees related to her motion. In the contempt order, the trial court deferred setting a payment schedule for the arrearages until entry of an order disposing of defendant's pending motion to modify child support. It does not appear from the record that the court ever heard this motion.

Plaintiff subsequently filed another motion to modify child support on 12 February 2018. On 6 September 2018, the trial court held a hearing on this motion ("the first hearing"). The trial court limited plaintiff and defendant to one hour and forty minutes each to present their cases. Plaintiff used nearly her full allotment of one hour and forty minutes to present her evidence. Near the end of plaintiff's case, the court implored the parties to reach a settlement agreement and ordered a recess for that purpose. During the recess, parties entered a settlement agreement and the hearing ended, so defendant never presented his case and evidence. This settlement fell through, as defendant's counsel subsequently told him not to sign the consent order.

On 6 February 2019, another hearing was held on plaintiff's motion ("the second hearing"). The trial court allotted plaintiff and defendant twenty-five minutes each to present their cases. Defendant's counsel asked for the one hour and forty minutes he did not use to present his case at the first hearing. The trial court refused, despite admitting it did not recall the prior proceedings in the case. Thus, defendant was only afforded twenty-five minutes total to present his case, compared to plaintiff's total of nearly two hours and five minutes across the two hearings.

After defendant used his twenty-five minutes to present his evidence, his counsel again requested additional time. The trial court responded:

> Why are we making this so hard y'all? It's so disappointing. It's so disappointing to see this enormous number and to

> see y'all do this after what we did with [defendant's counsel at the first hearing] who made his own mistakes. It's so disappointing. You're looking at me like I'm going to make it all better somehow. I'm going to issue some award for attorney's fees and child support and make some decisions about what you have to do and make it all better. That's delusional. So now [defendant's counsel], you're making the argument pursuant to these cases and so oh well Judge - - like I have all the time in the world to hear these cases.

This exchange was the extent of the trial court's treatment of defendant's request.

On 2 April 2019, the trial court entered an order modifying defendant's child support obligations and awarded plaintiff attorney's fees in relation to her motion. The order also set a payment schedule for defendant's child support arrearages and attorney's fees pursuant to the prior contempt order. Defendant timely noted his appeal.

II. Discussion

On appeal, defendant argues that the trial court: (a) erred in its contempt order by improperly placing the burden of proof on defendant, failing to make statutorily required findings of fact, and setting improper purge conditions; (b) abused its discretion by failing to allow defendant equal time to present evidence at the hearings on plaintiff's motion to modify child support; and (c) erred in awarding attorney's fees to plaintiff in both orders. We address each argument in turn.

A. Contempt Order

[1] Defendant argues that the trial court erred in its contempt order by (1) improperly placing the burden on defendant to prove why he was not in contempt, (2) failing to make statutorily required findings of fact, (3) setting improper purge conditions, and (4) awarding attorney's fees to plaintiff. We agree with defendant's first two arguments, and reverse and remand for entry of a new order. Thus, we do not reach defendant's remaining arguments.

"Review in [civil] contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986) (citation omitted). We review the trial court's conclusions of law *de novo*. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted).

In contempt proceedings initiated by a party, the burden is on the movant to prove the other party's contempt. N.C. Gen. Stat. § 5A-23(a1) (2019). Civil contempt consists of the following four elements:

> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2019). The trial court must make findings addressing each of these elements in its contempt order. N.C. Gen. Stat. § 5A-23(e).

"[T]his Court has required the trial courts to find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. [T]he court must find not only failure to comply but that the defendant presently possesses *the means* to comply. . . . To support a finding of willfulness, there must be evidence to establish as an affirmative fact that defendant possessed the means to comply with the order for support at some time after the entry of the order." *Teachey v. Teachey*, 46 N.C. App. 332, 333-34, 264 S.E.2d 786, 787 (1980) (emphasis added) (alterations and citations omitted). In the instant case, the trial court failed to make express findings on elements (2a) and (3) of N.C. Gen. Stat. § 5A-23(a1).

First, the trial court did not make any express findings on whether defendant's past failure to pay the overdue child support was willful, and improperly placed the burden of proof for this element on defendant. The court found that defendant had not worked as a golf pro, at an annual salary ranging from $150,000.00 to $175,000.00, since the entry of the 2010 divorce decree incorporating the parties' initial agreement on child support. The court also found that defendant now works at a job with an annual salary of $50,000.00. The court further found as fact that "[i]t has been his choice to work at a much lower-paying job," and it "may be the case" "that he has paid what he could afford[.]" The court does not reconcile these findings with each other and come to a clear determination on willfulness. Rather, the court found that "[h]e offered no reason, and the court finds none, why he could not have resumed working as a golf pro, where he earned [more money]."

Second, the contempt order contained no express findings of fact addressing defendant's present ability to comply with the child support order of which he was alleged to be in contempt, and improperly placed the burden of proof on defendant. The trial court found that "no evidence was offered of his ability to pay the entire amount of arrears at this time." In the same finding, the court also questioned the testimony he offered of his current income and expenses, finding that "[h]e offered no documents to corroborate either his income or his expenses." However, the court did not point to alternative evidence indicating a present ability to pay the overdue child support. These findings are fatal to the order.

"Under . . . show cause proceeding[s initiated by the trial court sua sponte], the burden of proof is on the alleged contemnor. However, when an aggrieved party rather than a judicial official initiates a proceeding for civil contempt, the burden of proof is on the aggrieved party, because there has not been a judicial finding of probable cause." *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 205 (2012) (internal citations omitted) (citing N.C. Gen. Stat. § 5A-23(a), (a1) (2011)). Here, plaintiff filed a motion requesting the trial court to find defendant in contempt pursuant to N.C. Gen. Stat. § 5A-23(a1). The court did not subsequently direct defendant to show cause why he should not be held in contempt, per N.C. Gen. Stat. § 5A-23(a), before the hearing on plaintiff's motion. Therefore, as the aggrieved party, plaintiff bore the burden of proving that defendant was in contempt of the 2010 child support order.

As such, the trial court's findings that no evidence was presented on whether defendant's noncompliance with his child support obligations was willful or whether he had the present ability to comply therewith were an improper basis for its affirmative findings on these issues. Plaintiff bore the burden of proving defendant's contempt. In contempt proceedings initiated under N.C. Gen. Stat. § 5A-23(a1), a finding that no evidence was presented of an essential element of civil contempt compels a finding that plaintiff, as the aggrieved party, failed to meet her burden of proving defendant's contempt. The court erred in holding otherwise.

The trial court failed to make essential findings mandated by N.C. Gen. Stat. 5A-23(a1) and improperly shifted the burden of proof to defendant. Thus, the trial court's findings of fact do not support its conclusion of law that defendant was in contempt of his child support obligations under the parties' 2010 divorce decree. Accordingly, we reverse the contempt order and remand for entry of a new order containing adequate findings of fact and placing the evidentiary burden upon plaintiff to prove defendant's contempt.

B. Hearing and Order on Motion to Modify Child Support

[2] Defendant next argues that the trial court violated his right to due process of law at the second hearing on plaintiff's motion to modify child support, by denying him an adequate amount of time to present his case. We agree.

Because defendant did not object on due process grounds after the trial court denied his request for additional time, we review the court's decision for abuse of discretion. "The trial judge has inherent authority to supervise and control trial proceedings. The manner of the presentation of evidence is largely within the sound discretion of the trial judge and his control of a case will not be disturbed absent a manifest abuse of discretion." *State v. Davis*, 317 N.C. 315, 318, 345 S.E.2d 176, 178 (1986) (citations omitted). "A trial court may be reversed for 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." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal citation omitted).

The Due Process Clause of the Fifth and Fourteenth Amendments entitles a person to some degree of notice and an opportunity to be heard before a state actor may deprive him of a recognized property interest. *See generally In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 47-48 (2010) (citing U.S. Const. Amends. V, XIV; N.C. Const. art. I, § 19). An obligation to pay child support is a recognized property interest triggering procedural due process requirements. *Mann v. Mann*, 57 N.C. App. 587, 589, 291 S.E.2d 794, 795 (1982). An opportunity to be heard must be provided "at a meaningful time and in a meaningful manner." *In re W.B.M.*, 202 N.C. App. at 615, 690 S.E.2d at 48 (internal quotation marks omitted) (citing *Matthews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 32 (1976)).

At the first hearing on plaintiff's motion, plaintiff used nearly her full allotment of one hour and forty minutes to present her case. After plaintiff rested her case, the court implored the parties to reach a settlement agreement and ordered a recess for that purpose. At recess, the parties then entered a settlement agreement per the court's request. The hearing ended, so defendant never presented his case and evidence. This settlement fell through. On 6 February 2019 at the next hearing on plaintiff's motion, plaintiff and defendant were each allotted twenty-five minutes to present their cases. Defendant's counsel asked for the one hour and forty minutes he did not use to present his case in the prior hearing. The trial court refused, despite admitting it did not remember the events of the prior hearing. Thus, defendant was only afforded

twenty-five minutes total to present his case compared to plaintiff's total of nearly two hours and five minutes.

Under the circumstances of this case, we find that the trial court abused its discretion by denying defendant's request for an adequate opportunity to be heard. As an initial matter, nothing in the record indicates that defendant undermined the settlement reached in the recess at the first hearing in bad faith. The trial court did not make any oral findings to that effect before denying defendant equal time to present his case. In fact, the trial judge admitted his lack of memory of the prior proceedings contemporaneously with his ruling. Nor did the trial judge make any findings on this matter in his written order on the motion to modify child support, other than simply finding that the court had denied defendant's request for the additional time.

Moreover, assuming *arguendo* that the trial court at the second hearing was operating under time constraints and limited the parties' time to present evidence in furtherance of a legitimate purpose of expediency, the record does not show why the matter could not have been continued to another time at which the court could afford defendant adequate time to present his case. Nor does it indicate why plaintiff was entitled to half of the limited time allotted to present her case, given that she had received an hour and forty minutes to do so at the first hearing.

The only reasoning the trial judge provided for his ruling was that, despite his initial lack of memory regarding the occurrences of the first hearing, he felt that the parties were wasting the court's time. In the circumstances present in the instant case, this was not a rational basis upon which to deny defendant adequate time to present evidence. Therefore, we hold that the trial court abused its discretion in so ruling. We reverse and remand for a rehearing at which defendant is afforded adequate time to present his evidence. Thus, we do not reach defendant's remaining argument on the trial court's award of attorney's fees to plaintiff.

III. Conclusion

For the foregoing reasons, we reverse and remand the contempt order for entry of an order that comports with the requirements of case law and statute; to the extent necessary, the court may conduct a new hearing to accomplish this result. We also reverse the child support modification order and remand for rehearing at which defendant can be afforded his due process right to present his case.

REVERSED AND REMANDED.

Judges INMAN and MURPHY concur.

SPARROW v. FORT MILL HOLDINGS, LLC

[272 N.C. App. 322 (2020)]

ROBERT CLAY SPARROW AND MICKEY CROWE, PLAINTIFFS
v.
FORT MILL HOLDINGS, LLC, AND DAVID BAUCOM, DEFENDANTS ROBERT CLAY SPARROW AND MICKEY CROWE, PLAINTIFFS
v.
MAURER HOLDINGS, LLC, AND DAVID BAUCOM, DEFENDANTS

No. COA19-1026

Filed 7 July 2020

1. Enforcement of Judgments—full faith and credit—out-of-state judgment—extrinsic versus intrinsic fraud

In a case involving the default of two purchase money promissory notes in which a South Carolina (SC) court entered a judgment compelling enforcement of the parties' settlement agreement, defendants failed to rebut the presumption that the judgment was not entitled to full faith and credit in North Carolina (NC) under the defense that the judgment was procured by extrinsic fraud. Although defendants argued that plaintiff's action to enforce the settlement agreement should have been governed by NC law (in accordance with the promissory notes' choice-of-law clause) and that the mediator's and court's failure to consider NC law constituted extrinsic fraud, defendants were not precluded from arguing the relevance of NC law during the SC proceedings, and therefore their allegations implicated intrinsic fraud, which is not a defense to an action to recover on a foreign judgment.

2. Enforcement of Judgments—full faith and credit—out-of-state judgment—public policy—anti-deficiency statute

In a case involving the default of two purchase money promissory notes in which a South Carolina court entered a judgment compelling enforcement of the parties' settlement agreement, defendants failed to rebut the presumption that the judgment was not entitled to full faith and credit in North Carolina (NC) under the defense that the judgment was unenforceable under NC public policy. Contrary to defendants' argument, the judgment was not a deficiency judgment on a purchase money mortgage under NC's anti-deficiency statute, and even if it had been, NC's policy of abolishing deficiency judgments is not one of the rare public policy exceptions to the Full Faith and Credit Clause.

Appeal by Defendants from Order entered 5 August 2019 by Judge Steve R. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 March 2020.

Henderson, Nystrom, Fletcher & Tydings, PLLC, by John W. Fletcher III and Christine M. Lamb, for plaintiffs-appellees.

Cranford, Buckley, Schultze, Tomchin, Allen & Buie, P.A., by R. Gregory Tomchin and Joseph L. Ledford, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

Fort Mill Holdings, LLC (Fort Mill), Maurer Holdings, LLC (Maurer), and David Baucom (Baucom) (collectively, Defendants) appeal from an Order on the Plaintiff's[1] Motion for Enforcement of Foreign Judgment (Enforcement Order) filed on 5 August 2019, concluding the foreign judgment from the Court of Common Pleas of York County, South Carolina (South Carolina Judgment), filed with the Clerk of Superior Court for Mecklenburg County remains in effect until satisfied. Relevant to this appeal, the Record before us tends to show the following:

On or about 1 December 2011, Robert Clay Sparrow (Sparrow) and Mickey Crowe (Crowe) (collectively, Plaintiffs) sold Defendants certain real property located in York County, South Carolina. Defendants financed the acquisition through two Purchase Money Promissory Notes (Notes) secured by two Mortgages totaling $1,191,800.00, naming Plaintiffs as the holders of the Notes and the mortgagees on the Mortgages. Both Notes specified they were "to be governed and construed in accordance with the laws of the State of North Carolina."

In June 2012, Defendants defaulted on the Notes, and Plaintiffs initiated two actions in the Court of Common Pleas of York County, South Carolina, on 8 February 2013. Plaintiffs sought judgment against Defendants, foreclosure of the Mortgages in the amounts due and owed under the Notes, and the right to seek deficiency judgments for the remaining balance of the Notes after a foreclosure sale of the real

1. While the caption reflects two Plaintiffs, as set forth herein, the Record reflects Mickey Crowe assigned his interest in the Promissory Notes and Mortgages underlying this case to Robert Clay Sparrow. Although litigation in both North and South Carolina proceeded in the names of both Plaintiffs, ultimately, and as recognized by the trial court, only Plaintiff Sparrow filed the Motion for Enforcement of Foreign Judgment giving rise to the trial court's Order in this case.

property secured by the Mortgages. In response, Defendants filed a Motion to Dismiss Defendant Baucom and Answers and Counterclaims in both actions.

During the course of litigation in South Carolina, on 1 October 2014, Crowe decided to migrate away from this dispute and assigned his rights and interest in the Notes and Mortgages to Sparrow who proceeded to fly solo with the litigation. Prior to trial, the parties and their counsel participated in mediation pursuant to the South Carolina Alternative Dispute Resolution (ADR) Rules. On 7 October 2014, the parties and their counsel signed an agreement to settle the then-pending claims (Settlement Agreement). The South Carolina Court of Common Pleas described the terms of the Settlement Agreement as follows:

> Plaintiffs agreed to pay the outstanding real estate taxes on the property, so that the property would not be sold at a tax sale. On their part, Defendants agreed to execute a contingent confession of judgment in favor of Plaintiffs as follows: (1) Principal and Interest under the Notes for $1,356,752.10 (at 7% interest through October 7, 2014); (2) Real Property Taxes of $70,595.46; and, (3) the combined amount of (1) & (2) to bear interest at a rate of $273.74 per diem until the judgment was paid in full.
>
> Plaintiffs agreed not to file the confession of judgment until the earlier of October 7, 2015, or until the sale of the mortgaged properties by Defendants resulted in a deficiency. In such case, the confession of judgment would be reduced by the proceeds of the sales paid to Plaintiffs. If a sale of the properties resulted in excess proceeds over the judgment, the excess would go to Defendants. Additionally, Plaintiffs would release the mortgages on the two properties prior to closing of any *bona fide* sale of the property by Defendants.

Thereafter, and in accordance with the Settlement Agreement, Plaintiffs paid the outstanding real estate taxes on the property. Defendants, however, were unable to sell the property and refused to execute the confession of judgment as required by the Settlement Agreement. Consequently, Plaintiffs filed a motion to compel in the Court of Common Pleas, seeking enforcement of the terms of the Settlement Agreement.

After a hearing, the Court of Common Pleas entered the South Carolina Judgment on 30 March 2016. In its Judgment, the Court of Common Pleas found—"the terms of the [S]ettlement [A]greement

are not ambiguous; nor was the [A]greement the a [sic] product of any fraud. The [A]greement was reduced to writing and signed by all parties and their counsel as required by Rule 43(k)" of the South Carolina Rules of Civil Procedure.[2] Defendants had also argued North Carolina's "anti-deficiency" statute[3] "prevents Plaintiffs from obtaining a deficiency judgment in the foreclosure action, and that therefore, [Defendants] are not required to execute the confession of judgment." The Court of Common Pleas, however, disagreed, concluding the North Carolina anti-deficiency statute was immaterial because "[t]he present case pertains only to enforcement of a voluntary settlement agreement made in accordance with applicable South Carolina rules and case law." Further, the Court of Common Pleas concluded it would be substantially unfair to Plaintiffs if the Settlement Agreement was not enforced because Plaintiffs had already paid all the outstanding real estate taxes as consideration for entering into the Settlement Agreement. Accordingly, the Court of Common Pleas granted Plaintiffs' motion to compel enforcement of the Settlement Agreement and entered judgment against Defendants in the principal amount of $1,427,347.56 plus interest.

On 15 August 2016, pursuant to N.C. Gen. Stat. § 1C-1703, Plaintiffs enrolled the South Carolina Judgment with the Mecklenburg County Clerk of Superior Court. Plaintiffs served the Notice of Filing of Foreign Judgment on Defendants on 31 August 2016 and filed Defendants' Acceptance of Service of the Notice of Filing of Foreign Judgment on 23 September 2016. On 28 September 2016, Defendants filed a Motion for Relief from and Notice of Defense to Foreign Judgment alleging, *inter alia*, the South Carolina Judgment was in violation of the public policy of North Carolina because it is a deficiency judgment on two purchase-money notes in violation of N.C. Gen. Stat. § 45-21.38. Defendants also attached a copy of their notice of appeal to the South Carolina Court of Appeals, appealing the South Carolina Judgment.[4]

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2. *See* S.C. R. Civ. Pro. 43(k) (2020) ("No agreement between counsel affecting the proceedings in an action shall be binding unless . . . reduced to writing and signed by the parties and their counsel.").

3. *See* N.C. Gen. Stat. § 45-21.38 (2019) ("In all sales of real property by mortgagees . . . to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee . . . secured by such mortgage . . . shall not be entitled to a deficiency judgment on account of such mortgage[.]").

4. On 11 July 2018, the South Carolina Court of Appeals filed an unpublished opinion affirming the South Carolina Judgment. *See Sparrow v. Fort Mill Holdings, LLC*, No. 2018-UP-321, 2018 WL 3387240 (S.C. Ct. App. July 11, 2018) (per curiam) (unpublished).

On 24 May 2019, Sparrow filed a Motion for Enforcement of Foreign Judgment (Enforcement Motion) seeking to enforce the South Carolina Judgment. Prior to the hearing on Sparrow's Enforcement Motion, Defendants filed a Memorandum of Law in Opposition to Plaintiff's Motion for Enforcement of a Foreign Judgment raising additional defenses that the South Carolina Judgment was procured by extrinsic fraud and in violation of due process. On 27 June 2019, the trial court held a hearing on Sparrow's Enforcement Motion, resulting in the trial court entering its Enforcement Order on 5 August 2019.

In its Enforcement Order, the trial court rejected Defendants' argument that enforcement of the South Carolina Judgment was precluded by North Carolina public policy and Defendants' "defenses of extrinsic fraud and violation of due process[.]" Instead, the trial court concluded the South Carolina Judgment "is a valid final judgment, enforceable in the rendering state of South Carolina when it was filed in North Carolina" and the South Carolina Judgment "is entitled to full faith and credit in North Carolina and to the same credit that it would be accorded in South Carolina." Accordingly, the trial court granted Sparrow's Enforcement Motion and decreed the South Carolina Judgment valid and enforceable against Defendants in North Carolina. On 27 August 2019, Defendants filed timely Notice of Appeal from the Enforcement Order.

Issue

The sole issue on appeal is whether in granting Sparrow's Enforcement Motion the trial court properly concluded the South Carolina Judgment is a valid final judgment entitled to full faith and credit in North Carolina and decreeing the South Carolina Judgment fully enforceable in North Carolina.

Analysis

I. Standard of Review

"We review de novo the issue of whether a trial court has properly extended full faith and credit to a foreign judgment." *Marlin Leasing Corp. v. Essa*, ___ N.C. App. ___, ___, 823 S.E.2d 659, 662-63 (2019) (citing *Tropic Leisure Corp. v. Hailey*, 251 N.C. App. 915, 917, 796 S.E.2d 129, 131 (2017)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and quotation marks omitted).

II. Uniform Enforcement of Foreign Judgments Act

"The Full Faith and Credit Clause of the United States Constitution requires North Carolina to enforce a judgment rendered in another state, if the judgment is valid under the laws of that state." *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 107, 367 S.E.2d 358, 360 (1988) (citations omitted). "[B]ecause a foreign state's judgment is entitled to only the same validity and effect in a sister state as it had in the rendering state, the foreign judgment must satisfy the requisites of a valid judgment under the laws of the rendering state before it will be afforded full faith and credit." *Bell Atlantic Tricon Leasing Corp. v. Johnnie's Garbage Serv.*, 113 N.C. App. 476, 478-79, 439 S.E.2d 221, 223 (1994) (citation omitted). "[T]he test for determining when the Full Faith and Credit Clause requires enforcement of a foreign judgment focuses on the validity and finality of the judgment in the rendering state." *DocRx, Inc. v. EMI Servs. of N.C., LLC*, 367 N.C. 371, 375, 378, 758 S.E.2d 390, 393, 395 (2014) (citations omitted) ("[I]f the foreign judgment is valid and final in the rendering state, it is conclusive in the forum state and is entitled to receive full faith and credit." (citation omitted)).

"The Uniform Enforcement of Foreign Judgments Act [UEFJA] governs the enforcement of foreign judgments that are entitled to full faith and credit in North Carolina." *In re Gardner v. Tallmadge*, 207 N.C. App. 282, 287, 700 S.E.2d 755, 758-59 (2010) (citing N.C. Gen. Stat. §§ 1C-1701 *et seq.* (2009)), *aff'd per curiam*, 365 N.C. 102, 721 S.E.2d 928-29 (2011). "In order to domesticate a foreign judgment under the UEFJA, a party must file a properly authenticated foreign judgment with the office of the clerk of superior court in any North Carolina county along with an affidavit attesting to the fact that the foreign judgment is both final and unsatisfied in whole or in part and setting forth the amount remaining to be paid on the judgment." *Tropic Leisure Corp.*, 251 N.C. App. at 917, 796 S.E.2d at 131 (citing N.C. Gen. Stat. § 1C-1703(a) (2015)).

"The introduction into evidence of [these materials] establishes a presumption that the [foreign] judgment is entitled to full faith and credit." *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 301, 429 S.E.2d 435, 437 (1993) (citations omitted). A foreign judgment may be collaterally attacked only on the grounds "that the judgment creditor committed extrinsic fraud, that the rendering state lacked personal or subject matter jurisdiction, that the judgment has been paid, that the parties have entered into an accord and satisfaction, that the judgment debtor's property is exempt from execution, that the judgment is subject to continued modification, or that the judgment debtor's due process rights have been violated." *DocRx, Inc.*, 367 N.C. at 382, 758 S.E.2d at 397

(citations omitted); *see also* N.C. Gen. Stat. § 1C-1708 (2019) (precluding enforcement of "foreign judgments based on claims which are contrary to the public policies of North Carolina"). "In the absence of such proof, the judgment will be presumed valid." *Rossi v. Spoloric*, 244 N.C. App. 648, 655, 781 S.E.2d 648, 654 (2016) (citation and quotation marks omitted).

In this case, Plaintiffs had the initial burden of proving the South Carolina Judgment is entitled to full faith and credit in North Carolina. Plaintiffs satisfied this burden by attaching an authenticated copy of the South Carolina Judgment to their Notice of Filing of Foreign Judgment. *See Lust*, 110 N.C. App. at 301, 429 S.E.2d at 437 (citations omitted). Therefore, in order to rebut this presumption, Defendants were required to establish one of the defenses under N.C. Gen. Stat. § 1C-1705(a).

Here, Defendants argue the South Carolina Judgment is not enforceable because (A) it "was procured by extrinsic fraud and in violation of their due process rights" and (B) it violates the public policy of North Carolina contending the Settlement Agreement effectively constitutes a deficiency judgment on a purchase-money mortgage in violation of N.C. Gen. Stat. § 45-21.38. Specifically, Defendants assert the South Carolina Judgment involves a deficiency judgment from the foreclosure of property in South Carolina and therefore violates North Carolina's prohibition on deficiency judgments arising from a purchase-money mortgage. *See* N.C. Gen. Stat. § 45-21.38.

A. Extrinsic Fraud

[1] Our Court has explained:

> Although extrinsic fraud is a defense to an action to recover on a foreign judgment, intrinsic fraud is not. "Extrinsic fraud" is fraud which occurs in the procurement of the judgment; intrinsic fraud arises in the proceeding itself and concerns some matter necessarily under the consideration of the foreign court in deciding the merits. Where a party has had proper notice of the foreign action and the alleged fraud did not prevent his full participation in the action, any fraud is intrinsic.

Satterfield, 90 N.C. App. at 107-08, 367 S.E.2d at 360 (citations omitted); *see also Stokley v. Stokley*, 30 N.C. App. 351, 354, 227 S.E.2d 131, 134 (1976) ("Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court.").

Here, Defendants argue the South Carolina Judgment should not be enforced "because it is the product of a process that produced a result

that, while not necessarily directly procured by extrinsic fraud, but indirectly procured by a process whereby [Defendants] were not allowed to be heard on what was the essence of their claim." Specifically, Defendants contend Plaintiffs' action in the Court of Common Pleas seeking enforcement of the Settlement Agreement should have been governed by North Carolina law in accordance with the Notes' Choice-of-Law Clause but instead Defendants were told by "the attorneys, the mediator and even the courts that North Carolina Law would not apply[.]" Accordingly, it is this failure to consider North Carolina law, and specifically North Carolina's anti-deficiency statute, in enforcing the Settlement Agreement that Defendants contend constitutes extrinsic fraud.

Defendants' allegations, however, sound in intrinsic rather than extrinsic fraud. Defendants were never prevented from arguing North Carolina law or that our anti-deficiency statute applied. In fact, Defendants argued before both the Court of Common Pleas and the South Carolina Court of Appeals that the North Carolina anti-deficiency statute precluded enforcement of the Settlement Agreement; however, both Courts concluded this statute was immaterial as the Plaintiffs' motion to compel "pertain[ed] only to enforcement of a voluntary *settlement agreement* made in accordance with applicable South Carolina rules and case law." (emphasis added). Thus, whether the Court of Common Pleas's and the South Carolina Court of Appeals's failure to consider our state's anti-deficiency statute constituted any type of fraud, it would be *intrinsic* as it "[arose] in the proceeding itself and concern[ed] some matter necessarily under the consideration of the foreign court in deciding the merits." *Satterfield*, 90 N.C. App. at 107, 367 S.E.2d at 360 (citations omitted). However, "intrinsic fraud is not" a defense to an action to recover on a foreign judgment. *Id.* (citation omitted). Further, Defendants have not alleged, and on this Record cannot allege, any acts constituting extrinsic fraud because Defendants were given "an opportunity to present [their] case to the court."[5] *Stokley*, 30 N.C. App. at 354, 227 S.E.2d at 134.

B. Public Policy

[2] N.C. Gen. Stat. § 1C-1708 provides, "The provisions of this Article shall not apply to foreign judgments based on claims which are contrary

5. To the extent Defendants' argument suggests their own attorney's failure to advise them of our anti-deficiency statute constituted extrinsic fraud, *Satterfield* forecloses this argument—"Allegations that the defendant's attorney in the foreign state . . . *failed to protect his interests* are claims of intrinsic fraud and must be directly attacked in that state." 90 N.C. App. at 108-09, 367 S.E.2d at 361 (emphasis added) (citations omitted).

to the public policies of North Carolina." N.C. Gen. Stat. § 1C-1708. However, our Court has previously recognized, "it is rare that we will disregard a sister state judgment on public policy grounds. The *Fauntleroy* [*v. Lum*, 210 U.S. 230, 52 L. Ed. 1039 (1908),] decision . . . narrows almost to the vanishing point the area of state public policy relief from the mandate of the Full Faith and Credit Clause—at least so far as the judgments of sister states are concerned." *FMS Management Systems v. Thomas*, 65 N.C. App. 561, 563, 309 S.E.2d 697, 699 (1983) (citation and quotation marks omitted), *aff'd per curiam*, 310 N.C. 742, 314 S.E.2d 545-46 (1984). Our courts have recognized public-policy exceptions to the Full Faith and Credit Clause only in very limited situations.

> One exception to the full faith and credit rule is a penal judgment; a state need not enforce the penal judgment of another state. Another exception is when the judgment sought to be enforced is against the public policy of the state where it was initially rendered. The exceptions, however, are few and far between. In general, we are bound by the Full Faith and Credit Clause to recognize and enforce a valid judgment for the payment of money rendered in a sister state.

Id. at 563-64, 309 S.E.2d at 699-700 (citations omitted); *see also Maxwell Schuman & Co. v. Edwards*, 191 N.C. App. 356, 361, 663 S.E.2d 329, 333 (2008) (holding a judgment based in part on a contingency fee in a child-custody action is not entitled to full faith and credit because contingency-fee arrangements in a child-custody action are strictly prohibited in North Carolina as against public policy); *but see MGM Desert Inn v. Holz*, 104 N.C. App. 717, 723-24, 411 S.E.2d 399, 402-03 (1991) (holding there is no exception to the Full Faith and Credit Clause that would prohibit enforcement of a Nevada judgment predicated on gambling debts in North Carolina, notwithstanding the fact gambling debts are generally unenforceable in North Carolina).

Here, Defendants assert N.C. Gen. Stat. § 45-21.38, which "abolishes deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient amount to satisfy the indebtedness," represents a public policy of North Carolina so strong that we should not give full faith and credit to the South Carolina Judgment. *Thomas*, 65 N.C. App. at 562, 309 S.E.2d at 699; *see also* N.C. Gen. Stat. § 45-21.38. We disagree.

First, as the Court of Common Pleas and the South Carolina Court of Appeals recognized, the Settlement Agreement, which the South Carolina Judgment upheld and enforced, is not a deficiency judgment on

the Notes. Rather, the Settlement Agreement is what its name implies—a voluntary agreement between the parties to settle all then-pending claims in the Court of Common Pleas regarding Defendants' default under the Notes. Although this Agreement recognized Plaintiffs had the right to seek a deficiency judgment, this was, *inter alia*, in consideration for Plaintiffs paying the outstanding real estate taxes and for entering into the Agreement to prevent further litigation. More importantly, though, the South Carolina Judgment—which was affirmed by the South Carolina Court of Appeals—concluded the Settlement Agreement was "not ambiguous; nor was the [A]greement the a [sic] product of any fraud. The [A]greement was reduced to writing and signed by all parties and their counsel as required by Rule 43(k)" of the South Carolina Rules of Civil Procedure. Because the Court of Common Pleas and the South Carolina Court of Appeals concluded the South Carolina Judgment was a valid final judgment under South Carolina law, this Judgment is entitled to full faith and credit in our courts. *See DocRx, Inc.*, 367 N.C. at 378, 758 S.E.2d at 395 ("[I]f the foreign judgment is valid and final in the rendering state, it is conclusive in the forum state and is entitled to receive full faith and credit." (citation omitted)).

Second, even assuming *arguendo* the South Carolina Judgment represents a deficiency judgment in violation of N.C. Gen. Stat. § 45-21.38, *Thomas* nevertheless dictates we must still recognize the South Carolina Judgment. *See* 65 N.C. App. at 563-64, 309 S.E.2d at 699-700 (citations omitted). This is so because our state's public policy of abolishing deficiency judgments is not one of the "rare" circumstances where "we will disregard a sister state judgment on public policy grounds." *Id.* at 563, 309 S.E.2d at 699.

In *Thomas*, the plaintiff obtained a deficiency judgment in Florida against the defendant and sought to enforce this judgment in a North Carolina court. *Id.* at 562, 309 S.E.2d at 699. The defendant contended the Florida judgment was not entitled to full faith and credit since it violated the public policy of our state against deficiency judgments. *Id.* at 563, 309 S.E.2d at 699. Our Court disagreed and held the plaintiff's deficiency judgment from Florida was entitled to full faith and credit in our state courts. *Id.* at 564, 309 S.E.2d at 700. The *Thomas* Court focused on the validity of the Florida judgment and concluded the judgment was entitled to full faith and credit because it was "valid and enforceable in Florida[.]" *Id.*; *see also DocRx, Inc.*, 367 N.C. at 375, 758 S.E.2d at 393 ("[T]he test for determining when the Full Faith and Credit Clause requires enforcement of a foreign judgment focuses on the validity and finality of the judgment in the rendering state." (citations omitted)).

Thus, in this case, even assuming the South Carolina Judgment constitutes a deficiency judgment, our anti-deficiency statute does not constitute one of the "rare" exceptions to the Full Faith and Credit Clause. *See Thomas*, 65 N.C. App. at 563, 309 S.E.2d at 699. Therefore, the South Carolina Judgment is a valid final judgment from our sister state and entitled to full faith and credit in our courts. *See DocRx, Inc.*, 367 N.C. at 375, 758 S.E.2d at 393 (citations omitted). Consequently, the trial court did not err by entering its Enforcement Order giving full faith and credit to the South Carolina Judgment and decreeing the South Carolina Judgment enforceable in North Carolina.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Enforcement Order.

AFFIRMED.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CANDACE JANE CRUZ

No. COA19-495

Filed 7 July 2020

1. Criminal Law—jury instructions—obstruction of justice—accessory after the fact—no abrogation by statute of common law offense

The trial court did not commit plain error by instructing the jury on both obstruction of justice and accessory after the fact in defendant's criminal prosecution because the codification of the latter offense in N.C.G.S. § 14-7 did not abrogate the common law offense of obstruction of justice.

2. Criminal Law—jury instructions—obstruction of justice—accessory after the fact—separate and distinct

The trial court did not commit plain error by instructing the jury on both obstruction of justice and accessory after the fact in defendant's criminal prosecution for transporting a man who shot and killed another man because those offenses are separate

and distinct, requiring proof of different elements, and neither is a lesser-included offense of the other. Instruction on both offenses was proper where the State presented substantial evidence of each element of both offenses, including that defendant's lies to law enforcement and deleting information from her phone constituted deceit and intent to defraud (obstruction of justice) and that defendant personally assisted the murderer in escaping detection (accessory after the fact).

3. Accomplices and Accessories—accessory after the fact—jury instructions—defendant's belief that principal acted in self-defense

The trial court did not commit plain error by instructing the jury that it could acquit defendant of being an accessory after the fact if it found defendant reasonably believed the person she gave a ride to after he had shot and killed another had acted in self-defense. The court was not required to instruct the jury that defendant's knowledge of the killing did not necessarily mean she knew that a murder had been committed. The evidence showed that defendant gave the shooter a second ride after being questioned by law enforcement, which put defendant on notice that the shooter was wanted for murder, and gave rise to a reasonable inference that defendant knew what had taken place and provided assistance anyway.

Appeal by defendant from judgment entered 29 June 2018 by Judge Lisa C. Bell in Cleveland County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Van Camp & Van O'Linda, PLLC, by James R. Van Camp, for defendant-appellant.

ZACHARY, Judge.

Defendant Candace Jane Cruz appeals from the trial court's judgment entered upon a jury's verdicts finding her guilty of accessory after the fact and felony common-law obstruction of justice. After careful review, we conclude that Defendant received a fair trial, free from error.

Background

On the night of 24 November 2015, Quavios Clyde shot and killed Shawn Borders in Shelby, North Carolina. Subsequently, Clyde contacted

Defendant, and she picked Clyde up and drove him from Shelby to Forest City, North Carolina, to the home of his brother, Johntae Littlejohn. Defendant drove Clyde back to Shelby later that night.

Meanwhile, Detective Cameron Stroup with the Cleveland County Sheriff's Office investigated the crime scene, and concluded that Clyde was the perpetrator. While law enforcement personnel searched for Clyde, a crime analyst with the Cleveland County Sheriff's Office began "pinging" the locations of Clyde's cell phone. After the analyst tracked Clyde's phone to Littlejohn's residence, Detective Stroup and several other deputies traveled to the Forest City home. Upon their arrival, Littlejohn reported that Clyde was not there, but had been earlier that night, accompanied by "a white female in an SUV." Littlejohn consented to a search of his home. When the detectives did not find Clyde at Littlejohn's residence, Detective Stroup visited Defendant's home in Shelby.

Detective Stroup spoke with Defendant at her residence after midnight on 25 November 2015. Defendant permitted law enforcement officers to search her home for Clyde. Detective Stroup asked Defendant if she had seen Clyde, and Defendant replied that earlier that night, she had driven Clyde from Shelby to Forest City and back. Detective Stroup then informed Defendant that Clyde "was wanted for the homicide of [Borders] that occurred earlier that evening" and that a warrant had been issued for his arrest. When asked whether she knew about Clyde's involvement in the fatal shooting, Defendant told Detective Stroup that she had no knowledge of the incident.

At around 8:00 a.m. later that morning, Defendant drove Clyde from Shelby to Lincolnton, North Carolina. Meanwhile, Detective Jordan Bowen with the Cleveland County Sheriff's Office tracked Clyde's cell phone to a location in Shelby, and a group of officers traveled there to investigate.

At approximately 10:00 a.m., Detective Bowen received information that a woman driving a gold Cadillac SUV had allegedly transported Clyde to Forest City and back following the shooting. While the other officers "knock[ed] on doors," Detectives Bowen and Jason Suludak drove around the area until they spotted a car matching the description from the tip. Defendant was sitting in the driver's seat.

At 11:41 a.m., Detectives Stroup, Bowen, and Suludak approached Defendant in her vehicle. Defendant told the detectives that she had not seen Clyde that morning, nor had she called, texted, or spoken to him since the night before. Detective Bowen requested Defendant's

permission to view her cell phone's call and text message histories in order to verify her story. But Defendant was "very hesitant" to relinquish her phone, and she told Detective Bowen that she could not comply with his request because her phone "was off and it was dead." However, Detective Bowen observed Defendant "deleting things" from her phone during their conversation. After Detective Bowen's conversation with Defendant, Detective Stroup requested, and the State obtained, a magistrate's order charging Defendant with felony common-law obstruction of justice for "withholding information from law enforcement in reference to a hom[i]cide investigation."

After obtaining the magistrate's order, Detective Stroup returned to the area where Clyde's cell phone last "pinged." Detective Stroup and other deputies were handing out Crime Stoppers "business cards" with information for individuals with knowledge of Clyde's whereabouts. When they saw Defendant drive by, Detectives Stroup and Suludak got into their patrol vehicles and prepared to initiate a stop of Defendant's vehicle. Detective Suludak stopped Defendant's vehicle at 3:35 p.m. After Detective Suludak pulled Defendant over, Detective Stroup arrested Defendant pursuant to the magistrate's order, and transported her to the Law Enforcement Center to interview her.

During the interview, Defendant waived her *Miranda* rights. Defendant told Detective Bowen that she had deleted some phone calls from her call history during their conversation earlier that morning. She further admitted that she had not been truthful when she told the detectives that she had not seen Clyde that day. Defendant told Detective Bowen that in reality, she had driven Clyde from Shelby to Forest City and back the previous evening, and again that morning from Shelby to Lincolnton. Defendant also consented to a "forensic download" of her cell phone, thereby providing law enforcement personnel full access to the device's contents. Following the interview, Defendant was processed and released on an unsecured bond.

On 28 November 2015, Clyde turned himself in to the sheriff's office, where he was charged with first-degree murder and possession of a firearm by a felon. Clyde was subsequently tried by a jury in a separate proceeding and was convicted of second-degree murder and possession of a firearm by a felon.

On 11 April 2016, Defendant was indicted for (i) accessory after the fact to a felony, and (ii) felony common-law obstruction of justice. On 25 June 2018, Defendant's case came on for trial before the Honorable Lisa C. Bell in Cleveland County Superior Court. On 27 June 2018, a jury

found Defendant guilty of both charges. On 29 June 2018, the trial court consolidated the offenses for judgment, and imposed a mitigated sentence of 50 to 72 months in the custody of the North Carolina Division of Adult Correction.[1]

Defendant timely filed written notice of appeal.

Discussion

On appeal, Defendant makes three distinct arguments challenging the trial court's instructions to the jury. We address each in turn.

Defendant initially contends that the trial court committed plain error by instructing the jury on both the offense of accessory after the fact and the offense of obstruction of justice. For the reasons set forth below, we disagree.

I. Standard of Review

This Court reviews a challenge to a trial court's decision regarding jury instructions de novo, and we review "the jury instructions in their entirety when determining if there was error." *State v. Wirt*, __ N.C. App. __, __, 822 S.E.2d 668, 673 (2018) (citation omitted).

> The charge will be held to be sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

Id. (citation omitted).

Here, however, Defendant failed to advance her arguments regarding the jury charge before the trial court although she had several opportunities to do so. Accordingly, she "specifically and distinctly" requests that we review 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 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

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1. At sentencing, the trial court found two mitigating factors: Defendant supports her family and has a support system in the community. The trial court found no aggravating factors, and thus, concluded that a sentence within the mitigated range was appropriate.

action questioned is specifically and distinctly contended to amount to plain error.").

Unpreserved issues may be reviewed for plain error "when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996).

> The 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. Lawrence, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (citation and internal quotation marks omitted). Moreover, "[u]nder the plain error rule, [the] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

II. Analysis

[1] Defendant first argues that the trial court committed plain error by instructing the jury on both obstruction of justice and accessory after the fact because the enactment of N.C. Gen. Stat. § 14-7, codifying the offense of accessory after the fact, partially abrogated the common-law offense of obstruction of justice with regard to the conduct at issue in this case—specifically, "withholding information from law enforcement and assisting a defendant to leave the scene of an offense." Our Supreme Court has previously addressed—and rejected—this very argument.

As our Supreme Court has explained, "[o]bstruction of justice is a common law offense in North Carolina[,]" and "Article 30 of Chapter 14 of the General Statutes *does not abrogate this offense*." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) (emphasis added). "Article 30 sets forth specific crimes under the heading of Obstructing Justice.

There is no indication that the legislature intended Article 30 to encompass *all aspects* of obstruction of justice." *State v. Taylor*, 212 N.C. App. 238, 245, 713 S.E.2d 82, 87-88 (emphasis added) (citation omitted), *disc. review denied*, 365 N.C. 342, 717 S.E.2d 558 (2011). Accordingly, Defendant's first argument lacks merit.

[2] Defendant next argues that the trial court committed plain error by instructing the jury that obstruction of justice and accessory after the fact are separate offenses, rather than greater- and lesser-included offenses, because they constitute the same offense for purposes of the Fifth Amendment's prohibition against double jeopardy. As with her first argument, Defendant's second argument is foreclosed by our existing jurisprudence.

This Court has expressly held that accessory after the fact and obstruction of justice do not constitute the same offense, and that neither is a lesser-included offense of the other. *See State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 343, *disc. review denied*, 367 N.C. 521, 762 S.E.2d 446 (2014). Indeed, as Defendant explicitly acknowledges, these two offenses have different elements. For example, unlike accessory after the fact, the offense of obstruction of justice "requires deceit and intent to defraud." *Id.* On the other hand, the offense of accessory after the fact "requires that the defendant personally assisted the principal who committed the crime in escaping detection, arrest, or punishment." *Id.* Therefore, "[*t*]*he two offenses are distinct, and neither is a lesser*[-]*included offense of the other*." *Id.* (emphasis added).

In the instant case, the State presented substantial evidence to support each essential element of both of the charged offenses. At trial, the State elicited testimony from Detectives Stroup and Bowen that ultimately supported the instruction on the charge of obstruction of justice. Detectives Stroup and Bowen explained that when they approached Defendant in her vehicle, she told them that she had not seen Clyde that morning, nor had she called, texted, or spoken to him since the night before. Detective Bowen noted that during the same conversation, he requested Defendant's permission to view her cell phone's call and text message histories in order to verify her story, but Defendant told him that she could not comply with his request because her phone "was off and it was dead." However, Detective Bowen testified that he had observed Defendant "deleting things" from her phone during their conversation, which Defendant confirmed during her interview with detectives later that day, after waiving her *Miranda* rights. Defendant's actions support the element of deceit and intent to defraud, as required

for an obstruction of justice conviction. As such, the trial court did not err by instructing the jury on the offense of obstruction of justice.

The State also presented evidence to support the instruction on the charge of accessory after the fact: that Defendant knew that Clyde shot and killed Borders, and that Defendant personally rendered assistance to Clyde. *See State v. Cole*, 209 N.C. App. 84, 91, 703 S.E.2d 842, 847 (setting forth the three elements of the charge of accessory after the fact), *disc. review denied*, 365 N.C. 197, 709 S.E.2d 922 (2011).

Detective Stroup testified that when he initially spoke with Defendant after midnight on 25 November 2015, he told her that Clyde "was wanted for the homicide of [Borders] that occurred earlier that evening" and that a warrant had been issued for his arrest. The State's evidence therefore demonstrated that when Defendant drove Clyde from Shelby to Lincolnton in the morning of 25 November 2015, she knew that there was an outstanding warrant for his arrest. Indeed, during her interview at the Law Enforcement Center, Defendant admitted that she had not been truthful when she told Detectives Bowen and Suludak that she had not seen Clyde that day. Moreover, Defendant told detectives that she did not know where Clyde was, despite having been in contact with him and having driven him multiple times. She also admitted that she had deleted evidence from her phone that would have alerted detectives to communications from Clyde. Taken together, this evidence supports the State's contention that although Defendant was aware that Clyde was wanted for murder in the shooting death of Borders, she nevertheless personally assisted Clyde in escaping detection, arrest, or punishment, as required for an accessory after the fact conviction. As such, a jury instruction on the charge of accessory after the fact was proper.

For these reasons, we conclude that the trial court did not err by instructing the jury on both the offenses of accessory after the fact and obstruction of justice.

[3] Finally, Defendant argues that the trial court committed plain error by failing to instruct the jury that, if it found that Defendant "reasonably believed that [Clyde] killed [Borders] in self-defense, at the time she transported Clyde," then "the verdict on the accessory after the fact charge must be 'not guilty.' " Specifically, Defendant maintains that the trial court should have instructed the jury that "the fact that . . . Defendant knew [Clyde] shot and killed [Borders] on the night of the incident does not necessarily mean that, at the time [she] drove [Clyde] to Lincolnton and Forest City, she *knew* [Clyde] had *committed murder*." We disagree.

Clyde was convicted of second-degree murder in a separate proceeding. Yet, through her argument, Defendant implicitly asks this Court to reassess Clyde's self-defense claim, which was already litigated and rejected by the jury during his trial, and thus has no bearing upon our decision in the instant case.

The elements of accessory after the fact are as follows: "(1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." *Id.* (citation omitted). "[I]f the totality of the evidence is such to give rise to a *reasonable inference* that [the] defendant knew precisely what had taken place, then there is sufficient evidence of the knowledge element[.]" *Id.* (citation and internal quotation marks omitted).

Here, even assuming *arguendo*, that Defendant believed that Clyde killed Borders in self-defense at the time that she drove him from Shelby to Forest City and back on the night of the shooting, Defendant fails to explain her actions the following day, when she was indisputably on notice that Defendant was wanted for murder. Indeed, Detective Stroup testified that when he first arrived at Defendant's home after midnight on 25 November 2015, he asked Defendant if she was aware that Clyde "had recently shot and killed someone[,]" and he told her that there was an outstanding warrant for Clyde's arrest. Notwithstanding this information, later that morning, Defendant drove Clyde from Shelby to Lincolnton. Shortly thereafter, however, Defendant told detectives that she did not know where Clyde was, she had not been in contact with him since the night before, and she deleted evidence to the contrary from her phone. This evidence "give[s] rise to a reasonable inference that [D]efendant knew precisely what had taken place," *id.* (citation and italics omitted), and that she personally assisted Clyde "in escaping detection, arrest, or punishment[,]" *Cousin*, 233 N.C. App. at 537, 757 S.E.2d at 343.

Conclusion

For the reasons stated herein, the trial court did not err—let alone plainly err—in its jury instructions on the offenses of felony common-law obstruction of justice and accessory after the fact to a felony. Accordingly, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges DILLON and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD DUNCAN

No. COA19-884

Filed 7 July 2020

1. Search and Seizure—traffic stop—frisk—reasonable suspicion—armed and presently dangerous

In a prosecution for possession of cocaine, where a police officer conducted a lawful traffic stop of defendant's car and saw a closed pocket knife in the center console, the trial court properly concluded that the officer's subsequent pat-down of defendant was not a lawful *Terry* frisk supported by reasonable suspicion—and therefore any contraband seized was the fruit of an unconstitutional search—because the officer could not have reasonably believed defendant was armed and presently dangerous where another officer was guarding the car (with the knife still inside), defendant was cooperative and did not act suspiciously, and the traffic stop occurred in broad daylight.

2. Search and Seizure—unconstitutional frisk—suspect fleeing from police—attenuation doctrine—applicability

In a prosecution for possession of cocaine, where a lawful traffic stop was illegally prolonged by an unconstitutional frisk of defendant's person—during which defendant tried to flee from the officer—the trial court erred in declining to suppress evidence seized during the frisk. Where the officer's search for drugs on defendant's person had nothing to do with the mission of the stop, defendant's flight from the scene did not constitute the crime of resisting a public officer and therefore was not an "intervening event" under the attenuation doctrine preventing exclusion of the unconstitutionally seized evidence. Also, the attenuation doctrine was inapplicable where the officer persisted in illegally frisking defendant despite defendant's repeated objections and discovered the evidence mere minutes after the illegal search.

Judge TYSON dissenting.

Appeal by Defendant from Judgments entered 16 April 2019 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Associate Attorney General Robert J. Pickett, for the State.

Office of the Appellate Defender, by Appellate Defender Glenn Gerding and Assistant Appellate Defender Michele A. Goldman, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

James Edward Duncan (Defendant) appeals from Judgments entered upon a jury's verdict finding him guilty of two counts of felony Possession of Cocaine. The Record before us tends to show the following:

Officer Andrew Isaacs of the Charlotte-Mecklenburg Police Department (Officer Isaacs) was on "routine patrol" on the afternoon of 19 March 2017. He conducted a traffic stop of Defendant's vehicle on the corner of North McDowell and East 7th Street in Charlotte. Officer Eric Kelly of the Charlotte-Mecklenburg Police Department (Officer Kelly) was also on duty and parked his car behind Isaacs's vehicle during the traffic stop. The sequence of events was captured and recorded on Officer Isaacs's and Officer Kelly's body cameras.

Officer Isaacs approached the driver's side door and informed Defendant he had observed the right taillight of Defendant's car was not operational. Officer Isaacs also stated he observed the front-seat passenger was not wearing a seatbelt. While speaking with Defendant, Officer Isaacs saw a closed pocketknife—roughly five inches in length—in the center console between Defendant and his passenger.

Officer Isaacs asked Defendant to exit his vehicle and told Defendant he was going to retrieve the knife and intended to check Defendant for other weapons. As Defendant got out of the car, Defendant asserted his possession of the knife was not illegal, which Officer Isaacs confirmed. Officer Isaacs clarified he was not searching the vehicle but rather only securing the knife for "our safety." Defendant replied, "okay, no problem at all."

Officer Isaacs again stated he intended to make sure Defendant did not have any weapons on him. Defendant replied he did not have any weapons on him and stated, "I don't give you permission." Officer Isaacs told Defendant he was "just going to pat [Defendant] down." Defendant

said "all right" and again insisted he did not have any weapons on him. Defendant raised his arms and allowed Officer Isaacs to pat him down.

Officer Isaacs checked Defendant's waistband from the outside as well as his pants pockets. Officer Isaacs patted down Defendant's left jacket pocket from the outside. He felt a bulge about the size of a "large grape," which he believed to be marijuana covered in cellophane. Officer Isaacs attempted to retrieve the bulging object from Defendant's outside jacket pocket with his right hand, but it was not located there. Officer Isaacs asked Defendant what the object was. Defendant replied it was something he had bought at a store.

Officer Isaacs realized the bulge he had felt was present in an inside jacket pocket and asked Defendant to pull the object out. Defendant removed a few objects wrapped in clear packaging, showed them to Officer Isaacs, and told him, "it's not illegal, man." Officer Isaacs said "alright, well . . ." and again felt Defendant's left jacket pocket with his right hand.

Officer Isaacs held onto the object from outside the pocket while he lifted Defendant's jacket and reached inside with his left hand. Officer Isaacs then reached inside the exterior pocket to access what he had been feeling with his right hand. Defendant objected as Officer Isaacs moved his hand inside the exterior pocket by asserting: "What are you doing? Come on, man. This is not a *Terry* frisk, man. You're illegally searching me, man."

Defendant asked Officer Isaacs multiple times to "get [his] sergeant out here, please." Officer Isaacs reached inside Defendant's interior pocket and warned Defendant, "you need to stop." Defendant pushed Officer Isaacs's hand away and again requested Officer Isaacs call his sergeant "because you're doing some illegal s--t to me." Officer Isaacs did not remove his hands from Defendant's pockets. Defendant stated "come on, dude" before turning and running away from the scene.

Officers Isaacs and Kelly gave chase. Officer Kelly caught up with Defendant between a building, bushes, and a gate. Defendant fell down, and as Defendant was getting up, Officer Kelly saw Defendant "digging in his waistband area." Officer Kelly then tasered Defendant, who yelled and fell to the ground.

Officer Isaacs approached with his weapon drawn and ordered Defendant to lie face down on the ground. He handcuffed Defendant and resumed searching him. Officer Isaacs did not find anything at first in the interior pocket he had originally attempted to search.

Officer Isaacs searched the surrounding area and found a bag containing, among other things, several grams of crack cocaine and about 0.7 grams of powder cocaine.

While Defendant lay handcuffed on the ground, Officer Kelly searched him and found a cigarette box containing a marijuana blunt in Defendant's left jacket pocket and a bag of crack cocaine and cash inside of Defendant's shoe. While Defendant was at intake at the Mecklenburg County Jail, Defendant stated the narcotics were for his personal use. A search of Defendant's vehicle was also conducted, and no additional contraband was found. No citations were issued for Defendant's taillight or seat-belt violations.

Defendant was indicted for felony Possession with Intent to Sell or Deliver Cocaine (PWISD Cocaine) and felony Possession of Cocaine. Defendant filed a pretrial Motion to Suppress all the evidence obtained, alleging it was the product of unreasonable searches and seizures in violation of his federal and state constitutional rights. Prior to empaneling a jury, the trial court heard arguments on Defendant's Motion to Suppress.

After hearing evidence and arguments on the Motion to Suppress, the trial court orally concluded the stop of Defendant's vehicle was lawful but that Officer Isaacs had no reasonable justification to believe "Defendant had exercised a suspicious behavior, that he was forcibly armed, or that he was presently dangerous to either of the officers or to others." The trial court held the search of Defendant was unconstitutional and, without more, "any item seized from the Defendant's person or in his vehicle" would be "fruit of the poisonous tree."

The trial court, however, further concluded, "Defendant's conduct after he bolted and ran of his own volition and accord gave rise to the admissibility of the contraband seized pursuant to said search" under the doctrine of attenuation on the basis Defendant's flight gave rise to independent probable cause to arrest him for resisting an officer and, thus, to search Defendant incident to his arrest. The trial court ruled, "the contraband seized in connection with the Defendant's stop, search, seizure and arrest and the Defendant's subsequent statement to law enforcement were not unconstitutionally seized, that the Defendant's constitutional rights under the state and federal constitutions were not violated, and that the aforesaid evidence is admissible against the Defendant in the trial of these matters."

The case proceeded to trial. During trial, counsel for Defendant repeatedly objected to testimony of Officer Isaacs based on the grounds asserted in the Motion to Suppress and was eventually granted a

continuing objection by the trial court. Following trial, the jury found Defendant guilty of the lesser included charge of felony Possession of Cocaine on the count of felony PWISD Cocaine. The jury also found Defendant guilty of the other felony Possession-of-Cocaine charge. The trial court sentenced Defendant to consecutive suspended sentences, placing him on supervised probation for 30 months. Defendant gave Notice of Appeal in open court.

Issue

The dispositive issue is whether the trial court erred by denying Defendant's Motion to Suppress on the basis Defendant's flight from Officer Isaacs gave rise to application of the attenuation doctrine, allowing for the introduction of evidence resulting from, and notwithstanding, the unconstitutional search of Defendant conducted after the traffic stop.[1]

Analysis

Standard of Review

"Our review of a trial court's denial of a motion to suppress is strictly limited to a determination of whether [the trial court's] findings are supported by competent evidence, and in turn, whether the findings support the trial court's ultimate conclusion." *State v. Reynolds*, 161 N.C. App. 144, 146-47, 587 S.E.2d 456, 458 (2003) (citation and quotation marks omitted). The trial court's conclusions of law, however, are reviewed de novo. *See State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citation omitted). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002) (citations omitted).

Trial Court's Ruling and Scope of Review

Here, the trial court denied Defendant's Motion to Suppress prior to trial. During trial, Defendant, through his trial counsel, repeatedly objected to the introduction of evidence of the stop, seizure, and searches and ultimately was granted a standing objection to the introduction of this evidence consistent with the Motion to Suppress. Thus, Defendant adequately preserved the trial court's ruling on the Motion to Suppress

1. Defendant also contends the trial court erred by denying his motion to dismiss the charge of Possession of Cocaine where that charge was a lesser included offense of PWISD Cocaine. However, given our ruling herein, we do not reach this second issue raised by Defendant in this appeal.

for appellate review. *See* N.C. Gen. Stat. § 15A-1446(d)(10) (2019); *see also Power Co. v. Winebarger*, 300 N.C. 57, 67-69, 265 S.E.2d 227, 233-34 (1980) (authorizing the use of line objections (citations omitted)).

In sum, the trial court ruled: (1) the initial traffic stop was "lawful and was not a pretextual stop"; (2) the search of Defendant based on Officer Isaacs's observation of the pocketknife in the console of the car was not a valid *Terry* frisk and was violative of Defendant's constitutional rights and thus nothing else appearing any items seized from Defendant or the vehicle and any statement Defendant gave subsequently would be fruit of the poisonous tree and unconstitutionally seized; but (3) Defendant's flight from Officer Isaacs constituted the independent offense of resisting, delaying, or obstructing a public officer in the course of a lawful traffic stop and therefore constituted an intervening event under the attenuation doctrine sufficient to allow for introduction of all evidence seized after Officer Isaacs's unconstitutional *Terry* frisk.

On appeal, Defendant does not challenge the trial court's ruling the initial traffic stop was valid, and we therefore do not address that aspect of the trial court's ruling here. Defendant also does not challenge the authority of Officer Isaacs to ask Defendant to step out of the car and thus away from the pocketknife as part of the traffic stop.

Instead, the arguments in this case focus on the following questions: (1) whether the trial court properly determined Officer Isaacs did not have reasonable suspicion to frisk Defendant; (2) even if Officer Isaacs had reasonable suspicion to frisk Defendant, whether the search of Defendant's jacket pockets exceeded the scope of a permissible *Terry* frisk; and (3) even if the frisk or search of Defendant constituted an unconstitutional search, whether Defendant's flight, on the remarkable facts of this case, constituted the independent offense of resisting, delaying, or obstructing a public officer, thereby constituting an intervening event under the attenuation doctrine sufficient to allow for introduction of all evidence seized after Officer Isaacs's unconstitutional *Terry* frisk.

A. Terry Frisk

[1] Defendant first asks this Court to uphold the trial court's ruling Officer Isaacs lacked reasonable suspicion to conduct a *Terry* frisk of Defendant. The State, however, argues the trial court actually erred in ruling the frisk of Defendant unconstitutional and urges this Court to hold the frisk lawful on the basis the presence of the closed pocketknife in the console of the car rendered Defendant armed and dangerous, thereby creating reasonable suspicion for the frisk. We conclude the trial court's findings on this issue are supported by evidence in the

Record and support the trial court's conclusion the frisk of Defendant was not supported by reasonable suspicion and therefore uphold the trial court's ruling on this aspect of Defendant's Motion to Suppress.

Warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." *Minnesota v. Dickerson*, 508 U.S. 366, 372, 124 L. Ed. 2d 334, 343-44 (1993) (citations and quotation marks omitted).

> One such exception was recognized in Terry v. Ohio, which held that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot[,] the officer may briefly stop the suspicious person and make reasonable inquiries aimed at confirming or dispelling his suspicions.

Id. at 372-73, 124 L. Ed. 2d at 344 (alteration, citations, and quotation marks omitted). The standard in *Terry* applies to traffic stops. *Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L. Ed. 2d 317, 334 (1984); *State v. Otto*, 366 N.C. 134, 137, 726 S.E.2d 824, 827 (2012).

> [W]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, the officer may conduct a patdown search to determine whether the person is in fact carrying a weapon. The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence[.] Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby. If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed.

Dickerson, 508 U.S. at 373, 124 L. Ed. 2d at 344 (citations and quotation marks omitted).

Here, the trial court concluded Officer Isaacs did not have reasonable suspicion to frisk Defendant because "there was no reasonable belief on the part of Officer Isaacs that the Defendant posed a danger to him by reason of the pocket knife being located at the console" and

"there was no justification to believe" Defendant was "forcibly armed or that he was presently dangerous to either of the officers or to others." In reaching this conclusion, the trial court found Officer Isaacs's colleague, Officer Kelly, could stand guard at the car with Defendant, the passenger, and the closed pocketknife contained inside while Officer Isaacs completed the traffic stop, there was no suspicious or furtive movement or behavior by Defendant, and the traffic stop occurred in broad daylight in uptown Charlotte blocks from the County Courthouse. These findings by the trial court are supported by the evidence and support the trial court's ultimate conclusion Officer Isaacs lacked reasonable suspicion to frisk Defendant. *See State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) ("The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." (citation omitted)).[2]

The State argues the mere presence of the pocketknife in the front console of the car means Defendant should be considered armed and should further automatically be considered dangerous. Thus, the State contends Officer Isaacs's frisk should be deemed permissible. In support of its position, the State points to our recent decision in *State v. Malachi*. *See* ___ N.C. App. ___, ___, 825 S.E.2d 666, 671 ("The risk of danger is created simply because the person, who was forcibly stopped, is armed." (alteration and quotation marks omitted) (quoting *United States v. Robinson*, 846 F.3d 694, 700 (4th Cir. 2017))), *appeal dismissed and disc. review denied*, 372 N.C. 702, 830 S.E.2d 830 (2019).

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2. Our dissenting colleague posits Defendant consented to the frisk. However, the trial court made no findings as to Defendant's consent to the frisk; therefore, we do not reach this issue. *See, e.g.*, *State v. Little*, 270 N.C. 234, 240, 154 S.E.2d 61, 66 (1967) ("The trial judge is in a better position to weigh the significance of the pertinent factors [supporting a finding of consent] than is an appellate tribunal. . . . The weight to be given the evidence was peculiarly one for the trial judge."); *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979) (emphasizing that where a trial judge sits as the trier of the facts, the appellate court cannot substitute itself for the trial judge in this task (citations omitted)); *see also State v. Smith*, 135 N.C. App. 377, 380, 520 S.E.2d 310, 312 (1999) (remanding to the trial court for further findings of fact on whether the defendant's consent was voluntary because the evidence was in dispute on this point and the trial court's findings did not include a specific finding resolving this dispute). Moreover—and perhaps illustrative of how subjective an exercise this may be—in our view, Defendant does not appear to consent to the frisk but rather simply complies with Officer Isaacs's demand notwithstanding Defendant's stated objection. *See Little*, 270 N.C. at 239, 154 S.E.2d at 65 ("To be voluntary, it must be shown that the [defendant's consent] was free from coercion, duress or fraud, and *not given merely to avoid resistance*." (emphasis added) (citation omitted)).

However, the facts of *Malachi* are entirely inapposite to this case. There, law enforcement received a tip the defendant was illegally in possession of a firearm. *Id.* at ___, 825 S.E.2d at 668. After the defendant observed uniformed law enforcement approaching, he engaged in a behavior described as "blading" and used to conceal the presence of a firearm on his person and began to walk away from the officers. *Id.* at ___, 825 S.E.2d at 670. Once the officers approached and grabbed him, the defendant attempted to squirm away. *Id.* at ___, 825 S.E.2d at 668. A *Terry* frisk revealed a revolver in the defendant's waistband. *Id.* Thus, *Malachi* involved evidence that the defendant possessed a firearm on his person that he attempted to conceal, which—"coupled with [the d]efendant's struggling during the stop and his continued failure to inform the officers that he was armed as required" by our concealed-carry statute—provided the officers with reasonable suspicion to frisk the defendant. *Id.* at ___, 825 S.E.2d at 671 (citation omitted).

Likewise, in *Robinson*, the Fourth Circuit determined law enforcement officers had reasonable suspicion to frisk a defendant for weapons where officers received a tip that someone had been seen loading a gun and concealing it in his pocket in a parking lot of the highest crime area in town and known for drug trafficking before getting in a blue-green Toyota as a passenger. 846 F.3d at 696-97, 700 (citations omitted). Shortly after the tip, responding officers stopped a blue-green Toyota, corroborating the tip, in which the defendant was a passenger on the basis neither occupant of the car was wearing a seatbelt. *Id.* at 697. The defendant was asked to exit the car, and as he got out, an officer asked him if he was armed. *Id.* Defendant did not reply but instead gave what was described as an: " ' "oh, crap" look[ ].' " *Id.* (alteration in original). The defendant was immediately frisked, and a loaded gun was found in his pocket. *Id.*

In both cases, law enforcement officers had ample reason to suspect the defendant possessed and concealed a dangerous weapon on their person, *coupled* with behavior giving rise to suspicion the defendant may be dangerous. *See Michigan v. Long*, 463 U.S. 1032, 1050, 77 L. Ed. 2d 1201, 1220 (1983) (reiterating that when determining whether a *Terry* frisk is proper, the "issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger" (citation and quotation marks omitted)). Central to our analysis here: the trial court's findings of fact—unchallenged by the State—reveal these circumstances did not exist in the present case. Indeed, here, the two officers were investigating a broken taillight and a seat-belt violation with no suspicion of any other criminal activity afoot.

The trial court expressly found Defendant did not exhibit any furtive or suspicious behavior. Defendant was compliant with Officer Isaacs's traffic stop and requests, did not deny or conceal the existence of the pocketknife, and exited the car upon command, thereby removing himself away from the knife.[3]

Accordingly, the trial court's findings, which are supported by competent evidence, support the trial court's conclusion Officer Isaacs lacked reasonable suspicion to frisk Defendant, thus violating Defendant's Fourth Amendment right against unreasonable searches.[4] Consequently, we agree with the trial court's analysis that, nothing else appearing, at this point all evidence recovered as a result of the unconstitutional frisk would otherwise be properly excluded as fruit of the poisonous tree.

However, because the trial court further ruled exclusion of this evidence was not required under the attenuation doctrine as a result of Defendant's subsequent flight and search incident to his arrest, our analysis does not end there. We must next determine whether the evidence obtained as fruit of the unlawful frisk should be suppressed as evidence pursuant to the exclusionary rule or whether, as the trial court concluded, the attenuation doctrine applies.

B. Attenuation Doctrine

[2] If evidence is obtained in violation of the Fourth Amendment, the exclusionary rule bars the admission of such evidence. *Wong Sun v. United States*, 371 U.S. 471, 484, 9 L. Ed. 2d 441, 453 (1963). "[T]he exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality, the so-called

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3. The dissent cites Defendant's prior convictions and invocation of *Terry* by name as evidence Defendant "had 'ridden this rodeo' many times[,]" seemingly suggesting this should be a factor weighing in favor of finding reasonable suspicion. Such considerations, however, are wholly irrelevant. Certainly, in this case, neither the trial court nor Officer Isaacs relied on these irrelevant considerations in making any reasonable-suspicion determination. Moreover, we fail to see how a suspect's invocation of their constitutional rights should be used against them in a court of law. Particularly so where our courts have long presumed our citizenry know both their rights and the law. *See State v. Boyett*, 32 N.C. 336, 343 (1849) ("Every one competent to act for himself is presumed to know the law.").

4. Because we uphold the trial court's ruling Officer Isaacs lacked reasonable suspicion to frisk Defendant at the outset of the stop, we do not address the State's argument Officer Isaacs developed probable cause based on that frisk to believe Defendant possessed contraband based on his "plain feel" of the object inside of Defendant's jacket.

'fruit of the poisonous tree.' " *Utah v. Strieff*, ___ U.S. ___, ___, 195 L. Ed. 2d 400, 407 (2016) (citation and quotation marks omitted).

The attenuation doctrine, which the trial court in this case found applicable, is an exception to the exclusionary rule. *Id.* As the United States Supreme Court has articulated: "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id.* (citation and quotation marks omitted). Three factors guide courts in determining whether application of this doctrine is warranted:

> First, we look to the "temporal proximity" between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider "the presence of intervening circumstances." Third, and "particularly" significant, we examine "the purpose and flagrancy of the official misconduct."

Id. at ___, 195 L. Ed. 2d at 408 (citations omitted); *see also State v. Hester*, 254 N.C. App. 506, 517, 803 S.E.2d 8, 17 (2017) (applying *Strieff*'s three-factor test).

Applying the first factor, the *Strieff* Court "declined to find that this factor favors attenuation unless 'substantial time' elapses between an unlawful act and when the evidence is obtained." ___ U.S. at ___, 195 L. Ed. 2d at 408 (citation omitted). Here, the trial court made no express finding on the first factor. However, in *Strieff*, the United States Supreme Court determined "only minutes" had passed between an illegal detention of the defendant and the discovery of drug contraband on him, which weighed in favor of suppression. *Id.* (citation omitted); *see also State v. Thomas*, ___ N.C. App. ___, ___, 834 S.E.2d 654, 661 (2019) (holding a three-day period was not a "substantial amount of time"). Here, as in *Strieff*, "only minutes" had gone by between Officer Isaacs's unconstitutional search and the discovery of the drug contraband on Defendant; accordingly, this factor weighs in favor of suppression. ___ U.S. at ___, 195 L. Ed. 2d at 408 (citation omitted). Indeed, the State in this case concedes as much.

Rather, the State points to the second factor—" 'the presence of intervening circumstances' "—as the central and controlling factor here. *Id.* (citation omitted). Certainly, this is the factor the trial court, relying on Defendant's flight, saw as critical to its analysis.

Unquestionably, our Court has held a defendant's "commission of a separate and distinct criminal offense is alone sufficient as an 'intervening circumstance' to purge the taint of the presumed illegal stop[.]" *Hester*, 254 N.C. App. at 519, 803 S.E.2d at 18. In *Hester*, after the defendant was stopped and asked to lift his shirt, on the belief the defendant had a weapon, the defendant pulled out a handgun and attempted to fire at the officer. *Id* at 518, 803 S.E.2d at 17. Because the defendant committed "a separate and distinct criminal offense"—attempting to fire a weapon at a police officer—the evidence of the handgun was admissible under the attenuation doctrine. *Id.* at 519, 803 S.E.2d at 18.

Here, the trial court determined Defendant's subsequent flight was unlawful because the trial court concluded Defendant attempted to flee from a *lawful* traffic stop—constituting the crime of resisting, delaying, or obstructing an officer—providing Officers Isaacs and Kelly with probable cause to arrest Defendant for resisting an officer and search Defendant incident to that arrest.[5] Thus, consequently, the illicit drugs recovered from and around Defendant and his subsequent incriminatory statements were admissible under the attenuation doctrine. Defendant, however, contends since the *Terry* frisk was unlawful, the traffic stop was no longer lawful and, once the stop became unlawful, he had a right to resist the stop.

Section 14-223 of our General Statutes provides, "[i]f any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a Class 2 misdemeanor." N.C. Gen. Stat. § 14-223 (2019).

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5. The dissent asserts our opinion does not faithfully adhere to our standard of review, contending our opinion "denies the same deference [we afforded the trial court's findings of fact regarding whether the officers had reasonable suspicion to frisk Defendant] to the trial court's findings [concerning whether Defendant was attempting to flee a *lawful* traffic stop], which support" application of the attenuation doctrine. Not so. Faithful application of the standard of review here requires a two-part analysis. In our reasonable-suspicion analysis, we "deferred" to the trial court's findings of fact surrounding the initial traffic stop and frisk precisely because they were supported by competent evidence in the Record, which in turn supported the trial court's conclusion Officer Isaacs lacked reasonable suspicion to conduct the *Terry* frisk. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878 (citation omitted). In contrast, the trial court's determination of whether Defendant's flight was from an *unlawful* or a *lawful* traffic stop is a conclusion of law. *See*, *e.g.*, *In re Gardner*, 39 N.C. App. 567, 571, 251 S.E.2d 723, 726 (1979) (explaining "whether the facts so found by the trial court . . . are such as to establish probable cause in a particular case, is a question of law as to which the trial court's ruling may be reviewed on appeal"). As such, we correctly apply de novo review to the question of whether Defendant's flight constituted the intervening statutory crime of resisting, delaying, or obstructing an officer so as to give rise to the attenuation doctrine. *See Fernandez*, 346 N.C. at 11, 484 S.E.2d at 357 (explaining conclusions of law are reviewed de novo (citation omitted)).

Our Court has held, "flight from a *lawful* investigatory stop may provide probable cause to arrest an individual for violation of [Section] 14-223." *State v. Washington*, 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008) (emphasis added) (citation and quotation marks omitted). Here, the trial court concluded Defendant's flight was from a *lawful* traffic stop, providing Officer Isaacs with probable cause to arrest Defendant for resisting, delaying, or obstructing an officer under Section 14-223.

However, under *Rodriguez v. United States*, a traffic stop "prolonged beyond" the "time reasonably required to complete [its] mission" is unlawful. 575 U.S. 348, 357, 191 L. Ed. 2d 492, 500 (2015) (citations and quotation marks omitted). A traffic stop's "mission" is "to address the traffic violation that warranted the stop and attend to related safety concerns[.]" *Id.* at 354, 191 L. Ed. 2d at 498 (citations omitted); *see also Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 233 (1983) ("The scope of the detention must be carefully tailored to its underlying justification."). Importantly, "[o]n-scene investigation into other crimes, however, detours from that mission." *Rodriguez*, 575 U.S. at 356, 191 L. Ed. 2d at 500 (citation omitted).

In *State v. Bullock*, our Supreme Court, interpreting *Rodriguez*, held a frisk lasting eight or nine seconds did not "measurably extend the duration of the stop" and therefore did not violate the Fourth Amendment. 370 N.C. 256, 262-63, 805 S.E.2d 671, 676-77 (2017) (citation and quotation marks omitted). Relying on *Bullock*, the dissent here concludes the roughly thirty-four-second frisk and unconstitutional search of Defendant did not measurably extend the duration of the stop and therefore Officer Isaacs's initial traffic stop remained lawful. As such, our dissenting colleague concludes Officer Isaacs had probable cause to arrest Defendant for resisting, delaying, or obstructing an officer after Defendant fled from a *lawful* traffic stop. *See Washington*, 193 N.C. App. at 679, 668 S.E.2d at 628 (citation omitted). We, however, disagree and believe *Bullock* is distinguishable, requiring a different result.

The *Bullock* Court held the officer's frisk of the defendant did not unconstitutionally prolong the traffic stop for two reasons. First, "the frisk lasted eight or nine seconds." 370 N.C. at 262, 805 S.E.2d at 677. Second, and more importantly, the *purpose* of the officer's frisk was for "the officer's safety[,]" which "stems from the mission of the traffic stop itself, [meaning] time devoted to officer safety is time that is reasonably required to complete that mission." *Id.* at 262, 805 S.E.2d at 676.

In contrast, even if the frisk of Defendant by Officer Isaacs could be deemed related to the mission of the stop, Officer Isaacs's unconstitutional search into Defendant's jacket pockets had nothing to do with the

"mission" of the traffic stop. *See Rodriguez*, 575 U.S. at 354, 191 L. Ed. 2d at 498 (citations omitted). Indeed, Officer Isaacs testified he believed he felt marijuana in Defendant's jacket and that *this* was the purpose of the search. As *Rodriguez* recognized, "[o]n-scene investigation into other crimes . . . detours from [the traffic stop's] mission." *Id.* at 356, 191 L. Ed. 2d at 500 (citation omitted). Given the fact this search was unconstitutional and that it was in no way related to the mission of the traffic stop, the traffic stop was "prolonged beyond" the "time reasonably required to complete [its] mission" and therefore was unlawful. *Id.* at 357, 191 L. Ed. 2d at 500 (citations and quotation marks omitted).

Our Supreme Court has long recognized:

> It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense.
>
> True the right of a person to use force in resisting an illegal arrest is not unlimited. He may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty.

State v. Mobley, 240 N.C. 476, 478-79, 83 S.E.2d 100, 102 (1954) (citations omitted).

Because the traffic stop was unlawful at the point of Officer Isaacs's unconstitutional search, Defendant had "the right to resist [the] unlawful arrest." *Id.* at 478, 83 S.E.2d at 102; *see also State v. Branch*, 194 N.C. App. 173, 178, 669 S.E.2d 18, 21 (2008) (recognizing where an officer unlawfully extended the duration of the defendant's traffic stop, the defendant had "the right to use such force as reasonably appeared to be necessary to prevent the unlawful restraint of his liberty" (alteration, citation, and quotation marks omitted)).[6]

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6. Based in part on *United States v. Ferrone*, 438 F.2d 381 (3d Cir. 1971), the dissent concludes, "Defendant did not possess the right to lawfully flee from Officer Isaacs'[s] purportedly unlawful search during an otherwise-lawful traffic stop." However, as discussed *supra*, Defendant's flight was from an *unlawful* warrantless search of his person unrelated to the traffic stop; therefore, Defendant had the right to resist this unlawful search. *See Branch*, 194 N.C. App. at 178, 669 S.E.2d at 21 (citation omitted). Further, we do not find *Ferrone* persuasive or applicable for two reasons. First, *Ferrone* held, "a person does not have a right to forcibly resist the *execution of a search warrant* by a peace officer or government agent, even though that warrant may subsequently be held to be invalid." 438 F.2d at 390 (emphasis added) (footnote omitted). Here, Defendant was not resisting the execution of a *search warrant* but rather was fleeing an unlawful warrantless search of his person; therefore, *Ferrone*'s pronouncement is inapposite. Second, *Ferrone* explicitly

Here, the State actually contends, "Defendant had other means of resistance to the frisk besides the unreasonable act of flight. For example, he could have stated his opposition to the search, passively resisted, or used reasonable force." The facts of this case, however, do not support the State's assertion.

Defendant repeatedly stated his opposition to the search, informed Officer Isaacs that he was performing an illegal *Terry* frisk, and requested Officer Isaacs to get his sergeant at least four separate times. Further, Defendant placed his hands on Officer Isaacs's arm in an attempt to remove Officer Isaacs's hand from inside Defendant's pockets. The State makes no attempt to articulate what more Defendant could have done to responsibly resist the illegal search short of flight. Indeed, our courts have recognized flight is a valid way of avoiding an unconstitutional search or seizure. *See, e.g.*, *Branch*, 194 N.C. App. at 178, 669 S.E.2d at 21 (citation omitted). Further, "[w]hile an individual's flight from a lawful investigatory stop may provide probable cause to arrest an individual for [resisting, delaying, or obstructing an officer,] an individual's flight from a consensual encounter or *from an unlawful investigatory stop* does not supply such probable cause." *State v. Joe (Joe I)*, 213 N.C. App. 148, 153, 711 S.E.2d 842, 845 (2011) (emphasis added) (citations and quotation marks omitted), *vacated in part on other grounds per curiam*, 365 N.C. 538-39, 723 S.E.2d 339-400 (2012).

Accordingly, Officer Isaacs did not have probable cause to arrest Defendant because of his flight from what had become an *unlawful* investigatory stop and search.[7] *See id.* (citations omitted). Because under our prior precedent Defendant's flight was not unlawful, Defendant's flight cannot constitute "a separate and distinct criminal offense" sufficient to purge the taint of the illegal frisk under the second factor of the attenuation doctrine. *Hester*, 254 N.C. App. at 519, 803 S.E.2d at 18.

Rather, we see *Thornton v. State* as highly instructive on this second factor. 465 Md. 122, 214 A.3d 34 (2019). In *Thornton*, officers attempted to frisk the defendant without the requisite reasonable suspicion, and the defendant ran away from the officers, ultimately leading to the

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stated it was not deciding the question of "[w]hether a person would, under some circumstances, have a right to resist an unlawful *warrantless* search[.]" *Id.* at 390 n.19. Because *Ferrone* did not decide this question and because our Court has addressed this question, answering in the affirmative, we respectfully disagree with the dissent's reliance on *Ferrone*. *See Branch*, 194 N.C. App. at 178, 669 S.E.2d at 21 (recognizing the right to flee an unlawful warrantless arrest (citation omitted)).

7. There is no indication on the Record before us Defendant was even charged with resisting an officer or cited for any traffic infraction.

officers seizing the defendant and finding a handgun on the defendant. *Id.* at 130-34, 149, 214 A.3d at 38-41, 50. The Maryland Court of Appeals, Maryland's highest court, concluded the defendant's attempt to flee—even if improper—did not constitute an intervening act breaking the causal connection between the illegal police conduct and the discovery of the handgun because

> [t]he officers' conduct indicates that when they frisked [the defendant], the officers were executing their intended mission to recover evidence of guns, drugs, or other contraband. From the moment they confronted [the defendant], the officers sought to investigate [the defendant] for evidence of a crime, regardless of whether they possessed the requisite quantum of suspicion to render a search of [the defendant] reasonable. As a result, we cannot say, on the facts before us, that [the defendant's] attempt to flee caused the officers to discover the handgun in any meaningful sense. Not unlike in [*State v.*] *Owens*, the officers here decided that they were going to search [the defendant] for evidence of a crime—based on an unparticularized hunch that he may possess a weapon—before [the defendant's] flight. *See* 922 N.E.2d 939 (2013) (holding that the causal connection between unlawful police conduct and the discovery of evidence remained intact where officers decided to arrest the suspect before he ran away, and therefore the suspect's flight did not cause the evidence's discover "in any meaningful sense[.]"). Thus, the discovery of [the defendant's] firearm was not caused by his conduct; it was an imminent product of the officers' own predisposition to locate and seize guns and contraband.

Id. at 157-58, 214 A.3d at 55 (alteration in original) (footnote omitted).

Here, on the facts of this case, Defendant's flight from an unlawful warrantless search—following his repeated peaceful objections to the unlawful warrantless search—does not constitute an intervening act sufficient to "purge the taint" of the unconstitutional search. Officer Isaacs's testimony illustrates he believed Defendant had marijuana in his jacket and he was attempting to retrieve this before Defendant fled. Thus, the discovery of the drug contraband was not caused by Defendant's conduct during the traffic stop; "it was an imminent product of [Officer Isaacs's] predisposition to locate and seize . . . contraband." *Id.* at 158, 214 A.3d at 55 (footnote omitted). Accordingly, this second factor also weighs in favor of suppression.

The third factor—the purpose and flagrancy of the official misconduct—is perhaps the most critical to the analysis. *See Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 408 (citation omitted). This is so because it focuses on the primary purpose of the exclusionary rule—deterring police misconduct. *See Hester*, 254 N.C. App. at 514, 803 S.E.2d at 15 (recognizing "the exclusionary rule [is] applicable only where its deterrence benefits outweigh its substantial social costs" (alteration, citation, and quotation marks omitted)). "For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure." *Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 410 (citation omitted); *see also Kaupp v. Texas*, 538 U.S. 626, 633, 155 L. Ed. 2d 814, 822 (2003) (*per curiam*) (finding flagrant violation where a warrantless arrest was made in the arrestee's home after police were denied a warrant and at least some officers knew they lacked probable cause).

Here, the trial court concluded Officer Isaacs's "unconstitutionally permissible search was done in good faith[.]" This conclusion by the trial court, however, is simply not supported by the evidence in this case. As the trial court acknowledged, at a minimum, Officer Isaacs lacked justification to reach inside of Defendant's jacket. Indeed, when Officer Isaacs moved his hand inside Defendant's exterior pocket, Defendant objected, stating—"What are you doing? Come on, man. This is not a *Terry* frisk, man. You're illegally searching me, man." Defendant also requested Officer Isaacs "get [his] sergeant out here" at least four times. Instead of taking the opportunity—indeed, at Defendant's invitation—to deescalate the situation, Officer Isaacs proceeded with the flagrantly unconstitutional search. *See Kaupp*, 538 U.S. at 633, 155 L. Ed. 2d at 822.

Weighing these three factors as a whole, we conclude on these extraordinary facts the trial court erred in denying Defendant's Motion to Suppress and further conclude the attenuation doctrine does not apply to prevent exclusion of the fruit of the unconstitutional warrantless search in this case. *Cf. Strieff*, ___ U.S. at ___, 195 L. Ed. 2d at 410 (holding attenuation found where two out of three factors supported that conclusion). This result is in keeping with the purpose of the exclusionary rule—to deter police misconduct. Accordingly, Defendant's Motion to Suppress should have been allowed.[8] Therefore, we reverse the trial court's ruling on the Motion to Suppress and grant Defendant a new trial.

8. Although a bag containing cocaine was found in the surrounding area of Defendant after his arrest, Defendant did not voluntarily abandon this contraband. *See State v. Joe* (*Joe II*), 222 N.C. App. 206, 212-13, 730 S.E.2d 779, 783 (2012) (holding where the defendant's abandonment of contraband was the product of his illegal arrest, the abandonment was not voluntary and required suppression (citation omitted)).

In so concluding, we observe the events at issue stem from a series of poor decisions by both Defendant and Officer Isaacs that could have resulted in disastrous consequences. Defendant was tasered. It could have been far worse. Defendant's flight put himself at risk of serious bodily harm and increased the risk of harm to the officers in pursuit. To be fair, it was Defendant's decision to transport illegal drugs that at a base level initiated these events. We further echo the Maryland Court of Appeals in *Thornton*:

> We emphatically do not condone [Defendant's] efforts to run away from the police officers. . . . Defendants facing these circumstances should resort to the courts, and not the streets, to resolve the constitutionality of searches and seizures. "There are strong public policy reasons why self-help, involving the use of force against a person, should not be condoned."

465 Md. at 159-60, 214 A.3d at 56 (citation omitted). In the same manner, though, we also should not "overlook the reactive nature of [Defendant's] flight, in conjunction with [Officer Isaacs's] purposeful and intrusive conduct. . . . [Defendant's] attempt to flee the situation created by the police was directly connected to and a result of the unlawful frisk." *Id.* at 160, 214 A.3d at 56.

Conclusion

Accordingly, for the foregoing reasons, we reverse the trial court's ruling on Defendant's Motion to Suppress and grant Defendant a new trial.

NEW TRIAL.

Judge DIETZ concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The issues before this Court include: (1) whether Officer Isaacs had reasonable suspicion to believe Defendant was armed and dangerous to justify a *Terry* pat-down; (2) whether Defendant consented to Officer Issacs' search; (3) whether Officer Isaacs developed probable cause to believe Defendant possessed contraband based on his "plain feel" of the object inside of Defendant's jacket pocket; (4) whether Officer Isaacs' pat-down extended the lawful traffic stop, to condone and excuse

Defendant's flight from the admittedly lawful stop; and, (5) whether the trial court erred where insufficient evidence supports submitting two distinct charges of possession of cocaine to the jury.

Neither Defendant nor the majority's opinion challenges the trial court's finding and conclusion the initial traffic stop was reasonable and lawful. Neither Defendant nor the majority's opinion challenges Officer Isaacs' authority to ask Defendant to exit his car and move away from the weapon in plain view as part of the lawful traffic stop.

Defendant first asks this Court to uphold the trial court's ruling Officer Isaacs lacked reasonable suspicion to conduct a *Terry* pat-down of Defendant. The State counters the trial court erred in ruling Defendant's pat-down was unconstitutional. The State correctly argues the pat-down was lawful because the presence of the knife in the console of the car rendered Defendant armed and dangerous, creating reasonable suspicion for the *Terry* pat-down.

The presence of and Defendant's access to the knife in the front console shows Officer Issacs could consider Defendant to be armed and dangerous. The State cites this Court's recent decision in *State v. Malachi*, which was reviewed and left undisturbed by our Supreme Court. __ N.C. App. __, __, 825 S.E.2d 666, 671 ("The risk of danger is created simply because the person, who was forcibly stopped, is armed." (alteration omitted) (quoting *United States v. Robinson*, 846 F.3d 694, 700 (4th Cir.), *cert. denied*, __ U.S. __, 199 L. Ed. 2d 277 (2017))), *appeal dismissed and disc. review denied*, 372 N.C. 702, 830 S.E.2d 830 (2019). Presuming Defendant's consent was revoked or the pat-down exceeded *Terry v. Ohio*'s standards and was unconstitutional, the trial court also found the attenuation doctrine allowed admission of the illegal contraband evidence as an exception to the exclusionary rule. *See Utah v. Strieff*, __ U.S. __, __, 195 L. Ed. 2d 400, 407 (2016). As the Supreme Court of the United States stated: "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id.* (citation and internal quotation marks omitted).

The trial court found and concluded Defendant's flight from Officer Isaacs' pat-down was "interrupted by" his unlawful resisting, delaying, or obstructing an officer. *Id.* The trial court properly found Defendant's conduct provided Officers Isaacs and Kelly with probable cause to arrest Defendant for resisting, delaying, or obstructing an officer and to search

Defendant incident to that arrest. The illicit drugs recovered from and around Defendant and his subsequent incriminatory statements while in custody were admissible under the attenuation doctrine. *See id.*

Our Court has applied the holding in *Utah v. Strieff*, and held a defendant's "commission of a separate and distinct criminal offense is alone sufficient as an intervening circumstance to purge the taint of the presumed illegal stop[.]" *State v. Hester*, 254 N.C. App. 506, 519, 803 S.E.2d 8, 18 (2017) (internal quotation marks omitted).

In *Hester*, the defendant was stopped and asked to lift his shirt, on the belief the defendant may have had a weapon. *Id.* at 518, 803 S.E.2d at 17. The defendant pulled out a handgun and attempted to fire at the officer. *Id.* Even with a "presumed illegal stop" in *Hester*, when the defendant attempted to fire a weapon at a police officer, he committed "a separate and distinct criminal offense," the evidence of the handgun was admissible under the attenuation doctrine. *Id.* at 519, 803 S.E.2d at 18.

The majority's opinion purports to support proper deference to the trial court's findings of fact, when supported by evidence in the record on its ruling on the search, but then denies the same deference to the trial court's unchallenged findings, which support the conclusion the attenuation doctrine is sufficient to uphold the trial court's ruling on this aspect of Defendant's motion to suppress. The rules and precedents do not allow such inconsistency in application.

The trial court correctly found and concluded Defendant's flight constituted the independent offense of resisting, delaying, or obstructing a public officer. Presuming Officer Issacs' search exceeded Defendant's consent, the *Terry* pat-down, or was without probable cause for contraband, Defendant's unlawful fleeing caused an intervening event under the attenuation doctrine to allow for admission of all evidence seized incident to and after his arrest. The trial court properly found and concluded Defendant unlawfully fled from Officer Isaacs during an otherwise-lawful traffic stop. *See United States v. Ferrone*, 438 F.2d 381 (3d Cir. 1971).

The majority's opinion errs in affirming the trial court's conclusion that Officer Isaacs did not possess the requisite reasonable suspicion to pat Defendant down upon observing the knife in Defendant's vehicle. The majority's opinion also fails to analyze Defendant's voluntary consent and actions to allow the search or Officer Issacs' developing probable cause after detecting contraband during the pat-down.

The majority's opinion applies a different standard of review to the same order and further errs in reversing the trial court's unchallenged

findings and conclusions that Defendant's flight from Officer Isaacs during a lawful traffic stop was unlawful, and that the evidence seized pursuant to the search incident to his arrest was admissible as attenuated from the purportedly unconstitutional search. Defendant fails to show any prejudicial or reversible error exists to reward a new trial. I respectfully dissent.

I. Motion to Suppress

A. Standard of Review

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

B. Analysis

1. Initiation of the Pat-Down

The trial court erroneously concluded Officer Isaacs could not have had a reasonable suspicion "that the Defendant had exercised a suspicious behavior, that he was forcibly armed, or that he was presently dangerous to either of the officers or to others" to constitutionally initiate a pat-down under *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). Officer Isaacs possessed and articulated a reasonable suspicion that Defendant was armed, and potentially dangerous, because Defendant possessed a knife in the console adjacent to where he was seated in his car.

This Court stated: "The risk of danger is created simply because the person, who was forcibly stopped, is armed." *Malachi*, __ N.C. App. at __, 825 S.E.2d at 671 (citation omitted). The Supreme Court of the United States has also recognized a police officer may reasonably believe the driver of a vehicle with a knife inside it may pose a danger to officer safety, if the driver is permitted to re-enter the vehicle. *Michigan v. Long*, 463 U.S. 1032, 1050, 77 L. Ed. 2d 1201, 1220 (1983) ("Long was not frisked until the officers observed that there was a large knife in the interior of the car into which Long was about to reenter.").

Defendant argues the totality of the circumstances in *Long* and other cases the State cites are distinguishable from the present case. In *Long*, "[t]he hour was late and the area rural. Long was driving his automobile

at excessive speed, and his car swerved into a ditch. The officers had to repeat their questions to Long, who appeared to be under the influence of some intoxicant." *Id.* (internal quotation marks omitted).

Defendant notes he was driving in broad daylight near downtown Charlotte and promptly pulled over when the traffic stop was initiated. Defendant argues the totality of the circumstances support the trial court's conclusion Officer Isaacs could not have had a reasonable suspicion that Defendant was armed and dangerous, when the knife in the console was the only fact Officer Isaacs cited to justify his pat-down. These arguments are distinctions without a difference. The trial court's conclusion also erroneously overlooked Officer Issacs' right to demand and Defendant's voluntary consent to exit his vehicle and be patted down.

The majority's opinion does not analyze Defendant's consent to the pat-down. "It is well-settled law that a person may waive his right to be free from unreasonable searches and seizures." *State v. Little*, 270 N.C. 234, 238, 154 S.E.2d 61, 64-65 (1967). "To be voluntary the consent must be unequivocal and specific, and freely and intelligently given. . . . [I]t must be shown that the waiver was free from coercion, duress or fraud, and not given merely to avoid resistance." *Id.* at 239, 154 S.E.2d at 65 (citations and internal quotation marks omitted).

We all agree Officer Issacs had the right to instruct Defendant to exit his vehicle. Even if Defendant may have initially objected to Officer Isaacs' patting down his person, he consented to allow a search of the car after he stepped out. Once Officer Isaacs informed Defendant he was "just going to pat [him] down," Defendant consented, said, "all right" and voluntarily raised his arms to be patted down.

Considering the totality of the circumstances, Defendant's consent to the pat-down was voluntary and unequivocal, at least at the outset of the pat-down. Officer Isaacs did not violate Defendant's constitutional rights after he observed a weapon next to where Defendant was seated, asked Defendant to exit the vehicle, and initiated the consensual or *Terry* pat-down. *See Long*, 463 U.S. at 1050, 77 L. Ed. 2d at 1220.

Contrary to the trial court's conclusion, whether analyzing Officer Isaacs' pat-down as a consensual search or as a *Terry* pat-down, Defendant arguably intended to give Officer Isaacs consent to pat him down. The pat-down was initiated without violating Defendant's constitutional rights. A reasonable officer would also understand Defendant's statements and behavior as consent. *See Little*, 270 N.C at 239, 154 S.E.2d at 65.

Defendant strenuously objected to the search, only after Officer Isaacs detected a bulge he believed to be contraband during the pat-down and, while holding the contraband from the outside, used his other hand to reach inside of Defendant's pocket. Defendant cited *Terry* by name, asking Isaacs to call his sergeant, and repeatedly describing Isaacs' more intensive search as "illegal."

As a prior record level III convicted felon with two prior convictions for resisting a public officer and multiple other prior drug-related convictions, Defendant had "ridden this rodeo" many times in order to cite the Supreme Court's decision in *Terry* by name. Officer Issacs may have also known from experience that drug dealers carry weapons and rent motor vehicles for drug transactions to avoid confiscation of their private vehicles. *See State v. Briggs*, 140 N.C. App. 484, 488, 536 S.E.2d 858, 860 (2000) (discussing an officer's awareness "that drug dealers frequently carry weapons"); *see also*, *e.g.*, *State v. Shuler*, __ N.C. App. __, __, 841 S.E.2d 607, 609 (2020) (drug dealer rented vehicle because he "was 'known to police' and 'just wanted to be in a different car so he could go and do whatever' ").

Officer Isaacs testified he felt what he "believed to be marijuana covered in cellophane" when he patted down the exterior of Defendant's jacket. At that point, and after Officer Isaacs had been shown larger wrapped paraphernalia items from inside the pocket by Defendant and was satisfied the "large grape" he felt was not a weapon, a *Terry* protective search for officer safety purposes was arguably replaced by probable cause for contraband.

2. Plain Feel

Even if Defendant revoked his consent or after Officer Isaacs was satisfied the object he felt was not a weapon, Officers Isaacs developed probable cause or an independent constitutional basis to reach inside of Defendant's jacket pockets to examine the contents. The State argues Officer Isaacs lawfully developed probable cause to believe Defendant possessed contraband, based upon his plain feel from the outside of Defendant's pocket of the object inside of his pocket to extend the search. Officer Issacs testified that the "large grape" object he felt during the pat-down was what he "believed to be marijuana covered in cellophane."

If "a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity *immediately apparent*, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons" and the officer

may seize the contraband without first obtaining a warrant. *Briggs*, 140 N.C. App. at 489, 536 S.E.2d at 861 (emphasis original) (citing *Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 124 L. Ed. 2d 334, 346 (1993)).

i. Preservation

As a threshold matter, the State argues Defendant did not raise the issue of plain feel to develop probable cause before the trial court. As a result, the State argues Defendant has not preserved this issue for appellate review.

As Defendant is effectively the appellee on this issue, this alternative argument that Isaacs' search exceeded its lawful scope is permitted by N.C. R. App. P. 10(c), which allows appellees to raise alternate bases in law to support judgments challenged on appeal. "This Court is free to and may uphold the trial court's 'ultimate ruling' based upon a theory not presented below" by "the party seeking to *uphold* the trial court's presumed-to-be-correct" ruling. *Hester*, 254 N.C. App. at 516, 803 S.E.2d at 16 (emphasis original) (quoting *State v. Bone*, 354 N.C. 1, 8, 550 S.E.2d 482, 486 (2001)). This issue is preserved and properly before us.

ii. Analysis

In *Dickerson*, the Supreme Court of the United States concluded the search in question had:

> exceeded the scope of *Terry* because the incriminating character of the object felt was not *immediately apparent* to the officer. The Court emphasized that "the officer determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket' -- a pocket which the officer already knew contained no weapon."

Briggs, 140 N.C. App. at 489, 536 S.E.2d at 861 (emphasis original) (quoting *Dickerson*, 508 U.S. at 378, 124 L. Ed. 2d at 347).

Officer Isaacs testified he "felt what [he] believed to be marijuana covered in cellophane" when he felt the outside of Defendant's jacket pocket with his flat hand. Officer Isaacs explained he could tell it was cellophane and stated, "the Defendant had on what looked like a jean jacket which is rough in texture. And so when putting my hand against the rough texture, I felt a bulge that felt like marijuana slide -- the jacket slide on the plastic of that bulge."

This Court has previously recognized a police officer's knowledge and experience is a factor to consider in upholding the seizure of

contraband under the plain feel doctrine. When an officer feels a container, the shape of which by itself does not reveal its identity or the identity of its contents as contraband, the search may be upheld when such an invocation is made. *Id.* at 489-93, 536 S.E.2d at 861-63.

Defendant argues neither Officer Isaacs nor the State's attorney properly invoked the officer's knowledge and experience when explaining his conclusion at the suppression hearing. Officer Isaacs' testimony to support his conclusion the "large grape" he "believed to be marijuana covered in cellophane" was by plainly feeling the "rough in texture" jacket from the outside "slide on the plastic of that bulge."

The trial court asked the State before giving its ruling:

> how does he know it's marijuana in cellophane? How does he know it's not pipe tobacco in cellophane? How does he know he's not wrapping tobacco in cellophane? How does he know it's not instant grits in cellophane? I mean . . . what's magic about feeling a bulge and detecting some cellophane on it and there's something there?

The State's attorney replied that, beyond repeating what Officer Isaacs had stated in his testimony, she could not answer the trial court's questions.

Viewed in the light of a responsible officer with training and experience, the trial court and the majority's opinion erroneously conclude any evidence discovered or later seized without a warrant and as a result of Officer Isaacs exceeding the lawful scope of his pat-down, Defendant's consent, or without probable cause, would be "fruit of the poisonous tree" and excluded, unless the evidence seized was admissible under some other exception. The trial court properly admitted this evidence was admissible as the attenuated result of a search incident to an arrest for an additional crime.

3. Defendant's Flight

Presuming the scope of Defendant's consent or permissible pat-down was exceeded, and Officer Issacs did not develop probable cause of contraband, evidence in the record supports the trial court's unchallenged finding and conclusion: "Defendant's conduct constituted [a] legal basis for the Defendant having resisted, delayed and obstructed an officer in the course of his duties. . . . [B]y reason of the Defendant's bolting and running from Officer Isaacs, the officers had lawful authority to pursue and overtake him."

The trial court also properly found and concluded both "the search of the Defendant's person and the area where he was located was pursuant to a lawful arrest" and "Defendant's conduct after he bolted and ran of his own volition and accord gave rise to the admissibility of the contraband seized pursuant to said search" under the attenuation doctrine.

Defendant asserts the trial court erred in applying the attenuation doctrine because his flight from police was lawful, so no intervening circumstances or exceptions justify its application to allow admission of the evidence. The majority's opinion erroneously agrees with Defendant's assertion he could lawfully flee from Officer Isaacs' lawful traffic stop and demand for Defendant to exit the rental vehicle.

This Court has held "an invalid search and seizure, in violation of a defendant's Fourth Amendment rights, does not give that defendant a license to engage in subsequent criminal behavior." *State v. Barron*, 202 N.C. App. 686, 696, 690 S.E.2d 22, 29 (citations omitted), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). This Court has also held "[a]lthough 'every person has the right to resist an unlawful arrest[,]' that right is limited to the use of 'such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty.' " *State v. Branch*, 194 N.C. App. 173, 174, 669 S.E.2d 18, 19 (2008) (quoting *State v. Mobley*, 240 N.C. 476, 478-79, 83 S.E.2d 100, 102 (1954)).

When Officer Isaacs' pat-down of Defendant detected Defendant's possession of illegal drugs and contraband, the undisputed evidence shows and the trial court found Defendant placed his hands on the officer's arm, resisted his search physically and verbally, and "bolted and ran of his own volition." At that point, Defendant's actions were clearly unlawful and put himself, the officers, and the public at grave risks. Defendant acted to remove the officer's hand from inside his pocket, while Officer Issacs continued to hold the contraband from the outside of Defendant's jacket. Defendant persisted and resisted after being warned "you need to stop," broke away, and unlawfully fled.

Physically confronting, pushing back, or placing hands on a police officer during a lawful stop, even if resisting a purportedly unlawful search, causes the encounter to rapidly escalate into a serious conflict and gives rise to injuries to the officers, bystanders, and to Defendant. The majority's opinion criticizes Defendant's actions that led to the events in this case, but nevertheless disregards the admonition it cites and rewards Defendant's lawlessness and fleeing from a lawful traffic stop with a new trial. This is both gross and dangerous error.

Our precedents clearly and unambiguously state: "no one is free to leave when they are stopped by a law enforcement officer for a traffic violation." *State v. Benjamin*, 124 N.C. App. 734, 738, 478 S.E.2d 651, 653 (1996). "Generally, an initial traffic stop concludes . . . only after an officer returns the detainee's driver's license and registration." *State v. Jackson*, 199 N.C. App. 236, 243, 681 S.E.2d 492, 497 (2009) (citations omitted).

Officer Isaacs retained Defendant's driver's license throughout the pat-down and during the eventual chase and arrest. The admittedly lawful traffic stop was not concluded when Officer Isaacs' search purportedly exceeded Defendant's consent, its permissible lawful scope, or probable cause. The trial court found and properly concluded when Defendant broke away from Officer Isaacs, he was fleeing from a lawful traffic stop at the same time and committed a new crime. *See Benjamin*, 124 N.C. App. at 738, 478 S.E.2d at 653; *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497.

The elements of resisting, delaying, or obstructing an officer in violation of N.C. Gen. Stat. § 14-223 are:

> (1) that the victim was a public officer;
>
> (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
>
> (3) that the victim was discharging or attempting to discharge a duty of his office;
>
> (4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
>
> (5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Washington, 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008) (brackets and citation omitted). This Court has held "flight from a lawful investigatory stop may provide probable cause to arrest an individual for violation of [N.C. Gen. Stat. §] 14-223." *Id.* (citation omitted).

This precedent and fact distinguish this case from *State v. Joe* (*Joe I*), 213 N.C. App. 148, 711 S.E.2d 842 (2011), *vacated in part on other grounds*, 365 N.C. 538, 723 S.E.2d 339 (2012), which Defendant and the majority's opinion cite. In *Joe I*, the defendant fled from *a consensual encounter*, rather than an admittedly lawful investigatory traffic stop. *Id.* at 156, 711 S.E.2d. at 847. *Joe I* is inapposite and not applicable to the undisputed and unchallenged facts before us.

Defendant also argues Officer Isaacs' purportedly unconstitutional search unlawfully extended the traffic stop. A traffic stop prolonged beyond the "time reasonably required to complete [its] mission" is unlawful. *Rodriguez v. United States*, 575 U.S. 348, 357, 191 L. Ed. 2d 492, 500 (2015) (citation omitted). Our Supreme Court has interpreted *Rodriguez* to address unrelated inquiries during the stop, which "do not *measurably* extend the duration of the stop." *State v. Bullock*, 370 N.C. 256, 262, 805 S.E.2d 671, 676 (2017) (alteration omitted) (emphasis original) (quoting *Rodriguez*, 575 U.S. at 355, 191 L. Ed. 2d. at 499).

> It follows that there are some inquiries that extend a stop's duration but do not extend it measurably. In *Rodriguez*, the government claimed that extending a traffic stop's duration by seven or eight minutes did not violate the Fourth Amendment. The Supreme Court disagreed. But here, the frisk lasted eight or nine seconds. While we do not need to precisely define what "measurably" means in this context, it must mean something. And if it means anything, then *Rodriguez*'s admonition must countenance a frisk that lasts just a few seconds.

Id. at 262-63, 805 S.E.2d at 677 (citations omitted).

Defendant argues, and the majority's opinion erroneously agrees, Officer Isaacs' pat-down "measurably" extended the duration of the traffic stop under *Rodriguez*. Defendant also erroneously asserts the pat-down added "thirty-four seconds" to the traffic stop.

Defendant's argument and calculation of the time added starts from the initiation of the admittedly lawful traffic stop and Defendant exiting his rental vehicle with a knife in plain view, rather than the time Defendant objected when Officer Isaacs purportedly exceeded its lawful scope. Both officers' body cameras' recordings contain time stamps marking the duration of the entire stop. This video evidence shows Defendant objected to his pat-down roughly halfway through Defendant's asserted thirty-four second delay from the initiation of the pat-down until he "bolted and ran of his own volition."

We need not split hairs over fifteen seconds here or there on this point. Officer Isaacs did not pause, delay, or stop from his initiation of the pat-down until Defendant fled. He had not "*measurably* extend[ed] the duration of the [lawful] stop" at the time Defendant unlawfully fled the lawful stop. *Id.* at 262, 805 S.E.2d at 676 (citation omitted).

The majority's opinion asserts, "Officer Isaacs's unconstitutional search into Defendant's jacket pocket had nothing to do with the

'mission' of the traffic stop. *See Rodriguez*, 575 U.S. at 354, 191 L. Ed. 2d at 498 (citations omitted)." The majority's opinion essentially argues *any* deviation from the "mission" of the stop is a more important factor than the measurable extension of the duration of the lawful stop. This bald assertion relies on neither *Rodriguez*'s command nor prohibition. *See id.*

In *Rodriguez*, but unlike here, the "mission" of the traffic stop had already been completed before the unconstitutional search prolonged the stop. *Id.* at 353, 191 L. Ed. 2d. at 498. The Supreme Court of the United States held an officer "may conduct certain *unrelated checks during an otherwise lawful traffic stop*. But . . . he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 355, 191 L. Ed. 2d at 499 (emphasis supplied).

The Supreme Court in *Rodriguez* explicitly foreclosed the majority opinion's argument here: in the absence of a measurable extension or prolongation of the duration of the stop, which had not yet occurred before Defendant ran, *an "unrelated check" is permitted "during an otherwise lawful traffic stop*." *Id.* (emphasis supplied).

Defendant's flight from Officer Issacs' pat-down was unlawful, even presuming Officer Issacs' pat-down itself unlawfully exceeded Defendant's consent, *Terry*'s permissible scope, or occurred without probable cause. As correctly noted in the majority's opinion, this situation "could have been far worse. Defendant's flight put himself at risk of serious bodily harm and increased the risk of harm to the Officers in pursuit." Weapons were drawn, bystanders were imperiled, and Defendant was tased and fell.

The description and warning of the consequences of this issue in *Ferrone* is pertinent, but unheeded by the majority:

> Society has an interest in securing for its members the right to be free from unreasonable searches and seizures. Society also has an interest, however, in the orderly settlement of disputes between citizens and their government; it has an especially strong interest in minimizing the use of violent self-help in the resolution of those disputes. We think a proper accommodation of those interests requires that a person claiming to be aggrieved by a[n unlawful] search conducted by a peace officer . . . test that claim in a court of law and not forcibly resist . . . at the place of search.

Ferrone, 438 F.2d at 390.

Under all our precedents, Defendant did not possess the right to lawfully flee from Officer Isaacs' purportedly unlawful search during an otherwise-lawful traffic stop. *See Barron*, 202 N.C. App. at 696, 690 S.E.2d at 29; *Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497; *Benjamin*, 124 N.C. App. at 738, 478 S.E.2d at 653.

Presuming the lawful scope of Defendant's consent and the *Terry* pat-down was exceeded, or probable cause was absent, the trial court did not err in concluding Defendant fleeing from a lawful stop "constituted [a] legal basis for the Defendant having resisted, delayed and obstructed an officer in the course of his duties." Defendant's argument promotes lawlessness, presents grave risks, and is properly overruled.

The trial court also properly found and concluded "the search of the Defendant's person and the area where he was located was pursuant to a lawful arrest" and "Defendant's conduct after he bolted and ran of his own volition and accord gave rise to the admissibility of the contraband seized pursuant to said search" under the attenuation doctrine. *See Strieff*, __ U.S. at __, 195 L. Ed. 2d at 407; *Hester*, 254 N.C. App. at 519, 803 S.E.2d at 18.

No prejudicial or reversible error in the trial court's order denying Defendant's motion to suppress supports awarding a new trial. Defendant's arguments are properly overruled. Because the majority's opinion awards a new trial on this issue, it fails to address Defendant's remaining issue.

II. Motion to Dismiss Charges

Defendant argues the trial court erred as insufficient evidence supports submitting two distinct charges of possession of cocaine to the jury.

A. Standard of Review

This Court reviews the trial court's denial of a motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citations omitted).

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*,

300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) (citations omitted). The evidence is reviewed in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995).

B. Analysis

"In order for the State to obtain multiple convictions for possession of a controlled substance, the State must show distinct acts of possession separated in time and space." *State v. Moncree*, 188 N.C. App. 221, 231, 655 S.E.2d 464, 470 (2008) (citation omitted).

In *Moncree*, officers found marijuana in the defendant's car and, subsequent to his arrest, in his shoe. *Id.* at 231-32, 655 S.E.2d at 471. This Court found the evidence supported the conclusion the defendant possessed both caches of marijuana simultaneously and, importantly, "there was no evidence that defendant possessed the marijuana for two distinct purposes." *Id.* at 232, 655 S.E.2d at 471 (citation and internal quotation marks omitted).

The State presented sufficient evidence tending to show Defendant possessed the two recovered caches of cocaine (one found near where he was arrested, one in his shoe) for two distinct purposes. Officer Isaacs testified the packaging of both the powder and crack cocaine recovered from the area around Defendant at his arrest was consistent with its purpose being for sale, and not consistent for personal use. After his arrest, Defendant voluntarily stated to Officer Isaacs the recovered drugs were for his personal use.

In the light most favorable to the State: "Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455 (citation omitted). Presuming the evidence regarding Defendant's distinct purposes for possessing each cache in this case contained "contradictions and discrepancies," those were properly submitted to the jury to weigh and decide. *Id.* The jury resolved any disputes in its verdicts. Defendant's argument is properly overruled.

III. Conclusion

The trial court erred in concluding Officer Isaacs' pat-down of Defendant was unconstitutional at its initiation. Under the Defendant's consent to search analysis, the *Terry v. Ohio* pat-down analysis, or Officer Isaacs' articulating a basis of probable cause under plain feel for contraband, even if the search exceeded its lawful scope by searching inside of Defendant's pockets, while the officer held the object outside

with his other hand, such action does not warrant exclusion of the illegal drugs. His subsequent flight from Officers Isaacs and Kelly from a lawful stop broke any illegal taint under the attenuation doctrine. *See Strieff*, __ U.S. at __, 195 L. Ed. 2d at 407; *Hester*, 254 N.C. App. at 519, 803 S.E.2d at 18.

Although Defendant may resist an unconstitutional search, he cannot restrain or move Officer Issacs' arm and be excused when he "bolted and ran of his own volition" from a lawful traffic stop. *See Jackson*, 199 N.C. App. at 243, 681 S.E.2d at 497; *Benjamin*, 124 N.C. App. at 738, 478 S.E.2d at 653.

The trial court correctly concluded Defendant's fight created the requisite probable cause to arrest him for resisting a police officer under N.C. Gen. Stat. § 14-223. The trial court's unchallenged findings and conclusions show it properly denied Defendant's motion to suppress. The evidence obtained as a result of the search incident to Defendant's lawful arrest was admissible.

Sufficient evidence supported submitting two distinct charges of possession of cocaine to the jury. "Contradictions and discrepancies" did not warrant dismissal of the charges. *See Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. No reversible errors are shown to award a new trial. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
DAVID BRANDON LEE

No. COA19-950

Filed 7 July 2020

Confessions and Incriminating Statements—confession of guilt—motion to suppress—voluntariness—confession in exchange for promise to be allowed to meet with family

The trial court properly denied defendant's motion to suppress his murder confession where the agreement to allow defendant to meet face-to-face with his family in exchange for a complete confession was not an improper inducement rendering the confession involuntary because it was defendant who proposed to confess in exchange for seeing his family and the inducement did not promise relief from criminal charges.

Appeal by defendant from judgment entered 30 November 2018 by Judge William W. Bland in Lenoir County Superior Court. Heard in the Court of Appeals 31 March 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General K.D. Sturgis, for the State.

Law Office of Lisa Miles, by Lisa Miles, for defendant.

DIETZ, Judge.

Defendant David Brandon Lee confessed to killing his aunt. On appeal from his first degree murder conviction, Lee challenges the denial of his motion to suppress that confession. He argues that his confession was involuntary because he gave it in exchange for a promise that law enforcement officers would arrange for him to meet face-to-face with his family.

As explained below, the trial court properly denied the motion to suppress. Viewing the totality of the circumstances, Lee's confession was knowing and voluntary and not the result of an improper inducement by the officers. The arrangement was Lee's idea—he suggested it after learning that he would only see his family through a computer monitor while in jail, and after his father spoke to him on the telephone and urged him to tell the officers what happened that night. Throughout

the process, the officers complied with the procedural safeguards required by *Miranda* and ensured that Lee was able to make a knowing and voluntary decision to confess. We therefore find no error in the trial court's judgment.

Facts and Procedural History

In 2016, David Brandon Lee lived with his aunt, Trudy Howard Smith. Lee is a longtime drug addict, and Smith had previously kicked Lee out of her home after he stole her prescription medications. On 5 August 2016, Lee picked up Smith's prescriptions for OxyContin and oxycodone at the pharmacy. Lee had spent the previous two weeks doing drugs, including cocaine, heroin, and "pills." Later that evening, Lee told an acquaintance, Jason Henderson, that he had just shot and killed his aunt. Henderson reported what Lee told him to law enforcement.

Officers then went to Smith's home and found her body. An autopsy confirmed two gunshot wounds as the cause of death. Police did not find Smith's OxyContin or oxycodone prescriptions inside the house. Further investigation confirmed that Lee had picked up those prescriptions earlier that day.

The next day, police arrested Lee, took him into custody, and placed him in an interview room at the sheriff's office. One of the officers present, Detective Ronald Farris, testified that when they brought Lee in, he was slurring his speech and appeared to be high. Lee admitted to the officers that he had taken oxycodone. After speaking briefly with Detective Farris, Lee asked for a lawyer. At that point, Detective Farris ended the interrogation.

Two days later, Lee sent a letter to the sheriff's office asking to speak with an officer. Before sending the note, Lee had spoken to his father on the telephone and his father told him to "just tell them what you know, son." Lee also was frustrated that he was only able to speak to his family on the telephone or through a "computer monitor" and wanted the opportunity to see his family face-to-face.

Detective Aaron Shambeau met with Lee in the interrogation room, read Lee his *Miranda* rights, and presented Lee with a *Miranda* waiver form, which Lee signed. Lee told Detective Shambeau that he knew he was going to prison and believed he would never get out again, so he wanted to see his family face-to-face one last time. Then, Lee said he was willing to tell police "whatever you want to know" but that he wanted to see his family and "hug them goodbye." Lee stated, "If I can do that, I'll tell you whatever you want to know."

Initially, Detective Shambeau cautioned Lee that he could not promise him anything. Detective Shambeau also told Lee that "we can't say for certain what your sentence will be," sentencing is "a long time away," and "there's gonna be plenty of opportunities to talk your parents" during jail visitation and in court. After consulting with his superior officer, Detective Shambeau told Lee that he would arrange for him to meet with his family "face-to face, as long as they want to," but that Lee would have to "tell everything, every detail, and don't leave out anything." Lee replied that he felt like the officers were "the only hope" he had of seeing his family again and that he believed he was doing the right thing. Lee then confessed to his aunt's murder, explaining that he thought he could just "knock her out" and take the pills.

Lee went to trial on a charge of first degree murder. He moved to suppress the videotape of his confession, but the trial court denied the motion in an oral ruling at a hearing shortly before trial. The jury found Lee guilty of first degree murder based on premeditation and deliberation. The trial court sentenced Lee to life in prison without the possibility of parole. Lee appealed.

Analysis

Lee's sole argument on appeal is that the trial court erred in declining to suppress his videotaped confession to police.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Huddy*, 253 N.C. App. 148, 151, 799 S.E.2d 650, 654 (2017). This standard presupposes findings of fact but where, as here, the parties agree that there is no conflicting evidence, "we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court." *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018).

Lee argues that his confession should have been suppressed because law enforcement officers induced him to speak by promising that he could see his family if he confessed. This inducement, Lee contends, meant his decision to waive his constitutional rights and speak the officers was not a knowing and voluntary one.

Due process protections guaranteed by the United State Constitution and the North Carolina Constitution prohibit the State from obtaining an in-custody confession from a defendant unless the defendant knowingly and voluntarily makes that confession. *State v. Pruitt*, 286 N.C. 442, 454,

212 S.E.2d 92, 100 (1975). Thus, even in cases where "the procedural safeguards required by the *Miranda* decision were recited by the officers and th[e] defendant signed a waiver stating that he understood his constitutional rights . . . the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made." *Id.*

Applying these principles, our Supreme Court repeatedly has held that a confession obtained by the improper "influence of hope or fear implanted in defendant's mind" by law enforcement officers can render the confession involuntary. *Id.* at 455, 212 S.E.2d at 100. But the Supreme Court also has held that not every promise or inducement in exchange for a confession renders the confession involuntary; the Court "has made it equally clear that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." *Id.* at 458, 212 S.E.2d at 102.

Moreover, in cases "in which the requirements of *Miranda* have been met and the defendant has not asserted the right to have counsel present during questioning, no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or fear and, therefore, involuntary." *State v. Corley*, 310 N.C. 40, 48, 311 S.E.2d 540, 545 (1984). "In determining whether a defendant's statement was in fact voluntarily and understandingly made, the court must consider the totality of the circumstances of the case and may not rely upon any one circumstance standing alone and in isolation." *Id.*

Viewing the totality of the circumstances in this case, there are many factors that distinguish it from cases involving unconstitutional inducements to confess. First, and most importantly, it was Lee, not the officers, who proposed that he would confess in exchange for seeing his family. Two days after his arrest, Lee sent a written note asking to speak to investigators. Lee explained that he expected to be convicted for the murder of his aunt and that he was willing to tell investigators "whatever you want to know" but that he wanted to see his family face-to-face to say goodbye to them.

At the suppression hearing, Lee testified that he sent the note because he intended to condition his confession on law enforcement arranging a face-to-face meeting with his family:

> My initial reason – and I stated this to Detective Shambeau from the very beginning – was that my talking with him would be conditional on him arranging a meeting between

> me and my parents because I was fearful that I would never see them outside of the – be able to see them face-to-face. I had already been told that the – the visits at the jail were on a computer monitor, and I wanted to see them face-to-face.

Lee also explained that he had talked to his father on the telephone and his father told him to "just tell them what you know, son." Lee testified that his father's conversation with him had an impact and that "the right thing to do would be to tell what happened" but that he wanted to arrange to see his family as part of his agreement to do so:

> Well, there was a part of me that the felt the right thing to do would be to tell what happened. I – I remember making the comment: she deserves that much. She deserves for somebody to know what happened. But, again, my – it was clear from the very start that the only way I would speak with Detective Shambeau was if he were to arrange that meeting, and he told me it had been arranged.

Simply put, although the record shows that Lee's confession was made in exchange for the promise that he could see his family face-to-face, it also shows that Lee's decision to agree to this exchange was knowing and voluntary. Indeed, it was Lee's idea; he contemplated it even before reaching out to the investigators, and he had other reasons for his decision to confess. He chose—in a reasoned, voluntary decision—to leverage his willingness to confess to get a face-to-face meeting with his family that otherwise would have occurred through a remote video meeting.

Moreover, as noted above, the Supreme Court held in *Pruitt* that "any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." 286 N.C. at 458, 212 S.E.2d at 102. That did not occur here. The officers never proposed any relief from the charges against Lee. When Lee asked to see his family face-to-face in exchange for his confession, Detective Shambeau said he could not "promise" anything and he then consulted with a superior officer. After that consultation, Detective Shambeau told Lee that he would be able to arrange that face-to-face meeting if Lee would "tell everything." That is precisely what Lee initially proposed—the officers did not propose any additional terms or conditions that could have induced hope or fear that rendered Lee's intended confession involuntary. Accordingly, under *Pruitt*, the officers' proposal to arrange the family meeting in exchange for a confession

was not the sort of improper inducement that renders the confession inadmissible. Accordingly, the trial court properly denied Lee's motion to suppress.

Conclusion

We find no error in the trial court's judgment.

NO ERROR.

Judges BRYANT and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
JAMAAH ROBERT McMILLAN

No. COA19-794

Filed 7 July 2020

1. Appeal and Error—standard of review—deviation from jury instructions—no objection—automatic preservation

In a first-degree burglary trial, no objection was required to preserve for appellate review the question of whether the trial court erred by deviating from the pattern jury instruction on the lesser included offense of misdemeanor breaking and entering when it omitted a portion stating that the breaking and entering must be "wrongful, that is, without any claim of right," where the parties generally discussed and referenced the pattern instructions. The proper standard of review was thus de novo, not plain error.

2. Burglary and Unlawful Breaking or Entering—jury instructions—misdemeanor breaking and entering—omission of "wrongful" language

In a first-degree burglary trial, the trial court's jury instruction on the lesser-included offense of misdemeanor breaking and entering was proper even though it did not include a portion of the pattern instruction that the breaking and entering must have been "wrongful, that is, without any claim of right," because the instruction given, that the breaking and entering must have been "without the consent" of the building's occupant, was correct in law and supported by the evidence. Even if error occurred, there was no

prejudice based on the undisputed evidence that defendant had no consent to break into and/or enter the apartment.

3. Drugs—jury instructions—actual and constructive possession—evidentiary support

In a prosecution for burglary and firearms and drug offenses, the trial court erred by instructing the jury on both actual and constructive possession of cocaine where the evidence did not support a theory of actual possession, but the error was not prejudicial because the State presented substantial credible evidence that defendant resided at the location where the cocaine was found, and there was not a reasonable possibility that but for the error, a different result would have been reached at trial.

4. Judgments—subject matter jurisdiction—correction to criminal sentence—after oral notice of appeal

The trial court continued to have subject matter jurisdiction to correct defendant's criminal judgment pursuant to N.C.G.S. § 15A-1448, even though defendant gave oral notice of appeal in open court when his sentence was first pronounced, because the correction was made prior to the expiration of the fourteen-day time period for giving notice of appeal and it constituted a statutorily mandated sentencing requirement (application of habitual felon status to the second of two convictions).

Appeal by Defendant from Judgments entered 13 February 2019 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 4 March 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Derek L. Hunter, for the State.

Meghan Adelle Jones for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jamaah Robert McMillan (Defendant) appeals from Judgments entered 13 February 2019 upon his convictions of Discharging a Weapon into Occupied Property, Possession of Firearm by Felon, First-Degree Burglary, Trafficking in Cocaine by Possession of 28 Grams or More But Less than 200 Grams (Trafficking in Cocaine by Possession), Possession

with Intent to Sell And Deliver (PWISD) Cocaine, and attaining Habitual-Felon status.[1] The Record before us, including evidence presented at trial, tends to show the following:

On the night of 28 October 2017, Defendant arrived at Daniel Hamilton's (Hamilton) apartment in Greensboro, North Carolina, to collect approximately $300.00 Hamilton owed Defendant. Hamilton previously sold drugs for Defendant and knew him only by the name of "Molly G." Defendant and Hamilton began arguing and the two men got into a physical altercation. Defendant left Hamilton's apartment "to get a gun." Hamilton closed the front door after Defendant left and walked back into his bedroom where his girlfriend Marichol Watkins (Watkins) was laying on the bed. As Hamilton reached the bedroom, he heard two gunshots into the apartment, one of which shattered the glass on the front door. Hamilton told Watkins to call the police, and he grabbed his phone and ran through the bathroom to hide in the closet of the apartment's second bedroom.

Hamilton called 911 and reported the gunshots. While Hamilton was on the phone with dispatch, he heard Defendant enter the apartment. Defendant entered the bedroom holding his gun and asked Watkins where Hamilton had gone. Watkins gestured toward the bathroom, but Defendant did not pursue Hamilton. Instead, Defendant told Watkins "if I kill him, I'm going to have to kill you because I can't leave a witness just like that." Defendant then again left the apartment.

Officer K.M. Nutter (Officer Nutter) with the Greensboro Police Department responded to Hamilton's apartment shortly after around 12:30 a.m. on 29 October 2017. Hamilton told Officer Nutter he suspected Defendant fired the gunshots and described his argument with Defendant from earlier that night. Hamilton admitted to Officer Nutter he used to sell drugs for Defendant. Hamilton stated that Defendant operated out of 1915 Freeman Mill Road, where Hamilton had purchased cocaine several times. Hamilton also gave descriptions of Defendant's two vehicles—a silver BMW two-door coupe and a gray Ford van.

Detective Adam Snyder (Detective Snyder) was assigned to Defendant's case and met with Hamilton and Watkins on 30 October 2017. Detective Snyder showed Hamilton and Watkins a photograph of Defendant, and they both identified Defendant by the name of "Molly G." At their meeting, Hamilton also gave Detective Snyder Defendant's

1. Defendant does not appeal from his convictions for Discharging a Weapon into Occupied Property, Possession of Firearm by Felon, or from attaining Habitual-Felon status.

phone number. Detective Snyder provided Defendant's phone number to Sergeant M.R. McPhatter (Sergeant McPhatter) of the Greensboro Police Department's Criminal Investigations Division, and Sergeant McPhatter received a "PIN track and trace order" for the number. The results of the track and trace order indicated, through GPS coordinates and call logs, that the phone number had been used from 1915 Freeman Mill Road.

On 1 November 2017, Sergeant McPhatter arrived at 1915 Freeman Mill Road with warrants for Defendant's arrest on charges of Discharging a Firearm into an Occupied Dwelling, Possession of Firearm by Felon, and First-Degree Burglary. Sergeant McPhatter observed a silver BMW and a gray Ford van parked in the backyard. Sergeant McPhatter contacted Defendant through the door of the residence and informed him of the active warrants for his arrest. After about thirty minutes, Defendant opened the door and surrendered. Sergeant McPhatter searched Defendant incident to his arrest and found a BMW key in his pocket and around $1,800.00 cash.

After Defendant's arrest, Detective Snyder went to 1915 Freeman Mill Road to search the residence with additional members of the violent criminal apprehension team. In the attic above a bedroom closet, detectives found a bag of what was suspected to be cocaine and a lockbox, which contained a handgun and a plastic bag with a "pink powdery . . . rock-like substance." Plastic bags, a digital scale, and a box of ammunition were found in the kitchen in addition to several glass containers, which detectives suspected contained residue of controlled substances. Inside the Ford van, detectives found two additional gun magazines—a silver colored handgun magazine in the back pocket of the passenger seat and a small Glock magazine from the passenger door pocket. Live rounds of ammunition were found in a closet of the residence as well as on the floorboard of the silver BMW and in the driveway. The rounds were later determined to match the bullet casings recovered from inside Hamilton's apartment.

On 22 January 2018, Defendant was indicted on charges of Discharging a Weapon into Occupied Property, Possession of Firearm by Felon, First-Degree Burglary, and attaining Habitual-Felon status. Defendant was also indicted of Trafficking in Cocaine by Possession, PWISD Cocaine, and attaining Habitual-Felon status. Defendant's case came on for trial on 6 February 2019. Hamilton and Watkins both testified on behalf of the State and recounted the night of 28 October 2017. Forensic scientist David Perron of the North Carolina State Crime Lab testified the substances recovered from 1915 Freeman Mill Road were

tested and determined to be 33.57 grams of cocaine. Defendant presented no evidence.

The trial court held a charge conference with counsel and went page by page through the proposed jury instructions. Defense counsel requested the trial court instruct the jury on Misdemeanor Breaking and Entering as a lesser included offense to the charge of First-Degree Burglary in accordance with the North Carolina Pattern Jury Instructions, and the trial court agreed. Defendant objected to the trial court's proposed instruction on both actual and constructive possession in relation to the charges of Trafficking in Cocaine by Possession and PWISD Cocaine; however, the trial court ruled it would instruct the jury on both theories of possession.

On the lesser included offense of Misdemeanor Breaking and Entering, the trial court instructed the jury:

> Breaking or entering differs from burglary, in that both a breaking and an entry are not necessary, either a breaking or an entry is enough; further, the building that was involved need not have been a dwelling house; the breaking or entry need not have been during the nighttime; and there need not have been the intent to commit a felony therein.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date of October 29th, 2017, the defendant broke into or entered a building without the consent of the owner or tenant, it would be your duty to return a verdict of guilty of breaking or entering.

For the charges of Trafficking in Cocaine by Possession and PWISD Cocaine, the trial court continued:

> A person possesses cocaine if the person is aware of its presence and has, either by oneself or together with others, both the power and intent to control the disposition or use of that substance.
>
> Possession of a substance or article may be either actual or constructive. A person has actual possession of a substance or article if the person has it on the person, is aware of its presence and, either alone or together with others, has both the power and intent to control its disposition or use.

> A person has constructive possession of a substance or article if the person does not have it on the person but is aware of its presence and has, either alone or together with others, both the power and intent to control its disposition or use.

The jury returned verdicts finding Defendant guilty of Discharging a Weapon into Occupied Property, Possession of Firearm by Felon, First-Degree Burglary, Trafficking in Cocaine by Possession, PWISD Cocaine, and, subsequently, two separate counts of attaining Habitual-Felon status. The trial court orally announced it sentenced Defendant as a habitual felon to 96 to 128 months active sentence for the charge of Discharging a Weapon into Occupied Property. The trial court orally rendered a consolidated judgment on the charges of First-Degree Burglary and Possession of a Firearm by a Felon and sentenced Defendant as a habitual felon to 96 to 128 months active sentence. The trial court also announced it would consolidate Defendant's convictions for PWISD Cocaine and Trafficking in Cocaine by Possession and entered judgment sentencing Defendant to 35 to 51 months with a mandatory fine of $50,000.00 for the Trafficking conviction without applying the enhancement for Habitual-Felon status. Defendant gave oral Notice of Appeal in open court.

The next day, on 13 February 2019, the trial court brought Defendant back before it, indicating it was "back to revisit sentencing" after it "made a mistake yesterday, in that the habitual felon also attaches to the drug trafficking." The trial court noted after Defendant left the courtroom the day before, the State pointed out the trial court failed to apply Habitual-Felon status to Defendant's Trafficking sentence. The trial court then sentenced Defendant as a habitual felon to 96 to 128 months active sentence for the conviction of Trafficking in Cocaine by Possession consolidated with the PWISD Cocaine conviction.

Written Judgments reflecting this corrected sentence dated 12 February 2019 were filed and entered on 13 February 2019. It appears on the Record after the corrected sentence was announced but before the written Judgments were entered on 13 February 2019, Defendant filed a written Notice of Appeal from the "verdicts and judgments entered against him on February 12, 2019." On 10 October 2019, out of an abundance of caution, Defendant filed a Petition for Writ of Certiorari with this Court for purposes of seeking review of the written Judgments entered on 13 February 2019. To the extent it is necessary to permit our appellate review of these Judgments, we grant Defendant's Petition and

issue our Writ of Certiorari specifically to review the issues raised in Defendant's appeal.

Issues

Defendant raises three issues on appeal: (I) whether the trial court erred when it deviated from the exact language of the North Carolina Pattern Jury Instruction for Misdemeanor Breaking and Entering; (II) whether the trial court erred when it instructed the jury on both theories of actual and constructive possession for Trafficking in Cocaine by Possession and PWISD Cocaine; and (III) whether the trial court had subject-matter jurisdiction to change Defendant's sentence for Trafficking in Cocaine by Possession after Defendant entered Notice of Appeal in open court.

Analysis

I. Misdemeanor Breaking and Entering

A. Standard of Review

[1] Defendant was convicted of First-Degree Burglary. On appeal, Defendant contends the trial court erred related to this conviction when it deviated from the North Carolina Pattern Jury Instruction on the lesser included offense of Misdemeanor Breaking and Entering by omitting the portion instructing the jury breaking and entering must be "wrongful, that is, without any claim of right." Defendant argues the trial court's instruction was an incorrect statement of the law because "wrongful does not only mean 'without consent[,]' wrongful means 'without claim of right.' "

Defendant contends this error is preserved without objection under *State v. Jaynes*, 353 N.C. 534, 549 S.E.2d 179 (2001). In *Jaynes*, "no explicit request was made that the instruction be given in conformance with the North Carolina Pattern Jury Instruction[.]" *Id.* at 556, 549 S.E.2d at 196. However, "during the charge conference all parties referred to the pattern instruction when discussing the submission" and the trial court further "drew the parties' attention to specific language in the pattern instruction[.]" *Id.* "Given the[ ] circumstances," our Supreme Court held the "defendant had no reason to make his own request that the pattern instruction . . . be given. Accordingly, when the instruction actually given by the trial court varied from the pattern language, defendant was not required to object in order to preserve this question for appellate review." *Id.* The State contends, in opposition, we should review Defendant's argument for plain error because Defendant failed to object to the language of the now-challenged instruction.

During the charge conference, the trial court discussed the relevant sections of the proposed jury instructions with counsel and specifically indicated it would instruct the jury on Misdemeanor Breaking and Entering as a lesser-included offense to First-Degree Burglary. However, it is not clear from the Record the trial court actually deviated from the jury instruction the parties were in fact discussing during the charge conference. Indeed, the transcript before us seems to indicate the parties were not specifically discussing and contemplating the verbatim pattern jury instruction but rather an instruction based on the pattern instruction drafted by the trial court for purposes of the conference.[2]

Although Defendant did not "explicit[ly] request . . . the instruction be given in conformance with the North Carolina Pattern Jury Instruction[,]" *id.*, it does appear there was some general discussion and references made to the pattern instructions. For purposes of our analysis, we assume the references to the pattern instructions in the present case are sufficiently analogous to *Jaynes* and conclude "defendant was not required to object in order to preserve this question for appellate review." *Id.* at 556, 549 S.E.2d at 198. Accordingly, "[t]his Court reviews issues relating to the substance of the trial court's instructions using a *de novo* standard of review." *State v. Watlington*, 234 N.C. App. 580, 593, 759 S.E.2d 116, 125 (2014) (citation and quotation marks omitted).

B. Jury Instruction

[2] The trial court instructed the jury on Misdemeanor Breaking and Entering as a lesser-included offense to the charge of First-Degree Burglary. "Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor." N.C. Gen. Stat. § 14-54(b) (2019). "A breaking or entry is wrongful when it is without the consent of the owner or tenant or other claim of right." *State v. Young*, 195 N.C. App. 107, 112, 671 S.E.2d 372, 375 (2009); *see State v. Boone*, 297 N.C. 652, 658, 256 S.E.2d 683, 686 (1979) (stating the offense of misdemeanor breaking and entering, codified at N.C. Gen. Stat. § 14-54(b), "expressly requires that an entry must be wrongful, *i.e.*, without consent of the owner, in order to be punishable").

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2. At the start of the charge conference, the trial court expressly stated:

> What I left on your tables . . . is just a draft of the instructions. And one of the differences that you will see in the previous draft is I just rearranged some . . . . I put all the patterns about witnesses together. . . . But if we can just go page by page, then I'll hear from you about any objections, corrections, or what you want.

The North Carolina Pattern Jury Instruction 214.10 titled "First Degree Burglary Covering . . . Lesser Included Offenses" provides the following instruction on Misdemeanor Breaking and Entering:

> Non-felonious breaking or entering differs from felonious breaking or entering in that it need not be done with the intent to commit a felony so long as the breaking or entering was *wrongful, that is, without any claim of right.*
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant wrongfully [broke into and entered] another person's building without that person's consent, it would be your duty to return a verdict of guilty of non-felonious breaking and entering.

N.C.P.I.-Crim. 214.10 (2011) (emphasis added). At trial, the trial court instructed the jury:

> Breaking or entering differs from burglary, in that both a breaking and an entry are not necessary, either a breaking or an entry is enough; further, the building that was involved need not have been a dwelling house; the breaking or entry need not have been during the nighttime; and there need not have been the intent to commit a felony therein.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date of October 29th, 2017, the defendant broke into or entered a building *without the consent of the owner or tenant*, it would be your duty to return a verdict of guilty of breaking or entering.

"It is well established in this jurisdiction that the trial court is not required to give a requested instruction in the exact language of the request." *State v. Green*, 305 N.C. 463, 476-77, 290 S.E.2d 625, 633 (1982). "When a defendant requests a special jury instruction that is correct in law and supported by the evidence, the court must give the instruction in *substance*." *State v. Godwin*, 369 N.C. 605, 613, 800 S.E.2d 47, 53 (2017) (emphasis added) (citation omitted).

Here, the evidence reflects after Defendant and Hamilton were in an altercation and after Defendant made the direct threat he was leaving to get his gun, Defendant broke into and entered Hamilton's apartment without consent after firing two gunshots through the front

door. Defendant walked into the bedroom where Watkins was resting and while Hamilton was hiding and asked her where Hamilton was. Defendant, brandishing his gun, told Watkins "if I kill him, I'm going to have to kill you because I can't leave a witness just like that." Despite the omission of the word "wrongful" or "without claim of right," the trial court's instruction on the lesser-included offense of Misdemeanor Breaking and Entering on the facts in this case was correct in law and was supported by the evidence Defendant broke into and/or entered the residence without consent. *See id.* Thus, the trial court's minor deviation from the pattern instruction on the lesser included offense in this case does not constitute error.

Moreover, even if the trial court's deviation from the pattern jury instruction did rise to the level of error, Defendant failed to establish any error in the omission from the instruction was prejudicial. First, Defendant does not articulate any basis in the evidence in this case under which his breaking and entering was either not wrongful or under a claim of right.

Moreover, the jury found Defendant guilty of First-Degree Burglary. Defendant did not object to—and does not challenge on appeal—the instruction on First-Degree Burglary, where the trial court charged: "The defendant has been charged with first degree burglary, which is breaking and entering in the nighttime of another person's occupied dwelling house *without that person's consent* and with the intent to commit assault with a deadly weapon with intent to kill." The trial court included Misdemeanor Breaking and Entering as a lesser-included offense at Defendant's request and instructed the jury consistent with its instruction for First-Degree Burglary—that the breaking and entering be "without the consent of the owner or tenant." The trial court's instruction on Misdemeanor Breaking and Entering thus was consistent with the instruction on the First-Degree Burglary charge, predicated on intent to commit assault with a deadly weapon with intent to kill, and the omission of "wrongful, that is, without any claim of right" from the pattern instruction was not error and did not prejudice Defendant because the undisputed evidence reflected Defendant did not have consent to break into and/or enter Hamilton's apartment. Therefore, the evidence was more than sufficient for the jury to determine Defendant broke into or re-entered the apartment wrongfully and/or without consent.

II. Actual and Constructive Possession of Cocaine

[3] Defendant next contends the trial court erred when it instructed the jury on theories of both actual and constructive possession for the

charges of Trafficking in Cocaine by Possession and PWISD Cocaine where the evidence did not support the instruction on actual possession. The State concedes the trial court's instruction on actual possession was not supported by the evidence; nevertheless, the State contends the error was not prejudicial.

> [A] defendant seeking to obtain appellate relief on the basis of an error to which he or she lodged an appropriate contemporaneous objection at trial must establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

State v. Malachi, 371 N.C. 719, 738, 821 S.E.2d 407, 421 (2018) (footnote omitted) (quoting N.C. Gen. Stat. § 15A-1443(a) (2017)). At trial, counsel for Defendant objected to the trial court's instruction on both actual and constructive possession; however, Defendant must still demonstrate the error resulted in prejudice. *See id.*

Possession is a necessary element of both the offenses of Trafficking in Cocaine by Possession and PWISD Cocaine. *See* N.C. Gen. Stat. §§ 90-95(h)(3), 90-95(a) (2019). "Possession of controlled substances may be either actual or constructive." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996). "Actual possession requires that a party have physical or personal custody of the item." *Malachi*, 371 N.C. at 730, 821 S.E.2d at 416 (citation and quotation marks omitted). Meanwhile, constructive possession arises when "[a] person . . . has the intent and capability to maintain control and dominion over that thing." *Id.* at 730-31, 821 S.E.2d at 416 (citation and quotation marks omitted). Defendant argues he was prejudiced by the inclusion of the actual possession instruction because it "unnecessarily suggested to the jury that the State presented some evidence at trial showing that [Defendant] had actual possession of a controlled substance[.]"

In contrast, the State argues Defendant was not prejudiced by this admittedly erroneous instruction because there was "exceedingly strong" evidence of Defendant's guilt on the basis of constructive possession. *See id.* at 738, 821 S.E.2d at 421. Where "the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." *Id.*

In the present case, the State presented exceedingly strong evidence to support a conviction based on Defendant's constructive possession of the cocaine recovered from 1915 Freeman Mill Road. Hamilton informed Officer Nutter Defendant operated out of the residence at 1915 Freeman Mill Road and that he had purchased cocaine from him there "a couple of times." When officers with the Greensboro Police Department executed the warrant for Defendant's arrest on 1 November 2017, the officers responded to 1915 Freeman Mill Road—where they found Defendant. The two vehicles Hamilton reported Defendant drove were both parked at the residence at the time the search warrant was executed. Police tracking of Defendant's cell phone number indicated he was at the residence, and call logs retrieved for the thirty-day period prior to Defendant's arrest showed calls made from 1915 Freeman Mill Road. Defendant argues his driver's license does not show he resided at 1915 Freeman Mill Road and that the residence was owned by someone named Robert Maddux. Even if this may constitute some evidence Defendant did not reside at 1915 Freeman Mill Road, it does not "dispute nor subject to serious credibility-related questions" the State's exceedingly strong evidence supporting the theory Defendant had constructive possession of the cocaine recovered from 1915 Freeman Mill Road. *Id.*

Accordingly, although the trial court's instruction on the theory of actual possession for Defendant's Trafficking in Cocaine by Possession and PWISD Cocaine charges was error, Defendant has not demonstrated "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).

III. Subject-Matter Jurisdiction to Correct Judgment

[4] Finally, Defendant contends the trial court lacked subject-matter jurisdiction to change his sentence for Trafficking in Cocaine by Possession on 13 February 2019 after he gave Notice of Appeal in open court when his sentence was first pronounced. "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) (citation omitted).

On 12 February 2019, the trial court sentenced Defendant to 35 to 51 months active sentence with a mandatory fine of $50,000.00 after consolidating his convictions of Trafficking in Cocaine by Possession and PWISD Cocaine. The trial court did not factor in Defendant's Habitual-Felon status on the Trafficking conviction. The same day, Defendant gave Notice of Appeal in open court. The very next day, after the State notified the trial court of the error, the trial court brought Defendant

back before the court indicating "[it] made a mistake yesterday, in that the habitual felon also attaches to the drug trafficking." Having ensured Defendant was present for sentencing, the trial court corrected Defendant's sentenced on the cocaine charges and sentenced Defendant as a habitual felon to 96 to 128 months active sentence.

On appeal, Defendant correctly notes the general rule: a trial court is divested of jurisdiction immediately upon the proper giving of notice of appeal. *See State v. Briggs*, 257 N.C. App. 500, 502, 812 S.E.2d 174, 176 (2018) ("Even where a statute allows the trial court to act beyond the close of the original session, '[t]he jurisdiction of the trial court with regard to the case' will remain divested as of the filing of a notice of appeal." (alteration in original) (citations omitted)). However, our Court has recently recognized a more specific rule governs in this context. In *State v. Lebeau*, this Court recognized N.C. Gen. Stat. § 15A-1448 allows for a trial court to correct an error in sentencing a defendant within fourteen days of pronouncing its sentence notwithstanding the fact a defendant had already given notice of appeal and even without a statutorily authorized motion for appropriate relief. *See State v. Lebeau*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (COA19-872, filed 21 April 2020); *see also In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, 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.").

Under N.C. Gen. Stat. § 15A-1448(a)(3), "[t]he jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by [N.C. Gen. Stat. §] 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired." N.C. Gen. Stat. § 15A-1448(a)(3) (2019). "Subsection (1) refers to 'the period provided in the rules of appellate procedure for giving notice of appeal.' " *Lebeau*, ___ N.C. App. at ___, ___ S.E.2d at ___, (Slip op. at 4) (quoting N.C Gen. Stat. § 15A-1448(a)(1) (2019)). The North Carolina Rules of Appellate Procedure allow a written notice of appeal in a criminal case to be filed 14 days after the entry of a judgment." *Id.* (citing N.C.R. App. P. 4(a)(2) (2019)). Subsection (2) addresses motions for appropriate relief made pursuant to Sections 15A-1414 and 15A-1416(a). N.C. Gen. Stat. § 15A-1448(a)(2). Therefore, under *Lebeau* where no motion for appropriate relief is made in accordance with Section 15A-1448(a)(2), "under the plain language of [Section] 15A-1448(a)(3), the trial court has jurisdiction until notice of appeal has been given *and* 14 days have passed." *Lebeau*, ___ N.C. App. at ___, ___ S.E.2d at ___, (Slip op. at 4) (emphasis added). This conclusion is supported by the Official Commentary to Section 15A-1448:

> This section permits the defendant to give his notice of appeal, and yet retains the case in the trial court for the full 10-day [now 14-day] period. This will insure a period during which matters may, if possible, be corrected at the trial level, without problem as to the timely notice of appeal.

N.C. Gen. Stat. § 15A-1448 cmt.

In *Lebeau*, the trial court originally announced only a minimum statutory term without including the statutory maximum. *See Lebeau*, ___ N.C. App. at ___, ___ S.E.2d at ___, (Slip op. at 2). Indeed, *Lebeau* recognized in a separate aspect of that appeal an amendment to a criminal sentence is not substantive if it is "a statutorily 'necessary byproduct' of the sentence." *Id.* at ___, ___ S.E.2d at ___, (Slip op. at 7) (citing *State v. Arrington*, 215 N.C. App. 161, 167, 714 S.E.2d 777, 782 (2011)). Likewise, in the case *sub judice*, the trial court originally announced a sentence for Trafficking in Cocaine by Possession that did not factor in the statutorily required sentencing enhancement based on Defendant's Habitual-Felon status. However, once the jury returned its verdict finding Defendant attained Habitual-Felon status, the trial court was required to sentence Defendant as a habitual felon—a statutorily necessary by-product of the sentence. *See* N.C. Gen. Stat. § 14-7.6 (2019) ("When [a] habitual felon . . . commits any felony under the laws of the State of North Carolina, the felon *must* . . . be sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted[.]" (emphasis added)).

Thus, we conclude under this Court's holding in *Lebeau*, the trial court retained jurisdiction to correct Defendant's sentence despite Defendant's prior Notice of Appeal because the fourteen-day period for giving written notice of appeal had not yet expired. In reaching this conclusion, we also hasten to note both this case and *Lebeau* involve an instance where a trial court was correcting an error in sentencing in order to comply with a statutorily mandated sentencing requirement. *See Briggs*, 257 N.C. App. at 502, 812 S.E.2d at 176 (recognizing following notice of appeal, "the trial court retains jurisdiction only over matters ancillary to the appeal," including correction of clerical errors not implicating judicial discretion or judicial reasoning).

Conclusion

Accordingly, for the foregoing reasons, the trial court did not err in its jury instructions on the lesser-included offense of Misdemeanor Breaking and Entering. The trial court erred when it instructed the

jury on the theories of both actual and constructive possession; however, the error was not prejudicial. We further conclude the trial court retained jurisdiction to correct Defendant's sentence for his convictions of Trafficking in Cocaine by Possession and PWISD Cocaine.

NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
EDWARD LAMONT WOMBLE

No. COA19-68

Filed 7 July 2020

1. Criminal Law—witness testimony—reference to prosecuting witness as victim—plain error analysis

No plain error occurred in a prosecution for rape and related charges where multiple witnesses for the State referred to the main prosecuting witness as "the victim." Use of the word "victim" did not constitute an improper vouching of credibility of that person or an opinion on defendant's guilt and, given the overwhelming evidence against defendant, did not prejudice defendant's case.

2. Constitutional Law—effective assistance of counsel—failure to object to use of word "victim"

In a prosecution for rape and related charges, defense counsel was not constitutionally ineffective for failing to object each time a State's witness used the word "victim" to describe the main prosecuting witness. Use of that word was not an improper vouching for the main prosecuting witness's credibility or an opinion on defendant's guilt, and there was no reasonable probability the trial outcome would have been different had counsel objected.

3. Criminal Law—jury instructions—reference to prosecuting witness as victim—plain error analysis

No plain error occurred in a prosecution for rape and related charges where the trial court's jury instructions included references to the main prosecuting witness as "the victim." Use of the word "victim" was not an improper judicial opinion in violation of

N.C.G.S. § 15A-1222 and § 15A-1232. The trial court followed the pattern jury instructions, informed the jury that defendant was presumed innocent, and cautioned the jurors not to infer anything from the court's language regarding the evidence.

Appeal from judgments entered 6 July 2018 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 9 June 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

Mark Montgomery for defendant-appellant.

BRYANT, Judge.

On 6 July 2018, defendant Edward Lamont Womble was found guilty of first-degree rape, first-degree sexual offense, crime against nature, assault on a female, assault with a deadly weapon, assault by pointing a gun, possession of a firearm by a felon, and willfully communicating threats.[1]

On 6 July 2018, defendant Edward Lamont Womble was found guilty of first-degree rape, first-degree sexual offense, crime against nature, assault on a female, assault with a deadly weapon, assault by pointing a gun, possession of a firearm by a felon, and willfully communicating threats.[2]

Factual and Procedural History

The State's evidence at trial tended to show the following: defendant and Crystal were married on 25 August 2011. Together, they have one child, and Crystal had five other minor children. Defendant grew abusive toward Crystal during their marriage, and they separated in March 2013. After Crystal filed for divorce in March 2015 and before the divorce was finalized in January 2016, she and defendant began communicating about their son and saw each other regularly.

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1. The jury acquitted defendant of first-degree kidnapping.

2. The jury acquitted defendant of first-degree kidnapping.

In November 2015, Crystal and her minor children lived in her mother's house outside of Carthage in Moore County. Defendant stayed at least part-time in the home of his girlfriend, Shantell Kimes, in Ramseur.

Ms. Kimes purchased two Cobra .380 caliber, semi-automatic pistols for defendant in 2015. The first gun, which Ms. Kimes purchased on 30 June 2015, was seized by law enforcement on 5 November 2015. The second gun was purchased by Ms. Kimes on 16 November 2015 and seized on 24 November 2015. At the time of defendant's trial, Ms. Kimes had pled guilty to federal gun charges stemming from these two straw purchases and was awaiting sentencing. She had hoped to obtain a lesser sentence as a result of her testimony against defendant.

A. The 5 November 2015 Incident

On 5 November 2015, defendant and Crystal had an argument about their relationship while parked in her car in a church parking lot near her mother's house. When Crystal told defendant she would not reconcile with him, he slapped her and said, "You need to get away from me before I kill you." Crystal exited the car. Defendant took her place in the driver's seat and said, "You think I'm playing with you? . . . I'll shoot you and your kids[,]" before driving off in her car.

Crystal called 911 and reported that her "husband was going to get a gun to come back and shoot [her] and [her] kids." While still on the phone, Crystal heard her car returning[3] and hid behind a shed. Defendant drove past Crystal to her mother's house. Defendant asked Crystal's mother where Crystal was before proceeding onto McCrimmon Road toward State Highway 15-501. Crystal remained on the phone with 911 until law enforcement arrived at her location.

Responding to the 911 call, Detective Rodriguez and Captain Medlin of the Moore County Sheriff's Office stopped defendant's vehicle at the intersection of McCrimmon Road and Highway 15-501. Corporal Cameron also responded to the scene and observed Detective Rodriguez speaking to defendant beside a white Honda Civic. Defendant "stated that it wasn't his car and he stated it was registered to his wife, Crystal . . . ." After obtaining Crystal's consent to search the car, officers found "what appeared to be a half[-]burnt marijuana cigarette . . . in the small pocket of the [front] door." Corporal Cameron also found defendant's driver's license and "several small handgun caliber bullets . . . in the glove box," and a black Cobra .380 caliber, semi-automatic handgun under the

3. Crystal testified her car was "loud" because it lacked a muffler.

passenger seat. Defendant was charged with multiple offenses related to the items seized during the traffic stop but was not taken into custody.

Captain Medlin drove to Barbers Park Drive to check on Crystal, who said "she had gotten into an argument with [defendant] over custody of a child and that the argument had escalated . . . to the point where he said he was going to leave to go get a gun and come back and shoot her and the kids." Captain Medlin advised Crystal to go to the magistrate's office to "swear out a warrant [against defendant] for communicating threats[.]" Crystal did so that same day and received an ex parte protection order from the trial court.

B. The 24 November 2015 Incident

Defendant spent the night of 23 November 2015 at Ms. Kimes's home in Ramseur and set an alarm clock for 4:30 a.m. Ms. Kimes asked why he was setting the alarm, and he replied, "So I can kill Crystal." When the alarm clock sounded on the morning of 24 November 2015, defendant got up, took a shower, and again told Ms. Kimes, "I'm going to kill Crystal." Defendant retrieved his Cobra .380 caliber, a semi-automatic pistol, from Ms. Kimes's closet, and left in Ms. Kimes's white Nissan Altima.

Crystal drove her son to the bus stop at 5:30 a.m. on 24 November 2015. When the bus arrived, her son exited her car and boarded the bus. While Crystal was adjusting her car's heater and "not paying attention," defendant opened the car door, sat down in the passenger seat with a gun in his hand, and said, "You wasn't expecting this, was [sic] you?" Defendant told Crystal to drive to the home of James A. Gilmore, who lived on a dirt road near her mother's house. When they arrived in Mr. Gilmore's yard, defendant ordered Crystal out of her car and into the Altima. Crystal refused, and defendant struck her with his gun—hitting her on the top of her head and her right eyebrow. Crystal fell to the ground and dropped her phone in Mr. Gilmore's yard before getting into the Altima, her head "pouring" blood.

On the morning of 24 November 2015, Mr. Gilmore saw Crystal's car and cell phone in his yard, and found the circumstance to be "kind of strange" because Crystal had never parked her car at his house. He picked up the phone and walked to Crystal's mother's house. When Mr. Gilmore handed the phone to Crystal's mother and told her Crystal's car was in his yard, she asked Crystal's daughter to call 911. Lieutenant Williams and other members of the Moore County Sheriff's Office responded to the call and began an investigation into Crystal's disappearance.

Defendant drove Crystal to a boat landing on a dirt road near Carbonton, saying he was "going to kill [her], put [her] body in a ditch so [her children] can't find [her]." Defendant parked at the boat landing and asked Crystal for sex. Because defendant was holding her at gunpoint, Crystal engaged in oral and vaginal intercourse with him. After having sex with Crystal, he began to ask her, "Why did I do this? What am I going to do now? . . . I can't take you back."

Defendant returned with Crystal to Ms. Kimes's house and parked in the driveway. He tried to stab Crystal with a syringe full of insulin, which he used to treat his diabetes. When the needle broke off of the syringe, defendant drove away from Ms. Kimes's house and parked on a side street where he continued to fight with Crystal, biting her on the right hand.

After speaking to Crystal's mother, Lieutenant Williams called Detective Rodriguez, told him Crystal was missing, and asked him to go to defendant's mother's house and try to locate defendant. Detective Rodriguez went to defendant's mother's residence and asked her to "please contact [defendant] to see if he knew where Crystal was." Defendant's mother spoke to defendant on his cell phone and then gave Detective Rodriguez his phone number. Detective Rodriguez immediately called defendant and asked if he had seen Crystal. Defendant said he had not seen Crystal and did not know where she was. Approximately fifteen minutes later, Crystal phoned Detective Rodriguez and said she was fine and was visiting friends in Asheboro. Detective Rodriguez asked Crystal to call Lieutenant Williams and verify she was okay.

Defendant next drove with Crystal to mechanic Joe Brady's garage in Siler City, where he asked Mr. Brady if he could take a "look at the Mazda out back" behind the garage. Defendant instead took a cup containing the broken syringe and the bloody tissues Crystal had used on her head wounds and deposited the cup in a "burn barrel" Mr. Brady kept on the property to burn trash. Mr. Brady remained in the garage but saw defendant "walk[] out back" in the direction of the Mazda.

As Crystal pleaded with defendant to take her home, he instead drove to the home of another friend in Siler City, Richard McSwain, who noticed a mark on Crystal's forehead. Defendant asked Mr. McSwain to "hold" defendant's gun, but he refused.

While at Mr. McSwain's house, Crystal borrowed a phone to call Lieutenant Williams. With defendant listening in on the call, Crystal told Lieutenant Williams she was visiting friends in Asheboro. Lieutenant Williams asked Crystal to go to the Asheboro Police Department to

confirm she was safe. After the call, Crystal's family told Lieutenant Williams that Crystal "doesn't know anybody in Asheboro."

Lieutenant Williams contacted Detective Rodriguez and instructed him to return to defendant's mother's residence and serve defendant with the outstanding arrest warrant from the 5 November 2015 incident. Detective Rodriguez called defendant, said he needed to take a statement from him, and asked to meet him at his mother's house. Defendant agreed and said he was approximately 45 minutes from his mother's house.

Defendant drove back to Ramseur and stopped at a BP gas station on State Highway 64. Defendant left Crystal at the BP station, saying he had to attend court in Carthage and would come back for her. Crystal entered the store and went into the restroom to tend to her still-bleeding head. When she emerged from the restroom, she asked the store's cashier if she could use the phone.

Diane Helms was working at the BP station when Crystal came inside with a wound on her forehead and asked to use the restroom. When Crystal emerged from the restroom, "[s]he was just kind of walking around, looking out the window" toward the gas pumps. Ms. Helms asked her what had happened. Crystal appeared "nervous and upset" and did not answer. A few minutes later, Crystal asked to use the phone and told Ms. Helms, "He has a gun."

After leaving Crystal at the BP station, defendant drove back to Ms. Kimes's residence and placed his .380 caliber handgun back in her bedroom closet. He then told Ms. Kimes, "Let's go, [be]cause the police is at my mama['s] house." As Ms. Kimes drove defendant back to the BP station to get gas, she noticed "a lot of blood in" her car.

Meanwhile, Crystal tried to call Detective Rodriguez, but he did not answer. She tried to call 911 to reach the Carthage police but hung up the phone when defendant arrived back at the BP station, accompanied by Ms. Kimes. Defendant put gas in Ms. Kimes's car and walked into the store to pay and check on Crystal, who promised to wait for him to come back for her. After defendant left the store and drove off with Ms. Kimes, Crystal called Lieutenant Williams and revealed what had happened to her. Lieutenant Williams told Crystal to wait for her in the store.

Defendant and Ms. Kimes drove from the BP station to his mother's house in Carthage, where they were met by sheriff's deputies. Detective Rodriguez arrested defendant on the outstanding warrant for the domestic violence protection order, and Deputy Godfrey transported

defendant to the sheriff's office. Ms. Kimes also drove to the sheriff's office, where she was interviewed and consented to a search of her car and her bedroom closet where defendant had placed the handgun.

Captain Hart and Detective Fogle transported Ms. Kimes from the sheriff's office to her residence in Ramseur to retrieve the weapon. After obtaining the loaded .380 caliber pistol from a "white plastic container on top of the master bedroom closet," they drove Ms. Kimes back to the sheriff's office. Lieutenant Holders conducted a recorded interview with Ms. Kimes, which was published to the jury.

Defendant waived his *Miranda* rights and was interviewed by Detective Rodriguez at the sheriff's office. Defendant initially claimed he had spent the day at Ms. Kimes's residence. Confronted with the information Lieutenant Holders obtained from Ms. Kimes, however, defendant "started crying" and said, "I'm done. I'm done." Defendant "admitted to lying to [Detective Rodriguez] and that. . . he had been with Ms. Crystal Womble." A copy of the audio-video recording of defendant's interview was admitted into evidence and published to the jury.

Investigator Lowery drove with Lieutenant Williams to meet Crystal at the BP station in Ramseur. He observed a laceration on Crystal's face and saw that she was upset and crying. On the way to the hospital, Crystal told the deputies about her abduction by defendant and led them to the series of locations he had taken her, including Mr. Brady's garage and the boat landing. Lieutenant Williams retrieved the cup containing the syringe and bloody tissues from the burn barrel on Mr. Brady's property. After visiting the boat landing, the deputies drove Crystal to FirstHealth Moore Regional Hospital.

While awaiting medical attention, Crystal gave a partial statement about the day's events to Investigator Lowery. Hospital personnel used five stitches to close the wound on Crystal's forehead; they also x-rayed her right hand and administered a sexual assault kit evidence collection. After being released from the hospital, Crystal was taken to the sheriff's office to record a full statement before returning home.

At the close of the State's evidence, defendant offered no evidence in response to the State's case. Defendant also stipulated to being a convicted felon. During sentencing, the trial court consolidated the convictions into four judgments and sentenced defendant to two concurrent prison terms of 386 to 524 months for first-degree rape and first-degree sexual offense, and additional concurrent terms of 25 to 39 months for possession of a firearm by a felon and 10 to 21 months for crime against nature. Defendant appeals.

On appeal, defendant raises three arguments challenging the use of the term "victim" to refer to Crystal at various points during the trial: (I) whether the trial court committed plain error in allowing eight of the State's witnesses to refer to Crystal as the victim, (II) whether he received ineffective assistance of counsel ("IAC") in violation of the Sixth Amendment because his counsel failed to object when the State's witnesses referred to Crystal as a victim, and (III) whether the trial court committed plain error by using the term "the victim" to refer to Crystal in its charge to the jury. We find each of these arguments meritless.

I. Witness Testimony

[1] Defendant faults the trial court for allowing multiple witnesses to refer to Crystal as the victim during their testimony. In addition to five of the sheriff's deputies involved in the investigation, an emergency room nurse who assisted in administering the sexual assault kit to Crystal on 24 November 2015 and two forensic analysts with the North Carolina State Crime Laboratory each used the term "victim" on at least one occasion when referring to Crystal. By characterizing Crystal as a victim, defendant argues, these witnesses effectively vouched for the truth of her accusations against him. Moreover, because five of the witnesses were law enforcement officers and four testified as experts, defendant contends their vouching for Crystal's story was particularly likely to have influenced the jury.

Defendant concedes he did not object to the challenged testimony but claims the trial court's failure to act *ex mero motu* to strike all testimony referring to Crystal as a victim amounts to plain error under N.C.R. App. P. 10(a)(4). We disagree.

"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); *see also* N.C.G.S. § 8C-1, Rule 103(a)(1) (2019) (requiring "timely objection" to preserve error). However, "[i]n criminal cases, an issue that was not preserved by objection . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

To establish plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental,

> a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Defendant cannot show plain error. This Court has rejected the premise that the use of the term "victim" by prosecution witnesses represents a "reinforcing the complainant's credibility at the expense of defendant." *State v. Jackson*, 202 N.C. App. 564, 568–69, 688 S.E.2d 766, 769 (2010). Here, as in *Jackson*, the strength of the State's evidence against defendant—which included officers' real-time communication with and pursuit of defendant and Crystal, injuries to Crystal consistent with her account of her abduction, immediate seizure of incriminating evidence from multiple locations, and contemporaneous statements from Crystal, Ms. Kimes, and defendant—outweighed any potential subliminal effect of the witnesses' occasional references to Crystal as the victim. *Id.* at 569, 688 S.E.2d at 769.

In his brief to this Court, defendant cites several cases in which an expert witness or police officer was held to have impermissibly vouched for a complainant's credibility or opined on the defendant's guilt. *See, e.g.*, *State v. Carrillo*, 164 N.C. App. 204, 209-10, 595 S.E.2d 219, 223 (2004) (ruling officer's response on cross-examination, "I think your client knew what was in that package[,]" amounted to an inadmissible opinion of the defendant's guilt); *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002) (deeming it "error to admit into evidence that portion of Dr. Brown's written report wherein she states J.M.'s disclosure to her that [the] Defendant 'sodomized and performed oral sex on him . . . was *credible*' " (ellipsis in original; emphasis added)); *State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986) (holding pediatrician's testimony, "I think she's believable[,]" was an impermissible "expert's opinion as to the credibility of the victim"). However, none of these cases rests on a witness's mere reference to the complainant as a victim. They, therefore, provide no support for defendant's claim.

The three expert witnesses, who used the term "victim" to refer to Crystal, testified as forensics analysts in the fields of fingerprint identification, hair examination, and DNA and body fluid identification—not as

experts in sexual assault or the psychology of sexual assault victims.[4] The witnesses did not purport to have interacted with Crystal or have any familiarity with her account of the events of 24 November 2015. We find no likelihood that the jury somehow misconstrued their testimony as vouching for Crystal's credibility.

Defendant further suggests that Nurse Hobbs, who assisted in administering the sexual assault kit to Crystal, was also "implicitly qualified" as an expert witness "by the trial court's allowance of her opinion testimony." A review of the transcript, however, shows Nurse Hobbs did not offer any opinions but merely recounted the step-by-step evidence-collection process she used with the sexual assault kit. When asked specifically about her interaction with Crystal on 24 November 2015, Nurse Hobbs responded as follows:

> A. I don't remember much. What I do remember is I was not her primary nurse. I was asked to do the sexual assault kit. So I was along with her, along with another nurse doing the kit.
>
> Q. Okay. If you remember, Ms. Hobbs, how was Ms. Womble's kind of demeanor while she was with you, if you recall or if you remember from that day?
>
> A. I don't remember much.

Finally, although Nurse Hobbs did use the term "victim" in reference to Crystal, she made clear she was reading from the sexual assault kit's instruction sheet. Defendant has not shown any prejudice resulting from her testimony.

II. Ineffective Assistance of Counsel

[2] As an alternative to his claim of plain error, defendant contends his trial counsel's failure to object to the use of the term "victim" by the

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4. These forensics experts testified that a latent print from defendant's right middle finger was found on the exterior of Ms. Kimes's car above the rear driver's-side door; a vaginal swab from Crystal's sexual assault kit "revealed the presence of sperm;" and Crystal's pubic hair combing contained a hair "microscopically consistent" with samples obtained from defendant. A swab taken by Moore County sheriff's deputies from the .380 caliber handgun seized from Ms. Kimes's bedroom closet on 24 November 2015 disclosed a DNA mixture from a least three individual contributors. Subsequent analysis excluded Ms. Kimes as a potential contributor but could not exclude Crystal or defendant. An additional swab of the gun's front barrel contained a DNA mixture from three contributors of which defendant and Ms. Kimes were excluded but Crystal could not be excluded as the potential major contributor.

State's witnesses violated his constitutional right to effective assistance of counsel. To succeed on an IAC claim, defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 80 L. Ed. 2d 674, 693, 698 (1984); *State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) (adopting the *Strickland* standard for IAC claims under N.C. Const. art. 1, §§ 19, 23). "[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." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 249.

For the reasons discussed above, we find no reasonable probability that defendant would have obtained a more favorable outcome at trial had his counsel objected on each occasion when a witness used the term "victim" to refer to Crystal.[5] *See Jackson*, 202 N.C. App. at 569, 688 S.E.2d at 769 (citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). Accordingly, defendant's alternative argument is overruled.

III. Jury instructions

[3] Defendant also argues that the trial court committed error, or plain error, in repeatedly referring to Crystal as the "victim" during its charge to the jury. He acknowledges having failed to object to the trial court's jury instructions. Still, he contends that the court's characterization of Crystal as a victim constitutes an impermissible "expression of a judicial opinion" in violation of N.C.G.S. §§ 15A-1222, -1232 (2019). Where the trial court violates a statutory mandate, defendant contends, no objection is required to preserve the issue for appellate review. *See State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985).

Our Supreme Court has consistently rejected a defendants' attempts to couch the trial court's use of the term "victim" in its jury instructions as an improper expression of judicial opinion in violation of N.C.G.S. §§ 15A-1222 and 15A-1232. *See State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413 (1997); *State v. McCarroll*, 336 N.C. 559, 565–66, 445 S.E.2d 18, 22 (1994); *State v. Hill*, 331 N.C. 387, 411, 417 S.E.2d 765, 777 (1992) ("The use of the word 'victim' in the jury charge was not

5. As defendant notes in his brief, counsel raised two such objections, both of which were sustained.

improper. By using the term 'victim,' the trial court was not intimating that the defendant committed the crime." (citations omitted)). We are not persuaded by defendant's attempt to do so here.

Likewise, our Supreme Court has rejected the argument that the trial court's use of the term "victim" in its charge to the jury amounts to plain error under N.C.R. App. P. 10(a)(4). *See McCarroll*, 336 N.C. at 565–66, 445 S.E.2d at 22 ("We cannot hold that the reference to the prosecuting witness as the victim was an error so basic and lacking in its elements that justice could not have been done."). Indeed, in *State v. Walston*, 367 N.C. 721, 766 S.E.2d 312 (2014), the Court found no error in the trial court's use of the term "victim" even though the defendant "objected to the trial court's use of the pattern jury instructions and requested that the court substitute the phrase 'alleged victim' for 'victim' when giving the jury charge."[6] *Id.* at 728, 732, 766 S.E.2d at 317, 319; *see also Jackson*, 202 N.C. App. at 569, 688 S.E.2d at 769 ("The trial court tracked the language of the pattern jury instruction for statutory rape nearly word-for-word, and the instruction uses the term 'victim' ten times. . . . The trial court did not err, let alone commit plain error." (citations omitted)).

Here, defendant failed to raise a timely objection to the jury charge, limiting our review to plain error. As discussed at the charge conference, the trial court adhered to the language of the pattern jury instructions for each of the charged offenses involving Crystal.[7] *See* N.C.P.I.—Crim 201.25 (Mar. 2005) (kidnapping), 207.10 (Jan. 2002) (rape), 207.40 (May 2001) (sexual offense), 208.50 (Mar. 2002) (assault with a deadly weapon), 208.70 (June 2011) (assault on a female), 208.85 (Apr. 2002) (assault by pointing gun), 226.10A (June 2006) (crime against nature), 235.18 (Feb. 2000) (communicating threats). The court also instructed the jury that defendant was "presumed to be innocent" and that it was the State's burden of proving his guilt beyond a reasonable doubt. It reminded jurors that they were "the sole judges of the credibility of each witness and the weight to be given to testimony of each witness." Finally, the court admonished the jury "not [to] infer from anything I have done

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6. The *Walston* Court did suggest that "when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase 'alleged victim' or 'prosecuting witness' instead of 'victim.' " *Walston*, 367 N.C. at 732, 766 S.E.2d at 319. Here, however, Crystal had physical injuries indicating she was the victim of at least some type of assault.

7. The trial court substituted the term "alleged victim" for the pattern instruction's term "victim" when instructing the jury on first degree sexual offense and assault on a female.

or said that the evidence is to be believed or disbelieved, that a fact has been proved or what your findings ought to be." Accordingly, we find no plain error in the court's jury charge. *See Walston*, 367 N.C. at 732, 766 S.E.2d at 319; *see also Jackson*, 202 N.C. App. at 569, 688 S.E.2d at 769.

To the extent defendant separately asserts a violation of his right to due process or other constitutional injury arising from the jury charge, we conclude his claim is not properly before this Court. "It is well settled that constitutional issues which are not raised and ruled upon in the trial court will not be reviewed for the first time on appeal." *State v. McClain*, 169 N.C. App. 657, 666, 610 S.E.2d 783, 789 (2005).

Conclusion

The trial court did not commit plain error in admitting witness testimony or charging the jury. With regard to defendant's ineffective assistance of counsel claim, we find no error.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges INMAN and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
DEONTRAE YOUNG-KIRKPATRICK, DEFENDANT

No. COA19-1138

Filed 7 July 2020

1. Robbery—common law robbery—use of violence—taking from the presence—continuous transaction—sufficiency of the evidence

In a trial for common law robbery, the evidence was sufficient to show that the assault and taking were part of a continuous transaction—and therefore sufficient to show a use of force and a taking from the person of the victim—where defendant's use of force caused the victim to flee and leave her property for defendant to take. Within a 20-minute period, defendant argued with the victim as she sat in her car, used multiple items to break the car window, choked the victim and pulled her from the car, followed her after she tried to flee, and then took items from her car.

2. Evidence—evidence of other crimes, wrongs, or acts—prejudice analysis—overwhelming evidence of guilt

In a common law robbery and habitual misdemeanor assault trial, defendant could not demonstrate prejudicial error where the trial court admitted evidence that he provided heroin to the victim. Even if the admission of the evidence was error, there was no reasonable possibility that a different result would have been reached at trial had the evidence not been admitted because the evidence of defendant's guilt was overwhelming.

3. Attorney Fees—criminal case—court-appointed attorney—civil judgment—notice and opportunity to be heard

After defendant was convicted of common law robbery and habitual misdemeanor assault, the trial court erred by entering a civil judgment against defendant for attorney fees where the trial court never directly asked defendant whether he wished to be heard on the issue and there was no other evidence that defendant was afforded notice and an opportunity to be heard regarding the fees charged.

Judge BERGER concurring by separate opinion.

Appeal by Defendant from judgments entered 2 April 2019 by Judge Joseph N. Crosswhite in Davidson County Superior Court. Heard in the Court of Appeals 10 June 2020.

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

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Andrew J. DeSimone, for Defendant.

BROOK, Judge.

Deontrae Young-Kirkpatrick ("Defendant") appeals from judgment entered upon jury verdicts for common law robbery and habitual misdemeanor assault and judgment entered upon plea of guilty for attaining the status of habitual felon. On appeal, Defendant argues that the trial court erred in denying his motion to dismiss the common law robbery charge. Defendant further argues that the trial court erred in admitting Rule 404(b) evidence and that the admission of such evidence was prejudicial. Finally, Defendant argues that the trial court erred in entering a civil judgment for attorney's fees against him.

For the following reasons, we hold that Defendant has failed to demonstrate error in regard to the first two issues; however, we agree that the trial court erred in ordering Defendant to pay attorney's fees.

I. Factual and Procedural Background

After spending the evening at her friend's house on 22 April 2018, Paige Lineberry pulled into her driveway in her new car. Though Defendant, her then-boyfriend, had purchased the car for her two days prior, Ms. Lineberry testified that her father had paid him back either that same day or the next with her tax return money.

Defendant was waiting for Ms. Lineberry in his car parked in her driveway. Ms. Lineberry testified at trial that she got out of her car and into Defendant's car, and the two started talking. After about 30 minutes, they got into an argument when Defendant called Ms. Lineberry "an ass kisser" and "said [her] parents control [her]." Ms. Lineberry testified that she got back into her car, and Defendant moved his car directly behind hers. She backed her car into Defendant's car but did not cause any damage to his car; however, Defendant "jumped out of his car[,]" approached Ms. Lineberry's driver's side window, and began yelling at her. She testified that Defendant told her she was going to have to "fix his mama's car."

Defendant told Ms. Lineberry to get out of the car, but she refused. Ms. Lineberry testified that Defendant proceeded to hit her windows with his fists, then with a tire iron, and finally with a piece of slate that was sitting on the driveway. While Defendant was trying to break into her car, Ms. Lineberry testified that she honked her horn and called her brother, who was inside the house, to try and get his attention. Jade Lineberry, Ms. Lineberry's brother, testified that he answered the phone and then called 911. Defendant eventually broke through one of the car's windows and grabbed Ms. Lineberry by the throat. Ms. Lineberry testified that she felt like she was going to die while he was squeezing her throat.

As Defendant was grabbing her throat, he opened her car door with his other hand and pulled Ms. Lineberry out of the car. She was able to get away from Defendant and ran to her front porch where he cornered her for about 10 minutes. Mr. Lineberry testified that at this point he opened his front door and saw Defendant blocking Ms. Lineberry's path and yelling at her. He put his hand on Defendant's shoulder to "calm the situation[,]" and Ms. Lineberry ran into the house. Defendant "tried to force his way" into the house "for a brief minute[,]" but then followed Mr. Lineberry away from the porch and down to the driveway.

Mr. Lineberry testified that Defendant repeatedly told him that Ms. Lineberry "was the problem and he needed his money." Defendant then went to Ms. Lineberry's car and took out her keys and car title, saying "something to the effect of, 'This is mine,' or 'She don't deserve this. This is mine.' " Officer Adam Gleave, who responded to the scene about 20 minutes after Mr. Lineberry called the police, testified that he found the keys and car title either on top of Defendant's car or in his driver's seat. Officer Gleave also testified that Defendant told him he had taken the keys and the title.

Ms. Lineberry also testified that Defendant provided her with heroin during the course of their relationship.

After a trial running from 1 to 2 April 2019 before Judge Crosswhite, the jury returned verdicts of guilty for habitual misdemeanor assault and common law robbery. Defendant then pleaded guilty to attaining habitual felon status. The trial court consolidated the convictions and sentenced Defendant to 110 to 144 months' active imprisonment. In an undated order, the trial court also entered a civil judgment for attorney's fees against Defendant in the amount of $5,640.50.

Defendant gave oral notice of appeal following entry of the criminal judgment.

II. Analysis

On appeal, Defendant argues that the trial court erred in denying Defendant's motion to dismiss the robbery charge because there was insufficient evidence that Defendant used violence or intimidation to take the property or that he took property from Ms. Lineberry's presence. Defendant further argues that the trial court erred in admitting evidence that Defendant provided heroin to Ms. Lineberry and that the error was prejudicial. Finally, Defendant argues that the trial court erred by ordering Defendant to pay attorney's fees without notice and opportunity to be heard.

We consider each argument in turn.

A. Motion to Dismiss for Insufficiency of the Evidence

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of common law robbery because the State failed to prove that he (1) used force or intimidation to take property and (2) took property from Ms. Lineberry's person or presence. For the following reasons, we hold that the trial court did not err.

i. Standard of Review

We review the denial of a motion to dismiss de novo. *State v. Robledo*, 193 N.C. App. 521, 525, 668 S.E.2d 91, 94 (2008). "Under a de novo review, th[is C]ourt 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).

ii. Merits

> When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.

State v. Earnhardt, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652 (internal marks and citation omitted). "In deciding a motion to dismiss, the evidence should be viewed in the light most favorable to the State[,]" *State v. Mucci*, 163 N.C. App. 615, 618, 594 S.E.2d 411, 414 (2004), "giving the State the benefit of every reasonable inference to be drawn therefrom[,]" *State v. Bates*, 70 N.C. App. 477, 479, 319 S.E.2d 683, 684 (1984).

Common law robbery under N.C. Gen. Stat. § 14-87.1 (2019) is the "felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Porter*, 198 N.C. App. 183, 186, 679 S.E.2d 167, 169 (2009) (citation omitted). In assessing whether the State has established the requisite connection between the taking and the force employed, our Supreme Court has held that "it makes no difference whether the intent to steal was formulated before the use of force or after it, so long as the theft and the use or threat of force can be perceived by the jury as constituting a single transaction." *State v. Fields*, 315 N.C. 191, 203, 337 S.E.2d 518, 525 (1985); *see also State v. Rasor*, 319 N.C. 577, 587, 356 S.E.2d 328, 335 (1987) (holding whether defendant formulated intent to take wallet before or after use of force immaterial to armed robbery charge so long as taking and force were a part of a continuous transaction). Furthermore, "[t]he exact time relationship . . . between the violence and the actual taking is unimportant as long as there is one continuing transaction." *State v. Bellamy*, 159 N.C. App. 143, 149, 582 S.E.2d 663, 668 (2003) (internal marks and citation omitted); *see also Porter*, 198

N.C. App. at 187-88, 679 S.E.2d at 170 (applying continuous transaction doctrine to common law robbery charge).

Accordingly, even when there is some attenuation between the use of force and the taking, the action can still amount to a continuous transaction. In *State v. Reaves*, this Court found no merit in the defendant's argument that his use of force and subsequent taking of a patrolman's revolver and patrol car were not joined in time because he only formed the intent to take them after he had scuffled with the officer and then tried to escape in his own automobile and found it locked. 9 N.C. App. 315, 317, 176 S.E.2d 13, 15 (1970). Relatedly, in *Bellamy*, the defendant stole videos from a video store and fled with a store employee in pursuit. 159 N.C. App. at 145, 582 S.E.2d at 665-66. Given that "[t]he chase ended only about twenty feet from the video store[,] at no time did the chase cease or Edison lose sight of defendant[,] and defendant did not make good his escape until after threatening Edison with the knife[,]" we held that "the taking and threatened use of force was so joined by time and circumstances so as to constitute a single transaction." *Id.* at 149, 582 S.E.2d at 668; *but see State v. Frogge*, 345 N.C. 614, 618, 481 S.E.2d 278, 280 (1997) (holding "a reasonable person could have concluded that there was no continuous transaction" in felony murder case where defendant perpetrated violent act, left the premises, and returned to take property hours later).

Building on the above case law,

> if the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in one continuous course of conduct, the taking is from the "presence" of the victim.

State v. Tuck, 173 N.C. App. 61, 67, 618 S.E.2d 265, 270 (2005) (internal marks and citation omitted). In *Tuck*, a case concerning robbery with a dangerous weapon that is nonetheless instructive, this Court held that the "presence" element was satisfied where the shopkeeper fled her store "after [the] defendant approached her with a handgun[,]" and then the defendant robbed the store. *Id.* at 68, 618 S.E.2d at 270-71; *see also State v. Herring*, 74 N.C. App. 269, 271, 328 S.E.2d 23, 25 (1985) (holding taking was "from the 'presence' of the victim" where defendant fired a gun into a car to prompt the victim to flee and then stole items from the car).

Viewing the evidence in the light most favorable to the State, Defendant's assault on Ms. Lineberry and his taking of her property

constituted a single transaction. There was substantial evidence that the assault, intimidation, and taking all related to the car Defendant purchased for Ms. Lineberry. More particularly, the evidence permitted the reasonable inference that the clash over the car informed Defendant's argument with and assault on Ms. Lineberry and, in turn, her flight into her parents' house. This argument was front and center in Defendant's conversation with Mr. Lineberry and motivated Defendant's removal of Ms. Lineberry's keys, car title, and wallet from the car. And all of the above occurred in an uninterrupted, 20-minute window. Finally, Defendant remained physically present in the same general location the entire time, moving only between the driveway and the front porch.

Relatedly, these facts analogize to cases where our Court has found a taking from the victim's presence. Here, as in *Tuck* and *Herring*, it was Defendant's use of force that caused Ms. Lineberry to flee, leaving her property behind for Defendant to take. Ms. Lineberry was in her car with the keys in the ignition and the engine on when Defendant parked behind her, and then began breaking into her car using a rock, his fist, and a tire iron. After cutting off her escape route, he dragged her from the car, forcing her to abandon her keys in the ignition as well as her wallet and the vehicle title on the passenger's seat. Had he not pulled her from the car and assaulted her, causing her to flee for the house, the taking of her keys, wallet, and title would not have been possible.

Defendant relies on *State v. Barnes*, 345 N.C. 146, 149, 478 S.E.2d 188, 190 (1996), to assert that when property is some distance away from the victim the "presence" requirement is not met; however, *Barnes* is legally and factually distinguishable. First, *Barnes* concerned the crime of larceny, not robbery, and larceny "is afforded special consideration [ ] to protect the person or immediate presence of the victim from invasion." 345 N.C. at 150, 478 S.E.2d at 191 (quoting 50 Am. Jur. 2d *Larceny* § 54 (1995)). In contrast, as discussed above, the robbery case law focuses more broadly on the connection between the violence or intimidation and the taking as opposed to more narrowly on whether a physical invasion occurred. Second, in *Barnes* the victim left willingly and then returned when she suspected theft. *Id.* Here, Ms. Lineberry was forced to flee, and that flight facilitated the robbery.

Viewing the evidence in the light most favorable to it, the State presented substantial evidence that Defendant's assault and taking were part of a continuous transaction. We therefore hold that the trial court did not err in denying Defendant's motion to dismiss the charge of common law robbery.

B. 404(b) Evidence

[2] Defendant next argues that the trial court erred in admitting evidence that Defendant supplied Ms. Lineberry with heroin. We hold that any error, if present, was not prejudicial.

i. Standard of Review

In reviewing the admission of evidence of other crimes, wrongs, or acts of a criminal defendant, we engage in a "three-pronged analysis." *State v. Adams*, 220 N.C. App. 319, 323, 727 S.E.2d 577, 580-81 (2012). "[W]e first determine whether the evidence was offered for a proper purpose under Rule 404(b), then determine whether the evidence is relevant under Rule 401, and finally determine whether the trial court abused its discretion in balancing the probative value of the evidence under Rule 403." *Id.* (internal marks and citation omitted).

"The standard of review applied to the first two prongs of our analysis is de novo[.]" *Id.* at 323, 727 S.E.2d at 581. "Under a de novo review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (citation and internal marks omitted). "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. Ward*, 354 N.C. 231, 264, 555 S.E.2d 251, 272 (2001) (citation omitted).

ii. Merits

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (2019). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* § 8C-1, Rule 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" *Id.* § 8C-1, Rule 403. However,

> [e]ven where evidence is erroneously admitted because it is irrelevant or prejudicial, the defendant has the burden

> of showing that the error was not harmless, that "there [was] a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]"

State v. Hyman, 153 N.C. App. 396, 402, 570 S.E.2d 745, 749 (2002) (quoting N.C. Gen. Stat. § 15A-1443(a) (2002)).

Here, the State presented evidence that Defendant provided Ms. Lineberry with heroin during the course of their relationship. Defendant argues that this evidence was inadmissible because the drug activity was unrelated to the charges he faced. Defendant further argues that the admission of this evidence was particularly prejudicial because Defendant is an African-American male, and this evidence "heightened the risk of implicit racial bias against him."

Assuming without deciding that the trial court erred in admitting this testimony, we cannot say there is a reasonable possibility that, had the trial court not admitted this evidence, a different result would have been reached at trial. *See* N.C. Gen. Stat. § 15A-1443(a) (2019). The unobjected-to evidence showed that Defendant forced Ms. Lineberry out of her car after punching through her car window. The evidence further showed that he grabbed her by the throat, and, after Ms. Lineberry ran into her house, Defendant took her keys and car title and moved them to his car. Finally, Officer Gleave testified that he found Ms. Lineberry's property on or in Defendant's car and that Defendant admitted to taking these items.

Given the overwhelming evidence of Defendant's guilt, we conclude Defendant has not demonstrated that any alleged error prejudiced him.

C. Attorney's Fees

Finally, Defendant argues that the trial court erred in ordering Defendant to pay attorney's fees absent notice and opportunity to be heard. We agree.

i. Petition for Writ of Certiorari

Before we reach the merits of Defendant's appeal of the trial court's imposition of a civil judgment for attorney's fees, we first turn to Defendant's petition for writ of certiorari.

Defendant entered an oral notice of appeal following entry of the criminal judgment on 2 April 2019 but did not file a timely written notice of appeal of the civil judgment for attorney's fees as is required by North Carolina Rule of Appellate Procedure 3(a). 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 (2005) (citation omitted). A defendant may file a petition for a writ of certiorari to appeal a civil judgment "when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1). In accordance with Rule 21, this Court has discretion to grant the petition and review the judgment. *Id.*

As we have done in similar cases involving appeals from civil judgments ordering indigent defendants to pay attorney's fees, *see*, *e.g.*, *State v. Mangum*, ___ N.C. App. ___, ___, 840 S.E.2d 862, 868 (2020); *State v. Boykin*, ___ N.C. App. ___, 840 S.E.2d 538, 2020 N.C. App. LEXIS 286, at *16 (2020) (unpublished), we grant Defendant's petition for writ of certiorari and reach the merits of Defendant's argument.

ii. Standard of Review

Whether the trial court provided a defendant adequate "notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney is a question of law," which this Court reviews de novo. *State v. Patterson*, ___ N.C. App. ___, ___, 839 S.E.2d 68, 73 (2020) (internal marks and citation omitted). "Under a de novo review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Williams*, 362 N.C. at 632-33, 669 S.E.2d at 294 (citation and marks omitted).

iii. Merits

[3] Pursuant to N.C. Gen. Stat. § 7A-455 (2019), a trial court may order an indigent defendant who is convicted to pay for the amount of fees charged by the defendant's court-appointed attorney. However, this Court has held that before entering a judgment for attorney's fees against an indigent defendant, the trial court must afford the defendant notice and opportunity to be heard regarding the fees charged. *State v. Friend*, 257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018). In evaluating whether the trial court provided adequate notice and an opportunity to be heard, this Court assesses whether the trial court asked

> 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. This standard was established to provide "further guidance on what trial courts should do to ensure that this Court can engage in meaningful appellate review when defendants raise this issue." *Id.* Thus, when there is no evidence in the record that the defendant was personally notified and given the opportunity to be heard "regarding the appointed attorney's total hours or the total amount of fees imposed," then the "imposition of attorney's fees must be vacated, even when the transcript reveals that attorney's fees were discussed following [the] defendant's conviction." *State v. Harris*, 255 N.C. App. 653, 664, 805 S.E.2d 729, 737 (2017) (internal marks and citation omitted).

Here, there is no indication in the record that Defendant was heard or that he understood he had a right to be heard on the issue of attorney's fees. The trial court did not engage in any colloquy with Defendant regarding attorney's fees. Given that the trial court never directly asked Defendant whether he wished to be heard on the issue and there is no other evidence that Defendant was afforded notice and opportunity to be heard, we must vacate the civil judgment for attorney's fees and remand for further proceedings on this issue.

III. Conclusion

For the reasons stated above, we hold that Defendant received a trial free from error. However, we vacate the trial court's award of attorney's fees.

NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur with the majority opinion.

However, on the issue of attorney's fees, "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." *State v. Mangum*, ___ N.C. App. ___, ___, 840 S.E.2d 862, 871 (2020) (*Berger, J., concurring*).

STITZ v. SMITH

[272 N.C. App. 415 (2020)]

WENDY PIPER STITZ, GLENN THOMAS PIPER, AND
NADINE PIPER TIMPANARO, PLAINTIFFS
v.
LAUREN PIPER SMITH AND HUSBAND COLIN BRYANT SMITH, DEFENDANTS

No. COA19-739

Filed 7 July 2020

1. Jurisdiction—conversion claim—assets of deceased parent—not subject to caveat proceeding—dismissal improper

The trial court improperly dismissed a conversion claim, brought by several children of a decedent against their sister, for lack of subject matter jurisdiction (Civil Procedure Rule 12(b)(1)) because the assets under contention—a deposit account with proceeds from the sale of savings bonds and an annuity—were not part of decedent's estate. Therefore, plaintiffs' caveat in their mother's estate proceeding did not deprive the trial court of jurisdiction to resolve the rightful ownership of the disputed assets.

2. Conversion—proceeds from sale of savings bonds—sufficiency of allegations—statute of limitations

Plaintiffs (several children of a deceased mother) sufficiently alleged a claim for conversion against their sibling and her husband by asserting that defendants wrongfully refused to turn over the proceeds from the sale of savings bonds, which were co-owned by plaintiffs and their mother and which defendant-sibling had told their mother she would distribute to plaintiffs. The claim was not barred by the three-year statute of limitations because the relevant time period did not begin to run until defendants refused to turn over the proceeds upon plaintiffs' request, which constituted a wrongful deprivation of the assets to the owners.

3. Unjust Enrichment—proceeds from sale of savings bonds—belonging to siblings—elements of claim

Plaintiffs (several children of a deceased mother) sufficiently alleged a claim for unjust enrichment against their sibling and her husband regarding the proceeds from the sale of savings bonds co-owned by plaintiffs and their mother. After the sale, the proceeds were deposited in an account owned by defendant-sibling and her mother with right of survivorship, so that upon the mother's death, the proceeds became defendant-sibling's property by operation of law. Plaintiffs alleged that defendants received a benefit and therefore held the proceeds in a constructive trust, despite the absence

of a fiduciary relationship. The claim was not barred by the statute of limitations because the relevant time period did not begin to run until defendants exercised ownership over the proceeds by refusing to turn them over.

4. Insurance—undue influence—change of beneficiary to life insurance—sufficiency of allegations—necessary party

Plaintiffs (several children of a deceased mother) sufficiently alleged a claim of undue influence against their sibling for convincing their mother to convert her life insurance policy, which listed plaintiffs as beneficiaries, to an annuity naming defendants (the sibling and her husband) as beneficiaries, since a change to beneficiaries can be rescinded. On remand, the trial court was directed to add the mother's estate as a party to the action.

5. Conversion—unjust enrichment—exertion of influence on mother to change annuity beneficiaries—claim for recovery of annuity proceeds

Plaintiffs (several children of a deceased mother) sufficiently alleged a claim to recover an appropriate share of the proceeds paid out to defendant-sibling and her husband from the mother's annuity, since defendants were alleged to have exerted undue influence on the mother to convert her life insurance policy, which listed plaintiffs as beneficiaries, to an annuity naming defendants as beneficiaries, thereby causing plaintiffs to lose an economic benefit.

6. Fraud—constructive fraud—breach of fiduciary duty—dispute over mother's assets—dismissal proper

In a dispute between siblings about the ownership of several of their deceased mother's assets, the trial court properly dismissed plaintiffs' claims for breach of fiduciary duty and constructive fraud where they failed to establish that defendants (their sibling and her husband) owed them a fiduciary duty. The claims could not arise from any alleged failure of defendant-sibling's duties as executor of the mother's estate because plaintiffs' caveat proceeding contesting the mother's will was still pending.

Appeal by Plaintiffs from order entered 25 February 2019 by Judge Phyllis M. Gorham in Onslow County Superior Court. Heard in the Court of Appeals 4 March 2020.

Harvell and Collins, P.A., by Wesley A. Collins and Samuel K. Morris-Bloom, for Plaintiffs.

Mewborn & DeSelms, Attorneys at Law, by Brett J. DeSelms and Sarah N. Sherrington, for Defendants.

DILLON, Judge.

Plaintiffs Wendy Piper Stitz, Glenn Thomas Piper, and Nadine Piper Timpanaro (collectively "Plaintiffs") are siblings. They brought this action against their sister, Defendant Lauren Piper Smith, and her husband Defendant Colin Bryant Smith (collectively "Defendants"). Plaintiffs claim that Defendants wrongfully converted certain assets of their mother ("Mother"), now deceased, during Mother's lifetime while Defendants lived with Mother.

Plaintiffs appeal from an order entered by the trial court dismissing their claims for lack of subject matter jurisdiction (based on the pendency of a separate caveat in Mother's estate proceeding) and for failure to state a claim.

I. Background

This matter is a dispute over two assets, which, as alleged by Plaintiffs, are as follows: (1) the proceeds from savings bonds owned by Mother and Plaintiffs that were liquidated by Mother during her lifetime and placed into an account jointly owned by Mother and Defendant Lauren and (2) an annuity, in which Defendant Lauren was the sole beneficiary, which was acquired by Mother converting a certain life insurance policy she owned in which all of her children had been named beneficiaries.

The allegations of the complaint state essentially as follows:

During her lifetime, Mother purchased a number of Series EE Savings Bonds, where each bond was owned by Mother and one of her children, such that each of her children co-owned some bonds with her. Also, Mother purchased a life insurance policy, naming her children as beneficiaries.

In 1989, Defendants moved in with Mother and remained there until Mother's death twenty-seven (27) years later.

In 2008, Mother executed a power of attorney naming her daughter, Defendant Lauren, as her attorney-in-fact.

At some point, Defendants learned of the savings bonds. In late 2012 and early 2013, Defendants transported Mother to the bank to cash in the savings bonds Mother owned with each Plaintiff. The proceeds were placed into an account jointly owned by Mother and Defendant Lauren.

Mother directed Defendant Lauren to send the proceeds from the bond sales to each Plaintiff.

In late 2013, Mother executed her Last Will and Testament, naming Defendants as the sole beneficiaries. She expressly left nothing to any of the Plaintiffs, stating that this was due "not for the lack of affection, but because I have made gifts to them previously, including savings bonds which I have bought in their names."

Shortly after signing her will, Mother rolled her life insurance policy, in which all her children were named beneficiaries, into an annuity, naming Defendants as the sole beneficiaries.

In 2016, Mother died. In 2017, Defendant Lauren qualified as the Executrix of Mother's estate.

Plaintiffs only learned of the savings bond proceeds and the annuity after their Mother's death. They requested that Defendants turn over the proceeds to them, but Defendants refused.

In 2018, Plaintiffs filed a caveat to their Mother's will. Also, in 2018, they filed this separate civil action concerning the savings bond proceeds and the annuity.

Defendants moved to dismiss Plaintiffs' complaint in this civil action. The trial court granted Defendants' motion based on Rule 12(b)(1) and Rule 12(b)(6).

Plaintiffs appealed.

II. Analysis

A. Rule 12(b)(1)

[1] The trial court dismissed Plaintiffs' claim pursuant to Rule 12(b)(1), presumably based on the pendency of the caveat in Mother's estate proceeding.

We conclude that the trial court erred in dismissing Plaintiffs' claims based on Rule 12(b)(1), as the subject-matter of the claims in this action are not part of Mother's estate. Specifically, the deposit account where the proceeds from the savings bond sales were placed was owned by Mother and Defendant Lauren, with a right of survivorship, and thus was not part of Mother's estate to be administered pursuant to Chapter 28A. The annuity owned by Mother names Defendants as beneficiaries, and likewise is not part of Mother's estate to be administered pursuant to Chapter 28A. Indeed, our Court has recognized that "[w]hile the[se] claims arise from administration of an estate, their resolution is not part

of the administration, settlement and distribution of estates of decedents so as to make jurisdiction properly exercisable initially by the clerk." *Ingle v. Allen*, 53 N.C. App. 627, 629, 281 S.E.2d 406, 407 (1981) (internal quotation marks omitted) (citations omitted). As such, these assets are not part of the caveat proceeding. *See, e.g.*, *Cornwell v. Huffman*, 258 N.C. 363, 369, 128 S.E.2d 798, 802 (1963) (life insurance policies with named beneficiaries are not part of estate administration proceeding). The superior court has subject-matter jurisdiction to resolve the issues concerning the rightful owner of these assets in this present action.

B. Rule 12(b)(6)

In this action, Plaintiffs seek an order directing Defendants to turn over the proceeds from the savings bonds and their portion of the proceeds from the annuity. Plaintiffs have alleged several legal theories/causes of action to support their prayer for relief regarding ownership of these assets. We address each in turn.

1. Conversion of the Savings Bonds Proceeds

[2] Plaintiffs allege that Defendants have converted the proceeds from the bonds for their own use. "The tort of conversion is well defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956).

Here, Plaintiffs have essentially alleged as a theory that Mother cashed in the bonds she owned with Plaintiffs; that Mother relinquished any claim to the proceeds from the sale of said bonds in favor of Plaintiffs; that Defendant Lauren, as her attorney-in-fact, told Mother that she would distribute the proceeds to Plaintiffs; but that Defendants have refused to do so, claiming ownership of the proceeds. We conclude that Plaintiffs have sufficiently alleged a claim for conversion.

Defendants, though, claim that the conversion claim, as alleged, necessarily fails based on the statute of limitations. Indeed, the party pleading conversion must bring the claim within three years from the time the property was converted. *See County Bd. of Educ. of Granville County v. State Bd. of Educ.*, 107 N.C. 366, 12 S.E. 452 (1890) (stating that the statute of limitations for a claim of conversion is three years). Defendants point out that Plaintiffs have alleged that the bonds were sold in 2013 but did not bring this action for conversion until 2018. We disagree. We conclude that, as alleged, the statute of limitations did not begin to run until Defendants refused to turn over the proceeds when

the rightful owners, i.e. Plaintiffs, asked for the money in 2017. As our Supreme Court, adopting the reasoning of a dissent from our Court, has held, "[t]he essence of conversion is not the acquisition of property by the wrongdoer, *but a wrongful deprivation of it to the owner*." *Horry v. Woodbury*, 189 N.C. App. 669, 678, 659 S.E.2d 88, 93 (2008) (McCullough, J., dissenting) (emphasis added), *rev'd*, 363 N.C. 7, 673 S.E.2d 127 (2009).

2. Unjust Enrichment/Constructive Trust-Savings Bond Proceeds

[3] As an alternate theory, Plaintiffs claim that Defendants have been unjustly enriched by the fact that the account became Defendant Lauren's property by operation of law when Mother died, as the proceeds from the bond sales were held in an account which she owned with Mother with right of survivorship. As such, Defendants hold the proceeds in a constructive trust for the benefit of Plaintiffs.

To bring a claim for unjust enrichment, "a party must have conferred a benefit on the other party. The benefit must not have been conferred officiously [and] . . . [t]he benefit must not be gratuitous and it must be measurable." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citation omitted).

In certain instances, our Court has found a constructive trust to have been formed in situations such as this. Generally,

> [a] constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970) (citations omitted). While it has been held that a fiduciary relationship is generally "the basis for constructive trust claims," it is not a requirement, and thus, can be formed without such relationship between the parties. *See Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 530, 723 S.E.2d 744, 752 (2012).

We conclude that Plaintiffs have adequately pleaded a claim based on unjust enrichment/constructive trust. We reject Defendants' argument that this claim is barred by the statute of limitations, concluding that the action did not accrue until Defendants exercised ownership over the proceeds, which did not occur until at least after Mother's death in 2016. *See Christenbury Eye Center, P.A. v. Medflow, Inc.*, 370 N.C. 1, 7,

802 S.E.2d 888, 892 n. 4 (2017) (stating that the statute of limitations for an unjust enrichment claim is three (3) years according to N.C. Gen. Stat. § 1-52(1) (2018)).

3. Interference With Inheritance/Undue Influence – Annuity

[4] Plaintiffs essentially allege that they have a right to a share of the annuity proceeds that they would have received under the life insurance policy. Specifically, they allege that Defendant Lauren exerted undue influence to cause Mother to convert the policy to an annuity. In convincing Mother to convert her life insurance policy into an annuity naming Defendants as the sole beneficiaries, Plaintiffs are losing a potential economic advantage.

Based on our holding in *Matthews v. James*, 88 N.C. App. 32, 362 S.E.2d 594 (1987), we conclude that Plaintiffs have stated a claim for which relief can be granted. In *Matthews*, the decedent had purchased a life insurance policy during his lifetime, naming the plaintiff as a beneficiary. *Id.* at 35-37. After decedent's death, the plaintiff discovered that the beneficiary designation had been changed by decedent in favor of the defendant. *Id.* at 36-37. Our Court held that the plaintiff could bring a civil action to rescind the change of beneficiary where he claimed that the defendant procured the change by undue influence. *Id.* at 39, 362 S.E.2d at 599. We recognize in the present action that the conversion from a life insurance policy into an annuity cannot be rescinded; however, the beneficiary designation still can be.

We note, though, that in *Matthews*, the estate of the decedent was a named party to the action. We direct the trial court on remand to add Mother's estate as a party.

4. Conversion/Unjust Enrichment – Annuity

[5] For the reasoning stated above, we conclude that Plaintiffs have stated a claim for their share of any proceeds Defendants received from the annuity within three years of the filing of the complaint.

5. Breach of Fiduciary Duty and Constructive Fraud Claims

[6] Plaintiffs assert claims based on a breach of fiduciary duty and constructive fraud. We agree with the trial court that Plaintiffs have failed to allege facts establishing that Defendant Lauren owed a fiduciary duty *to Plaintiffs*. Rather, as Mother's power of attorney, Defendant Lauren owed a fiduciary duty *to Mother*. *See O'Neal v. O'Neal*, 254 N.C. App. 309, 312, 803 S.E.2d 184, 187 (2017) (The agency relationship that is created by a power of attorney "is between one who gives the power, the

principal, and one who exercises authority under the power of attorney, the agent [or attorney-in-fact]").

It may be that where an executor refuses to assert claims on behalf of the estate, beneficiaries may step in and assert those claims where the estate is also a named party. However, at this point, Plaintiffs have failed to show that they are beneficiaries under Mother's will. Rather, they have pleaded that Mother's will expressly disinherits them. Plaintiffs, therefore, lack standing, as Mother's will has not yet been set aside in the caveat proceeding.

Likewise, Plaintiffs' claims based on constructive fraud fail since Defendants owe no fiduciary duty to Plaintiffs. Indeed, our Court has held "[t]o survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citations omitted). However, as there was no relationship of trust or confidence between Plaintiffs and Defendant Lauren, this claim fails.

III. Conclusion

We reverse the trial court's order in part. We reverse the trial court's order dismissing Plaintiffs' claims based on Rule 12(b)(1). We reverse, in part, the trial court's order dismissing some of Plaintiffs' claims based on Rule 12(b)(6). Specifically, we hold that Plaintiffs have stated claims for conversion and unjust enrichment concerning the proceeds from the savings bonds and concerning any proceeds that Defendants have enjoyed from the annuity within three years of the filing of the complaint. We also hold that Plaintiffs have stated a claim for undue influence/rescission of the change of beneficiary concerning the annuity. On remand, Plaintiffs shall be allowed to pursue these claims, and Mother's estate will be added as a party. We affirm the order in all other respects.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges ZACHARY and HAMPSON concur.

STOWE v. STOWE

[272 N.C. App. 423 (2020)]

SHELLEY GOULAS STOWE, PLAINTIFF
v.
RAYMOND LEE STOWE, DEFENDANT

No. COA19-733

Filed 7 July 2020

1. Divorce—equitable distribution—business valuation—independent insurance agency

In an equitable distribution case, the trial court erred in calculating the net value of the parties' independent insurance agency (purchased during the marriage), where it based its valuation on incompetent evidence (namely, testimony from an expert who based his opinion on sources explaining how to value captive insurance agencies for a specific insurance company rather than how to value independent agencies); used an improper valuation methodology; failed to consider the requisite factors for valuing intangible goodwill, as set forth in controlling case law and by the Internal Revenue Service; and by double-counting the insurance agency's revenue from a particular year.

2. Appeal and Error—preservation of issue—sustained objection at trial—additional objection—unnecessary

In an equitable distribution case, where the trial court ruled against qualifying defendant's witness as an expert in business valuation after sustaining plaintiff's objection when defendant asked the witness about business valuation methodology, defendant did not have to make his own objection at trial in order to preserve for appellate review his challenge to the trial court's ruling on plaintiff's sustained objection.

3. Discovery—Rule 26—failure to disclose expert—sanctions—trial court's discretion

In an equitable distribution case in which the defendant violated Civil Procedure Rule 26(b)(4) by failing to disclose a purported expert before trial, the trial court was not required to exclude the expert's testimony where the law leaves the proper remedy for discovery violations to the court's discretion.

4. Evidence—expert witness—qualification—business valuation—equitable distribution case

In an equitable distribution case, where the net value of the parties' independent insurance agency (purchased during the marriage)

was at issue, the trial court did not abuse its discretion in refusing to admit defendant's witness—a certified public accountant—as an expert in business valuation and forensic accounting. Although the witness's accounting firm conducted business valuations as part of its practice, the witness himself had minimal business valuation experience, maintained minimal continuing education in business valuation methodologies, and had not prepared business valuations for insurance agencies more than twice in the thirty years before trial.

5. Divorce—equitable distribution—valuation of retirement accounts—consideration of hypothetical tax consequences

In an equitable distribution case, the trial court erred by reducing the value of the parties' 401(k) and IRA accounts by factoring in the hypothetical tax consequences of withdrawing the funds from those accounts, where the sale or liquidation of the retirement accounts was not "imminent and inevitable."

6. Divorce—equitable distribution—payments on note payable to parties' business—mutual agreement of parties

In an equitable distribution case, where the parties owned an independent insurance agency during the marriage, the trial court did not err by distributing payments to plaintiff on a note payable to the agency without requiring the agency to be joined as a party to the action. The parties had previously entered a memorandum of judgment addressing the note payable, in which they agreed that the underlying loan was owed to the marriage and under which defendant accepted the first fifty percent of the loan repayment individually while agreeing that the remaining balance would be paid to plaintiff.

Appeal by defendant from judgment and order entered 29 January 2019 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 15 April 2020.

Emily Sutton Dezio for plaintiff-appellee.

Fox Rothschild LLP, by Michelle D. Connell, for defendant-appellant.

TYSON, Judge.

Raymond Lee Stowe ("Defendant") appeals from an equitable distribution judgment and order entered 29 January 2019. We affirm in part, reverse in part, and remand.

I. Background

Shelley Goulas Stowe ("Plaintiff") and Defendant were married on 5 October 1996 and separated on 11 September 2017. Two minor children were born of the marriage. The trial court entered a consent order for child custody and child support on 22 June 2018. The consent order for child custody and child support is not a part of this appeal.

Defendant owned an Allstate Corporation captive insurance agency, which sold only Allstate insurance products. Both Plaintiff and Defendant felt that owning an independent insurance agency, rather than a captive agency, would better fit the family's needs. They purchased Madison Insurance Group, Inc. ("Madison"), an independent insurance agency, during the marriage. Madison is a North Carolina sub-S corporation. Madison sells policies issued by approximately thirty different vendors, but Allstate is the primary vendor, accounting for nearly one-third of the policies written.

The parties' equitable distribution trial, centered primarily on the value of Madison, began on 29 November 2018. Plaintiff engaged F. Foster Shriner as an expert witness to express an opinion of value of Madison. Plaintiff presented two letters to Plaintiff's attorney from Shriner, one dated 25 July 2018 and one dated 28 November 2018. Shriner's 25 July 2018 letter valued Madison at $531,435, while his later 28 November 2018 letter valued Madison at $511,212.

Both letters provided a "conclusion of value" of Madison, but stated that the records he relied upon were "incomplete, at best." The 25 July 2018 letter contained two additional documents: Madison's Form 1120S, a U.S. Corporation Income Tax Return for an S Corporation, from 2016 and a balance sheet dated 11 September 2017.

The 25 July 2018 letter contained the following asset values: $25,987 in cash, $26,100 for a note receivable, and $532,958 for goodwill/intangibles against liabilities of $53,610 for a note payable. The $532,958 for goodwill/intangibles estimate was calculated by multiplying the Madison 2016 revenues of $217,534 by a value of 2.45. The total estimated value of Madison was $531,435.

The 2.45 multiplier Shriner used to calculate estimated value was contained in an article sent by Plaintiff and Plaintiff's father to Shriner, entitled "First Quarter 2018 Allstate Agency Value Index." The article was found on PPC Loan's website, a lending company for Allstate Insurance agencies, and was written by its president and Chief Executive Officer, Paul Clarke. The article included a chart detailing "Allstate Agency Price

to New/Renewal Commission Ratio (National Average)" for the fourth quarter of 2016, all of 2017, and the first quarter of 2018.

Shriner's 28 November 2018 letter reflected assets of: $24,790 in cash, $30,140 in a note receivable, and $532,958 in goodwill/intangibles against liabilities of $76,676 for a note payable. The total estimate of value was $511,212. The goodwill/intangibles were calculated using the same revenues and the 2.45 multiple as the 25 July 2018 letter. Nowhere in the letters or sheets is there a reference or certification the opinion was prepared according to Generally Accepted Accounting Principles ("GAAP") or disclaimer.

At the equitable distribution trial, Shriner was tendered as an expert witness in business valuation, forensic accounting, and certified public accounting. Shriner explained his methodology behind the income-based approach he used to calculate Madison's value, as well as his assigned 2.45 revenue multiplier. Shriner based his valuation on four factors: cash assets verified by Quickbooks software, a note receivable, a loan taken by Madison, and goodwill. Shriner had the 2017 tax returns, most of the bank statements, and a summary book, but not a balance sheet.

On cross-examination, Shriner testified he understood the difference between a captive Allstate agency and an independent agency. Shriner defended his 2.45 value multiplier from the "Allstate Agency Price to New/Renewal Commission Ratio (National Average)" chart, because "[i]t was a document that stated what the market rates were in terms of the revenue multiple."

Shriner further acknowledged the chart's valuation was based, in part, on an agency that sold as a part of a group merger, and the chart included only captive Allstate agency sales transactions. Shriner acknowledged Allstate captive agencies have a buy-back provision that an independent agency does not have, which would factor positively into the valuation.

Defendant's counsel provided Shriner with another article, also written by Paul Clarke and PPC Loan, entitled "Allstate Agencies - Why so Valuable?" The article states Allstate captive agencies are very unique, as compared to their peers in other service sector industries, because Allstate-only agencies have resources available to them that independent agencies do not have. The article provides a chart illustrating Allstate captive agencies having a superior multiple, in value, as compared to independent agencies. Clarke and PPC Loan valued Allstate captive agencies at 2.5 times the annual commissions and valued independent agencies at 1.5 times the annual commissions.

Defendant tendered Tom Franks, as an expert witness in certified public accounting, business valuation, and forensic accounting. Franks testified he had significant experience in the insurance business and had owned an independent insurance agency for ten years, from 1978 through 1988. The trial court admitted Franks as an expert witness only in certified public accounting. The court found he had "minimal business valuation experience, had maintained minimal continuing education in business valuation methodologies, and had not prepared more than two business valuations for insurance agencies."

The trial court entered an equitable distribution order valuing Madison by using Shriner's 28 November 2018 letter's valuation amount of $511,212, less a preliminary distribution to Plaintiff of $21,003.45, giving Madison a net value of $490,208.55. Tax consequences of a sale were not factored into the value of Madison.

The equitable distribution order also distributed IRA and 401(k) accounts. The trial court found a 10% penalty would accrue if the accounts were immediately withdrawn. The trial court also found there would be a taxable event creating tax consequences when the money was withdrawn, and reduced the value of the American Traditional IRA from $138,847.65 to 104,135.74, the Lumina Wealth IRA from $20,601 to $15,450.75, and the Principal 401(k) from $28,362 to $21,271.50 to account for those consequences. Defendant appeals.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 50-19.1 (2019).

III. Issues

Defendant argues the trial court erred by: (1) failing to reasonably approximate the value of Madison by basing the valuation on incompetent evidence; (2) refusing to qualify Franks as an expert witness in the field of business valuation; (3) calculating early withdrawal penalties for retirement accounts, but not calculating imbedded taxes for Madison; and, (4) distributing payments on a note payable to Madison to Plaintiff where Madison is not a party to this suit.

IV. Valuation of Madison

[1] Defendant asserts the trial court's findings did not reasonably approximate the value of Madison and made erroneous conclusions of valuation upon incompetent evidence.

A. Standard of Review

> [T]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.

Peltzer v. Peltzer, 222 N.C. App. 784, 786-87, 732 S.E.2d 357, 359-60 (2012) (citations, quotation marks, and brackets omitted).

"The task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest. If it does, the valuation will not be disturbed." *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (1985) (citation omitted).

The holding in *Poore* has been applied to closely-held corporations. *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) ("the trial court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied."(citation and quotation marks omitted)).

B. Analysis

The equitable distribution order states, in relevant parts:

> 33. The Court received testimony from the parties and expert witnesses regarding the business entity known as

Madison Insurance Group, Inc. Based upon the credible evidence received, the Court makes the following specific findings of fact regarding this asset:

a. The parties acquired the foregoing business during the course of the marriage and prior to the date of separation; at the time the parties acquired the business, they purchased the business using a multiplier of two times the gross revenue of the business in order to determine the value of the entity. The parties borrowed money from the marital residence in order to fund this purchase; that following the purchase of the business and until the date of separation, the business paid the mortgage associated with the residence, and the parties considered the debt secured by the residence and associated with the purchase of the business to be a business liability.

b. Madison Insurance Group, Inc. is an insurance agency with its primary operating location in Madison County, North Carolina. Since the purchase of the business and through the present date, the Husband has operated this business.

c. The Husband made an additional purchase of another agency in the Buncombe County, North Carolina, and folded this business into Madison Insurance Group, Inc. This location has been operated under the business name of Madison Insurance Group, Inc. since it was acquired by the parties and continues to operate at the present time.

d. The business maintains certain assets, including tangible personal property, intangible accounts, accounts receivable, renewable contracts, and liabilities including but not limited to loans and credit card debt.

e. The business is an independent agency and sells policies backed by approximately 30 different vendors. The primary vendor, accounting for approximately one third of the policies written, is Allstate insurance.

f. The Husband testified and the Court finds credible on this particular issue, that the parties purchased Madison Insurance Group, Inc. in order to have an

insurance agency operated by the parties which was not a captive Allstate agency. At the time the parties purchased Madison Insurance Group, Inc., the Husband owned a captive Allstate agency. It was the intention of the parties to acquire Madison Insurance Group, Inc. in order to generate greater revenue and to have access to different products and vendors.

g. The Husband testified as to his belief regarding the value of this business. The Husband testified that he believed the business value to be nominal, based upon his belief that the business entity has operated at a loss for years. The Court does not find this testimony to be competent nor does it find the testimony to be credible. Regarding the issue of competency, the Husband was not qualified as an expert in business valuations and did not provide any business valuation methodology appropriate for determining the fair market value of the business. Furthermore, regarding credibility, the Court finds that the Husband executed a personal financial statement on 22 June 2017, approximately three months prior to the separation parties (sic), where he listed the business as having a value of $400,000 or approximately two times the gross revenue of the business.

. . .

i. The Wife tendered an expert witness, Mr. Foster Shriner, for the purpose of determining a business value for Madison Insurance Group, Inc. Mr. Shriner was tendered as an expert witness in certified public accounting, forensic accounting, and business valuations. The Court accepted Mr. Shriner as an expert witness in all three areas, and found the witness to be competent to testify, and found the testimony of the witness to be credible and of assistance to the Court in determining the fair market value of the business. Pursuant to the testimony of Mr. Shriner, the Court makes the following specific findings regarding Madison Insurance Group, Inc.:

1. That industry standard for valuing an insurance agency considers the use of a multiplier of the

gross sales of the business; that depending on the type, size and volume of the agency, a multiplier of 2 to 5 times gross sales would be appropriate;

2. That Madison Insurance Group, Inc. is not a captive agency, however, the majority of all policies written from any individual vendor are Allstate Insurance policies; that Allstate policies account for approximately one-third of the sales for Madison Insurance Group, Inc.

3. That Madison Insurance Group, Inc. at the time of separation maintained certain cash accounts, accounts receivable, had outstanding loans paid to third parties (specifically Andy Stowe, brother of the Husband), and had certain goodwill; that furthermore, the business maintained certain debts, including certain liabilities due to a lending institution known as Oak Funding.

4. That in considering the appropriate multiplier to determine the goodwill value of the business, Mr. Shriner considered the industry standards, and also considered multipliers used by Allstate Insurance in valuing agencies considering the size, volume and sales. Mr. Shriner further interviewed professionals in the industry to determine appropriate multipliers. Based upon all sources and consideration, and consistent with industry standard, Mr. Shriner applied a multiplier of 2.45 times gross sales to determine the goodwill of the business. The Court finds this to be reasonable and credible.

5. Mr. Shriner determined the business to have the following assets and liabilities:

Cash assets, net of funds held in trust:	$24,790
Notes receivable from A. Stowe:	$30,140
Goodwill and intangibles 2.45 x gross sales of $217,534:	$532,958
Note payable to Oak Funding:	[$](76,676)
Madison Insurance Group, Inc. FMV	$511,212

6. That at the time that Mr. Shriner completed his evaluation he had requested but had not received

> 2018 taxes or business information to update his analysis. This information was provided approximately three days prior to the hearing. Mr. Shriner testified that, upon review of the gross sales, the business value would have increased, but only slightly and not in any significant amount. The Court finds it credible that this value is the value of the business as of the date of separation, and on the date of the hearing.
>
> . . .
>
> 8. In considering the credible testimony of Mr. Shriner, the Court finds Madison Insurance Group, Inc. to have a fair market value of $511,212 less the preliminary distribution received by the Wife . . . , in the amount of $21,003.45 with a resulting net value of $490,208.55.

(brackets and alterations omitted).

Defendant argues the trial court erred in its valuation of Madison by basing its valuation on incompetent evidence, by utilizing an improper valuation methodology, which did not approximate the market value of the agency and goodwill, and by double-counting revenue in the calculation.

1. Competent Evidence

The trial court accepted Shriner's opinion of valuation of Madison, expressed in his 28 November 2018 letter. During the equitable distribution trial, Shriner testified towards the basis of this valuation. A critical part of the evidence was Paul Clarke's article from his company's website entitled "First Quarter 2018 Allstate Agency Value Index," and the included chart: "Allstate Agency Price to New/Renewal Commission Ratio (National Average)" for the fourth quarter 2016, all of 2017, and the first quarter of 2018.

Absent from the record or transcript is Paul Clarke' background or qualifications to assert an opinion of value. This is a distinction Shriner acknowledged during cross examination and in the record, but is not addressed or rectified by either Shriner or the trial court in the equitable distribution order.

Paul Clarke and PPC Loan only financed Allstate captive agencies, not independent agencies like Madison. Shriner relied upon the chart, providing the value of only captive Allstate agencies, to base his opinion. Included in the sample data was an Allstate agency sold as a part

of a group merger. The trial court concluded "that Allstate policies account for approximately one-third of the sales of Madison Insurance Group, Inc." However, this conclusion failed to consider and reconcile resources and advantages that a captive Allstate agency has, such as a buy-back provision for a prospective seller and other resources to justify and warrant the higher revenue multiples over that applied to independent insurance agencies.

Paul Clarke's other article, "Allstate Agencies - Why so Valuable?", recognizes the resources and advantages to justify the high multiple of 2.5 for all Allstate captive agencies. The article also valued independent agencies at a multiple of 1.5 times the commissions. Plaintiff argues Defendant's own valuation of Madison at a 2.0 multiplier of sales supports the 2.45 finding to arrive at the value.

The trial court found Defendant's testimony of valuation of Madison not to be credible, due in part to his not being tendered or accepted as a business valuation expert, yet it references this application and value in its order. A business or property owner is competent to testify to the value of his business or property. *Hill v. Hill*, 244 N.C. App. 219, 229, 781 S.E.2d 29, 37 (2015) ("[L]ay opinions as to the value of the property are admissible if the witness can show that he has knowledge of the property and some basis for his opinion. Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value."). The weight given to that testimony is for the finder of fact to determine. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("[T]he trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence."). The evidence and findings do not support the trial court's conclusion on valuation.

2. Valuation Methodology

The Internal Revenue Service ("IRS") provides the following factors to value the stock of a closely-held corporation:

> SEC. 4. FACTORS TO CONSIDER.
>
> .01 It is advisable to emphasize that in the valuation of the stock of closely held corporations or the stock of corporations where market quotations are either lacking or too scarce to be recognized, all available financial data, as well as all relevant factors affecting the fair market value, should be considered. The following factors, although not all-inclusive are fundamental and require careful analysis in each case:

> *(a) The nature of the business and the history of the enterprise from its inception.*
>
> *(b) The economic outlook in general and the condition and outlook of the specific industry in particular.*
>
> *(c) The book value of the stock and the financial condition of the business.*
>
> *(d) The earning capacity of the company.*
>
> *(e) The dividend-paying capacity.*
>
> *(f) Whether or not the enterprise has goodwill or other intangible value.*
>
> *(g) Sales of the stock and the size of the block of stock to be valued.*
>
> *(h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.*

Rev. Rul. 59-60, 1959-1 C.B. 237 (January 1, 1959) (emphasis supplied).

This Court's precedents provide further guidance on valuation. Specifically, a trial court should consider: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Poore*, 75 N.C. App. at 419, 331 S.E.2d at 270 (citations omitted); *Goodwill*, Black's Law Dictionary (11th ed. 2019) ("A business's reputation, patronage, and other intangible assets that are considered when appraising the business, . . . the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets.").

However, this Court in *Poore* cautioned trial courts "to value goodwill with great care, for the individual practitioner will be forced to pay the ex-spouse tangible dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements." *Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271 (citation and quotation marks omitted).

As noted above, when valuing goodwill of a closely-held business, several factors should be examined: "the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets." *Id.* (citations omitted).

Here, the trial court found accounts of cash assets verified by Quickbooks software and a note receivable. The trial court further found the intangible goodwill asset and computed a liability balance of the loan taken by Madison. The trial court's designation was based upon Shriner's findings, where he had the 2017 tax returns, most of the bank statements, and a summary book but not a balance sheet.

The evidence before and findings and conclusions by the trial court did not utilize the factors from *Poore* or the IRS for valuing a business. The trial court's order made no mention of the nature of the business and the history of the enterprise from its inception, the economic outlook in general and the condition and outlook of the specific industry in particular, the financial condition of the business, the company's earning capacity, the market price of corporations engaged in the same or a similar line of business, or factors that led to the finding of intangible goodwill.

The trial court did not address the framework in *Poore* in finding and valuing goodwill. It simply addressed the amount of goodwill by concluding Madison "had certain goodwill." Outside of this conclusory statement, the trial court began consideration of the appropriate multiplier to apply to the goodwill, even though the multiplier was derived from a non-analogous source applying un-adjusted factors.

The trial court failed to address "the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets." *Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271.

The trial court merely evaluated one years' past performance in the form of a balance sheet and a tax return. While there may ultimately be goodwill or other intangible assets to include, the trial court did not conduct any further analysis to support the conclusion of value of goodwill. *Id.* at 422, 331 S.E.2d at 272.

3. Apportionment of Revenue

During direct examination, Defendant testified:

> [Defense Counsel]: So in 2016 the corporation earned commissions of $217,534?
>
> [Defendant]: Yes.
>
> [Defense Counsel]: What was the – where did the cash assets bank accounts come from?

> [Defendant]: They came from that revenue.
>
> [Defense Counsel]: So you have [$]217,000 and then [$]24,790 that's actually the same funds?
>
> [Defendant]: Correct.
>
> . . .
>
> [Defense Counsel]: And the monies that were paid to Andy Stowe of the loans the corporation made to Andy Stowe, what were the source of funds for those amounts?
>
> [Defendant]: That revenue.
>
> [Defense Counsel]: The [$]217,534?
>
> [Defendant]: That's correct.

Shriner counted the cash asset and note receivable twice in the asset section: as both revenue in the annual revenue and as an account. Neither Shriner's testimony, Shriner's letter, nor the trial court's order provides a remodeling or reason for this double count of these amounts.

Defendant argues our Supreme Court's reasoning in *Seifert* is controlling. *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987). In *Seifert*, the Supreme Court of North Carolina examined a double reduction of the value in an equitable distribution calculation of a military service member's pension. The Court held: "The effect is an unfair or inequitable reduction in the value of the award between the date of separation and the date of the employee-spouse's retirement." *Id.* at 371, 354 S.E.2d at 509-10. The Court in *Seifert* prohibited a double discount.

What occurred here is a double credit. While not controlling, it is instructive to the facts before us. Allowing the double credit of the same funds created an "unfair" and "inequitable" increase in the value of the company. *Id.*

The trial court erred in calculating the value of Madison by utilizing incompetent evidence, conducting an improper valuation of Madison incorporating methodology that did not approximate the value of the practice and goodwill, and by double counting revenue in the calculation. We reverse these portions of the order and remand to the trial court for additional findings and calculations of the value of Madison to support its conclusions. *See id.*

V. Refusal to Qualify Franks as an Expert

A. Preservation

[2] Defendant argues the trial court erred by not accepting Franks as an expert witness in the field of business valuation. Plaintiff asserts the issue is not properly preserved for appellate review by this Court.

N.C. R. App. P. 10(a)(1) requires: "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." During the trial, Franks was qualified as an expert witness in the field of certified public accounting. When defense counsel sought to ask Franks a question about the methodology of business valuation Plaintiff objected and asserted a *Daubert* challenge:

> [Plaintiff's Counsel]: Your Honor, he was not qualified as a business valuation expert. He was qualified as a CPA. He's not establishing appropriate methodology. And based on [N.C. Gen. Stat. §] 8C-702, I don't think the expert evidence that he's presenting passes a Daubert challenge.
>
> [Court]: There's been a Daubert challenge made. [Defense Counsel] would you like to respond to that?
>
> [Defense Counsel]: Your Honor, I don't think there's any question that this expert has specialized knowledge. I don't think there's any question that his testimony can assist the Court to understand some of the issues in this case. The weight you give it is totally up to the Court. It's not an admissibility issue, it's a weight issue. The basis of his opinion is based upon facts known to him and reasonably relied upon by experts. You have testimony before this Court from Mr. Shriner that the rule of thumb is the appropriate methodology. That's the methodology he used. You have testimony from Mr. Franks that that is also the methodology that he used. It appears the only difference is the multiple factor used, and I think he is surely competent in his experience to tell what that should be.
>
> . . .
>
> [Plaintiff's Counsel]: The difference between Mr. Shriner and Mr. Franks is that Mr. Shriner was admitted as a business valuation expert. Mr. Franks has not been admitted

as a business valuation expert. And under North Carolina Law, as a CPA he cannot render an opinion. This is no more than a personal opinion and it is not something - - under same rule with Mr. Stowe providing that same impression or belief of what the value was. When we go through this - - and again, Your Honor hasn't, I don't believe, reviewed the evaluation. But nothing on this evaluation that he has presented lays out his multiplier. Nothing in his evaluation does anything other than say I think this. [That] is not an appropriate standard under Daubert. Because he has not been admitted as an expert in business valuation all he can testify to - - I guess he can opine as to the cash flow, the taxes and everything else, but it is not a business valuation that's subject to being admitted by this Court, because again it does not provide assistance to this Court. It does not rely upon principles. I don't believe that he - - again, there's a reason why Your Honor did not admit him as a business valuation expert. He doesn't have the basis, the credentialing and the skill set to provide assistance to Your Honor. So again, under 702 and under the case law of Daubert moving for, most recently, as State versus McCreevy (ph), I don't believe he's competent to testify as to this business value.

. . .

[Defense Counsel]: Your Honor, I think the admissibility test is, is he qualified by knowledge, skill, experience, training and education, and I think that he is. The weight that you give is up to you, but it's not admissibility. It is relevant. It is. We're before this Court on this. And is it reliable, and I think it is reliable. And I think particularly when you look at it in light of he's used the same methodology as Foster Shriner. And he has also had the benefit of having owned an insurance company and been actively involved in the running of the company and knows how it works when Mr. Foster Shriner has not. So I think we do have admissibility. And I think having heard his testimony I would reoffer him as an expert in the area of business evaluations based upon his history and his involvement in the insurance business.

[Court]: Counsel, thank you. The Court will sustain the objection. The Court will not qualify Mr. Franks as an

> expert in the area of business valuation. You may ask another question, counselor.

Defendant asserts Plaintiff's objection that was sustained by the trial court is error. When an objection is sustained, our precedents and appellate rules do not require the other party to register their own objection on top of having the objection sustained against them. *See* N.C. R. App. P. 10(a)(1). N.C. R. App. P. 10(a)(1) applies when a party failed to object to an action in the trial court and then claims error on appeal. Plaintiff improperly seeks to assert an inverse of N.C. R. App. P. 10(a)(1), where a party does not object and thus has not preserved the issue for appellate review, to bar this Court's review of the issue. Plaintiff's argument is dismissed.

[3] Plaintiff further asserts Defendant did not properly notice Franks' expert testimony prior to trial. N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1) (2019). Rule 26(b)(4)(a)(1) mandates the disclosure of any experts prior to trial. This Court recently interpreted this rule in *Myers v. Myers*, holding: "The Rule does require advance disclosure of expert witnesses who will testify at trial, even without a discovery request, discovery plan, or court order." *Myers v. Myers*, __ N.C. App. __, __, 837 S.E.2d 443, 456-57 (2020).

Plaintiff's argument relies on the premise that the only remedy for a discovery violation is exclusion. The goal of N.C. Gen. Stat. §1A-1, Rule 26(b)(4)(a)(1) is "to provide openness and avoid unfair tactical advantage in the presentation of a case at trial[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(4)(a)(1). The court in *Myers* leaves the determination of the proper remedy to the discretion of the trial court. *Myers*, __ N.C. App. at __, 837 S.E.2d at 457. In light of a discovery violation, *Myers* requires a trial court to determine "whether [Defendant's] failure to disclose the expert sufficiently in advance of the trial gave h[im] an 'unfair tactical advantage' at trial or defeated the purpose of 'providing openness' as contemplated by Rule 26(b)." *Myers*, __ N.C. App. at __, 837 S.E.2d at 456. Plaintiff misstates the remedy for this alleged discovery violation. *Id.* ("Here, the trial court's interpretation of Rule 26(b)(4)(a)(1) as *requiring* exclusion of [the expert's] testimony was in error." (emphasis original)). In light of our holding on this issue, additional findings by the trial court on sanctions are not required on remand.

B. Standards of Review

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . that it

could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

"Where the plaintiff contends the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*." *Cornett v. Watauga Surgical Grp.*, 194 N.C. App. 490, 493, 669 S.E.2d 805, 807 (2008).

C. Analysis

[4] This Court reviews this issue for abuse of discretion. *Id.* Defendant does not challenge the trial court's interpretation of N.C. Gen. Stat. § 8C-1, Rule 702 (2019). Defendant proffered Franks as an expert in "business valuation in forensic accounting and certified public accounting." Plaintiff requested a *voir dire* to question Franks' qualifications:

> [Plaintiff's Counsel]: How many CPE courses do you take on a yearly basis in business valuation?
>
> [Franks]: Usually one.
>
> . . .
>
> [Plaintiff's Counsel]: And are you specialized or do you have any specialization under AICPA - -
>
> [Franks]: I do not
>
> [Plaintiff's Counsel]: - - - business valuation?
>
> [Franks]: No,
>
> [Plaintiff's Counsel]: So you are not a CVA - - strike that, and ABV under the AICPA?
>
> [Franks]: No.
>
> [Plaintiff's Counsel]: Do you have any specialized accreditation under NACVA?
>
> [Franks]: I do not.

Franks is a North Carolina licensed certified public accountant and owner of an accounting firm whose practice consists of business valuations, taxes, accounting, and tax planning. The trial court held:

> The Husband tendered an expert witness, Mr. Tom Franks, for the purposes of placing value on the business entity. The witness was tendered as an expert in business valuation,

> certified public accounting and forensic accounting; upon examination by counsel for the Wife, the Court found that the witness was a certified public accountant, however, had minimal business valuation experience, maintained minimal continuing education in business valuation methodologies, has not prepared business valuations for insurance agencies more than twice in the preceding 30 years and that these were for the purposes of assisting a client in the purchase of an agency. The Court accepted Mr. Franks as an expert witness in certified public accounting, however, did not find him to be an expert in business valuation or forensic accounting. Accordingly, the Court did not consider the witness's testimony regarding a business value for Madison Insurance Group, Inc.

N.C. Gen. Stat. § 8C-1, Rule 702(a) provides:

> 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).

The Supreme Court of North Carolina has recently interpreted Rule 702(a) and examined leading cases interpreting Rule 702(a) by the Supreme Court of the United States: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999). Our Supreme Court held:

> the witness must be qualified as an expert by knowledge, skill, experience, training, or education. This portion of the rule focuses on the witness's competence to testify as

> an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

State v. McGrady, 368 N.C. 880, 889-90, 787 S.E.2d 1, 9 (2016) (citations and quotation marks omitted).

Contrary to Defendant's arguments before the trial court and this Court, Franks' qualifications are pertinent to admissibility, not just weight or credibility of the testimony. *See id.* ("Rule 702(a) has three main parts, and expert testimony must satisfy each to be admissible.").

Defendant has failed to show the trial court abused or did not act within its discretion when the court concluded not to admit Franks as an expert in the field of business valuations. *Id.* Defendant's argument is overruled.

VI. Tax Implications

[5] Defendant contends the trial court erred by calculating imbedded taxes for retirement accounts but not for Madison when the same testimony was presented for both assets.

A. Standard of Review

When reviewing an equitable distribution order, our standard of review "is limited to a determination of whether there was a clear abuse of discretion." *White*, 312 N.C. at 777, 324 S.E.2d at 833. "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.*

B. Analysis

"[E]quitable distribution is a three-step process requiring the trial court to (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property." *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (citation, quotation marks, and brackets omitted).

N.C. Gen. Stat. § 50-20(c)(11) provides that the trial court shall consider the following distributive factor when equitably dividing the marital and divisible property:

> The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

N.C. Gen. Stat. § 50-20(c)(11) (2019).

The trial court made the following finding of fact:

> That with regards to the American Traditional IRA, the Lumina Wealth IRA and the Principal 401(k) as set forth in the preceding paragraph, the parties presented evidence regarding embedded tax consequences and the value of these accounts . . . . That these are pretax retirement plans from which no taxes have been withheld. These accounts are fully subject to taxation at such time as the funds are withdrawn; at the present time, should these funds be withdrawn, there would also be a 10% penalty. *The Court finds that there is no evidence that these accounts will be immediately liquidated, however, the Court further finds, based upon the credible testimony of Mr. Shriner, that these accounts will have taxable consequences at such time as they are liquidated.* Mr. Shriner further testified, and the Court finds credible, that a 25% reduction in value is appropriate for purposes of valuing these assets when dividing these assets in exchange for post-tax or net of tax assets. (emphasis supplied)

The equitable distribution order distributed the IRA and 401(k) accounts. The trial court found if the funds are withdrawn at the present time, a ten percent penalty would be assessed. Additionally, the

trial court also found "there is no evidence that these accounts will be immediately liquidated." The trial court further found when the funds are withdrawn, it will be a taxable event. The trial court thus reduced the value of each account by twenty-five percent to account for the tax consequences, reducing the American Traditional IRA from $138,847.65 to $104,135.74, the Lumina Wealth IRA from $20,601 to $15,450.75, and the Principal 401(k) from $28,362 to $21,271.50.

The trial court based its tax treatment on the potential future liquidation of the accounts. "Valuation of marital property may include tax consequences from the sale of an asset *only when the sale is imminent and inevitable*, rather than hypothetical or speculative." *Peltzer*, 222 N.C. App. at 797, 732 S.E.2d at 366 (citations omitted) (emphasis supplied). "It is error for a trial court to consider hypothetical tax consequences as a distributive factor." *Plummer v. Plummer*, 198 N.C. App. 538, 548 680 S.E.2d 746, 753 (2009) (internal quotation marks omitted).

The trial court erred by reducing the accounts as a result of a hypothetical tax consequence when the sale or liquidation of the retirement accounts was not "imminent and inevitable," or that the equitable distribution would be a taxable event. *Peltzer*, 222 N.C. App. at 797, 732 S.E.2d at 366. We reverse these portions of the order and remand for additional findings and calculations of the tax consequences and valuations of the retirement accounts.

VII. Improper Joinder

[6] Defendant argues the note payable was owed to Madison and it was error for the trial court to distribute payments on a note payable of the company to Plaintiff without joining Madison in the action.

The parties and their respective counsels entered a memorandum of judgment on 13 August 2018 addressing the loan underlying the note payable. By agreement the note payable was classified as a loan owed to the marriage in the amount of $97,206.90. Defendant had accepted the first fifty percent of the loan repayment individually and used the funds for his and Madison's benefit. The parties agreed the remaining balance was owed to Plaintiff as an interim distribution. Defendant is bound to the memorandum of judgment. *See Smith v. Smith*, 247 N.C. App. 135, 786 S.E.2d 12 (2016). Defendant's argument is dismissed.

VIII. Conclusion

We affirm the trial court's treatment of the payments from the note payable and the trial court's denial of admitting Franks as an expert

witness in business valuation. We reverse the trial court's finding and conclusion valuing Madison and assessing a hypothetical tax consequence without a finding and conclusion the sale or liquidation of the retirement accounts was "imminent and inevitable" to trigger the penalty. *Peltzer*, 222 N.C. App. at 797, 732 S.E.2d at 366.

These portions of the trial court's order are reversed and remanded for further proceedings not inconsistent herewith. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges BERGER and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JULY 2020)

AQUINO v. CHAVIS No. 19-907	Wake (15CVD11932)	Affirmed
DOW-REIN v. SARLE No. 19-911	Wake (18CVS9604)	Vacated and Remanded
FOY v. KITE No. 19-404	Pitt (17CVD2305)	Affirmed in Part; Reversed in Part and Remanded.
IN RE A.V.I. No. 19-528	Guilford (18JA209)	Affirmed in Part; Reversed in Part; and Remanded.
IN RE BEZANSON No. 20-105	Buncombe (19CVD2609)	Affirmed in part, Dismissed in part
IN RE E.M.G. No. 19-849	Randolph (18JA97,18JA98)	Affirmed
IN RE E.R. No. 19-783	Johnston (18JA143)	Affirmed
IN RE H.A.G. No. 19-942	Guilford (19JA280) (19JA281) (19JA282)	Reversed
IN RE J.J. No. 19-875	Greene (19JA8) (19JA9)	Affirmed in Part, Vacated and Remanded in Part.
IN RE J.R. No. 19-987	Johnston (17JA23)	Affirmed
IN RE K.E.D. No. 19-605	Ashe (18JA19)	Affirmed
IN RE Q.L.H. No. 19-972	Brunswick (19JA2,) (19JA3,) (19JA4,) (19JA5)	Affirmed
ISRAEL v. ISRAEL No. 19-1032	Cumberland (10CVD7116)	Affirmed

McDOWELL v. BUCHMAN No. 19-945	Wake (18CVD15091)	Affirmed
OM SHANKAR CORP. v. SAI DEVS., INC. No. 19-599	Lee (18CVS412)	Dismissed in part; affirmed in part
ROUTTEN v. ROUTTEN No. 19-1075	Wake (14CVD10295)	Appeal Dismissed
STATE v. HUNT No. 19-855	Johnston (16CRS56584-85)	No Error
STATE v. JENKINS No. 19-723	Union (17CRS54843)	Remanded for resentencing.
STATE v. LAND No. 19-665	Wake (17CRS764702)	Remanded for Resentencing
STATE v. LUCK No. 19-1167	Forsyth (18CRS533)	Reversed and Remanded
STATE v. RENFREW No. 19-901	Mecklenburg (16CRS206216)	No error
STATE v. SAVAGE No. 19-980	Mecklenburg (15CRS237540) (17CRS14932-34)	No Error
STATE v. WALLACE No. 19-923	Rowan (16CRS2831) (16CRS53110-11) (16CRS53113-14) (17CRS1267)	No Error in Part; Vacated and Remanded in Part
WILLIAMS v. ENTER. HOLDINGS, INC. No. 19-730	Guilford (18CVD5508)	Affirmed

DALY v. KELLY

[272 N.C. App. 448 (2020)]

MICHAEL B. DALY, PLAINTIFF
v.
CHRISTY KELLY, DEFENDANT

No. COA19-532

Filed 21 July 2020

1. Evidence—excluded evidence—request to make offer of proof —Rule 43(c)—violation of statutory mandate

In a child custody modification case, where the trial court quashed the father's subpoena of his daughter to protect her from potentially reliving trauma while testifying, the court erred by denying the father's request to make an offer of proof of the child's testimony, as mandated under Civil Procedure Rule 43(c), where the mother never argued at trial that the testimony was inadmissible or privileged (despite suggesting, for the first time on appeal, that the child was incompetent to testify) and where the court did not cite inadmissibility or privilege as grounds to preclude the father from making the offer of proof. The case was remanded because the trial court's error precluded meaningful appellate review of the father's challenge to the quashing of the subpoena.

2. Evidence—denial of access to therapy records—under seal—high conflict child custody action

In a child custody case where the trial court did not allow the parties' child to testify and, in its discretion, properly ordered the child's therapist to produce all notes from their counseling sessions under seal (and therefore not under the public court file), the trial court abused its discretion by allowing the therapist's notes for in camera review only and denying the parties (and their counsel) any access to them. Although this was a high conflict case and the court sought to protect the child from any potential trauma or loss of trust in her therapeutic relationship, neither of these reasons justified preventing the father—who sought access to the notes to spare the child from having to testify—from preparing and presenting his defense in the case.

Appeal by plaintiff from orders entered 7 March 2018, 28 January 2019, 10 June 2019 by Judge Mary H. Wells in District Court, Lee County. Heard in the Court of Appeals 13 November 2019.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for plaintiff-appellant.

Post, Foushee & Patton, P.A., by Kristy G. Patton, for defendant-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Timothy P. Lehan and Robert E. Desmond, for non-party Katie Thomas, LCSW.

STROUD, Judge.

Plaintiff-father appeals trial court orders modifying permanent child custody, granting motions to quash, denying motions for contempt by both parties, and denying his offer of proof regarding the minor child's testimony. Where the trial court quashed Father's subpoena to the child for testimony, the trial court was required to allow Father to make an offer of proof of the child's testimony under North Carolina Rule of Civil Procedure 43 as this evidence does not clearly appear to be inadmissible or privileged. In addition, the trial court erred by having the child's therapist's records produced to the trial court for *in camera* review *only* without even allowing counsel to review the records. Although the trial court did not err by sealing the therapy records of a child so they are not available in the public court file, the trial court did not present any legal justification for preventing the *parties* from having at least some form of access to the records. In a high conflict custody case such as this one, the testimony of the child and the therapist's notes are obviously pertinent.

Because all of the trial court's findings of fact and conclusions of law regarding modification of custody were based upon the evidence presented without the benefit of an offer of proof or evidence from Father regarding the child's desires and without access by the parties or counsel to the therapist's records, we are unable to review the substantive arguments regarding the custody order. The trial court erred in (1) denying Father the right to make an offer of proof and in (2) sealing records upon which the trial court relied in granting Mother's motion to modify custody, so we must reverse and remand the 10 June 2019 order as to modification of custody for a new hearing.[1]

1. The order on appeal also denied the parties' motions for contempt. Father has not addressed the denial of his motions for contempt on appeal, and Mother did not cross-appeal to challenge the denial of her motions for contempt. Thus, this opinion addresses only the trial court's rulings as to motions to quash and modification of custody.

I. Background

In 2001, the parties were married and had one child, Amy.[2] In 2013, the parties separated, and in 2015, the parties divorced. On 6 January 2016, the trial court entered a child custody order granting joint legal custody to the parties, with Mother having primary physical custody and Father having visitation. On 14 June 2017, Mother filed a verified "DEFENDANT'S SECOND MOTION TO SHOW CAUSE FOR CONTEMPT AND MOTION TO MODIFY CHILD CUSTODY[.]"[3] Mother alleged that Father was not complying with the custody order and further that he was bullying Mother, making threats regarding the timing of his visitation, harassing Mother, disparaging Mother in front of the child, and telling the child to put the Mother on the phone though under the custody order communication should be through email. Mother further contended that Father's actions were causing substantial emotional distress and chaos for the child. After this motion for contempt, both parties filed additional motions for contempt.

On or about 21 December 2017, Father filed and served a notice of deposition and subpoena duces tecum for Ms. Katie Thomas, LCSW, Amy's therapist. Pursuant to the subpoena, Father requested Ms. Thomas to produce "[a]ny and all notes or other documents from any counseling sessions with" Amy and "[a]ny and all communications you have had with" Mother. The deposition was scheduled for 25 January 2018. On 4 January 2018, Father's counsel received a letter from Mr. Timothy Lehan, counsel for Ms. Thomas, stating that the subpoena was not "HIPPA" compliant. Father's counsel responded on 8 January, correctly noting that under the existing custody order, Father was entitled to full access to Amy's records and that Mother had not raised any objections to the notice of deposition or subpoena.

On 16 January 2018, Mother filed an objection to notice of deposition and subpoena and motion for protective order. The introduction to the motion states it is based upon North Carolina Rules of Civil Procedure 26, 30 and 45, although the substance of the motion does not mention what relevance any of these rules have to the relief requested. According to Mother's motion, four days prior, on 12 January 2018, Mother was faxed Father's motion to compel compliance with subpoena and notice of hearing for 24 January 2018.[4]

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2. We have used a pseudonym to protect the child's privacy.

3. Our supplement to the record filed pursuant to North Carolina Rule of Appellate Procedure 9(d)(2) contains an 11 May 2016 motion for contempt, presumably Mother's first motion.

4. The motion to compel was not file stamped until 22 January 2020.

Mother's motion alleged Father's counsel had not consulted with her counsel about scheduling the deposition and it is "standard and customary practice" to have mental health records of this sort produced under seal. Mother further alleged Father's attempt to subpoena the records would interfere with the therapeutic relationship between the child and Ms. Thomas. However, Ms. Thomas did not file a motion to quash or any objection to the subpoena other than the letter from her counsel.[5]

On 24 January 2018, the trial court held a hearing on Father's Motion to compel and Mother's objection to the subpoena and motion for protective order. Counsel for Ms. Thomas also appeared at the hearing. On 7 March 2018, the trial court entered an order denying Father's motion to compel without prejudice and granting Mother's motion for protective order. The trial court ordered Ms. Thomas to produce the records as subpoenaed by Father under seal to the trial court within 14 days of the order for *in camera* review and no deposition of Ms. Thomas could be taken until after the trial court reviewed the records and entered an additional order regarding the scope of discovery allowed. Ms. Thomas produced the records to the trial court on 15 March 2018. The trial court kept the child's records under seal and did not allow either party or counsel to review them.

On 5 September 2018, the trial court again held a hearing on Father's motion to compel, as anticipated by the 7 March 2018 order. On 20 September 2018, the trial court entered an order allowing Father to depose Ms. Thomas by written questions only, limited to a list of questions as noted in the order. Ms. Thomas was required to respond to

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5. Written objection to subpoenas.–Subject to subsection (d) of this rule, *a person commanded to appear at a deposition* or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:
   a. The subpoena fails to allow reasonable time for compliance.
   b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
   c. The subpoena subjects a person to an undue burden or expense.
   d. The subpoena is otherwise unreasonable or oppressive.
   e. The subpoena is procedurally defective.

N.C. Gen. Stat. § 1A-1, Rule 45(c)(3) (2017) (emphasis added).

the written questions by 5:00 pm on 19 September 2018.[6] Ms. Thomas responses were filed on 20 September 2018.

On 20 September 2018, the trial court entered a pretrial order addressing the upcoming hearing which would address seven pending motions filed by the parties, including Mother's motion to modify custody and both parties' total of six motions for contempt. The hearing on these motions started on 20 September 2018 and continued into the next day but was not completed. The hearing resumed on 26 October 2018.

On or about 15 October 2018, Mother filed a second notice of objection, motion to quash, and motion for attorney fees regarding Father's subpoena to Amy. According to Mother's second notice of objection, motion to quash, and motion for attorney fees, on 1 October 2018 Father had issued a subpoena for Amy to testify at the 26 October 2018 hearing. As noted, the hearing on custody modification and contempt resumed on 26 October 2018.

At the beginning of the hearing, the trial court heard the motions to quash the subpoena for Amy. During the third and final day of hearing in October, the focus regarding subpoenas and motions to quash was primarily on Amy and not Ms. Thomas. Father argued that Amy had a right to be heard by the trial court when the court was determining custody. Father also noted he had requested a deposition from Ms. Thomas specifically to eliminate the need for the child to testify, but since the trial court had not allowed Father to depose Ms. Thomas and limited discovery to a written deposition with limited questions, his only way to present this evidence was through testimony of Amy. Father argued,

> So I want to be crystal clear, though, about what we have -- and make it clear for the record about what we have continually asked of this Court.
>
> First off, we asked for Ms. Thomas to sit for a deposition precisely for the reason that perhaps her testimony would alleviate the possibility of having [Amy] even being involved in this matter. Ms. Thomas objected and, more importantly, [Mother] joined in that objection. And the Court limited us to these written interrogatories.

Father's counsel then noted he was simply requesting Amy to talk to the trial court in chambers, without counsel or parties present, but as Mother would not agree to this procedure, he had issued the subpoena to Amy.

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6. Ms. Thomas's responses to the written questions were due one day before the order was actually entered.

Father's attorney noted since he had never talked to Amy, he did not know what she would say, but that "I know this: That you -- from the comments that you've made from the bench, both parties have exposed this child to stuff that they shouldn't have based upon Ms. Thomas' notes."[7]

Mother's counsel argued that there was no need for Amy to testify because the trial court had "all of Katie Thomas' records; so you have everything that she would have talked about. You've already seen that." Mother's counsel argued,

> So when they say, "We tried to avoid even talking about bringing the child by getting these things from Ms. Thomas," Your Honor already has everything Ms. Thomas could have presented. I mean, her notes are her most secret thing, I would think, with a counselor.
>
> When they say that they want her to come in here and speak with you with no one present, that -- that goes right back to my concern because the recordings[8] have shown that, you know, Mr. Daly has told this child false things about court orders, you know, made statements about my client breaking court orders, about provisions that were not even in the order -- you know, that her parents can only do exchanges, that she could let her go stay overnight, you know, that she has control in this matter -- and that's not the case.

Thus, Mother argued that Ms. Thomas' records were directly relevant to the issues in dispute, both as to modification of custody and to her motions to hold Father in contempt, but since the *trial court* already had the information in the records – reviewed *in camera* and still under seal – there was no need for *Father* and his counsel to be able to review this relevant information or to present evidence from Ms. Thomas or Amy.

After Father testified further, his counsel again raised his request to have Amy testify, as the trial court had not yet made a final ruling on the motions to quash. Counsel and the trial court had an extensive colloquy. Father's counsel noted he could not say what the child would say, since he had never spoken to her, but he noted if the trial court determined she was of suitable age and discretion, the trial court was required to consider her wishes regarding the custodial schedule, even though the

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7. This Court has reviewed the records under seal, and Father's counsel was correct.

8. Both parties had produced phone recordings as part of their evidence including conversations between Amy and Father.

court would not be bound by her wishes. In addition, Amy could be able to address whether either parent was improperly influencing her or saying things to her in violation of the custody order, as alleged by the contempt motions. Father's counsel also argued if the trial court granted the motion to quash, he would make an offer of proof to preserve the issue for appeal. Father noted that an offer of proof is required under Rule 43 of the Rules of Civil Procedure:

> (c) Record of excluded evidence.--In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, *the court on request of the examining attorney shall order a record made of the answer the witness would have given.* The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. *In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.*

N.C. Gen. Stat. § 1A-1, Rule 43(c) (2017) (emphasis added). Based upon *Rhew v. Felton*, 178 N.C. App. 475, 488, 631 S.E.2d 859, 868 (2006), Father argued allowing an offer of proof is not a discretionary decision, but the trial court is required to allow the offer of proof to be made in some manner, even if the trial court does not hear the evidence personally:

> Rule 43(c) thus requires the trial court, upon request, to allow the insertion of excluded evidence in the record. In the present case, the trial court allowed plaintiff to introduce the excluded evidence into the record. Plaintiff cites no binding authority, and we find none, that requires a trial court to personally take an offer of proof. Therefore, the trial court's failure to personally consider plaintiff's offer of proof was not prejudicial.

Id. (citation and quotation marks omitted).

Mother's counsel did not argue an offer of proof regarding the evidence from Amy would be irrelevant or privileged. *See generally* N.C. Gen. Stat. § 1A-1, Rule 43(c). Instead, Mother's counsel argued requiring Amy to come to court or any other setting to give an offer of proof would cause the same trauma to her as testifying. Mother's counsel argued:

> [a]nd now what I hear is that "If we don't like your ruling, we are going to get the testimony of this child and are going to take it up," and that is -- to me, is outrageous because this is all supposed to be the best interests of this child.
>
> She is under the care of a therapist, a therapist that you were so concerned about -- you know, you kept those records to yourself. They tried to depose her, did the interrogatories, all in the hopes of not even involving this child.
>
> I mean, I don't know what else they could have gotten from her that you don't have as evidence before Your Honor, and now saying that they are just going to go to a transcript and -- if they don't like your ruling.
>
> I've just never seen anything like it.

Ultimately, the trial court allowed Mother's motions to quash the subpoenas and Amy did not testify. Furthermore, the trial court denied Father's request to make an offer of proof regarding Amy's testimony, either in court or by a procedure outside the courtroom.

Based upon the three hearing dates in September and October, on 28 January 2019, the trial court entered an interim memorandum of order for custody which granted Mother sole "care custody and control" of the child and suspended Father's visitation and telephone contact until he had a psychological evaluation. Father timely appealed the 28 January 2019 interim memorandum of order ("Interim Memo"). On 27 February 2019, Father appealed the Interim Memo and "any other immediate orders involving the merits and necessarily affecting said Order, including but not limited to the March 7, 2018 order concerning Katie Thomas." Ultimately, on 10 June 2019, the trial court entered an "ORDER MODIFYING PERMANENT CHILD CUSTODY ORDER, GRANTING MOTIONS TO QUASH[9], DENYING MOTIONS FOR CONTEMPT, AND DENYING OFFER OF PROOF" ("Permanent Order"). The Permanent Order denied all six contempt motions filed by Mother and Father against the other. The trial court modified custody, granting full legal and physical custody to Mother and denied Father any visitation or contact with Amy. The Permanent Order also addressed the motions to quash:

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9. The order only has a decree regarding the motions to quash Amy's subpoenas. The decree does not address Ms. Thomas' records or testimony.

46. After hearing all of the evidence in this matter, the Court grants the Defendant's Motion to Quash the Subpoena 2 issued for the appearance of the minor child that was filed on October 15, 2018.

47. Upon rendering the ruling on the motion to quash, the Plaintiff's counsel made an oral motion to make an Offer of Proof pertaining to the minor child's testimony.

48. The minor child's presence in court and testimony will likely cause her great emotional distress. The Plaintiff's counsel argued that the minor child had a right to testify in this matter; however, the minor child has not expressed any desire to participate in the custody proceedings and it is the Plaintiff, not the minor child, who wishes for the minor child to be involved.

49. Due to parental conflict, divorce and custody proceedings, the Order provided that the Defendant was to obtain any counseling recommended for the minor child to assist her in dealing with any issues she may have arising from the separation and divorce of the parties. The minor child began seeing her therapist, Katie Thomas, shortly after the Order was entered and is still under her care.

50. Pursuant to prior orders entered in this matter Ms. Thomas produced her records for the minor child to the Court under seal for the review of the Court only. Neither party, nor their counsel, were granted access to the records, due to the high conflict nature of this matter. The Plaintiff's counsel, pursuant to orders of this court, did serve Ms. Thomas with written interrogatories, which she responded to and her responses were admitted into evidence without objection. Ms. Thomas' responses expressed concern for the minor child being involved in discussions relating to the nature of this proceeding.

51. The Plaintiff has been aware that the minor child has been under the care of Ms. Thomas since she began therapy and has not had any involvement with her therapy with the exception of contacting Ms. Thomas on one occasion to question her about things unrelated to the minor child's mental wellbeing as outlined in her response.

52. The Plaintiff, through his counsel, was unable to articulate a specific forecast of what the minor child's testimony would be.

53. The Plaintiff, through his counsel, represented that the purpose in offering the minor child's testimony was so that the Court may hear the minor child's wishes with respect to the current custodial schedule whether she desired any changes, whether either party is trying to unduly influence the minor and/or unfairly share information regarding the court process with the minor child and whether the minor child can clarify factual disputes regarding the parties' statements and/or the minor child's responses to the parties' statements.

54. Plaintiff's attorney represented that he had no idea what the minor child might say.

55. Plaintiff's attorney could not inform the Court of the nature or content of the evidence being offered.

56. Plaintiff's attorney did not describe the purpose of the evidence beyond what the minor child's perspective might be.

57. Plaintiff's attorney did not explain what consequential facts the evidence is expected to prove.

58. Plaintiff's attorney offered no forecast that the minor child's testimony would provide the Court an exclusive or better basis on which to make a ruling.

59. Plaintiff's attorney did not articulate or forecast how the minor child's testimony would provide the court with more information regarding the evidence on which to make a more complete or even a merely adequate basis for a ruling.

60. Plaintiff's request to bring the minor child in to testify in order to make an offer of proof as to what the minor child would have said if called to testify is denied.

The trial court's decree had 14 provisions: Mother's first motion to quash Amy's subpoena was granted; Mother's second motion to quash Amy's subpoena was granted; Father's oral motion to make an offer of proof regarding Amy's testimony was denied; Mother's motion to modify custody was granted; Mother was given sole legal and physical custody

of Amy; Father's visitation and telephone contact was suspended, including any contact through a third party on his behalf; Father was ordered not to contact any third party, such as teachers and counselors, in an attempt to gain information about Mother and Amy, although he was allowed access to Amy's "educational and medical records for informational purposes only[;]" Mother was ordered to notify Father of any emergencies regarding Amy via email; Father was to "submit to and obtain a complete psychological evaluation" provided "by a licensed psychiatrist and/or psychologist" both parties agreed upon, and to "complete any and all recommended education and treatment[;]" Father was not to file a motion to establish visitation until "completion of the full psychological evaluation and any and all recommended education and treatment[;]" Amy should continue to see Ms. Thomas, and neither parent would "have access to Ms. Thomas' therapy session notes and/or confidential records, Ms. Thomas" was entitled to give the parties general information that did not interfere with her relationship with Amy, and Father was only to contact Ms. Thomas via email for "reasonable" purposes; all contempt motions were denied; this Permanent Order supersedes all of the prior custody orders; and law enforcement officers shall assist to "carry out the terms of this Court order." Father timely appealed from this order and had previously appealed from the interim memorandum of order. Thus, Father appealed the Interim Memo and Permanent Order. As the Permanent Order superseded the Interim Memo, and as all of Father's issues are properly addressed by considering the Permanent Order, we address only that order.

II. Offer of Proof of Child's Testimony

[1] While Father's brief raises four issues challenging the modification of custody, all issues arise from the trial court's denial of his request to present testimony and evidence from Ms. Thomas and Amy. As Father noted in his argument before the trial court, "there's a couple black holes in this case. One black hole is we don't know what [Amy] would say. But the other black hole that the counsel don't know is what's in Katie Thomas' notes." This Court is confronted by the same black hole, although unlike Father, we do have the benefit of *in camera* review of Ms. Thomas' records. We turn first to Amy.

Father argues the trial court erred by denying not only his request to present any evidence from Amy by quashing the subpoena but also by denying his request to make an offer of proof, either in court or in another setting outside court. Because the trial court did not allow Father to make an offer of proof of any sort, we are unable to determine

if the trial court abused its discretion in quashing the subpoena.[10] We will therefore address Father's second issues on appeal, the trial court's refusal to allow Father to make an offer of proof.

Father contends the trial court erred in not following the requirement of Rule 43(c) and allowing him to make an offer of proof. We review whether the trial court failed to follow the mandate of Rule 43 *de novo*. *See State v. Johnson*, 253 N.C. App. 337, 345, 801 S.E.2d 123, 128 (2017) ("Defendant alleges a violation of a statutory mandate, and alleged statutory errors are questions of law and as such, are reviewed *de novo*." (citation, quotation marks, and brackets omitted)).

On appeal, Mother stresses that Father failed to make an offer of proof as to Amy's testimony, so he cannot raise the exclusion of her testimony on appeal. In fact, Mother argues that the trial court gave Father

> multiple opportunities to make his offer, by making the substance of [Amy]'s testimony apparent from the record through the testimony of his own witness or on cross-examination of the opposing party, or making an informal offer as described by the Court in Martin – however, he failed to do so. In his failure, he forfeited the right of the Plaintiff to assign error to the court's decision on appeal.

In *State v. Martin*, this Court noted that an offer of proof may be formal, by presenting the actual proposed testimony of the witness, or informal, by making a specific forecast of what the testimony would be from the witness. *See State v. Martin*, 241 N.C. App. 602, 605, 774 S.E.2d 330, 333 (2015) ("In the present case, Defendant's counsel made an informal offer of proof; that is, he represented to the court the content of the testimonies his witnesses would provide. In contrast, a formal offer of proof is made when counsel calls the witnesses to provide their proposed testimonies at the hearing. . . . Our Supreme Court has never held that a formal offer of proof is the only sufficient means to make an offer of proof: We wish to make it clear that there may be instances where a witness need not be called and questioned in order to preserve appellate review of excluded evidence. . . . Our Court has recently held that an informal offer of proof may be sufficient in certain situations to establish the essential content or substance of the excluded testimony."

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10. "The trial court's evidentiary decisions, including a decision granting a motion to quash a subpoena on grounds that it is unduly burdensome, also will not be disturbed absent a showing of abuse of discretion." *In re A.H.*, 250 N.C. App. 546, 553, 794 S.E.2d 866, 872 (2016).

(citations and quotation marks omitted)).[11] Thus, Mother contends that Father, by failing to make even an "informal" offer of proof regarding the substance of Amy's testimony, should not be allowed to raise this issue on appeal. But the Permanent Order belies Mother's argument as Father was denied the opportunity to make any type of offer of proof.

Both the caption of the order -- "ORDER MODIFYING PERMANENT CHILD CUSTODY ORDER, GRANTING MOTIONS TO QUASH, DENYING MOTIONS FOR CONTEMPT, AND *DENYING OFFER OF PROOF*" -- and the decree of the order -- "The Plaintiff's Oral Motion to make an Offer of Proof pertaining to the minor child's testimony is denied" -- specifically deny Father's request to make an offer of proof in any form. (Emphasis added.)

Mother further cites to Rule 601(b) of the Rules of Evidence, apparently implying that Amy may not have been competent to testify. *See* N.C. Gen. Stat. § 8C-1, Rule 601(b) (2017) ("A person is disqualified to testify as a witness when the court determines that the person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth."). But Mother did not argue incompetency before the trial court nor was it a basis the trial court found for denying the request for an offer of proof.[12] Furthermore, because no evidence was presented as to Amy's competency as a witness, the trial court -- by not allowing an offer of proof -- had no basis upon which to make such a determination. We fully appreciate that the high level of conflict between Mother and Father in this case has no doubt been traumatic

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11. In *Martin*, this Court also noted that if the significance of the evidence is obvious from the record, a specific offer of proof may not be necessary: "Our Supreme Court has held that to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *Id.* at 605, 774 S.E.2d at 332-33 (citation and quotation marks omitted). Of course, while the relevancy of Amy's testimony is obvious as the child at issue in the custody matter, the significance is not, as Father's counsel himself noted, having never spoken with Amy it was not clear what if anything she would have to say. Without the significance of the offer of proof being obvious, it "must be made to appear in the record" so that this Court may properly analyze whether the trial court abused its discretion in allowing Mother's motions to quash. *Id.*

12. Mother argued, "Your Honor has the right to say, 'You know, based on everything this child has been put through, I don't find that she's a competent witness.' " But being "put through a lot" is not a legal basis for incompetency as a witness nor did Mother present any evidence upon which the trial court could make a finding regarding Amy's competency as a witness. Further, our review of Ms. Thomas's records does not suggest any reason Amy may be incompetent as a witness as this is defined under Rule 601, although on remand, the trial court may certainly consider the issue if it is raised.

to Amy, and Father's counsel, even in requesting to make his offer, addressed Father's concerns about Amy by noting his efforts to protect her: He attempted to avoid subpoenaing Amy by deposing Ms. Thomas; he would prefer Amy only testify without the parties or even counsel present; he was willing to have Amy questioned outside of the court. Ultimately, the trial court quashed the subpoena and refused to allow any sort of offer of proof based upon potential trauma to Amy. We agree Amy's wellbeing is an important concern, but it is a not a legal basis to disregard the mandate within Rule 43.

As we have determined there was no evidence presented nor legal basis noted for denying Father's request to make an offer of proof, we conclude the trial court erred as counsel at trial *must* be allowed to make an offer of proof under these facts. *See* N.C. Gen. Stat. § 1A-1, Rule 43(c). The court may deny an offer of proof only if it "clearly appears that the evidence is not admissible on any grounds or that the witness is privileged[:]"

> [i]n an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. *In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.*

Id. (emphasis added). "As used in statutes, the word 'shall' is generally imperative or mandatory." *Silver v. Halifax County Board of Commissioners*, 371 N.C. 855, 863, 821 S.E.2d 755, 761 (2018) (citation and quotation marks omitted). "Rule 43(c) thus requires the trial court, upon request, to allow the insertion of excluded evidence in the record." *Nix v. Allstate Ins. Co.*, 68 N.C. App. 280, 282, 314 S.E.2d 562, 564 (1984).[13] Here, the trial court was required to allow the offer of

13. *Nix* continues, "The trial judge, however, is not required to allow insertion of an answer in the record if it clearly appears that the proffered testimony is not admissible on any grounds. The trial judge, though, should be loath to deny an attorney his right to have an excluded answer placed in the record because the Appellate Division may not concur in his judgment that the proffered testimony is clearly inadmissible." *Id.* (citations and quotation marks omitted). But here no grounds for inadmissibility were raised before the trial court.

proof, unless "it clearly appear[ed] that the evidence [wa]s not admissible on any grounds or that the witness [wa]s privileged[,]" and neither inadmissibility nor privilege were grounds raised by the Mother in challenging Father's request to make an offer of proof or mentioned in the Permanent Order itself as a basis for denying Father's request. N.C. Gen. Stat. § 1A-1, Rule 43.

Under similar circumstances, in *State v. Brown*, 116 N.C. App. 445, 447, 448 S.E.2d 131, 132 (1992), our Court followed the procedure laid out by the Supreme Court when counsel has been denied this "fundamental" part of the trial process:

> It is fundamental that trial counsel be allowed to make a trial record sufficient for appellate review. In *State v. Chapman*, our Supreme Court stated:
>
> > We regard the trial judge's refusal to allow counsel to complete the record as a regrettable judicial mistake. 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 (1) 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, and (2) that he may leave with the bench and bar the impression that he acted arbitrarily.
>
> Counsel here was prevented from making a sufficient record because the trial court refused to allow the defendant to make an offer of proof regarding the testimony of Ms. Russell.
>
> Without having the substance of Ms. Russell's proposed testimony, we cannot determine whether the defendant was prejudiced by the trial court's refusal to allow Ms. Russell to testify. The record must be complete in order that the defendant have meaningful appellate review.

Id. (citation omitted).

On remand, if Amy is again subpoenaed to testify and this issue arises again and the trial court determines there is a legal basis to quash the subpoena, we note that the method for making an offer of proof is within the discretion of the trial court. The offer could be taken in a setting outside the courtroom but both to preserve the rights of Father

and to provide a proper record for appellate review, the offer itself is required. Only with the offer of proof would an appellate court be able to address Father's first and fourth issues on appeal – whether the trial court abused its discretion in allowing Mother's motions to quash and whether "many" of the trial court's findings of fact are not supported by competent evidence "given the court's legal error in not hearing from" Amy. (Original in all caps.)

III. Denial of Access to Therapy Records

[2] We turn now to Father's third issue on appeal regarding Ms. Thomas' sealed records. This issue is related to the first, as Ms. Thomas's notes are the only documentation of Amy's potential testimony, but Father was not allowed to have any access to this information. The only issue Father raises as to Ms. Thomas on appeal is that neither party was provided her therapy notes. Thus, this opinion is *not* to be construed as a substantive determination on any of the other issues regarding Ms. Thomas, such as the fact that Mother raised the motion quash on her behalf rather than Ms. Thomas raising it herself; the trial court's decision to allow Mother's motion to quash on Ms. Thomas' behalf; and or the limited questions the trial court allowed. The only issue we are addressing regarding Ms. Thomas is the one Father brings forth on appeal: "Did the trial court err in sealing records of the child's counselor when the court's order fails to show the court considered alternatives to a complete sealing of the records?" (Original in all caps.)

Both Mother and Ms. Thomas contend on appeal that Father failed to properly preserve the issue regarding Ms. Thomas' notes. Ms. Thomas admits that Father provided a notice of appeal to the 7 March 2018 "order concerning Katie Thomas" but then contends Father thereafter waived this issue by failing to argue it in his brief. Mother, in a one paragraph argument, also makes a similar waiver argument to Ms. Thomas and does not substantively address the issue of sealing the notes. But the only reason both Ms. Thomas and Mother addressed the issue of the sealed notes in their briefs is *because* Father *did* address it in his brief. Neither Ms. Thomas nor Mother have raised any *valid* issues with preservation, such as a failure to raise the issue with the trial court or a defective notice of appeal, and thus we turn to the substantive issue raised by Father.

Father contends "the trial court abused its discretion in not providing the notes of [Amy]'s counselor to counsel for the parties[.]" (Original in all caps.) The trial court's 7 March 2018 order is the first addressing the issues arising around the testimony and documents to be provided

by Ms. Thomas; in that order, the trial court denied Father's motion to compel, allowed Mother's motion for a protective order, ordered Ms. Thomas "to provide a copy of [Amy]'s medical records under seal to the Court for its review, *in camera*, within (14) days from the entry of this order[,]" and instructed Father to not depose Ms. Thomas "until such time as the Court has reviewed the records and determined if the deposition shall occur at a future time and under what conditions[.]" The trial court also decreed that the order was issued "without prejudice, as to" Father.

At a hearing on 11 April 2018 to discuss Ms. Thomas' testimony and notes the trial court noted it had reviewed the records and was concerned because "this child trusts this therapist and I don't want that to be destroyed at all." The trial court explained it was leaning toward allowing a deposition but not for "any information that would harm" Amy's trust but rather for "her opinion as to where we are with the child needing to or not needing to spend more time with Dad." Father's attorney then explained he was simply trying to respond to allegations made in the motions for contempt and to modify custody regarding statements made by Amy and his only route for doing that was Amy, an option he was trying not to exercise; instead, he was hoping to explore this information with Ms. Thomas to avoid involving Amy. After hearing from all three attorneys involved, the trial court determined it would not be releasing the records in any manner, not even by limiting access to counsel. The basis of the trial court's decision against releasing records was the therapeutic relationship and the potential harm that may come to Amy from releasing the records.[14] Thereafter, on 20 September 2018, the trial court determined Ms. Thomas would "submit to a written deposition" and then provided the questions to be answered; this order did not address sealing records. The trial court then entered its pretrial order which did not address Ms. Thomas and then it entered the Interim Memo and Permanent Order. As to Ms. Thomas, the Permanent Order stated,

> 49. Due to parental conflict, divorce and custody proceedings, the Order provided that the Defendant was to obtain any counseling recommended for the minor child to assist her in dealing with any issues she may have arising from the separation and divorce of the parties. The minor child began seeing therapist, Katie Thomas, shortly after the Order was entered and is still under her care.

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14. It is not clear on the record before us how allowing the parties' counsel some form of access to records could impair Amy's trust in her therapist, since this access could not harm Amy's trust *unless* she is made aware of it.

50. Pursuant to prior orders entered in this matter Ms. Thomas produced her records for the minor child to the Court under seal for the review of the Court only. Neither party, nor their counsel, were granted access to the records, due to the high conflict nature of this matter. The Plaintiff's counsel, pursuant to orders of this court, did serve Ms. Thomas with written interrogatories, which she responded to and her responses were admitted into evidence without objection. Ms. Thomas' responses expressed concern for the minor child being involved in discussions relating to the nature of this proceeding.

51. The Plaintiff has been aware that the minor child has been under the care of Ms. Thomas since she began therapy and has not had any involvement with her therapy with the exception of contacting Ms. Thomas on one occasion to question her about things unrelated to the minor child's mental wellbeing as outlined in her responses.

The trial court then decreed as to Ms. Thomas:

> The minor child shall continue counseling with Katie Thomas. Neither party shall have access to Ms. Thomas' therapy session notes and/or confidential records. Ms. Thomas shall be entitled to provide the parties with general information regarding the minor child's counseling so long as contact with the parties does not interfere with her therapeutic relationship with the minor child. The Plaintiff shall only contact Ms. Thomas via email to inquire as to the progress of the minor child so long as said contact is reasonable and limited in duration and is not used to harass and/or interfere with the minor child's therapy.

"Under the common law the decision to grant or deny access is left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *France v. France*, 209 N.C. App. 406, 414, 705 S.E.2d 399, 406 (2011) (citation, quotation marks, and brackets omitted). In *Raper v. Berry*, the trial court spoke with a minor in chambers without counsel or parties present, and the exclusion of the parties and counsel was challenged on appeal:

> Did the court commit error in conferring with Judith Ann Raper in the absence of parties and counsel during the pendency of the proceeding? Her affidavit was before the court and the findings show that great weight was attached to her views and feelings, and properly so. However, *in a court proceeding all parties are entitled to be present at all of its stages so that they may hear and refute if they can*. In the *Gibbons* case the court conferred with the child whose custody was at issue and with others in the absence of parties and counsel. This Court held [245 N.C. 24, 95 S.E.2d 88]: "*The court committed error in receiving testimony from witnesses without affording petitioner an opportunity to be present and know what evidence was offered.*" It is true witnesses other than the child were examined in the *Gibbons* case, but the error was not in the number but in the fact that any witness was so examined. While we recognize that in many instances it may be helpful for the court to talk to the child whose welfare is so vitally affected by the decision, *yet the tradition of our courts is that their hearings shall be open*. The Constitution of North Carolina so provides. Article I, Section 35. *The public, and especially the parties are entitled to see and hear what goes on in the courts. That courts are open is one of the sources of their greatest strength.* There is no suggestion that the able and conscientious judge was improperly influenced by the private interview but *the petitioner's right to hear all that was offered in his case must not be denied him.*

246 N.C. 193, 194–95, 97 S.E.2d 782, 783–84 (1957) (emphasis added) (citations omitted); *contrast Cox v. Cox*, 133 N.C. App. 221, 227, 515 S.E.2d 61, 66 (1999) (concluding that a party was not prejudiced when precluded from an "in-chambers interview" because counsel was present to represent them: "The attorneys' presence adequately protects the parties' rights and interests").

Here, Father's "right to hear all that was offered in his case" was denied him as neither he nor his attorney was allowed to view Ms. Thomas' notes.[15] *See Raper*, 246 N.C. at 195, 97 S.E.2d at 784. We conclude the trial court abused its discretion in precluding counsel from any access to Ms. Thomas's notes. The trial court may limit the parties' access and may order that the parties not copy or disclose the contents of the records to others, but they

15. On appeal, Father only challenges the trial court's refusal to provide access to counsel and we do not address whether further access by the parties would be required under these facts or circumstances.

must be allowed to review the records in some manner. In addition, the fact that the case is a "high conflict" case does not justify the complete denial of access by Father or his counsel to Ms. Thomas' notes. Instead, as Father's counsel repeatedly argued, he needed access to the notes in the hope of avoiding a need to call Amy as a witness, thus avoiding any potential trauma to Amy from having to come to court or answer questions in an offer of proof. We appreciate the trial court's desire to protect Amy, but Father must also be allowed to prepare and present his case and to defend himself.

We also note Father has not raised any objection to the trial court's sealing of the notes so they are not available to the *public* in the court file. Father never requested that the records not be sealed as to the public, and it is certainly within the trial court's discretion to protect the child's therapy medical records from public access, but that is not the issue presented in this case. On remand, Amy's therapy records remain sealed as to public access, but the trial court must allow some form of access to the parties or their counsel.

IV. Conclusion

Because the trial court did not allow Father to make an offer of proof of Amy's potential testimony in any form, we are unable to address the substantive arguments regarding the trial court's order regarding the motion to quash the subpoena to Amy. Because the trial court erred in denying Father the right to make an offer of proof regarding Amy's testimony and in denying Father any form of access to Ms. Thomas's records, and because the trial court specifically relied upon Ms. Thomas's records in making the findings of fact and entering the modification of custody order on appeal, we must reverse and remand the 10 June 2019 order as to modification of custody for further proceedings. Father did not address the portions of the order denying both his and Mother's motions for contempt on appeal, so we affirm the order to the extent of the denial of the motions for contempt. On remand, before proceeding to a new hearing regarding Mother's motion to modify custody, the trial court shall hold a hearing to address the parties' access to Ms. Thomas' notes and, if requested by either party, her testimony either in a deposition or at trial. If necessary on remand, the trial court shall also address Father's subpoena to Amy and if the subpoena is quashed, the trial court shall allow Father to make an offer of proof as required by Rule 43 of the Rules of Civil Procedure.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges MURPHY and BROOK concur.

GUADALUPE HIDALGO, ADMINISTRATRIX OF THE ESTATE OF JESUS ENRIQUE HIDALGO, PLAINTIFF

v.

EROSION CONTROL SERVICES, INCORPORATED, JAMES BERNARD, JEFFREY BYRUM, AND DALLAS GLOVER, DEFENDANTS

No. COA19-756

Filed 21 July 2020

Workers' Compensation—Woodson claim—wrongful death—safety violation—evidence of conduct necessary for claim

In a *Woodson* claim for wrongful death involving an overturned tractor at a construction site, the trial court lacked subject matter jurisdiction due to the exclusivity provisions of the North Carolina Workers' Compensation Act. Although defendant-employer created an unsafe condition and violated OSHA safety regulations by installing a replacement seat on the tractor without the required seat belt, that fact alone was not sufficient evidence of intentional misconduct substantially certain to cause serious injury or death as required for a claim under *Woodson*, and the trial court's denial of summary judgment for defendant was reversed.

Appeal by Defendants from Order entered 15 April 2019 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 March 2020.

Butler, Quinn & Hochman, PLLC, by Brian R. Hochman and Ian A. McIntyre, for plaintiff-appellee.

McAngus, Goudelock & Courie, PLLC, by Heather G. Connor and Christopher J. Campbell, for defendant-appellant Erosion Control Services, Inc.

Dean & Gibson, PLLC, by Michael G. Gibson, for defendant-appellant Dallas Glover.

HAMPSON, Judge.

Factual and Procedural Background

Erosion Control Services, Inc. (ECS) and Dallas Glover (collectively, Defendants) appeal from an Order entered 15 April 2019 denying in part

and granting in part Defendants' Motions for Summary Judgment. The Record reflects the following relevant facts:

On 20 July 2016, Jesus Enrique Hidalgo (Decedent) was the victim of a fatal workplace accident. Decedent was employed by ECS, a provider of soil and sediment control services for construction projects. On the date of the accident, Decedent was operating a M8200 Kubota Tractor at a construction site in Mecklenburg County, North Carolina. Decedent was driving the tractor on a slope in an area of the project known as Basin Two when the tractor started to roll. Decedent was ejected from the tractor and fatally injured when the tractor rolled on top of him.

Decedent's mother, Guadalupe Hidalgo (Plaintiff), filed a complaint as Administratrix of Decedent's estate on 17 July 2018 and an amended complaint[1] (Complaint) on 14 January 2019. Plaintiff's Complaint alleged wrongful death due to Defendants' negligence. Plaintiff specifically alleged Defendants ECS, as Decedent's employer, and Bernard, Byrum, and Glover, as owners and officers of ECS, were negligent and grossly negligent by: "replacing the seat of the tractor with one that did not have a seatbelt"; "allowing the tractor to be operated without a seatbelt"; failing to implement safety procedures that would have prevented Decedent from operating the tractor "on a slope where it was certain to roll over"; directing Decedent to operate the tractor on a slope where it was certain to roll over; and failing to provide proper training for Decedent, as an operator, to appreciate the risks of operating the tractor on a slope. Plaintiff contended the alleged actions were intentional and "substantially certain to cause serious injury or death and proximately caused the death of [Decedent]." Defendants answered Plaintiff's Complaint denying negligence on their behalf and moved to dismiss Plaintiff's Complaint. Defendants also filed Motions for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

Subsequent discovery revealed in April 2015, ECS shop manager David White (White) procured a replacement seat for the tractor in question from eBay after the manufacturer was unable to directly provide one. The replacement seat did not include a seatbelt. However, White averred he was unaware of the lack of seatbelt upon purchasing the seat and, further, he was not present when the site crew unpacked and installed the seat in the tractor. Moreover, at the time of the accident on 20 July 2016, Decedent was operating the tractor outside of the

1. Plaintiff amended her complaint to allege only claims under the theory of wrongful death.

designated project area (Basin Three), on a slope in Basin Two, where there was "no reason for him to be driving on the slope if [ECS] w[as] not actively working the slope at the time" and where no other ECS crew members were working. Following the accident, ECS was cited by the Occupational Safety and Health Administration (OSHA) for four workplace safety violations pertaining to the lack of seatbelt and safety measures for the tractor. No evidence was entered into the Record indicating Decedent was specifically directed by ECS or its agents to work in or enter Basin Two at the time of the accident.

The trial court held a hearing on Defendants' Motions for Summary Judgment on 4 April 2019. Defendants argued the exclusive remedy for Plaintiff's claim was within the North Carolina Workers' Compensation Act before the Industrial Commission and therefore that the trial court lacked subject-matter jurisdiction to hear Plaintiff's claims. Plaintiff contended Defendants' negligence was so egregious it fell within the exception to the Workers' Compensation Act's exclusivity provision as articulated by the North Carolina Supreme Court in *Woodson v. Rowland* and therefore Plaintiff could seek relief through a civil action.

On 15 April 2019, the trial court filed its Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment. The trial court granted summary judgment in favor of individual Defendants Bernard and Byrum. The trial court denied Defendants Glover and ECS's Motions for Summary Judgment on their arguments "based upon lack of subject matter jurisdiction due to the exclusivity provisions of the North Carolina Workers' Compensation Act." Defendants Glover and ECS timely appealed on 29 April 2019. Plaintiff did not appeal the trial court's entry of summary judgment in favor of individual Defendants Bernard and Byrum.

Issue

The dispositive issue on appeal is whether Plaintiff forecast sufficient evidence to establish Plaintiff's claims fell outside the exclusivity provisions of the North Carolina Workers' Compensation Act under our Supreme Court's decision in *Woodson v. Rowland*, 329 N.C. 330, 341, 407 S.E.2d 222, 228 (1991), to withstand Defendants' Motions for Summary Judgment.

Analysis

A. Standard of Review

The denial of a motion for summary judgment is usually considered interlocutory; however, "[t]his Court has appellate jurisdiction because

the denial of a motion concerning the exclusivity provision of the Workers' Compensation Act affects a substantial right and thus is immediately appealable." *Fagundes v. Ammons Dev. Grp., Inc.*, 251 N.C. App. 735, 737, 796 S.E.2d 529, 532 (2017) (citation omitted). "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and quotation marks omitted).

B. Plaintiff's *Woodson* Claim

The North Carolina Workers' Compensation Act (the Act), located in Chapter 97 of our General Statutes, was created to "ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003); *see* N.C. Gen. Stat. § 97-9 (2019). However, to balance competing interests between employees and employers, the Act includes an exclusivity provision, which "limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damage awards in civil actions." *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227 (citation omitted); *see* N.C. Gen. Stat. § 97-10.1 (2019).

Our Supreme Court carved out an exception to the Act's exclusivity provision in *Woodson* for civil actions brought as a result of conduct that is "tantamount to an intentional tort." 329 N.C. at 341, 407 S.E.2d at 228. Our Supreme Court laid out an exacting standard that plaintiffs must meet in order to escape the exclusivity provision:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer.

Id. at 340-41, 407 S.E.2d at 228. "Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and

where such misconduct is substantially certain to lead to the employee's serious injury or death." *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668.

In *Woodson*, the decedent was killed in a tragic workplace accident when the fourteen-foot-deep trench he was working in collapsed on top of him. 329 N.C. at 336, 407 S.E.2d at 226. The facts in *Woodson* demonstrated the defendants, including the defendant-employer and president, blatantly disregarded the safety of the decedent in expressly directing him to work in a trench that was "substantially certain to fail." *Id.* at 345, 407 S.E.2d at 231. The defendant-president, who was present on site at the time of the fatal accident, had a career in "excavating different kinds of soil." *Id.* The defendant-employer "had been cited at least four times in six and one-half years immediately *preceding* th[e] incident for violating multiple safety regulations governing trenching procedures." *Id.* (emphasis added). The defendant-president was not only "aware of safety regulations designed to protect trench diggers from serious injury or death[,]" but he "knew he was not following th[ose] regulations in digging the trench in question." *Id.*; *see also Whitaker*, 357 N.C. at 556, 597 S.E.2d at 668 (noting in *Woodson* "[t]he hazard of a cave-in was so obvious that the foreman of another construction crew working on the project had emphatically refused to send his men into the trench until it was properly shored"). On those facts, the Supreme Court held the plaintiff was not limited by the exclusivity provision of the Act, although she was entitled to only one recovery. *Woodson*, 329 N.C. at 348, 407 S.E.2d at 233.

In *Whitaker*, our Supreme Court reaffirmed the *Woodson* exception, reiterating it "represents a narrow holding in a fact-specific case" and "applies only in the most egregious cases of employer misconduct." *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668. In *Whitaker*, the Court reversed this Court and reinstated the trial court's grant of summary judgment in favor of the defendants. *Id.* at 558, 597 S.E.2d at 669. The Court in *Whitaker* determined there was "insufficient evidence to reasonably support plaintiffs' contention that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to decedent." *Id.* at 557, 597 S.E.2d at 668. Namely, there was "no similar evidence that defendants were manifestly indifferent to the health and safety of their employees"; there was "no evidence of record that the [defendant] had been previously cited for multiple, significant violations of safety regulations"; "[o]n the day of the accident, none of the [defendant's] supervisors were on-site to monitor or oversee the workers' activities"; and the "[d]ecedent was not expressly instructed to proceed into an obviously hazardous situation . . . ." *Id.* at 558, 597 S.E.2d at 668.

Here, taking "all reasonable inferences . . . in the light most favorable to the non-moving party[,]" *Woodson*, 329 N.C. at 344, 407 S.E.2d at 231, we conclude on the Record before us, the facts of the case at hand are more akin to those in *Whitaker* than in *Woodson*, and thus Plaintiff has not demonstrated Defendants "intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to decedent." *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668.

First, the Record is devoid of any indication Decedent was expressly directed by Defendants to drive his tractor into Basin Two and onto the slope that resulted in the fatal rollover. In fact, the Record reflects no ECS work was occurring in Basin Two at the time of the accident and no other ECS employees were present in Basin Two to witness the accident. ECS was cited for four OSHA violations *after* the accident from which Plaintiff's case arose. However, unlike the defendant-employer in *Woodson* who had received multiple citations for OSHA violations pertaining to unsafe trenching, no evidence in the Record shows a history or pattern of OSHA violations by ECS pertaining to tractor safety *prior* to the incident in question.

Plaintiff contends Defendant Glover had knowledge the replacement seat for the tractor lacked a seatbelt or, at the very least, that it is a question of fact defeating Defendants' Motions for Summary Judgment; however, that fact, even taken as true, would not meet the high threshold set out by our Supreme Court in *Woodson*. "On a number of occasions, North Carolina courts have rejected *Woodson* claims despite the presence of evidence in the record demonstrating that the workplace at issue was unsafe at the time of the accident." *Blue v. Mountaire Farms, Inc.*, 247 N.C. App. 489, 504, 786 S.E.2d 393, 403 (2016) (citations omitted). Furthermore, "[a]s discussed in *Woodson*, simply having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death." *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 668-69.

The Record before us indicates the tractor seat was replaced in April 2015, over a year before Decedent's accident. There is no question the lack of seatbelt on the tractor seat was a violation of OSHA safety regulations, and ECS did not contest that fact. However, the tractor was operated for over a year without the proper seatbelt, and the Record reflects no prior safety incidents. While the lack of a seatbelt created an unsafe condition and may well have made serious injury or death more likely or even probable in the event of an accident, in light of the high bar set by our Supreme Court in *Woodson* and *Whitaker*, this fact alone does not support Plaintiff's argument the lack of seatbelt made it

substantially certain death or serious injury would occur when operating the tractor. Even assuming *arguendo* for purposes of Defendants' Motions for Summary Judgment that Defendants' replacement of the seat without a seatbelt was intentional misconduct, Plaintiff has not forecasted such misconduct was substantially certain to lead to Decedent's serious injury or death.

Although we are sensitive to the facts of this case, we emphasize as did our Supreme Court in *Whitaker*, there must be "uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death." *Id.* at 557, 597 S.E.2d at 668. We conclude, on the Record before us, that without more Plaintiff has not forecast evidence of intentional misconduct by Defendants substantially certain to lead to Decedent's death so as to create a genuine issue of material fact sufficient to survive summary judgment on Plaintiff's claims arising under *Woodson*. Thus, the trial court erred in denying Defendants' Motions for Summary Judgment. Consequently, the trial court should have also entered summary judgment in favor of Defendants Glover and ECS.

Conclusion

Accordingly, for the foregoing reasons, we reverse the part of the trial court's Order denying Defendants' Motions for Summary Judgment "based upon lack of subject matter jurisdiction due to the exclusivity provisions of the North Carolina Workers' Compensation Act."[2] We further remand this matter for the trial court to enter Judgment in favor of Defendants.

REVERSED AND REMANDED.

Judges DIETZ and TYSON concur.

2. Plaintiff did not appeal the trial court's grant of summary judgment to the individual Defendants Bernard and Byrum, and those two individual Defendants are not parties to this appeal. Consequently, the portion of the trial court's Order granting summary judgment to Bernard and Byrum is not before us and stands undisturbed.

IN RE EST. OF MEETZE

[272 N.C. App. 475 (2020)]

IN THE MATTER OF THE ESTATE OF JOHN TIMOTHY MEETZE, DECEASED

No. COA19-1097

Filed 21 July 2020

1. Estates—spousal allowance—re-dating of assignment and deficiency judgment—abuse of discretion analysis—time to appeal

Where the assistant clerk assigned a spousal allowance to petitioner three years after petitioner applied for it but backdated her signature to the day petitioner submitted the application, the Clerk of Court and the trial court abused their discretion by re-dating the assignment to a later date. Their actions fell outside the scope of Civil Rules 60(a) and 60(b) because the re-dating affected substantial rights of the parties by extending the time for respondents to appeal the assignment, the assistant clerk's original mistake did not involve impropriety, and equity did not require re-dating because—regardless of the date determined—the period of time for respondents to appeal it began to run on the date the assistant clerk actually signed it.

2. Estates—spousal allowance—willful abandonment without just cause—domestic violence

In an action for a spousal allowance, the trial court erred in determining petitioner willfully and without just cause abandoned the decedent where petitioner involuntarily and unwilfully separated from decedent due to his acts of domestic violence and she had not condoned or forgiven decedent such that the abuse was no longer a justifiable grievance. Due to his abuse, the abandonment was decedent's and the passage of time, divorce filings, and lack of contact, without steps by decedent to rehabilitate his conduct, did not convert his abandonment into an abandonment by petitioner.

Appeal by Petitioner from order entered 3 September 2019 by Judge Marvin K. Blount, III, in Wilson County Superior Court. Heard in the Court of Appeals 9 June 2020.

Batts, Batts & Bell, LLP, by Michael R. Smith, Jr., and Benjamin D. Carter, for Petitioner-Appellant.

Narron & Holdford, P.A., by Ben L. Eagles, for Respondents-Appellees.

INMAN, Judge.

Petitioner-Appellant Candee Able Peacock ("Ms. Peacock"), who applied for and received an assignment and a deficiency judgment for her spousal year's allowance from an assistant clerk with the Wilson County Superior Court, appeals an order of the superior court: (1) affirming the Wilson County Clerk of Superior Court's decision to re-date the assignment and deficiency judgment, thereby renewing Respondent-Appellees Jordan Lynn Batchelor's and Blair Nicole Batchelor's (the "Batchelors") time to appeal them to the superior court; and (2) disqualifying Ms. Peacock from receiving her spousal allowance under N.C. Gen. Stat. § 31A-1(a) (2019). After careful review, we reverse the trial court's order.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

Ms. Peacock and John Timothy Meetze ("Decedent") were married in South Carolina on 13 April 1997. Decedent physically abused Ms. Peacock throughout the marriage. On 23 April 1998, Decedent physically assaulted Ms. Peacock and caused multiple injuries that required medical attention. Ms. Peacock fled the home that day, beginning what would become a years-long separation. Ms. Peacock also sought a Domestic Violence Protective Order against Decedent, which was granted by a South Carolina court on 4 May 1998.

Ms. Peacock filed for divorce in South Carolina later that year. Decedent then sent a letter from prison to Ms. Peacock's lawyer stating he still loved his wife and would be contesting the divorce. As a result of the letter, Ms. Peacock dropped the divorce proceeding. Ms. Peacock saw Defendant for the last time in a South Carolina courtroom in 1999 but had no further contact with him.

Decedent and Ms. Peacock remained separated and both entered other relationships between 1999 and Decedent's death in January 2016. Ms. Peacock had sexual relationships and cohabitated with at least two other men, while Decedent purported to marry Carol Burgess Meetze ("Ms. Burgess") on 4 August 2001. Burgess was unaware that Decedent was still married to Ms. Peacock.

Ms. Peacock filed a second divorce action in Virginia in December of 2015. Decedent passed away the following month and Ms. Peacock voluntarily dismissed her divorce action.

On 29 January 2016, Ms. Burgess filed an application for and was assigned the spousal year's allowance by the Wilson County Clerk of

Superior Court. On 5 February 2016, however, Decedent's son from a previous marriage filed a motion to set aside the assignment of the year's allowance to Ms. Burgess because Decedent was still married to Ms. Peacock at the time of his death. On 15 February 2016, while Decedent's son's motion was still pending, Ms. Peacock filed with the Clerk her own application for the spousal year's allowance. She also joined the motion to set aside the assignment to Ms. Burgess. The trial court later set aside the assignment of the year's allowance to Ms. Burgess after declaring the marriage void, and, in July 2017, this Court affirmed that order. *In re Estate of Meetze*, 254 N.C. App. 610, 802 S.E.2d 916, 2017 WL 3027483 (2017) (unpublished). Following that decision, the Batchelors—the children of Decedent's godmother—filed Decedent's purported Last Will and Testament, which named them as beneficiaries and voided any gifts to Ms. Burgess.

Despite her filing of the application on 15 February 2016 and this Court's subsequent ruling setting aside Ms. Burgess's spousal allowance, Ms. Peacock's application for the year's allowance sat unresolved in the Clerk's office until 15 February 2019, when an assistant clerk allowed the application and assigned the year's allowance to Ms. Peacock (the "Assignment"). The assistant clerk also entered a deficiency judgment for the full amount of the allowance because funds in Decedent's estate were insufficient to pay it (the "Deficiency Judgment"). In reviewing the Assignment, the assistant clerk believed it had been erroneously left unsigned on 15 February 2016. So, she dated her signature on the Assignment 15 February 2016. The assistant clerk dated the Deficiency Judgment 15 February 2019 consistent with the date she actually signed.

The backdating of the Assignment was brought to the attention of Wilson County's elected Clerk of Superior Court (the "Clerk") sometime after its entry and, on 1 April 2019, the Clerk heard arguments from counsel for the parties concerning whether the assistant clerk correctly dated the Assignment and the Deficiency Judgment. The Clerk determined that the Assignment was signed by the assistant clerk on 15 February 2019 but was "mistakenly" dated 15 February 2016. As a result, the Clerk entered an order on 4 April 2019 re-dating the entry of the Assignment and Deficiency Judgment to 4 April 2019 (the "Clerk's Order"). In that order, the Clerk concluded that such relief was authorized pursuant to Rule 60 of the North Carolina Rules of Civil Procedure without specifying which specific subsection of the Rule applied.

Following the entry of the Clerk's Order, the Batchelors and Ms. Burgess filed a motion to set aside the Assignment and Deficiency Judgment and a Notice of Appeal to superior court. Ms. Peacock also

filed a Notice of Appeal, as well as a motion challenging Ms. Burgess's standing to appeal, a motion to stay proceedings, and an answer to the motion to set aside the Assignment and Deficiency Judgment.

On 22 July 2019, the trial court heard the parties' appeals. At the hearing, the assistant clerk testified about backdating the Assignment. The assistant clerk explained that she backdated the Assignment because she believed it was supposed to have been signed concurrent with the filing of Ms. Peacock's application on 15 February 2016 as a matter of rote procedure, and assumed in 2019 that it went unsigned by simple oversight.

Ms. Peacock also testified at the hearing, describing in detail the abuse and injuries she suffered at Decedent's hands. The court received photographs of her injuries into evidence, as well as a transcript of the domestic violence protection hearing in which she described her injuries for the South Carolina court. Ms. Peacock further testified that Decedent continued to harass her by phone after they separated, that she stayed away for fear of her personal safety, and that she did not try to get back together with Decedent because she "d[id]n't think [she]'d be sitting here today if [she] would have."

In an order dated 3 September 2019, the trial court granted Ms. Peacock's motion to dismiss Ms. Burgess's appeal, concluding she lacked standing because her marriage to Decedent was void. The trial court also affirmed the Clerk's re-dating of the Assignment and Deficiency Judgment based on Rule 60 of the North Carolina Rules of Civil Procedure. Finally, the trial court granted the Batchelor's motion to set aside the Assignment and Deficiency Judgment pursuant to N.C. Gen. Stat. § 31A-1. Although the trial court found that Ms. Peacock "involuntarily and unwilfully separated from [Decedent]," it also determined that, "[b]ased upon the passage of time between [the] involuntary separation . . . to include [Ms.] Peacock's prior divorce filings as well as lack of contact between the parties, Ms. Peacock did willfully and without cause abandon [Decedent]." Ms. Peacock timely appealed.

II. ANALYSIS

Ms. Peacock presents two principal arguments on appeal: (1) the trial court erred in concluding that the Clerk was authorized under Rule 60 to amend the dates of entry of the Assignment and Deficiency Judgment to 4 April 2019; and (2) if the Clerk did possess that authority, the trial court erred in concluding that Ms. Peacock willfully and without just cause abandoned Decedent such that she was disqualified from receiving her spousal year's allowance. We address each argument in turn.

A. Standards of Review

"The personal representative, or the surviving spouse, or child by the child's guardian or next friend, or any creditor, devisee, or heir of the deceased, may appeal" *de novo* a clerk of court's ruling regarding spousal allowance to superior court. N.C. Gen. Stat. § 30-23; *see also* N. C. Gen. Stat. § 1-301.2 (2019) (providing for *de novo* review of such an appeal to superior court). On appeal to this Court, "[u]nchallenged findings of fact 'are presumed to be supported by competent evidence and are binding on appeal.' " *In re Estate of Harper*, ___ N.C. App. ___, ___, 837 S.E.2d 602, 604 (2020) (quoting *In re Estate of Warren*, 81 N.C. App. 634, 636, 344 S.E.2d 795, 796 (1986). Conclusions of law are subject to *de novo* review. *In re Estate of Peacock*, 248 N.C. App. 18, 21, 788 S.E.2d 191, 194 (2016).

Relief under Rule 60(a) is limited to the "correction of clerical errors, [and] it does not permit the correction of serious or substantial errors." *Buncombe Cty. By and Through Child Support Enf't Agency ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784 (1993) (citation omitted). A trial court's order correcting a clerical error under Rule 60(a) is subject to the abuse of discretion standard. *Id.* A trial court abuses its discretion and enters an order outside the scope of the Rule "when it alters the effect of the original order." *Id.* (citation omitted). Relief under Rule 60(b) is also left to the discretion of the trial court, and its determination "will not be disturbed absent: (1) an abuse of discretion; and/or (2) a trial court's misapprehension of the appropriate legal standard for ruling on a Rule 60(b) motion." *Pope v. Pope*, 247 N.C. App. 587, 590, 786 S.E.2d 373, 376-77 (2016) (quotation marks and citation omitted).

B. Rule 60

[1] Rule 60 provides relief from a final judgment or order. N.C. Gen. Stat. § 1A-1, Rule 60 (2019). It provides two paths—Rule 60(a) and Rule 60(b)—by which a party may modify a final judgment or order without entering an appeal. *Id.* The former permits a judge to correct clerical mistakes in judgments resulting from an oversight or omission, N.C. Gen. Stat. § 1A-1, Rule 60(a), while the latter provides "a grand reservoir of equitable power by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it." *Barnes v. Calvary Homes*, 148 N.C. App. 397, 400, 559 S.E.2d 246, 248-49 (2002) (internal quotation marks and citation omitted).

"A clerical error is [a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *In re D.D.J.*, 177 N.C. App. 441, 444, 628 S.E.2d 808, 811 (2006) (quotation marks and citations omitted) (additional alterations in original). *See also Rudder v. Rudder*, 234 N.C. App. 173, 179, 759 S.E.2d 321, 326 (2014) (identifying a clerical error when a trial court inadvertently checked the incorrect box on a preprinted form). The judge may correct the error "on his own initiative or on the motion of any party after such notice, if any, as the judge orders." N.C. Gen. Stat. § 1A-1, Rule 60(a). However, the judge does not have the power to make a correction affecting the substantive rights of the parties. *Food Serv. Specialists, Inc. v. Atlas Restaurant Mgmt., Inc.*, 111 N.C. App. 257, 259, 431 S.E.2d 878, 879 (1993).

Food Service Specialists, Inc. is instructive. There, a trial judge entered a judgment on 13 December 1991, but the judgment was inadvertently dated incorrectly as having been entered on 2 October 1991. *Id.* at 258, 431 S.E.2d at 879. The trial court identified the clerical error and changed the judgment date to 21 January 1992. *Id.* We held that the trial court's order exceeded the parameters of Rule 60(a):

> By changing the incorrect date of entry of judgment (2 October 1991) to a date other than 13 December 1991, the actual date judgment was entered, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal. Rule 60(a) does not vest the trial court with such authority.

Id. at 259-60, 431 S.E.2d at 880.

Based on a straightforward application of *Food Service Specialists, Inc.*, Ms. Peacock is correct that the Clerk (and the trial court in affirming the Clerk's order on appeal) could not rely on Rule 60(a) to re-date the Assignment and Deficiency Judgment to 4 April 2019. In making that modification, the Clerk worked a substantial change by renewing the time in which the Batchelors could appeal those orders. *Id.* Such a result is plainly prohibited under Rule 60(a) and *Food Service Specialists, Inc.*, and we hold that any reliance on that Rule by the Clerk and trial court constitutes error.

As for Rule 60(b), neither the Clerk nor the trial court indicated whether relief was proper under that Rule and, if so, which subsection of the Rule applied. Given that the parties are in apparent agreement

that Rules 60(b)(1) and 60(b)(6) are the only provisions that apply,[1] we review whether the trial court abused its discretion in affirming the re-dating of the Assignment and Deficiency Judgment for the assistant clerk's "[m]istake," N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), or "[a]ny other reason justifying relief from the operation of the judgment," N.C. Gen. Stat. § 1A-1, Rule 60(b)(6).

Assuming *arguendo* that the Clerk could grant relief under Rule 60 without a motion from either party, the assistant clerk's mistake in this case does not fall within the ambit of Rule 60(b)(1). "To set aside a judgment based upon mistake, the moving party must prove mutual mistake or that a unilateral mistake was made because of some misconduct[,]" *Griffith v. Curtis*, 205 N.C. App. 462, 465, 696 S.E.2d 701, 703 (2010), and nothing in the record suggests that the assistant clerk's unilateral mistake in backdating her signature on the Assignment was the result of impropriety. Indeed, the trial court found that the assistant clerk backdated the Assignment because "she thought it was the proper thing to do and there was no ill will on [her] part." The Clerk, therefore, could not grant relief for the assistant clerk's unilateral mistake under Rule 60(b)(1).

The Batchelors contend that equity required re-dating the Assignment and Deficiency Judgment under Rule 60(b)(6), which is available only upon "a showing (1) that extraordinary circumstances exist and (2) that justice demands relief." *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480 (1992) (citations omitted). Specifically, they argue—without citation to any authority—that the assistant clerk deprived them of their statutory right to appeal within ten days by backdating the Assignment to 2016, and that renewing their time to appeal by re-dating the Assignment and Deficiency Judgment to 4 April 2019 was necessary to vindicate that right. We disagree. The backdating of the Assignment had no impact on the Batchelors' right to appeal. That is because regardless which artificial date the assistant clerk or the trial court determined was appropriate for the Assignment—three years earlier or three weeks later—the period for the Batchelors to appeal expired on 25 February 2019, ten days after the assistant clerk actually signed it.

N.C. Gen. Stat. § 30-23 provides that a decedent's heirs may appeal an assignment of the spousal year's allowance "within 10 days after the

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1. In her appellate brief, Ms. Peacock contends that neither subsection supports the trial court's order. The Batchelors do not argue from any specific subsection, but instead contend that the Clerk was correcting a "mistake" on the part of the assistant clerk in order to effectuate an equitable result.

assignment, and the appeal shall be heard as provided in [N.C. Gen. Stat. §] 1-301.2." That statute, in turn, provides that "a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days *of entry of the order or judgment*, appeal to the appropriate court for a hearing de novo." N.C. Gen. Stat. § 1-301.2(e) (emphasis added). Under our Rules of Civil Procedure, "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 (2019). Here, although the assistant clerk dated her signature on the Assignment 15 February 2016, both parties acknowledge that the Assignment and Deficiency Judgment were actually "reduced to writing, signed by the [clerk], and filed" on 15 February 2019. *Id.* As a result, the Assignment and Deficiency Judgment were entered on that date,[2] and the Batchelors had ten days thereafter, or until 25 February 2019, to file any appeal. N.C. Gen. Stat. §§ 30-23, 1-301.2(e). In other words, the assistant clerk's error in misdating her signature on the Assignment in no way deprived the Batchelors of their right to appeal within ten days of its actual entry on 15 February 2019.[3]

With the Batchelors suffering no injury from the assistant clerk's backdating of the Assignment, nothing supports employing Rule 60(b)(6) to amend the Assignment's and Deficiency Judgment's dates of entry. The Batchelors were not entitled to notice of the Assignment, *In re Estate of Archibald*, 183 N.C. App. 274, 277, 644 S.E.2d 264, 266 (2007), and any expiration of the ten-day timeframe to appeal was the result

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2. The parties do not discuss on appeal whether the Assignment was entered *nunc pro tunc*. We note, however, that "*Nunc pro tunc* orders are allowed only *when a judgment has been actually rendered, or decree signed*, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk . . . ." *Long v. Long*, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (emphasis added) (citation and quotation marks omitted). Here, the assistant clerk testified that she believed the Assignment should have been signed in 2016 but was not, and the record discloses that Ms. Peacock's application was not passed upon until the assistant clerk reviewed and signed the Assignment in 2019. We therefore decline to treat the Assignment as entered *nunc pro tunc* 15 February 2016.

3. At oral argument, the Batchelors' counsel posed that if he had filed a notice of appeal within ten days of the unamended, backdated Assignment, their appeal would have been dismissed as untimely or otherwise unreviewable due to an erroneous record. Such speculation does not alter our holding; just as Ms. Peacock's motion to dismiss Ms. Burgess's appeal for lack of standing was argued at the hearing before the trial court, so too would any motion to dismiss a timely appeal by the Batchelors. Given the parties' agreement that the Assignment was actually signed and dated 15 February 2019 and the availability of the assistant clerk to testify—either in person or by affidavit—to the time of the Assignment's entry, we decline to address the Batchelors' hypothetical argument.

of inaction on their part.[4] Under these facts,[5] the Batchelors have not made the required showing under Rule 60(b)(6) "(1) that extraordinary circumstances exist and (2) that justice demands relief." *Thacker*, 107 N.C. App. at 481, 420 S.E.2d at 480 (citations omitted).

The parties identify no other bases for the Clerk's decision to re-date the Assignment and Deficiency Judgment. Because the relief requested by the Batchelors falls outside the scope of Rules 60(a), 60(b)(1), and 60(b)(6), we hold that the Clerk—and the trial court on *de novo* review—abused their discretion in re-dating the Assignment and Deficiency Judgment to 4 April 2019. As a result, the Batchelors failed to timely prosecute their appeal of those orders, and we vacate the trial court's order for lack of jurisdiction. *See Spalding Division of Questor Corp. v. DuBose*, 46 N.C. App. 612, 613-14, 265 S.E.2d 501, 503 (1980) (holding under a predecessor to N.C. Gen. Stat. § 1-301.2 that "[t]he appeal must be taken within ten days after the clerk's judgment to entitle the judge of superior court to review the ruling. There must be an appeal from the clerk's judgment to give the superior court jurisdiction. The superior court does not acquire jurisdiction where there is no appeal from the clerk's judgment." (citations omitted)); *cf. In re C.M.H.*, 187 N.C. App. 807, 809, 653 S.E.2d 929, 930 (2007) ("In the absence of subject matter jurisdiction, the trial court's order is void and should be vacated." (citation and quotation marks omitted)). And, because the Assignment was "a clerk's order that [was] not timely appealed[, it] 'will stand as a judgment of the court[.]' " *In re Thompson*, 232 N.C. App. 224, 227, 754 S.E.2d 168, 171 (2014) (quoting *In re Atkinson-Clark Canal Co.*, 234 N.C. 374, 377, 67 S.E.2d 276, 278 (1951)).

B. Willful Abandonment Without Just Cause

[2] Assuming *arguendo* that the Clerk could properly re-date the Assignment and Deficiency Judgment to 4 April 2019, we further hold that the trial court erred in concluding that Ms. Peacock willfully and without just cause abandoned Decedent within the meaning of N.C. Gen. Stat. § 31A-1. Under that statute, "[a] spouse who [1] willfully and [2] without just cause [3] abandons and refuses to live with the other

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4. At trial and oral argument on appeal, counsel for the Batchelors acknowledged that his clients did not discover the Assignment and Deficiency Judgments had been entered until more than 10 days after 15 February 2019.

5. Because "the remedy provided by Rule 60(b)(6) is equitable in nature[,]" *Thacker*, 107 NC. App. at 482, 420 S.E.2d at 480, and "[e]quity . . . will so mold its decrees as to fit the exigencies of each particular case[,]" *McNinch v. American Trust Co.*, 183 N.C. 36, 42-43, 110 S.E. 663, 667 (1922), we limit our holding to the particular facts of this case.

spouse and [4] is not living with the other spouse at the time of such spouse's death" is prohibited from receiving the spousal year's allowance. N.C. Gen. Stat. § 31A-1(a)(3).[6]

On *de novo* review, the trial court made the following findings of fact and conclusions of law pertinent to our analysis:

> 3. Candee Able Peacock involuntarily and unwilfully separated from John Timothy Meetze on April 23, 1998, following John Timothy Meetze's acts of domestic violence committed against Candee Able Peacock, never to be reunited with John Timothy Meetze again prior to his death.
>
> . . . .
>
> 5. After separating from John Timothy Meetze, and prior to the death of John Timothy Meetze, Candee Able Peacock lived in adulterous relationships.
>
> 6. Based upon the passage of time between Candee Able Peacock's involuntary separation from John Timothy Meetze, to include Candee Able Peacock's prior divorce filings as well as lack of contact between the parties, Candee Able Peacock did willfully and without cause abandon John Timothy Meetze.

Ms. Peacock does not directly challenge any specific findings on appeal; she does, however, contend that the trial court erred in concluding she "willfully and without cause abandoned" Decedent. Given the nature of Ms. Peacock's particular argument on appeal—and the dearth of precedent on the question—we must first determine whether and to what extent the trial court's determination that she willfully and without just cause abandoned Decedent is a finding of fact or conclusion of law.

Marital abandonment occurs when a spouse "brings their cohabitation to an end without justification, without the consent of the other

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6. Respondents argue that subsection (a)(2) of the statute also applies, which bars a spouse who "voluntarily separates from the other spouse and lives in adultery and such has not been condoned[.]" N.C. Gen. Stat. § 31A-1(a)(2). However, the trial court expressly found that Ms. Peacock "involuntarily and unwilfully separated from [Decedent]." The trial court then reiterated its finding of "involuntary separation" before concluding, in the language of subsection (a)(3), that Ms. Peacock "did willfully and without just cause abandon [Decedent]." Based on the trial court's order, which did not make the necessary finding of voluntary separation consistent with subsection (a)(2), we limit our review to whether the trial court correctly concluded Ms. Peacock abandoned Decedent without just cause under subsection (a)(3).

spouse and without intent of renewing it." *Panhorst v. Panhorst*, 277 N.C. 664, 671, 178 S.E.2d 387, 392 (1971) (citation omitted).[7] Intent to abandon is a factual finding. *Cf. In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986) (construing "willful[] abandon[ment]" under an adoption statute and holding "[w]hether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence" (citation omitted)). However, "[a]bandonment is a legal conclusion." *Patton v. Patton*, 78 N.C. App. 247, 251, 337 S.E.2d 607, 609 (1985), *rev'd on separate grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986) (discussing the statutorily-undefined term abandonment in application of now-repealed N.C. Gen. Stat. § 50-16.2 examined in *Panhorst*). *See also In re Estate of Lunsford*, 359 N.C. 382, 387-88, 610 S.E.2d 366, 370 (2005) (holding, in a case examining whether a mother was barred from intestate succession rights to her child's estate for willful abandonment under N.C. Gen. Stat. § 31A-2, that an unchallenged finding of willfulness was a binding finding of fact on appeal but that the issue of "abandon[ment]" within the meaning of the statute was a question of law subject to *de novo* review). Whether the abandonment is accomplished "without just cause" also constitutes a conclusion of law. *See Patton*, 78 N.C. App. at 253, 337 S.E.2d at 611 (reviewing findings as to a husband's specific conduct and holding "[t]hese findings receive support from evidence in the record and are, in our opinion, sufficient to support a conclusion that the husband abandoned the wife without just cause or provocation").[8]

Our courts have addressed the legal conclusion of abandonment in other contexts. In *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E.2d 243 (1948), which involved issues of alimony, our Supreme Court described how the concept of abandonment relates to abuse and physical threats between spouses:

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7. *Panhorst* provided this definition for willful abandonment under a now repealed statute, N.C. Gen. Stat. § 50-16.2, which applied the term within the context of divorce and alimony actions. However, in more recent decisions, this Court has used *Panhorst's* definition to define willful abandonment under N.C. Gen. Stat. 31A-1(a)(3). *See Meares v. Jernigan*, 138 N.C. App. 318, 321, 530 S.E.2d 883, 885 (2000) (applying the same definition from *Panhorst* to an action under N.C. Gen. Stat. § 31A-1(a)(3)); *In re Estate of Hendrick*, 231 N.C. App. 170, 753 S.E.2d 740, 2013 WL 6237353 (2013) (unpublished) (relying on *Panhorst* in evaluating a party's challenge to an assignment of spousal year's allowance on grounds of willful abandonment without just cause).

8. Whether a party has acted with "just cause" is also treated as a legal conclusion in other areas of the law. *See, e.g.*, *N.C. Dep't of Corr. v. Myers*, 120 N.C. App. 437, 462 S.E.2d 824 (1995) (recognizing that whether just cause existed to demote an employee was a conclusion of law).

> *When the husband by cruel treatment renders the life of the wife intolerable or puts her in such fear for her safety that she is compelled to leave the home, the abandonment is his, not hers.* Although the conduct of the spouse may such as to create a cause of action [for divorce] it may be condoned, or forgiven by the injured party, and become no longer a justiciable grievance. But a renewal of the misconduct may such as to wipe out the condonation, revive the former offense, and restore its effectiveness in an action for relief.

228 N.C. at 679, 47 S.E.2d at 250 (citation omitted) (emphasis added).

Here, the trial court determined that Decedent's spousal abuse caused Ms. Peacock to "involuntarily and unwilfully separate[] from [Decedent] . . . following [his] acts of domestic violence," but—by virtue of Ms. Peacock's divorce filings, lack of contact, and the passage of time—nonetheless concluded that she had abandoned Decedent without just cause. We hold that those findings do not support the conclusion reached by the trial court that Ms. Peacock abandoned Decedent. Based on the finding of domestic violence, and consistent with the concept of abandonment expressed in *Eggleston*, Decedent abandoned Ms. Peacock. *Id.* at 679, 47 S.E.2d at 250. There was no evidence or finding from the trial court that Ms. Peacock "condoned, or [had] forgiven" Decedent such that the abuse was "no longer a justifiable grievance." *Id.* To the contrary, Ms. Peacock testified Decedent continued harassing her and her family after she left the home and that, at the time of the hearing, she "d[id]n't think [she]'d be sitting here today if [she] would have [resumed relations]."

Nor does the passage of time, the divorce filings, or the lack of contact standing alone—*i.e.*, without steps by Decedent to rehabilitate his conduct—convert Decedent's abandonment into Ms. Peacock's. To hold otherwise would invert the common-sense notion that as between the abuser and the abused, the onus of reconciliation is on the former, not the latter. Thus, to the extent that Ms. Peacock's divorce filings indicate a willful desire to end her relationship, the evidence and findings do not support a conclusion of abandonment *without just cause* on the part of Ms. Peacock. Such a holding is consistent with the purpose of N.C. Gen. Stat. § 31A-1(a)(3) to ensure "that no person shall be allowed to profit by his own wrong." N.C. Gen. Stat. § 31A-15 (2019). Ms. Peacock is not the wrongdoer here, and she should not suffer the consequence of being barred her spousal rights.

III. CONCLUSION

The evidence presented and findings of fact made by the trial court do not support its conclusion that Ms. Peacock abandoned Decedent without just cause. Decedent abandoned her through his abuse, and nothing shows any acts of contrition or reform on Decedent's part. However, because we hold the Clerk and the trial court abused their discretion in re-dating the Assignment and Deficiency Judgment to 4 April 2019—and that holding renders the Respondents' appeal of the Assignment and Deficiency Judgment to superior court untimely—we vacate the trial court's order barring Ms. Peacock from her spousal year's allowance and reinstate the Assignment and Deficiency Judgment entered by the assistant clerk.

VACATED.

Judges BRYANT and HAMPSON concur.

IN THE MATTER OF K.W. & J.W.

No. COA19-943

Filed 21 July 2020

1. Child Abuse, Dependency, and Neglect—adjudication of abuse —emotional abuse—sufficiency of evidence

The trial court did not err by adjudicating the minor child as an abused juvenile where the unchallenged findings of fact showed respondent-mother had made false claims regarding physical abuse by the father and about the child's living situation, the child had repeated some of the false allegations, a forensic evaluator found indicators of emotional abuse stemming from the high level of acrimony and vilification of the father by respondent, and the child told a therapist she was anxious about being in the middle of the conflict between her parents and suffered severe anxiety about visits with the father. The trial court did not err by identifying respondent as the cause of the child's emotional damage in a conclusion of law, given the facts concerning respondent's conduct, even though the adjudicatory process concerns the status of the child and not any fault of the parent.

2. Child Abuse, Dependency, and Neglect—abuse—disposition hearing—sworn testimony

In a child abuse disposition hearing, the trial court did not err by failing to hear sworn testimony because a disposition hearing is less formal than an adjudication hearing and the court may rely on written reports and incorporate findings made at the adjudication hearing if they are sufficient to support the ultimate disposition.

3. Child Abuse, Dependency, and Neglect—dispositional order—electronic visitation only—DSS authority to expand visitation—abuse of discretion analysis

The trial court did not err by issuing a disposition order after an adjudication of abuse which limited respondent-mother's access to the children to electronic visitation and gave DSS discretion to grant face-to-face visitation in the future. No abuse of discretion was shown where the court was not required to hear additional evidence at the disposition hearing and findings made at the adjudication stage—that respondent-mother caused significant distress to the children, fostered anxiety and fear of the father, and exposed them to unnecessary medical interventions—were sufficient to support a finding that electronic visitation was in the best interests of the children. Further, a visitation order that sets out a visitation plan and allows DSS to expand visitation is not an abuse of discretion or an impermissible delegation of judicial authority.

4. Child Abuse, Dependency, and Neglect—dispositional order—visitation—failure to notify parent of right to move for review of visitation plan

Where a disposition order limited respondent-mother's visitation with her children after an adjudication of neglect and abuse, the trial court erred by failing to notify respondent of her right, pursuant to N.C.G.S. § 7B-905.1(b), to move for review of the visitation plan. The disposition order was vacated and remanded for entry of an order containing the required notification.

Appeal by Respondent Mother from orders on adjudication and disposition entered 15 May 2019 and 2 July 2019, respectively, by Judge Pennie M. Thrower in Gaston County District Court. Heard in the Court of Appeals 9 June 2020.

Elizabeth Myrick Boone for Petitioner-Appellee Gaston County Department of Social Services.

Matthew D. Wunsche for Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for Respondent-Appellant Mother.

INMAN, Judge.

I. FACTUAL AND PROCEDURAL HISTORY

Father and Respondent-Appellant Mother are the parents of K.A.W. ("Kim") and J.M.W. ("Josh").[1] Mother and Father separated in February 2017 and received joint custody of the children. In September 2018, when the petition in this matter was filed, Kim was 13 years old and Josh was 7 years old.

In February 2018, Kim was diagnosed with Generalized Anxiety Disorder. Prior to February 2018, there were no reports that either child was mistreated. In February 2018, Mother reported to Kim's therapist that Father physically abused the children and that Kim was afraid to go to Father's home for visitation. This information was reported to the Gaston County Department of Social Services ("GCDSS"), which opened an investigation. Kim did not visit Father during February or March 2018.

Between February 2018 and September 2018 Mother reported to physicians, therapists, social workers, and law enforcement various events of physical abuse and maltreatment of the children by Father, resulting in physical injuries and psychological impact. Investigations revealed Mother's reports to be false. Mother claimed after multiple visits with Father that the children had sustained injuries as a result of Father's physical abuse. GCDSS, during their investigation, never observed evidence the children were being physically abused, nor did medical examinations reveal injuries indicating abuse. Mother showed photographs she claimed showed injuries resulting from abuse to GCDSS investigators, but investigators did not see evidence of intentional injuries in these photographs. Mother reported to physicians that both children suffered from chronic headaches which she believed were caused by Father striking them on the head. The children's accounts of their headaches differed from Mother's, and a neurologist found both children to be neurologically normal. After one visit between Josh and Father, Mother took Josh to the emergency room, claiming that he had

1. Pseudonyms are used to preserve the anonymity of the juveniles.

suffered a concussion as a result of abuse by Father. Examining medical providers determined that Josh was not concussed. When told by physicians that the children were not in need of medical care or challenged by therapists or social workers on her allegations against Father, Mother became very upset.

Mother also reported to GCDSS and others that Father did not have sufficient food or bedding for the children in his house and that he locked the children in their bedrooms for long periods. Law enforcement officers and social workers investigated Father's house in response to these allegations and found them to be false. Mother also reported that Father withheld food from the children, but the children's own statements as well as receipts Father produced contradicted these reports.

In interviews with therapists and social workers, Kim and Josh sometimes confirmed Mother's allegations. Kim sometimes repeated Mother's allegations almost verbatim. Kim and Mother reported that during visits, Father would take Kim's phone and watch to prevent her from communicating with Mother. These allegations were contradicted by the observations of social workers and therapists. Both children alleged that Father shouted curse words at them, hit them, and denied them food. These allegations were not made consistently, and when pressed on them, the children were unable to provide details or context about instances of this behavior. Kim expressed fear and anxiety about visiting with her father, and on two occasions refused to go to scheduled visitations for over an hour before finally agreeing to go.

Mother also alleged that Father had vandalized her home in order to threaten her. Other than her mailbox being out of place, her home and yard were undisturbed.

On 17 September 2018, GCDSS filed a petition in the District Court alleging that Kim and Josh were abused and neglected. That day, the court entered a non-secure custody order granting GCDSS custody and keeping the children in Father's care. Mother was allowed two hours of supervised visitation weekly.

Between 12 December 2018 and the trial court's initial disposition on 3 September 2019, several incidents occurred which led the court to limit Mother's visitation. On 30 January 2019, Mother brought to a visitation certain items Kim had asked for. When Kim said she no longer wanted the items, Mother began yelling at the juveniles, telling them to "have a nice life" and using profanity. After that incident, Kim requested more limited visitation with Mother. GCDSS began having Father park in a secure, gated area when he brought the children for visitation. Mother

learned of this and, on one occasion, parked her car blocking the gate. When Mother saw law enforcement was present, she became angry and said she would not attend further visitation. In response to these incidents, the court limited visitation to once every two weeks. Then, on 28 March 2019, Lincoln County law enforcement began investigating allegations that Mother had attempted to hire someone to kill Father. The court "in an abundance of caution" ordered that Mother have only electronic visitation with her children.

The trial court held an adjudicatory hearing on 4 and 5 February 2019, hearing testimony from Father and several other witnesses. The court entered two adjudication orders on 5 March 2019, one for each child, finding Kim neglected and abused and Josh neglected.

On 21 May 2019, the trial court held its disposition hearing. Mother was present at the hearing and unrepresented. The court did not hear any additional testimony at this hearing. The trial court heard argument from Mother regarding her psychological treatment, and a motion by Father requesting custody be transferred to him. After denying the motion the court orally ordered that Mother's visitation remain the same, except that GCDSS would have discretion to grant in-person visitation upon Mother making progress on her case plan. Mother appeals the Adjudication and Disposition Orders to this Court. Mother does not appeal from the trial court's adjudication of Kim and Josh as neglected.

II. ANALYSIS

A. Jurisdiction

Mother failed to raise each of the issues she identifies on appeal before the trial court. Generally, arguments not made before the trial court are not reviewable on appeal, including in juvenile abuse, neglect, and dependency cases. *In re L.M.C.*, 170 N.C. App. 676, 678, 613 S.E.2d 256, 257 (2005). However, we have discretion under Rule 2 of the Rules of Appellate Procedure to review the merits of Mother's arguments. Given that Mother is indigent and proceeded *pro se* (with standby counsel) in the trial court, in our discretion we will review the trial court's decisions for error.

Mother also filed notice of her appeal with the trial court after the disposition hearing but before the court entered its order. Accordingly, we allow GCDSS's motion to dismiss the appeal. However, Mother has petitioned this court for a writ of certiorari. In our discretion we allow Mother's petition and proceed to the merits of her appeal.

B. Evidence of Emotional Abuse after February 2018

[1] Mother argues that the trial court erred in adjudicating Kim as an abused juvenile. Allegations in a petition alleging abuse must be proven by clear and convincing evidence. N.C. Gen. Stat. § 7B-805 (2019). We review the trial court's adjudication to determine whether the findings of fact are supported by clear and convincing evidence and whether the conclusions of law are supported by the findings of fact. *In re B.M.*, 183 N.C. App. 84, 88, 643 S.E.2d 644, 646 (2007).

In its 15 May 2019 order, the trial court adjudicated Kim abused, concluding that "Respondent/mother has created or allowed to be created serious emotional damage to the juvenile by causing the juvenile to experience severe anxiety." Mother argues that because Kim was diagnosed with General Anxiety Disorder in February 2018, only events preceding that diagnosis are relevant to determining whether Kim was abused and whether that abuse caused her anxiety. Since anxiety need not be shown by a formal diagnosis and none of the trial court's findings are based on conduct or circumstances prior to February 2018, this argument is untenable.

When a parent "creates or allows to be created serious emotional damage to the juvenile," that juvenile is abused for purposes of the governing statute. N.C. Gen. Stat. § 7B-101(1)(e) (2019). This damage can be shown by the juvenile's "severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others." *Id.* Section 7B-101(1)(e) does not impose a requirement that a finding of anxiety be the product of a formal psychiatric diagnosis, so Mother's focus on Kim's diagnosis is misplaced. *In re A.M.*, 247 N.C. App. 672, 676, 786 S.E.2d 772, 775 (2016). Mother's argument essentially implies that the trial court should not consider emotional abuse suffered by a child who has been previously diagnosed with a psychological disorder—a child who may be especially vulnerable to that type of abuse.

Mother does not challenge the trial court's findings of fact supporting its conclusion that Kim was abused. Unchallenged findings of fact are binding on appeal. *In re K.B.*, 253 N.C. App. 423, 428, 801 S.E.2d 160, 164 (2017). The trial court found that Mother made allegations of physical abuse against Father which were not substantiated, and in some cases were refuted by medical examinations, and accusations regarding Kim's living situation which were refuted by DSS inspection.

At times, Kim repeated the allegations of abuse made by Mother. A forensic evaluator found indicators of emotional abuse stemming from "the high level of acrimony and vilification of Respondent/father

by Respondent/mother," and Kim told a therapist that she was anxious about being in the middle of the conflict between her parents and expressed "severe anxiety" about visits with Father. These findings support the trial court's conclusion adjudicating Kim as abused.

Mother also argues that the trial court erred because, in its conclusion of law regarding Kim's status as an abused juvenile, it identified Mother as the parent who created or allowed to be created serious emotional damage. The adjudication of a child as abused concerns only the status of the child, not the fault or culpability of the parent. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). In light of the false allegations of abuse which the trial court found Mother made against Father, we cannot conclude that the trial court erred in providing clarity in its order. In any event, Mother has not identified any way in which the language of the adjudication prejudices her and has therefore not identified reversible error.

C. Testimony at Disposition Hearing

[2] Mother argues that the trial court erred in failing to hear sworn testimony at the disposition hearing. She argues that an initial disposition hearing should incorporate the same procedural requirements as a permanency planning hearing, including sworn testimony.

Mother's argument overstates the formal requirements of an initial disposition hearing. A proceeding to protect an allegedly abused, neglected, or dependent juvenile requires two hearings. *In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2004). First, the trial court holds an adjudicatory hearing to determine if a child is abused, neglected, or dependent. *Id.* At this stage, heightened requirements are in place to "protect the rights of . . . the juvenile's parent" and "assure due process of law." N.C. Gen. Stat. § 7B-802 (2019). The trial court must apply the Rules of Evidence, N.C. Gen. Stat. § 7B-804 (2019), and can find a child abused, neglected, or dependent only if that status is proven "by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2019).

If the trial court finds at adjudication that the allegations in a petition have been proven by clear and convincing evidence and concludes based on those findings that a juvenile is abused, neglected, or dependent, the court then moves on to an initial disposition hearing. N.C. Gen. Stat. § 7B-901 (2019). At this stage, the trial court, in its discretion, determines the child's placement based on the best interests of the child. *O.W.*, 164 N.C. App. at 701, 596 S.E.2d at 853. Unlike the adjudicatory hearing, the initial dispositional hearing may be informal:

> The dispositional hearing may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and the juvenile's parent, guardian, or custodian shall have the right to present evidence, and they may advise the court concerning the disposition they believe to be in the best interests of the juvenile. The court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.

N.C. Gen. Stat. § 7B-901(a). In addition to considering evidence otherwise barred by the Rules of Evidence, the trial court may incorporate into its findings information obtained from written reports by the parties, as well as findings made at adjudication. *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 593-94 (2007); *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). The court may rely on written reports in the disposition hearing even if they have not been admitted into evidence. *In re M.J.G.*, 168 N.C. App. 638, 648-49, 608 S.E.2d 813, 819 (2005).

In this statutory two-step, the adjudication is a formal, adversarial process, aimed at determining the truth or falsehood of the allegations in the petition. Conversely, the initial disposition is inquisitive, and the trial court's principal consideration is the best interests of the child. Section 7B-901(a) explicitly allows the court in its disposition order to rely on written reports, and to incorporate the findings it made at the adjudication hearing. If these sources of fact are sufficient to support the trial court's conclusions of law and its ultimate disposition, there is no need for the court to hear additional testimony.

When a trial court's disposition order relies on information gained from individuals addressing the court during the disposition hearing, that information must be in the form of sworn testimony. *In re J.N.S.*, 207 N.C. App. 670, 679-80, 704 S.E.2d 511, 517-18 (2010). In *J.N.S.*, the trial court addressed various parties and family members during the disposition hearing and based some of its findings of fact upon the information that they provided, but none of these individuals were placed under oath. *Id.* We examined the record to determine if the remaining findings of fact, based upon the DSS and guardian *ad litem* reports, were sufficient to support the conclusions of law and disposition, and vacated the disposition order only because it relied on facts based on unsworn

testimony. *Id*. In this case, by contrast, the record reflects that the trial court received no new information from individuals during the disposition hearing other than references to reports and the court's own findings in the adjudication order. And the absence of sworn testimony in a disposition hearing does not render the hearing improper.

Mother does not contest the findings of fact in the adjudication order or argue that those findings and the pre-disposition report submitted by GCDSS were insufficient to support the disposition order. The trial court did not err in proceeding with disposition absent the presentation of sworn testimony at the disposition hearing.

D. Visitation

[3] The trial court's disposition order limited Mother's access to her children to electronic visitation, with discretion given to DSS to allow in-person visits if Mother makes progress on her case plan. Mother argues that there was no evidence to support a finding that face-to-face visitation was not in the best interests of the children, and that giving DSS discretion to allow in-person visits in the future is an impermissible delegation of judicial authority. We disagree.

Orders removing custody of children from their parents "shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2019). The court may order no visitation if it determines visitation is not in the best interest of the child. *See In re T.R.T.*, 225 N.C. App. 567, 572, 737 S.E.2d 823, 828 (2013). We review disposition orders, including visitation determinations, for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). When reviewing for abuse of discretion, we defer to the trial court's judgment and overturn it only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *In re A.R.*, 227 N.C. App. 518, 520-21, 742 S.E.2d 629, 632 (2013). When determining visitation, the court considers the best interests of the child. N.C. Gen. Stat. § 7B-905(c).

Mother's argument regarding the visitation portion of the disposition order mirrors her argument as to the disposition order as a whole: that the court did not hear testimony during the disposition hearing and therefore it abused its discretion in determining that visitation was inappropriate. But, as discussed above, the disposition hearing is the second part of the two-step adjudication-disposition process. It is an informal proceeding in which the court considers, in its discretion, the best interests of the child and may base its ruling on the findings made during the adjudication stage.

In its disposition order the court found that "due to concerns for the safety of the juveniles," electronic-only visitation was in their best interests. In its findings of facts in the adjudication order, the trial court found that Mother caused significant distress to the children in a number of ways, in particular fostering anxiety and fear of Father, frequently exposing them to unnecessary medical intervention, and failing to acknowledge her role in creating unreasonable fear of Father. This finding in the adjudication order followed sworn testimony and other evidence meeting the rigorous standard of clear and convincing evidence. Given the evidence before the trial court as to Mother's behavior, we cannot hold that determining electronic visitation was in the best interests of the children was an abuse of discretion.

Mother also argues that allowing DSS discretion to grant face-to-face visitation in the future is an impermissible delegation of judicial authority. We have held in the past that a disposition order that sets out a visitation plan and allows DSS to expand visitation is not an abuse of discretion. In *In re L.Z.A.*, the trial court ordered that visitation continue "in accordance with the current plan," which provided for twice-weekly two-hour visits, and granted Mecklenburg DSS "discretion to expand visitation." 249 N.C. App. 628, 639, 792 S.E.2d 160, 169 (2016). We held that this satisfied the requirements of Section 7B-905.1(b). *Id.*

Mother cites *In re C.S.L.B.*, 254 N.C. App. 395, 829 S.E.2d 492 (2017) and *In re J.D.R.*, 239 N.C. App. 63, 768 S.E.2d 172 (2015) in support of her argument. However, both of these cases involve a grant of authority by the court to a guardian, not DSS, and are therefore distinguishable from this case. In *C.S.L.B.*, the disposition order provided for a minimum visitation schedule, but allowed the juveniles' guardian to unilaterally suspend visitation based on their "concerns." 254 N.C. App. at 400, 829 S.E.2d at 495. In *J.D.R.*, the order specified certain minimum visits but granted Father substantial discretion over expansion of visitation rights "contingent on Father deciding Mother has complied with the trial court's directives," which "effectively turned Father into Mother's case worker." 239 N.C. App. at 75-76, 768 S.E.2d at 179-80. We have consistently held that "[t]he court may not delegate this authority to the custodian." *In re Custody of Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

In this case, the discretion granted was not to a custodian, but to DSS. The disposition order sets out a minimum visitation schedule and allows DSS to expand visitation if Mother makes progress on her case

plan.[2] Mother has not identified, nor have we found, any caselaw that conflicts with *L.Z.A.*'s approval of an order granting DSS discretion to expand visitation. DSS has already been granted significant discretion by the legislature in managing visitation—under Section 7B-905.1(b), DSS may determine who will supervise visits and the location of visits, change the day and time if necessary, and may temporarily suspend visitation upon a good faith determination that the plan is not consistent with the juvenile's health and safety. The trial court complied with the statutory requirement of Section 7B-905.1(b) by considering the best interests of the child and ordering a visitation plan indicating a minimum frequency and length of visits. The disposition order only gives DSS discretion to expand visitation, not reduce it below the minimum set by the court. Allowing DSS to expand visitation contingent upon Mother's progress with her case plan is not an impermissible delegation of judicial authority.

E. Failure to Inform of Right of Review

[4] Mother argues that the trial court committed reversible error in failing to inform her of her right to move for review of its visitation plan. GCDSS and the guardian *ad litem* agree that the trial court did not inform Mother of this right. They disagree, however, as to whether this failure constitutes reversible error in an appeal arising from an initial disposition. The guardian *ad litem* agrees with Mother that the case should be remanded so that the trial court can properly inform Mother of her right to file a motion for review of the trial court's visitation plan.

When a court in an abuse, neglect, and dependency case retains jurisdiction after a dispositional order, "all parties shall be informed of the right to file a motion for review of any visitation plan . . . ." N.C. Gen. Stat. § 7B-905.1(d). This Court has held that a trial court's failure to inform a party of this right in a permanency planning order can constitute reversible error. *In re J.L.*, 264 N.C. App. 408, 422, 826 S.E.2d 258, 268 (2019). In *J.L.* this Court vacated a trial court's permanency planning order and remanded the case because the order failed to notify the parties of their respective rights to move for review of the visitation plan and because "careful review of the transcript reveals that the trial court did not inform respondent of this right in open court." *Id.*

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2. We have held that electronic visitation does not constitute visitation as contemplated by Section 7B-905(c). *T.R.T.*, 225 N.C. App. at 574, 737 S.E.2d at 828. However, the court may order no visitation if it determines that is in the best interest of the child.

Here, as in *J.L.*, neither the disposition order nor the transcript of the hearing indicates that the trial court provided the required notice to Mother. But, unlike *J.L.*, this appeal arises from an initial disposition order, which the trial court is required to review "within 90 days from the date of the initial disposition hearing." N.C. Gen. Stat. § 7B-905(b). By contrast, the trial court is allowed up to six months to conduct a hearing to review a permanency planning order. N.C. Gen. Stat. § 7B-906.1(a) (2019). *J.L.* is not directly controlling.

GCDSS argues that, because N.C. Gen. Stat. § 7B-906.1(a) requires the trial court to schedule a review hearing "within 90 days from the date of the initial dispositional hearing," failure to inform the parties is harmless error. While we recognize the common sense merit of that argument, the statute does not make that distinction between these orders in its notice requirement. Accordingly, we agree with Mother and the guardian *ad litem* that this case must be remanded so that the trial court can enter an order compliant with N.C. Gen. Stat. § 7B-905.1(d).

III. CONCLUSION

For the above reasons, we hold that the trial court did not err in its adjudicating Kim abused or in its disposition. We remand to allow the trial court to inform Mother of her right to move that the visitation plan be reviewed.

AFFIRMED AND REMANDED.

Judges BRYANT and HAMPSON concur.

IN RE S.M.L.

[272 N.C. App. 499 (2020)]

IN THE MATTERS OF S.M.L., E.R.M.L, MINOR CHILDREN

No. COA19-476

Filed 21 July 2020

1. Child Abuse, Dependency, and Neglect—adjudication of neglect—findings of fact—sufficiency of evidence

An order adjudicating two children neglected (after the older child disclosed she was sexually abused by respondent-mother's boyfriend) contained findings of fact that were supported by clear and convincing evidence, except for one minor detail having to do with an incident in which law enforcement conducted a welfare check and discovered the presence of the boyfriend in the home (where he was not supposed to be). Even if the inaccurate detail was ignored, the remaining findings describing the incident and the aftermath were supported by evidence.

2. Child Abuse, Dependency, and Neglect—adjudication of neglect—probability of repetition of neglect—sufficiency of findings

The trial court's adjudication of a child as a neglected juvenile was proper, even though the court did not make a specific finding of the probability of repetition of neglect, because the court's conclusions that the child was neglected for lack of proper care and supervision and that she lived in an environment injurious to her welfare were supported not only by findings of sexual abuse (which the child disclosed was perpetrated by respondent-mother's boyfriend), but also by findings regarding respondent's conduct after the abuse disclosure and up to the adjudication hearing, including her failure to believe and support her daughter, active efforts to undermine her daughter's treatment, and unwillingness to protect her daughter from the boyfriend.

3. Child Abuse, Dependency, and Neglect—adjudication of neglect—based on abuse of sibling—insufficient findings

The trial court erred by adjudicating a child neglected without sufficient findings that there was a substantial risk that abuse or neglect might occur in the future. The adjudication was based on a sibling being sexually abused, but there were no findings detailing how the sibling's abuse impacted the child or whether the child was at risk of similar abuse, and the only findings specifically pertaining to the child noted he was happy and had no health concerns. The

matter was remanded for additional findings, based on new or existing evidence according to the trial court's discretion.

4. Child Abuse, Dependency, and Neglect—transfer to pending Chapter 50 case—lack of findings—order never entered

The trial court erred in a juvenile neglect case by failing to make findings and conclusions required by N.C.G.S. § 7B-911 to properly terminate its jurisdiction and transfer the case to an already pending Chapter 50 custody case. Although the court directed that an appropriate order be prepared and entered, no order was entered, necessitating remand.

Appeal by respondent from order entered 4 March 2019 by Judge J. H. Corpening, II in District Court, New Hanover County. Heard in the Court of Appeals 18 February 2020.

New Hanover County Department of Social Services, by Jill R. Cairo, for petitioner-appellee.

Miller and Audino, LLP, by Jeffrey L. Miller, for appellant-mother.

Administrative Office of the Courts, by Michelle FormyDuval Lynch, for appellee-guardian ad litem.

STROUD, Judge.

This appeal arises out of an Order on Adjudication of neglect and Initial Disposition. Because there were not sufficient findings of fact to support the trial court's conclusion of neglect as to one of the juveniles, Ed,[1] we reverse the adjudication as to Ed and remand for further findings. The trial court's findings of fact as to the other juvenile, Sara, support its conclusion of law regarding her adjudication as neglected. However, the trial court failed to comply with the requirements of North Carolina General Statute § 7B-911 in terminating jurisdiction of the juvenile court and transferring the case as a Chapter 50 matter because the trial court failed to make findings of fact and conclusions of law regarding modification of the existing Chapter 50 custody order and finding no need for continued intervention by the juvenile court. In addition, the trial court failed to enter a Chapter 50 order as directed in its rendition and mandated by the Adjudication and Disposition order

1. Pseudonyms are used to protect the identity of the juveniles.

on appeal, so we must remand for entry of the Chapter 50 order in accord with North Carolina General Statute § 7B-911. Accordingly, with respect to Sara, we affirm in part, reverse in part, and remand for further proceedings.

I. Background

Mother and Father were married in 2009 and separated in 2014. They are the parents of Sara, born in 2008, and Ed, born in 2013. On 14 June 2016, Father initiated a civil action under Chapter 50 against Mother seeking child custody. On 13 October 2016, the trial court entered a temporary child custody order granting Mother primary physical custody of the two children. The trial court granted Father visitation and required him to pay child support. On 17 March 2017, the trial court entered a Consent Judgment and Order adopting the custody terms of the October 2016 temporary order with minor changes and adjudged Father in contempt for nonpayment of child support. The Consent Order regarding custody was still in effect when the petition was filed in this action.

Since the trial court's findings of fact are mostly unchallenged, we will quote the portions of the facts pertinent to the issues on appeal as found by the trial court. Finding of Fact 2 was based upon a written stipulation by the parties, while the remaining findings were made by the trial court and were not stipulated:

> [2.] a. On or about March 2018, the Juvenile, [Sara], disclosed to Respondent-Mother that she was being sexually abused by [Joe], a man who had resided with the family for several years prior to the disclosure.[2]
>
> b. The Respondent-Mother immediately took [Sara] to the hospital and reported the allegations to medical and law enforcement officials.
>
> c. [Sara] was treated by medical professionals and made available to law enforcement.
>
> d. [Sara] had a CME (Child Medical Examination) at the Carousel Center on March 9, 2018, during which she again made consistent disclosures regarding the sexual abuse. During her interview, [Sara] was also able to illustrate her disclosure by drawing a penis with "white stuff coming out of it."

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2. We have used a pseudonym for Mother's boyfriend who sexually abused Sara, to protect the identity of the minor children.

e. [Joe] has not been charged with any criminal conduct.

f. Respondent-Mother has had a difficult time adjusting to the fact that her significant other was responsible for sexually assaulting her daughter. However, for purposes of this action, the parties stipulate and agree that [Sara] was sexually assaulted by [Joe], on or before February 2018, and any allegations she has made to law enforcement or medical professionals regarding her assault shall be deemed admissible and credible at the trial of this matter.

3. At the time [Sara] disclosed the sexual abuse to Respondent-Mother, and before taking her to seek medical attention, Respondent-Mother drove [Sara] to [Joe]'s place of employment to confront him about the allegations.

4. In her CME on March 9, 2018, [Sara] disclosed that on more than one occasion, [Joe] had her touch his genitals with her hand and also touched her genitals with his hand. This touching was skin-to-skin contact, but [Sara] denied that there was vaginal or anal penetration.

5. [Sara] disclosed that the sexual abuse would usually happen at night, at times when her mother was not present in the residence.

6. A. copy of the CME Report for [Sara] for March 9, 2018 was admitted into evidence without objection and pursuant to the stipulation of the parties and is incorporated by reference as if fully set forth herein.

7. [Sara] disclosed to Helen DePuy, Family Preservation and Reunification Specialist with Methodist Home for Children, that the sexual abuse began when she was six years old. She described that it was very confusing to her, because [Joe] would be nice to her otherwise.

8. Neither Respondent-Parent was aware of the sexual abuse of [Sara] by [Joe] prior to [Sara] making the disclosure in March 2018.

9. From March 29, 2018 to April 5, 2018, both Juveniles were placed with the Respondent-Father. They were allowed to move back to Respondent-Mother's residence upon assurance that the Juveniles would have no contact with [Joe].

10. Respondent-Mother and the Juveniles remained in the same residence throughout the CPS investigation. This residence is owned by [Joe]'s brother and was being rented jointly by Respondent-Mother and [Joe].

11. As the Child Protective Services (CPS) investigation continued, Respondent-Mother continued to have contact with [Joe]. As of May 30, 2018, Respondent-Mother reported that she still talked to [Joe] because she was worried about him as he had been sleeping in his car and has a seizure disorder. At that time, she denied that he had been to her home or had contact with the Juveniles.

12. Both [Sara] and Respondent-Mother were referred for therapy services. In her sessions, Respondent-Mother continued to express doubt about the sexual abuse allegations, often actively seeking to discredit [Sara] and the details of her account.

13. The family was referred to Helen DePuy, a Family Preservation and Reunification Specialist with Methodist Home for Children. The first session was held on June 5, 2018. The goals of this intervention were to support [Sara] and help Respondent-Mother come to terms with what had happened. The plan for services included in-home family sessions twice per week and individual sessions for Respondent-Mother as well as joint sessions with one or both Juveniles for a six- to eight-week period. [Sara] was ultimately transitioned into Cognitive Behavioral Therapy which lasted until November 2018.

14. Ms. DePuy provided counseling and psychosocial education to Respondent-Mother to educate her regarding various aspects of sexual abuse, including the disclosure process of sexual assault victims as Respondent-Mother continued to question why, if the allegations were true, [Sara] waited so long to disclose. Respondent-Mother expressed the belief that [Sara] was manipulating the family to "get rid of" [Joe] in hopes that the Respondent-Parents would reunite. Respondent-Mother compared her own sexual activities with [Joe] to [Sara]'s account in attempting to discredit the allegations. Respondent-Mother stated that [Joe] was the first man who made her happy and was not abusive or aggressive towards her,

asserting that she has "a right to be happy." Respondent-Mother was confronted about having put pictures of herself and [Joe] back on the walls in the residence where she and the Juveniles continued to reside; she responded that those were her happy times, and she did not want to not have them up because of the happy memories they represented, evidencing a complete lack of insight as to how this would affect [Sara]. Respondent-Mother expressed that she felt it was unfair to ask her to take the pictures down, but agreed to do so, only if she could place them on her bedside table. In counseling with [Sara], the Juvenile was very upset about these pictures continuing to be displayed in the household, saying that nobody believed her (about the allegations) and that her mother did not care.

15. On June 14, 2018, police responded to Respondent-Mother's home to do a welfare check of the Juveniles at the request of Respondent-Father who was standing by down [sic] the street with law enforcement. Misti Campbell, Social Worker with the Department, was summoned to the scene at approximately 10:30 p.m.

16. Upon her arrival, Social Worker Campbell learned that law enforcement had located [Joe] inside the home and asked him to leave. Respondent-Mother had initially denied that he was present within the residence, but he was discovered in her bedroom playing video games when law enforcement searched the premises with Respondent-Mother's consent.

17. Social Worker Campbell attempted to interview Respondent-Mother on scene, but Respondent-Mother refused to answer questions as to when [Joe] had arrived at the residence. When confronted by Social Worker Campbell about the prohibition of [Joe] being present in the residence, Respondent-Mother refused to directly answer the questions, but stated "but he isn't around the kids" and went on to say that she did not feel the allegations of sexual abuse were true. At no time did Respondent-Mother claim that [Joe] had broken into her residence,[3] that she did not know he was in the residence, or that

3. Respondent Mother later made some of these claims to her counselor and others in her testimony at the hearing.

she was surprised law enforcement found him there; she made no inquiry about pressing criminal charges against [Joe] related to him being in the home that night or at any other time.

18. Social Worker Campbell advised that the Juveniles were being removed from the home to go stay with Respondent-Father as a result of [Joe] being found in the residence and asked Respondent-Mother to wake them and gather their belongings. Respondent-Mother agreed but punched the front windows of the home as she went inside. She woke the Juveniles up but did not gather any of their belongings and sent them outside without shoes on. The Juveniles were initially upset and crying but as soon as they saw Respondent-Father, they immediately stopped crying and were fine.

19. Social Worker Campbell again attempted to interview Respondent-Mother and complete a Safety Assessment . . . but Respondent-Mother refused.[4]

20. Social Worker Lindsay Hayden followed up with Respondent-Mother on June 18, 2018 about [Joe] having been found in her residence. During that interview, Respondent-Mother said that [Joe] had since left for California, as him leaving was the only thing that would separate their love for one another. Social Worker Hayden questioned Respondent-Mother as to why the sexual abuse allegations had not been sufficient reason to separate from him, and Respondent Mother replied that "the details don't add up" referring to [Sara]'s disclosure. When specifically discussing [Joe] being found inside the residence days earlier, Respondent-Mother indicated that he would come over and stay in the bedroom on the opposite side of the residence from the children's bedrooms, saying she could lock the hallway door that led to that bedroom. Respondent-Mother again stated that [Joe] was now in California, but that if he could not get a job, he would go to Kentucky where he was originally from. Respondent-Mother questioned Social Worker Hayden about the ramifications for the CPS case if she were to marry [Joe].

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4. We have omitted the portion of this finding not supported by the record, as discussed below.

21. Contrary to what Respondent-Mother said to Social Worker Hayden, she told Helen DePuy in a subsequent counseling session that [Joe] had been coming into her home without her knowledge, saying she did not know he was there because she sleeps on the couch in her work clothes so she did not have any reason to go back to the bedroom. Ms. DePuy was "very, very" concerned that [Joe] had been located back in the residence, particularly when the Juveniles were present.

22. [Sara] related to Ms. DePuy her belief that [Joe] had been coming to her mother's residence regularly prior to the June 14, 2018 incident.

23. In subsequent counseling sessions, Respondent-Mother wavered between disbelief of [Sara]'s account of the sexual abuse, believing that "something" happened to [Sara] without acknowledging [Joe]'s culpability, and saying that she does believe [Sara]. At times, she complains of [Sara] not listening or being disrespectful towards her but seems unable to comprehend that this could be symptomatic of her having been sexually abused, particularly in conjunction with Respondent-Mother's stated disbelief of the allegations. Ms. DePuy stated that Respondent-Mother's disbelief impeded [Sara]'s recovery; [Sara]'s "trauma narrative" she wrote as part of her Cognitive Behavioral Therapy included references to Respondent-Mother's disbelief.

24. By contrast, Ms. DePuy observed Respondent-Father to be fully and appropriately supportive of [Sara]'s therapy. He was always present, not missing a single session, verbalized his belief in [Sara]'s account and made her feel safe and protected.

25. Subsequent to the June 14, 2018 incident and the June 18, 2018 follow up interview with Social Worker Hayden, Respondent-Mother continued to remain in contact with [Joe], such that she reported that he had gone from California to Kentucky. In early July 2018, Social Worker Hayden had local law enforcement confirm that [Joe] was staying at his father's residence in Covington, Kentucky.

26. By July 23, 2018, Social Worker Hayden learned that [Joe] had returned to Wilmington and was able to make telephone contact through his employer, Booth Brothers.

> 27. When confronted on July 24, 2018, about [Joe] being back in Wilmington, Respondent-Mother acknowledged that she already knew he was back in town and was aware of where he was staying and working. During this conversation, Respondent-Mother again questioned the lack of physical evidence to substantiate the sexual abuse allegations and would only say "something happened to [Sara]." When Social Worker Hayden pressed her to acknowledge that "[Joe] did something to [Sara]," Respondent-Mother only repeated "something happened to [Sara]." When Social Worker Hayden asked Respondent-Mother point blank whether she believed [Sara], she again stated only that "something happened to [Sara]."
>
> 28. On August 10, 2018, during a walk-through inspection of Respondent-Mother's residence, Social Worker Hayden observed a dresser in the hallway outside of the master bedroom that was full of [Joe]'s clothing as well as drug paraphernalia and other items that Respondent-Mother indicated belonged to [Joe].

After the New Hanover County Department of Social Services ("DSS") and Father discovered Joe was continuing to come to Mother's residence in June and July, DSS recommended that Father file a motion in the existing Chapter 50 custody case seeking modification of custody. "On or about July 30, 2018, Respondent-Father attempted to modify the existing custody order, which had granted primary physical custody of both Juveniles to Respondent-Mother, but his motion for *ex parte* relief was denied when the Court realized the Department of Social Services was involved." Thus, on 13 August 2018, DSS filed the petition alleging the juveniles were neglected.

The trial court also made the following findings and conclusions relevant to the issues on appeal:

> 29. It is relevant to the Court's determination that the Juvenile, [Ed], when residing with Respondent-Mother, lived in a home where another child was abused and/or neglected by a person who regularly lived in the home.
>
> 30. The Juveniles . . . are neglected Juveniles as that term is defined by N.C.G.S. § 7B-101(15), in that they do not receive proper care, supervision or discipline from the Respondent-Mother and lived in an environment injurious to their welfare, as detailed in Findings of Fact 2 through 29 above.

> 31. [Sara] has remained in placement with Respondent-Father since June 14, 2018, and [Ed] has been placed with him since August 13, 2018. Respondent-Father has followed all recommendations of the Department as to the Juveniles' care, and no concerns are noted.
>
> . . . .
>
> 33. Helen DePuy discharged [Sara] from therapeutic services on November 8, 2018, with no recommendation for ongoing services. Ms. DePuy did counsel Respondent-Father on possible symptoms that could arise in the future.
>
> 34. [Ed] is in daycare and is a healthy, happy five-year-old. He is up-to-date on well-child checks with no ongoing health concerns. He is being considered for a referral to speech therapy services.
>
> 35. Respondent-Mother has been visiting with both Juveniles. She insisted on having visits with [Sara] despite the same not being therapeutically recommended previously by Ms. DePuy. During the visits, Respondent-Mother struggles to respond appropriately to [Sara], becoming defensive when [Sara] attempts to address issues with her. Respondent-Mother is able to interact well with [Ed] during visits, drawing or playing together with him.
>
> 36. Respondent-Mother has refused to sign releases for the Department or the Guardian ad Litem such that no information is available as to her compliance or lack thereof with recommended services nor did Respondent-Mother present direct evidence as to her compliance.

An Order for Nonsecure Custody was entered on 13 August 2018 granting DSS custody and placement authority. The trial court held a hearing regarding adjudication and disposition on 28 November and 6 December 2018. On 4 March 2019, the court entered an Order on Adjudication and Initial Disposition. Both juveniles were adjudicated to be neglected, and the Father was granted legal custody of the children. The trial court also ordered as follows:

> 6. Attorney Jennings shall prepare an Order reflective of the findings, conclusions and decretal set forth therein, and the same shall be filed in the existing Chapter 50 custody action between Respondent-Parents, to wit, New Hanover County Case Number 16 CVD 1965. All further

> hearings as may be necessary shall be conducted under that case file and shall occur in regular civil district court.

No order regarding the Chapter 50 action as directed by the trial court appears in our record, and according to the briefs, this order was never entered.[5] Mother timely appealed the Adjudication Judgment and Disposition Order.

II. Standard of Review

"The role of this Court in reviewing a trial court's adjudication of neglect and abuse is to determine '(1) whether the findings of fact are supported by "clear and convincing evidence," and (2) whether the legal conclusions are supported by the findings of fact[.]' " *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007) (alteration in original) (quoting *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000)), *aff'd as modified*, 362 N.C. 446, 665 S.E.2d 54 (2008). "If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary." *Id.* (citing *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003)).

> In order for a child to be properly adjudicated as neglected, "this Court has consistently required that there be some physical, mental or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." "Whether a child is neglected is a conclusion of law which must be supported by adequate findings of fact."

In re R.L.G., 260 N.C. App. 70, 75, 816 S.E.2d 914, 918 (2018) (citation omitted).

III. Findings of Fact

[1] We first note that Mother's argument regarding the trial court's conclusion of law as to neglect mentions several findings of fact she claims are not supported by the evidence, although she did not make a separate argument regarding the findings of fact she claims were not supported by the evidence. As to the few findings challenged within her other arguments, her primary contention is regarding the wording of the finding more than its substance or a specific detail within the finding. But since conclusions of law must be supported by findings of fact, we will first

5. We have no information as to why this order was not entered.

address Mother's challenges to the findings of fact. *See Rittelmeyer v. Univ. of North Carolina at Chapel Hill*, 252 N.C. App. 340, 348-49, 799 S.E.2d 378, 384 (2017) ("Since findings of fact are required to support conclusions of law, if the findings of fact were not supported by substantial evidence, it would have been helpful for petitioner to challenge those facts *before* addressing alleged errors of law. After all, if material facts in the findings were not supported by the evidence, we might never need to reach at least some of the arguments regarding errors of law." (citations omitted)).

Mother's most detailed argument mentions Finding No. 19. She contends that Finding of Fact 19 is not supported by "any evidence that Social Worker Campbell attempted to interview Mother, or to complete a safety assessment, *once the juveniles left the scene*, or that Mother refused such an assessment or interview, on 14 June 2018." Mother's argument is that the Social Worker did not attempt to interview her or do an assessment *after* the juveniles were removed from her home. In support of this argument, her brief cites to the testimony of Social Worker Campbell. Social Worker Campbell's only involvement in the case was on the evening of 14 June 2018, as Social Worker Hayden was the regularly assigned social worker for the case at that time. Finding of Fact 19 states: "Social Worker Campbell again attempted to interview Respondent-Mother and complete a Safety Assessment *once the juveniles had left the scene*, but Respondent-Mother refused." (Emphasis added.). The Findings 15 through 18 address in detail the events of 14 June 2018, when Social Worker Campbell went to investigate a report that Joe was at the home in violation of a safety agreement "that [Mother] would not allow [Joe] around the children." Mother does not challenge Findings 15 through 18, which address her admission that Joe had been at the home, her disbelief in Sara's allegations of sexual abuse, and her refusal to answer Social Worker Campbell's questions. Mother's only argument is that the words "once the juveniles left the scene" are not accurate. Mother is correct that Social Worker Campbell's testimony was that she attempted to talk to Mother *before* the children were removed, not *after*, although they were talking outside the home, in the driveway, and not in the home with the children present. Since Social Worker Campbell was not the regularly assigned social worker for the case, the follow-up after 14 June was done by Social Worker Hayden several days later. Thus, Mother is correct that the words "once the juveniles left the scene" are not supported by clear and convincing evidence, but the rest of the finding is supported by clear and convincing evidence. Even if we ignore these words of Finding 14, this minor omission has no effect on the details of the events of 14 June 2018 or on the detailed findings regarding DSS's follow-up after that day.

Mother also challenges the first sentence of Finding 31 as unsupported by the evidence:

> 31. [Sara] has remained in placement with Respondent-Father since June 14, 2018, and [Ed] has been placed with him since August 13, 2018.

She contends the evidence does not support the finding as to Ed's "placement" with Father in August. She notes that the Guardian ad Litem's report states that both children "have been in this placement [with Father] since mid-June." Social Worker Hayden also testified that both children were placed with Father as of "June [when] [Joe] was found in the residence[.]" Mother is correct that the reports and evidence show that both children had been *residing* with Father as of mid-June, but Ed had not been officially placed, by court order, until August. The Petition was filed on 13 August 2018 and on the same date, the trial court entered an Order for Nonsecure Custody on 13 August 2018 which placed both children with Father. Sara had been placed with Father in June under the existing safety plan, but Ed was not. This Order found that DSS had made efforts to "prevent or eliminate the need" for the placement by arranging a child medical evaluation for Sara and counseling for Sara and Mother and by "encouraging Respondent-Father to seek a modification of the existing custody order." The Petition alleges Father had filed a motion to modify the Chapter 50 custody order on 30 July 2018, but "his motion for *ex parte* relief was denied when the Court realized the Department of Social Services was involved." Thus, DSS filed the Petition and obtained the Nonsecure Custody order. Therefore, Finding 31 is supported by the evidence, since Ed was not officially "placed" with Father until August 2018, although Ed had been *residing* with Father since June.

Mother also challenges Finding of Fact 36 which states:

> 36. Respondent-Mother has refused to sign releases for the Department or the Guardian Ad Litem such that no information is available as to her compliance or lack thereof with recommended services nor did Respondent-Mother present any direct evidence as to her compliance.

The Court Report by DSS was presented as evidence at the adjudication and disposition hearing. The report states "[Mother] has refused to sign releases for the Department or GAL to follow up with collateral contacts regarding any of her services." The Guardian ad Litem's court report stated that Mother "was asked to complete a CCA" and "[t]he release she signed for the Department was limited and did not allow access to

a copy of the CCA." Mother had reported that she was "diagnosed with anxiety and depression." The Guardian ad Litem asked Mother "to sign a release but the Guardian has been unable to reach her Therapist as of the writing of this report [dated 6 December 2018]." Mother did not present any evidence regarding her compliance with the recommended services at the hearing. Finding 36 is supported by clear and convincing evidence.

Therefore, all of the challenged findings of fact, except for the words in Finding 19, discussed above, are supported by clear and convincing evidence.

IV. Probability of Repetition of Neglect

[2] Mother contends that the trial court erred by concluding both children were neglected because the trial court failed to make findings of a probability of a repetition of neglect at the time of the adjudication hearing.[6]

Mother argues the trial court failed to make any findings or conclusions regarding a "probability of a repetition of the past neglect" or "whether any past neglect had been adequately remedied, and whether Mother was able to adequately care for her children and provide for their physical and economic needs" as of the time of the hearing. She contends that Sara's abuse occurred prior to March 2018, that she promptly reported the abuse and sought evaluation and treatment for Sara, and that she did not allow Joe in Sara's "presence" after DSS requested that he not be in the presence of the children. She contends she continued to ensure Sara was not in his presence—even while acknowledging Joe came into the home—and she eventually accepted Sara's report of sexual abuse and supported her. By the time of the hearing, in November 2018, she contends she had "accepted the allegations and ended her relationship with [Joe]." She also notes that the children were removed from her home in June "without a court order and despite an existing civil Order granting Mother custody." She also claims it is "unclear what services were being provided to Mother other than counseling with Ms. Depuy and some visitation." She contends the trial court failed to "resolve conflicts in the key evidence" regarding her living circumstances at the time of the adjudication hearing, her counseling, Ed's bond with her, Joe's denials to Mother regarding Sara's abuse, her "innocent explanation for

6. We consider this argument as to the adjudication of Sara only because we must reverse the adjudication of neglect regarding Ed because there were no findings of any neglect or substantial risk of future abuse or neglect to Ed based upon the sexual abuse of Sara. *See infra* Part V.

the hallway dresser with Joe's old clothes," and many other facts. She contends she immediately sought help for Sara, supported her disclosure of abuse even if she had difficulty accepting it at first, and denied Joe was even "in the presence of" the children after March 2018, even though she admits she testified that Joe "occasionally broke in" to the home and she "found him in the home without her consent or invitation."

Mother's arguments regarding the facts address mainly the trial court's determinations regarding credibility and weight of the evidence, which we cannot review on appeal. *In re C.J.H.*, 240 N.C. App. 489, 493, 772 S.E.2d 82, 86 (2015) ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (quoting *In re S.C.R.*, 198 N.C. App. 525, 531-32, 679 S.E.2d 905, 909 (2009)). As noted in the unchallenged findings of fact quoted above, Mother continued to express disbelief of Sara's revelation of sexual abuse up until the hearing, when she stipulated "for purposes of this action," it had occurred. She discredited Sara during their counseling sessions, and her visits with Sara were also difficult due to her disbelief. In fact, Mother's continued disbelief was part of Sara's "trauma narrative." Mother continued to express her love for Joe and her desire to marry him for months. Mother argues she had "innocent explanations" for the presence of Joe's clothing and drug paraphernalia in her home, even as late as August,[7] and she continued to come up with different explanations each time she was asked. She also testified that she was sometimes unaware that Joe was in the house because "[w]hen you're upstairs, you can't hear anything downstairs" and that she could not keep Joe out of the house. At trial, after admitting Joe had been in the house several times after March 2018, Mother was asked if she was "concerned that the man who had sexually assaulted your daughter had access to your home without you knowing about it?" She replied that "[Joe] would have had access

7. More than two months after the children were removed from the home, a Social Worker found that Mother's master bedroom was still "full of [Joe]'s clothes as well as drug paraphernalia and other items belonging to [Joe]." Her explanations for the continued presence of Joe's clothing and belongings in the home were nonsensical. She first claimed clothes are "expensive" so she did not get rid of them because Joe may need them. But if he was not living in the home, he would not have access to the clothing and thus would presumably need to buy new clothing to wear anyway, since his old clothing was still in the home and inaccessible to him. Mother then claimed the dresser in which the clothing was stored was "heavy" and she could not move it. She did not explain why she could not simply remove the clothing from the heavy dresser and arrange for Joe to get it without coming to the home. In fact, Mother was still residing in the home owned by Joe's brother until just prior to the hearing.

no matter what," even if she changed the locks because he would break in. But she did not call the police when he broke in because she did not need "more chaos and drama." She argues that she had moved away from the home owned by Joe's brother. But she testified at the first day of the hearing, on 28 November 2018, that she was in the process of finding a new place to live and was staying with a friend and presented no evidence that she ever actually found a new residence.

Based on the findings of fact, the trial court did resolve the relevant issues presented by the evidence. The trial court did not find Mother's claims of ending her relationship with Joe or her support for Sara's report of sexual abuse to be credible. There was no evidence upon which the trial court would have been able to find that Mother had obtained a new residence where Joe would not have access "no matter what," as the only evidence was Mother had just begun looking for a new place to live. But despite these findings of fact, Mother is correct that the trial court did not make a specific finding regarding the "probability of repetition" of neglect.

The Guardian ad Litem concedes the trial court did not address the probability of repetition of neglect specifically but argues there was no need for the trial court to make this finding. Normally, the issue of the probability of *repetition* of neglect arises in termination of parental rights cases or in cases where there has been a prior adjudication by the court. It is well-established when the court has made a prior adjudication of neglect and the child has not lived with the parent for a period of time, the prior neglect cannot be the sole ground for termination of parental rights unless the court has determined there is a probability of repetition of the neglect if the child were returned to the parent. *See In re Brim*, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372 (2000) ("[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." However, such prior adjudication, standing alone, will not suffice where the natural parents have not had custody for a significant period prior to the termination hearing. Therefore, the court must take into consideration "any evidence of changed conditions in light of the evidence of prior neglect and *the probability of a repetition of neglect*. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." (alteration in original) (citations omitted) (quoting *In Re Ballard*, 311 N.C. 708, 713-15, 319 S.E.2d 227, 231-32 (1984))). But the definition of neglect is the same, whether for purposes of an adjudication or for termination of parental rights. *See* N.C. Gen. Stat. § 7B-101(15).

Here, the trial court concluded that Sara was neglected because she does not "receive proper care, supervision, or discipline" and she "lived in an environment injurious to [her] welfare." The trial court's conclusion of neglect by Mother was not based simply on the findings of sexual abuse by Joe; Mother was not aware the abuse was happening until March 2018, and she did act immediately to stop the sexual abuse. The trial court's conclusion of neglect based upon Sara's emotional injury from the failure to receive proper care and supervision and an injurious environment were based upon the findings regarding what had happened *after* March 2018: Mother's failure to support Sara, her prioritizing her relationship with Joe before Sara's welfare, her efforts to discredit Sara in therapy sessions, and her apparent inability to keep Joe out of her home. Mother continued to live in the home owned by Joe's brother until the time of the adjudication hearing, despite her claim that Joe kept breaking into the home and showing up in the home without her even hearing him. Mother simply had not demonstrated her willingness or ability to ensure that Sara was protected from Joe, even after repeated warnings from DSS. The trial court's findings of fact and conclusion of neglect properly consider Mother's circumstances and ability to care for Sara at the time of the adjudication and were based upon the "physical, mental or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re R.L.G.*, 260 N.C. App. 70, 75, 816 S.E.2d 914, 918 (2018) (quoting *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993)).

V. Adjudication of Neglect as to Ed

[3] Mother contends that the trial court's findings of fact were not sufficient to support its conclusion of law adjudicating Ed as a neglected juvenile. We agree.

A neglected juvenile is one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101(15) (2019). In determining whether a juvenile is neglected, "it is relevant that juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." *Id.* The decision of the trial court regarding whether the other children in the home are neglected, "must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

If the trial court relies on instances of past abuse or neglect of other children in adjudicating a child neglected, the court is required to find "the presence of other factors to suggest that the neglect or abuse will be repeated." *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014). "[W]hile this language regarding neglect of other children 'does not mandate' a conclusion of neglect, the trial judge has 'discretion in determining the weight to be given such evidence.' " *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (quoting *In re Nicholson*, 114 N.C. App. 423, 427, 610 S.E.2d 852, 854 (1994)). "Section 7B-101(15) affords 'the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.' " *In re C.M.*, 183 N.C. App. 207, 210, 644 S.E.2d 588, 592 (2007) (quoting *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999)).

Here, the trial court's findings focused almost exclusively on Sara, as a result of the sexual abuse by Joe, and the trial court relied on instances of Sara's past abuse to adjudicate Ed neglected. Only two findings address Ed specifically, Findings of Fact 29 and 34. The findings do not address any impact of Sara's abuse on Ed but instead find only that he "is a healthy, happy five-year-old" with "no ongoing health concerns." The only findings of abuse of Sara were sexual abuse by Joe. There are no findings that this abuse had any effect on Ed, or that there was any reason to believe Joe may abuse Ed in the future. In this regard, this case is quite similar to *In re J.C.B.*, where the trial court found the respondent-father had sexually abused one of the juveniles in the home, although there were no allegations of abuse of the other children:

> Even if we assume *arguendo* that respondent-father abused R.R.N., a juvenile, in the home where J.C.B., C.R.R., H.F.R., and respondent-father lived, this fact alone does not support a conclusion that J.C.B., C.R.R., and H.F.R. were neglected. The trial court made virtually no findings of fact regarding J.C.B., C.R.R., or H.F.R., and wholly failed to make any finding of fact that J.C.B., C.R.R., and H.F.R. were either abused themselves or were aware of respondent-father's inappropriate relationship with R.R.N. Additionally, the trial court failed to make any findings of fact regarding other factors that would support a conclusion that the abuse would be repeated. As a result, the findings of fact do not support a conclusion that respondent-father's conduct created a "substantial

> risk" that abuse or neglect of J.C.B., C.R.R., and H.F.R. might occur.

233 N.C. App. at 644–45, 757 S.E.2d at 489–90 (citation omitted).

Here, as in *In re J.C.B.*, the trial court did not make any finding even of any risk of physical, mental or emotional impairment to Ed or the presence of other factors supporting a conclusion that he was neglected. The only specific finding regarding Ed is that he is happy, healthy, and has no "health concerns." Thus, the trial court's findings of fact do not support its conclusion of law regarding adjudication of neglect regarding Ed.

Based upon our review of the record, there is evidence which could support additional findings addressing the potential risk to Ed based upon Sara's neglect, such as Respondent-Mother's continued refusal to believe Sara was abused and repeated misrepresentations regarding Joe's continuing presence in the home in violation of the safety plan. But this Court cannot make the findings of fact, as only the trial court has the discretion to make findings. *See In re H.D.H.*, 269 N.C. App. 409, 413, 839 S.E.2d 65, 67 (2020).

On remand, the trial court shall make findings addressing the relevance of the sexual abuse of Sara and the effect of Mother's neglect upon Ed, if the trial court deems the evidence sufficient to support such findings. In its discretion, the trial court may hold an additional hearing and consider additional evidence regarding the allegation of neglect as to Ed.

VI. Transfer of Jurisdiction under North Carolina General Statute § 7B-911

[4] Mother contends that the trial court's order "fails to meet the requirements of N.C. Gen. Stat. §7B-201 and §7B-911." She contends the order fails to make the required findings and conclusions to terminate the jurisdiction of the juvenile court and to transfer jurisdiction to civil district court. We review an order's compliance with statutory requirements *de novo*. *In re J.K.*, 253 N.C. App. 57, 63, 799 S.E.2d 439, 443 (2017).

We first note that the trial court intended and directed that two orders be prepared and entered based upon the hearing. The trial court instructed counsel as follows at the close of the hearing:

> So, Ms. Cairo, I'm going to ask you to draw that order. I'm going to convert this to Chapter 50. And so, Ms. Jennings, I'll ask you to draw the custody order out of this pursuant to 7B 911.

> MS. JENNINGS: Okay.
>
> THE COURT: With appropriate findings. Since custody's being granted to a parent, we don't have to have the case open for any period of time. And -- and by operational law, this order will actually resolve the pending motion in the open Chapter 50 case.
>
> And then if there are issues about visitation or further issues about custody, then it can go back to that court and it can be between these two young people.
>
> MS. JENNINGS: Okay. Thank you, your Honor.
>
> THE COURT: So I'll ask each of you to share your orders with Ms. Harjo and Ms. Everett for their input.
>
> Reviews are waived.
>
> Guardian's released.
>
> Counselor released.
>
> . . .
>
> MS. CAIRO: Your Honor, I would also ask for a provision that -- that [Joe] be prohibited from having contact with either child.
>
> THE COURT: Yes. That should be in both orders. Thank you for pointing that out, Ms. Cairo. That should be in both the 7B order and the Chapter 50 order.

In addition, the order on appeal included a decree that a separate order be prepared and entered:

> Attorney Jennings shall prepare an Order reflective of the findings, conclusions and decretal set forth herein, and the same shall be filed in the existing Chapter 50 custody action between Respondent-Parents, to wit, New Hanover County Case Number 16 CVD 1965. All further hearing as may be necessary shall be conducted under that case file and shall occur in regular civil district court.

The briefs concede only one order, the one on appeal, was entered. Thus, it is not surprising that the order on appeal fails to include all of the findings and conclusions as required by North Carolina General Statute § 7B-911, as the trial court directed that another order be entered to address these matters.

Here, there was a pre-existing Chapter 50 custody proceeding in which Mother and Father were parties and there was a custody order in effect when the petition was filed. Because "the juvenile [was] already

the subject of a custody order entered pursuant to Chapter 50," the trial court was required to enter an order which "makes findings and conclusions that support modification of that order pursuant to G.S. 50-13.7." N.C. Gen. Stat. § 7B-911(c)(1) (2019). The trial court's order did not include any findings or conclusions regarding a substantial change in circumstances affecting the best interests of the minor child, as required by North Carolina General Statute § 50-13.7. *Hibshman v. Hibshman*, 212 N.C. App. 113, 710 S.E.2d 438 (2011) (finding remand for further proceedings to be required where trial court did not make a finding showing a substantial change in circumstances before modifying custody).

The trial court also failed to find, as required by N.C. Gen. Stat. § 7B-911(c)(2)(a), that "[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding." We therefore remand for entry of an order terminating juvenile court jurisdiction and transferring to civil district court, as directed by the trial court, including the appropriate findings of fact and conclusions of law.

VII. Visitation Order

Mother also contends that the trial court erred in its visitation order by allowing Sara discretion regarding visitation and cites to North Carolina General Statute § 7B-905.1(a), (c) in support of her argument. However, the Guardian ad Litem states "[b]ecause the court placed custody with the father (not DSS) and terminated the neglect case, N.C. Gen. Stat. § 7B-905.1 does not apply in regards to visitation." The Guardian Ad Litem is technically correct, in the sense that the trial court *intended* to end DSS's involvement in the case, to terminate jurisdiction of the juvenile court, and to enter a custody order under N.C. Gen. Stat. § 7B-911. But as discussed above, the custody order required by N.C. Gen. Stat. § 7B-911 and directed by the trial court was not entered, and we have remanded for entry of this Order. Because the trial court will necessarily address the details of visitation in the order on remand, we will not further address Mother's argument regarding Sara's visitation. In addition, as the trial court will need to hold a hearing on remand, the parties will have the opportunity to present additional evidence regarding visitation arrangements which will be in Sara's best interest upon remand.

VIII. Conclusion

Because there were not sufficient findings of fact to support the trial court's conclusion of neglect as to Ed, we reverse the adjudication as to Ed and remand for further findings. The trial court's findings of fact as to Sara support its conclusion of law regarding her adjudication as

neglected. However, the trial court failed to comply with the requirements of North Carolina General Statute § 7B-911 in terminating jurisdiction of the juvenile court and transferring the case as a Chapter 50 matter because the trial court failed to make findings of fact and conclusions of law regarding modification of the existing Chapter 50 custody order and failed to make a finding stating there was no need for continued intervention by the juvenile court. In addition, the trial court failed to enter the Chapter 50 order as directed in its rendition and mandated by the Adjudication and Disposition order on appeal, so we must remand for entry of the Chapter 50 order in accord with North Carolina General Statute § 7B-911. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

On remand, the trial court shall hold a hearing and receive additional evidence as it deems appropriate to address the issues noted in this opinion and to enter a new order addressing the allegations of neglect as to Ed, an order addressing the termination of juvenile jurisdiction and transfer to the Chapter 50 custody action, and appropriate visitation provisions for Sara in accord with the trial court's findings on remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges INMAN and YOUNG concur.

STEPHEN V. JUDD, PLAINTIFF
v.
TILGHMAN MEDICAL ASSOCIATES, LLC, DEFENDANT

No. COA19-581

Filed 21 July 2020

1. Civil Procedure—motion to set aside—entry of default—default judgment—applicable standard

In a fraud lawsuit where defendant corporation moved pursuant to Civil Procedure Rules 55 and 60 to set aside either the entry of default or the subsequent default judgment entered against it, the trial court properly declined to analyze defendant's motion under the Rule 55(b) "good cause" standard for setting aside an entry of default because the default judgment had already been entered, and therefore the plain text of Rule 55(b) required the trial court to rule on defendant's motion under the standards set forth in Rule 60(b) for setting aside default judgments.

2. Judgments—default—motion to set aside—Rule 60(b)(1)—excusable neglect—no follow-up with counsel

In a fraud lawsuit, the trial court did not abuse its discretion by declining to set aside a default judgment against defendant corporation under Rule 60(b)(1) where defendant failed to appear in the case over a two-year period and failed to show the judgment resulted from excusable neglect. Defendant asserted that it reasonably relied on its law firm of ten years to timely handle the case, but because defendant never followed up with its counsel about the lawsuit after providing the law firm with plaintiff's complaint, counsel's inexcusable neglect in handling the case was imputed to defendant.

3. Judgments—default—motion to set aside—Rule 60(b)(6)—extraordinary circumstances

In a fraud lawsuit, the trial court did not abuse its discretion by declining to set aside a default judgment against defendant corporation under Rule 60(b)(6) where competent evidence showed that defendant's failure to appear in the case over a two-year period resulted from its own inexcusable neglect of its business affairs rather than from extraordinary circumstances (defendant never followed up with its then-counsel about the case after turning the complaint over to counsel).

4. Judgments—default—discretionary written finding of fact—sufficiency

When denying defendant corporation's motion to set aside a default judgment under Civil Procedure Rule 60(b) for excusable neglect (among other grounds), the trial court did not err by making only one written finding of fact regarding defendant's excusable neglect argument without entering additional findings addressing all the evidence defendant presented in support of that argument. The trial court was not required to enter written findings on defendant's Rule 60(b) motion—because neither party requested written findings—but chose to do so in its own discretion; therefore, the court was not required to enter findings regarding every fact presented to it by the parties. Moreover, competent evidence supported the court's sole finding on excusable neglect despite defendant's evidence to the contrary.

5. Judgments—default—excusable neglect—conclusion of law—sufficiency—recitation of evidence

In its order denying defendant corporation's motion to set aside a default judgment, the trial court's conclusion of law—stating that

defendant had not established the requisite excusable neglect to set aside the judgment under Rule 60(b)(1) where he failed to respond to more than eighteen pleadings, motions, and other documentation relating to a lawsuit over a two-year period—was supported by the court's findings of fact and the evidence in the case. Further, the conclusion did not constitute a mere recitation of the evidence, but rather it properly referenced the facts upon which the court concluded defendant's neglect was inexcusable.

Appeal by plaintiff from order entered 8 February 2019 by Judge Vince Rozier in Harnett County Superior Court. Heard in the Court of Appeals 8 January 2020.

Ortiz & Schick, PLLC, by Heather E. Connor, for plaintiff-appellee.

The Charleston Group, by Jose A. Coker and Daniel DiMaria, for defendant-appellant.

TYSON, Judge.

Tilghman Medical Associates, LLC ("Defendant") appeals from the trial court's order denying its motion to set aside the default judgment in favor of Stephen V. Judd ("Plaintiff"). We affirm.

I. Background

Plaintiff purchased three office buildings ("the properties") from Defendant for $1,800,000.00 on 3 February 2015. Plaintiff determined the properties' effective occupancy level at the time of sale was lower than Defendant and/or its agents had allegedly represented to him.

Plaintiff filed a complaint, which alleged fraud against Defendant and its broker on 2 June 2016. The broker filed a motion to dismiss and an answer, but Defendant did not. Plaintiff filed an affidavit of service upon Defendant, and moved for entry of default, which the court entered on 5 August 2016. Plaintiff moved to file an amended complaint, which the trial court also granted.

Plaintiff filed an amended complaint, which alleged fraud and negligent misrepresentation against Defendant, the broker, and Capitol Properties I, LLC ("Capitol"), and breach of contract against Defendant, on 6 September 2016. The broker and Capitol jointly filed a motion to dismiss and an answer, but Defendant did not. Plaintiff again filed an affidavit of service upon Defendant and moved for entry of default against Defendant, which the trial court entered on 8 November 2016.

Mediation was held on 10 April 2017. The broker and Capitol settled with Plaintiff. All claims against them were dismissed with prejudice on 10 July 2017. Plaintiff moved for default judgment against Defendant on 17 November 2017.

The trial court conducted a hearing on 16 January 2018, which Defendant did not attend. The trial court entered default judgment against Defendant for $840,000.00, plus interest at the legal rate, on 31 January 2018. Writs of execution were issued to the Sheriff of Harnett County, who posted a notice of sale of lots owned by Defendant on the same road as the properties on 14 August 2018. The sale was set for 5 September 2018.

Defendant filed a verified emergency motion to stay the sale and a motion to set aside the judgment on 29 August 2018. Defendant asserted its member/manager, Dr. Ibrahim Naim Oudeh, "immediately provided the Amended Complaint to [Defendant]'s then-counsel" upon its receipt on 8 September 2016. Defendant claimed its then-counsel advised Dr. Oudeh they would move to dismiss the action, and Dr. Oudeh "reasonably believed that this matter was being timely handled" by Defendant's then-counsel "and had no reason to doubt otherwise."

Dr. Oudeh and Defendant both asserted they "were unaware at any time" their then-counsel "did not file an answer and failed to pursue any defense" on Defendant's behalf. Defendant claimed to have become first aware of the default judgment entered against it after Dr. Oudeh disclosed his real estate holdings in response to complaints filed against him by the United States and the State of North Carolina, which alleged false and fraudulent Medicare and Medicaid claims.

Defendant moved to set aside the default judgment on the basis of excusable neglect due to the non-action and negligence of its then-counsel. Defendant further moved to set aside the entry of default for good cause. Defendant also sought a stay of the sale.

The trial court stayed the sale on 30 August 2018 and set a hearing on Defendant's motion to set aside the judgment. Following the hearing, the trial court entered its order denying Defendant's motion on 8 February 2019. Defendant timely filed its notice of appeal.

II. Jurisdiction

This appeal is properly before us pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019). Defendant's brief fails to include a statement of the grounds for appellate review, as is 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.

Defendant's non-jurisdictional failure to comply with Appellate Rule 28(b)(4) does not mandate dismissal. *See id.* Counsel is admonished that our Appellate Rules are mandatory, compliance is expected therewith, and multiple sanctions are available for violation. *Id.*; N.C. R. App. P. 28(b)(4).

III. Issues

Defendant argues the trial court abused its discretion by denying its motion to set aside either the entry of default pursuant to N.C. Gen. Stat. § 1A-1, Rule 55(d) (2019) or the default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) (2019). Defendant also challenges one finding of fact and one conclusion of law in the trial court's order as erroneous.

IV. Entry of Default

[1] Defendant argues the trial court erred by denying his motion to set aside the entry of default under Rule 55(d). Defendant cites the first portion of Rule 55(d): "For good cause shown the [trial] court may set aside an entry of default[.]" N.C. Gen. Stat. § 1A-1, Rule 55(d). "This standard is less stringent than the showing of 'mistake, inadvertence, [surprise,] or excusable neglect' necessary to set aside a default judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)." *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000) (citation omitted).

Although Defendant moved "pursuant to Rules 55 [and] 60 . . . of the North Carolina Rules of Civil Procedure for an order . . . setting aside the entry of default," the trial court analyzed the motion solely under Rule 60(b). "While entry of default may be set aside pursuant to Rule 55(d) and a showing of good cause, after judgment of default has been entered, the motion to vacate is governed by Rule 60(b)." *Estate of Teel by Naddeo v. Darby*, 129 N.C. App. 604, 607, 500 S.E.2d 759, 762 (1998) (citations omitted).

The trial court appropriately declined to analyze Defendant's motion under the Rule 55(b) "good cause" standard, after default judgment

had already been entered against Defendant. This ruling accords with the plain text of Rule 55(d), when read in its entirety: "For good cause shown the court may set aside an entry of default, and, *if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)*." N.C. Gen. Stat. § 1A-1, Rule 55(d) (emphasis supplied).

The cases Defendant cites, in which this Court reviewed a trial court's denial of a motion to set aside the entry of default using the Rule 55(d) "good cause" standard, are inapposite upon closer examination. In *Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, this Court reversed the denial of a motion to set aside the entry of default, in which case default judgment had subsequently been entered, but only after this Court had previously held the defendants' initial appeal from the denial of a motion to set aside entry of default "was interlocutory *because no default judgment had been entered.*" *Swan Beach Corolla, L.L.C. v. Cty. of Currituck* (*Swan Beach III*), 255 N.C. App. 837, 840, 805 S.E.2d 743, 746 (2017) (emphasis supplied), *aff'd per curiam*, 371 N.C. 110, 110, 813 S.E.2d 217, 217-18 (2018); *see also Swan Beach Corolla, L.L.C. v. Cty. of Currituck* (*Swan Beach II*), 244 N.C. App. 545, 781 S.E.2d 350, 2015 WL 8747777, at *2 (2015) (unpublished). In *Swan Beach III*, the issue of the trial court's denial of the motion to set aside the entry of default was independently preserved upon remand, despite the subsequent entry of default judgment after this Court's decision in *Swan Beach II*.

In *Jones v. Jones*, also cited by Defendant, this Court affirmed the denial of a motion to set aside the entry of default, but again no default judgment had been entered in that case. __ N.C. App. __, __, 824 S.E.2d 185, 189 (2019), *aff'd per curiam*, 373 N.C. 381, 837 S.E.2d 872 (2020) (defendant appealed the trial court's entry of default, denial of motion to dismiss entry of default, and order for specific performance, but no default judgment was ever entered).

We need not consider Defendant's arguments regarding the entry of default. After default judgment was entered in this case and before Defendant filed his motion to set aside either entry of default or default judgment, the trial court was bound by the plain text of Rule 55(d) and precedents to analyze Defendant's motion under the standards set forth in Rule 60(b). "We proceed thusly as the propriety of the trial court's denial of [D]efendant's motion to vacate entry of default is irrelevant, if the trial court properly denied [D]efendant's motion to vacate entry of default judgment." *Estate of Teel*, 129 N.C. App. at 608, 500 S.E.2d at 762. Defendant's argument is overruled.

V. Default Judgment

Defendant argues the trial court abused its discretion by denying his motion to set aside the default judgment under N.C. Gen. Stat. § 1A-1, Rules 60(b)(1) and 60(b)(6).

A. Standard of Review

> The decision whether to set aside a default judgment under Rule 60(b) is left to the sound discretion of the trial judge, and will not be overturned on appeal absent a clear showing of abuse of discretion.
>
> Whether neglect is "excusable" or "inexcusable" is a question of law. The trial judge's conclusion in this regard will not be disturbed on appeal if competent evidence supports the judge's findings, and those findings support the conclusion.

Elliott v. Elliott, 200 N.C. App. 259, 261-62, 683 S.E.2d 405, 408 (2009) (citation omitted).

B. Excusable Neglect

[2] "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . excusable neglect[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b)(1). "To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense." *Elliott*, 200 N.C. App. at 262, 683 S.E.2d at 408.

> It is well settled that provisions relating to the setting aside of default judgments should be liberally construed so as to give litigants an opportunity to have a case disposed of on the merits. However, statutory provisions designed to protect plaintiffs from defendants who do not give reasonable attention to important business affairs such as lawsuits cannot be ignored.

Estate of Teel, 129 N.C. App. at 607, 500 S.E.2d at 762 (citations omitted).

This Court has recognized:

> the neglect of a litigant's attorney will not be imputed to the litigant unless the litigant is guilty of inexcusable neglect. . . . When a litigant has not properly prosecuted his case because of some reliance on his counsel, the

> excusability of the neglect on which relief is granted is that of the litigant, not of the attorney.

N.C. State Bar v. Hunter, 217 N.C. App. 216, 228, 719 S.E.2d 182, 191 (2011) (citation and alterations omitted).

Defendant argues its reliance on its then-counsel was reasonable and has demonstrated excusable neglect. Defendant asserts it provided the amended complaint immediately to its former counsel. Dr. Oudeh "reasonably believed that this matter was being timely handled by his then law firm, and he had no reason to doubt otherwise based on his prior dealings with the law firm," which "handled nearly all of the legal matters for [Defendant] in the preceding ten (10) years."

Defendant disputes Plaintiff's assertions regarding documents he allegedly mailed to Defendant at Dr. Oudeh's place of business. Defendant, however, makes no assertion it communicated further with its then-counsel about this matter after providing counsel with the amended complaint.

"The standard of care required of the litigant is that which a man of ordinary prudence usually bestows on his important business." *Moore v. Deal*, 239 N.C. 224, 227, 79 S.E.2d 507, 510 (1954) (citations omitted). Our Supreme Court has repeatedly held: "the employment of counsel does not excuse the client from giving proper attention to the case." *Hyde Cty. Land & Lumber Co. v. Thomasville Chair Co.*, 190 N.C. 437, 438, 130 S.E. 12, 13 (1925) (citations omitted). "When a man has a case in court the best thing he can do is to attend to it." *Pepper v. Clegg*, 132 N.C. 312, 316, 43 S.E. 906, 907 (1903).

> Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable.

Meir v. Walton, 2 N.C. App. 578, 582-83, 163 S.E.2d 403, 406 (1968) (citing *Moore*, 239 N.C. at 228, 79 S.E. 2d at 511; *Pepper*, 132 N.C. at 316, 43 S.E. at 907).

In the case of *Estate of Teel*, the record was "devoid of any evidence of follow-up by [the defendant] once he turned this matter over to his attorney." *Estate of Teel*, 129 N.C. App. at 611, 500 S.E.2d at 764. While

the defendant in *Estate of Teel* "may have depended on counsel . . . to answer the complaint," this Court found "nothing to prevent the imputation of the inexcusable negligence" of the defendant's agents in that case. *Id.* "The trial court, therefore, properly found and concluded [the defendant] had failed to show excusable neglect." *Id.* The analysis and holding in *Estate of Teel* controls the outcome here.

The Supreme Court of North Carolina observed over 115 years ago: "A lawsuit is a serious matter. He who is a party to a case in court must give it that attention which a prudent man gives to his important business. That was not done in this case." *Pepper*, 132 N.C. at 315, 43 S.E. at 907 (citations and internal quotation marks omitted).

"In the absence of a sufficient showing of excusable neglect, the question of a meritorious defense becomes moot and is immaterial." *Estate of Teel*, 129 N.C. App. at 611, 500 S.E.2d at 764 (citing *Stephens v. Childers*, 236 N.C. 348, 351, 72 S.E.2d 849, 851 (1952)). "We, therefore, need not address defendant's argument in this regard." *Id.* Defendant has failed to demonstrate the trial court abused its discretion by denying its motion under Rule 60(b)(1) for excusable neglect to reverse the judgment.

C. Rule 60(b)(6)

[3] Defendant also argues the trial court abused its discretion by denying its motion pursuant to Rule 60(b)(6). In lieu of a showing of any of the other reasons for relief listed in Rule 60(b), a trial court may also grant relief from a judgment or order to a party for "[a]ny other reason justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6).

"To qualify for relief under Rule 60(b)(6), a movant must satisfy a three-part test: (1) extraordinary circumstances exist, (2) justice demands the setting aside of the judgment, and (3) the defendant has a meritorious defense." *Wiley v. L3 Commc'ns Vertex Aerospace, LLC*, 251 N.C. App. 354, 361, 795 S.E.2d 580, 586 (2016) (citation and internal quotation marks omitted). "This Court previously has recognized that the size of a default judgment award is a relevant factor to consider when determining whether extraordinary circumstances exist and whether justice would be best served by affording relief from judgment." *Id.*

If the evidence and findings supports the conclusion that a party's "failure to appear was due to its own inexcusable neglect of its business affairs rather than to extraordinary circumstances[,] . . . the trial court's conclusion that extraordinary circumstances did not exist will not be

disturbed." *Partridge v. Associated Cleaning Consultants & Services, Inc.*, 108 N.C. App. 625, 632-33, 424 S.E.2d 664, 669 (1993). Defendant cannot show entitlement to relief under Rule 60(b)(6). These arguments are overruled. *See id.*

VI. Finding of Fact Number 39

[4] Defendant challenges the trial court's finding of fact number 39: "Defendant['s] sole argument is that the Default Judgment should be set aside under North Carolina Rule of Civil Procedure 60(b) for excusable neglect, because the neglect of counsel rendered Defendant Tilghman's neglect excusable."

A. Standard of Review

"Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (citation and alterations omitted).

B. Analysis

"A trial court is not required to make written findings of fact when ruling on a Rule 60(b) motion, unless requested to do so by a party." *Monaghan v. Schilling*, 197 N.C. App. 578, 582, 677 S.E.2d 562, 565 (2009) (citations omitted). Defendant does not assert it requested the trial court to make written findings of fact. Instead, Defendant argues that, because the court elected to make findings of fact in its own discretion, it abused its discretion by not making any findings of fact regarding Defendant's asserted justifications of excusable neglect and a meritorious defense.

Defendant argues, "the trial court in essence did not consider any of those facts presented to the trial court." Defendant then cites assertions of fact it presented to the trial court below. Defendant's argument boils down to: if the trial court elects to make findings of fact, in its own discretion, on a Rule 60(b) motion, then it must make findings of fact on *all* facts presented to it by *each* party. This assertion is neither required nor supported by our rules or precedents.

"Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion." *Id.* (citations and alteration omitted). The challenged finding of fact in this case is supported by competent evidence in the record, as well as the preceding

thirty-eight findings of fact, even if Defendant presented evidence to the contrary. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434. "Although it is clearly the better practice for trial courts to make explicit findings of fact with respect to the elements of Rule 60(b)(1), . . . the trial court's failure to do so here does not require reversal." *Parris v. Light*, 146 N.C. App. 515, 519, 553 S.E.2d 96, 98 (2001). Defendant's argument is overruled.

VII. Conclusion of Law Number 10

[5] Lastly, Defendant challenges the trial court's conclusion of law number 10:

> Based upon the foregoing findings of fact, and given that Defendant . . . was served with over eighteen pleadings, motions, notices of hearing and other documentation related to the case over a two year period, Defendant has not established excusable neglect to set aside the Default Judgment entered against it under North Carolina Rule of Civil Procedure 60(b).

A. Standard of Review

"Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted).

B. Analysis

Defendant argues conclusion of law number 10 was erroneous because: (1) it is unsupported by the findings of fact, specifically the challenged finding of fact number 39; (2) it does not address the elements of Rule 60(b) or the evidence presented below by Defendant; and, (3) it contains bare conclusions or mere recitations of the evidence. As discussed above, we disagree with Defendant's arguments challenging the findings of fact in this case, and so find that argument here unpersuasive. The arguments concerning the elements of Rule 60(b) and the other evidence presented below by Defendant is similarly repetitive of arguments previously discussed and resolved.

Defendant argues the trial court failed to make conclusions of law regarding the remaining elements of Rule 60(b) or the other evidence presented below. This argument is: "A conclusion of law is the court's statement of the law which is determinative of the matter at issue and *must be based on the facts found by the court*[.]" *Williamson v. Williamson*,

140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000) (emphasis supplied) (citation, alteration, and internal quotation marks omitted). The findings referred to in the trial court's conclusion of law number 10 are not mere recitations. Rather, the trial court references the evidence and findings of fact upon which it concludes Defendant's neglect was inexcusable.

The trial court's conclusion of law was supported by its findings of fact and the competent evidence in record in this case. Defendant's arguments are overruled.

VIII. Conclusion

The trial court appropriately declined to analyze Defendant's motion to set aside entry of default under Rule 55(b)'s "good cause" standard after default judgment had already been entered against Defendant in this case. *See* N.C. Gen. Stat. § 1A-1, Rule 55(d); *Estate of Teel*, 129 N.C. App. at 607, 500 S.E.2d at 762.

Defendant failed to show excusable neglect under Rule 60(b)(1), when its member/manager provided Plaintiff's amended complaint to its then-counsel and the record is "devoid of any evidence of follow-up by [Defendant] once he turned this matter over to his attorney." *Estate of Teel*, 129 N.C. App. at 611, 500 S.E.2d at 764. Competent evidence supports the conclusion that Defendant's "failure to appear was due to its own inexcusable neglect of its business affairs rather than to extraordinary circumstances." *Partridge*, 108 N.C. App. at 632, 424 S.E.2d at 669. As a result, "the trial court's conclusion that extraordinary circumstances did not exist [under Rule 60(b)(6)] will not be disturbed." *Id.* at 633, 424 S.E.2d at 669.

The finding of fact Defendant challenges was supported by competent evidence in the record, despite Defendant's evidence to the contrary. *See Sisk*, 364 N.C. at 179, 695 S.E.2d at 434. The trial court's conclusion of law number 10 was supported by findings of fact and the evidence in this case. This conclusion was not a mere recitation, but rather referenced the facts upon which it concluded Defendant's neglect was inexcusable.

The trial court properly denied Defendant's motion to set aside the default judgment. We affirm the trial court's rulings. *It is so ordered.*

AFFIRMED.

Judges DILLON and MURPHY concur.

SHERRILL v. SHERRILL

[272 N.C. App. 532 (2020)]

JAMIE D. SHERRILL, PLAINTIFF
v.
JOSEPH C. SHERRILL, DEFENDANT

No. COA20-106

Filed 21 July 2020

Attorney Fees—child custody action—insufficient means to defray costs—calculation of income at time of hearing

The trial court's award of attorney fees to plaintiff in a child custody dispute was reversed and remanded where the trial court's calculation of plaintiff's monthly income included her salary as a kindergarten teacher but failed to include income from her additional part-time job as an adjunct professor. Although plaintiff testified she would soon be leaving the university job, the court was required to calculate plaintiff's earnings as they existed at the time of the hearing when determining whether plaintiff had insufficient funds to defray the costs of litigation.

Judge DILLON dissenting.

Appeal by defendant from order entered 26 November 2019 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 10 June 2020.

Rivenbark Attorney at Law, P.C., by Nancy M. Rivenbark, for plaintiff.

Miller & Johnson, PLLC, by Andrea M. Fink, for defendant.

ARROWOOD, Judge.

Joseph C. Sherrill ("defendant") appeals from trial court order awarding attorney fees to Jamie D. Sherrill ("plaintiff") following a child custody dispute. Defendant argues the trial court erred in awarding attorney fees by: (1) finding plaintiff has insufficient means to defray the costs of the lawsuit; (2) denying defendant's motion to dismiss; (3) making erroneous findings as to plaintiff's income; and (4) miscalculating plaintiff's expenses. For the following reasons, we reverse and remand.

I. Background

Plaintiff and defendant were married on 31 August 2014 and separated on 19 November 2018. Two children were born into the marriage

(hereinafter the "minor children"). On 30 November 2018, plaintiff filed a motion for *ex parte* emergency custody of the minor children. On 8 and 30 July 2019, a hearing was held on the matter of permanent child custody. On 9 August 2019, the trial court entered a written order awarding custody of the minor children to plaintiff. On 31 October 2019, the trial court held a hearing addressing plaintiff's motion for attorney fees.

At the hearing, defendant conceded the issues of whether plaintiff was an interested party, and whether she had acted in good faith. Thus, the only issue before the trial court was whether plaintiff had insufficient means to defray the costs of the child custody suit. Plaintiff presented evidence including her own testimony and that of her mother, as well as proof of her income, debt, and expenses. Plaintiff testified that she currently worked as a kindergarten teacher and as a part-time adjunct professor at Appalachian State University, but would soon be leaving the university position in the following months. At the time of the hearing, however, she received a net monthly income of $3,482.07 as a kindergarten teacher and $1,336.42 as a part-time professor, for a total monthly income of $4,818.49. Plaintiff also received $900.00 in child support from defendant per month. Plaintiff further presented and testified to an expense sheet she prepared which detailed her expenses and those of the minor children. Pursuant to the expense sheet, plaintiff's expenses totaled an amount of $3,758.64 monthly. Plaintiff testified she was currently able to meet her expenses.

At the close of plaintiff's presentation of evidence, defense counsel moved to dismiss plaintiff's claim for attorney fees on the ground that plaintiff had not proven she had insufficient means to defray the costs of the litigation. Defendant did not offer any evidence. The trial court denied the motion. The trial court subsequently entered a handwritten order granting plaintiff's claim for attorney fees. In its order, the trial court found that plaintiff will lose the income she earns at Appalachian State University and calculated her net monthly earnings to include only the income she earned as a kindergarten teacher and payments she received for child support. It further found that plaintiff's monthly expenses were $3,758.64, and that her monthly income would decrease due to additional withholdings. Based on its findings, the trial court concluded plaintiff had insufficient means to defray the costs of this action. On 26 November 2019, a typewritten order memorializing the handwritten order was entered and defendant timely filed a notice of appeal.

II. Discussion

Defendant raises several arguments on appeal, in which he essentially contends the trial court erred in awarding attorney fees by: (1)

miscalculating plaintiff's income and finding plaintiff has insufficient means to defray the costs of litigation; (2) miscalculating plaintiff's expenses; and (3) denying defendant's motion to dismiss.

"In a custody and support action, once the statutory requirements of [N.C. Gen Stat. §] 50-13.6 have been met, whether to award attorney's fees and in what amounts is within the sound discretion of the trial judge and is only reviewable based on an abuse of discretion." *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 905-906 (1991) (citing *Atwell v. Atwell*, 74 N.C. App. 231, 237-38, 328 S.E.2d 47, 51 (1985)). However, "[w]hether [the] statutory requirements [of N.C. Gen. Stat. § 50-13.6] have been met is a question of law, reviewable on appeal." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996) (quotation marks omitted) (quoting *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980)). "In addition, the trial court's findings of fact must be supported by competent evidence." *Conklin v. Conklin*, 264 N.C. App. 142, 144, 825 S.E.2d 678, 680 (2019). "Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Schneider v. Schneider*, 256 N.C. App. 228, 229, 807 S.E.2d 165, 166 (2017) (quoting *Doan v. Doan*, 156 N.C. App. 570, 575, 577 S.E.2d 146, 150 (2003)).

N.C. Gen. Stat. § 50-13.6, provides, in pertinent part:

> In an action or proceeding for the custody or support, or both, of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. . . .

N.C. Gen. Stat. § 50-13.6 (2019). "We have interpreted this provision as requiring that before attorney's fees can be taxed in an action for custody or in an action for custody and support, the facts required by the statute—that the party seeking the award is (1) an interested party acting in good faith, and (2) has insufficient means to defray the expense of the suit—must be both alleged and proved." *Taylor*, 343 N.C. at 54, 468 S.E.2d at 35 (citing *Hudson*, 299 N.C. at 472, 263 S.E.2d at 723). "A party has insufficient means to defray the expense of the suit when he or she is 'unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.' " *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 184 (1992) (quoting *Hudson*, 299 N.C. at 474, 263 S.E.2d at 725).

In the case before us, defendant conceded that plaintiff was an interested party and had acted in good faith. Defendant only challenges the

trial court's findings supporting its conclusion that plaintiff has insufficient means to defray the costs of the underlying child custody suit. We first address defendant's contention the trial court erred calculating plaintiff's income. Specifically, we consider that part of his argument contesting the trial court's disregard of the income plaintiff received as an adjunct professor.

In its order, the trial court made the following findings of fact:

> 5. As a result of this custody proceeding, the Plaintiff has been required to relocate her residence to Burke County to the home of her parents. This move required her to change her employment to the Burke County School system as a teacher. Furthermore, she will lose the income she earns at Appalachian State University as an adjunct professor in the amount of $1,300.00 monthly.
>
> 6. Plaintiff has net monthly earnings of $3,482.07, together with $900.00 per month child support from the Defendant. The parties share equally in all uninsured medical expenses for their two (2) minor children. Plaintiff has monthly expenses of $3,758.64. Her monthly income will decrease due to additional withholdings.
>
> 7. Plaintiff's parents are requiring Plaintiff to pay the charges incurred on the credit card [that they allowed Plaintiff to charge all of her legal fees on] as follows:
>
> a. Attorney fees – $15,985.50;
>
> b. Costs – $234.00.
>
> . . . .
>
> 10. Plaintiff has insufficient means to defray all of these costs and fees.

In making its finding that "Plaintiff has net monthly earnings of $3,482.07," the trial court appears to have included only the income plaintiff receives from her position as a kindergarten teacher, and omitted the $1,300.00 it found that she was receiving at the time from Appalachian State University. However, a review of this Court's cases makes clear that the trial court, when calculating a party's income, must calculate the income as it exists at the time of trial, not base its calculations on anticipated future earnings.

For instance, in *Savani*, we found that the trial court's finding that the plaintiff had insufficient means to defray the expense of the action was supported by competent evidence where the evidence showed that "*[a]t the time of the hearing*, defendant had a gross income of $5,250.00 per month [and] [t]he plaintiff presented evidence showing a gross income of $1,189.00 per month." 102 N.C. App. at 503, 403 S.E.2d at 904-905 (emphasis added). In *Lawrence*, in considering a party's claim for attorney fees, this Court noted that "[t]he evidence reveals that Mother incurred legal fees in connection with this action in the amount of $6741.00; that her monthly gross income *is* $215.00 and that her monthly expenses exceed her gross income[.]" 107 N.C. App. at 153, 419 S.E.2d at 184 (emphasis added). We thus considered only her current gross income and expenses. *See also Hennessey v. Duckworth*, 231 N.C. App. 17, 23, 752 S.E.2d 194, 199 (2013) (upholding an award of attorney fees where "the trial court found that plaintiff is *currently* unemployed") (emphasis added).

Here, plaintiff's own testimony revealed that, at the time of the hearing, she worked as a kindergarten teacher and a part-time adjunct professor at Appalachian State University. She received a net monthly income of $3,482.07 as a kindergarten teacher and $1,336.42 as a part-time professor, and thus had a total monthly income of $4,818.49. The trial court's finding that "Plaintiff has net monthly earnings of $3,482.07" is thus unsupported by the evidence. Though plaintiff testified she would soon be leaving the university position in the following months, the trial court was required to calculate plaintiff's earnings as they existed at the time of the hearing, not as they would allegedly stand in the future. We thus hold the trial court erred in finding plaintiff had net monthly earnings of $3,482.07. Had the trial court correctly calculated plaintiff's monthly earnings from employment, the amount would have exceeded her monthly expenses of $3,758.64, and the trial court may not have concluded plaintiff had insufficient means to defray the costs of the action. *See Taylor*, 343 N.C. at 55, 468 S.E.2d at 36 (upholding a denial of attorney fees where the plaintiff's income exceeded her expenses).

Though the dissent would affirm this matter on the basis there was no abuse of discretion, we note that before this Court can apply that standard, we must first address whether the trial court properly complied with the mandate of N.C. Gen. Stat. § 50-13.6, which is a question of law subject to *de novo* review. In the case before us, the trial court, in miscalculating plaintiff's income by disregarding a substantial portion of it, could not have properly determined whether plaintiff had "insufficient means" to defray the costs of the suit under the statute. Moreover, our holding today is not that the trial court could not have reasonably

reached the same conclusion had it properly calculated plaintiff's income. Indeed, it is conceivable that the trial court could have included the income plaintiff was currently receiving from Appalachian State University and still concluded that she had insufficient means to defray the costs of the suit if it found, for instance, that requiring plaintiff to pay her attorney's fees would result in the unreasonable depletion of her estate. *See Lawrence*, 107 N.C. App. at 153-54, 419 S.E.2d at 185 (awarding attorney's fees because the plaintiff's income was not sufficient to pay her legal expenses and she was "not required to deplete her small estate in order to pay those expenses."). However, that is not what happened in this case. We thus hold that in determining whether a party is entitled to attorney fees under N.C. Gen. Stat. § 50-13.6, the trial court must consider the party's income as it existed at the time of trial, and we remand on that basis. Because we reverse on this ground, we decline to consider defendant's other arguments.

III. Conclusion

For the foregoing reasons, we reverse the trial court's order and remand for further determination in a manner not inconsistent with this opinion.

REVERSED AND REMANDED.

Judge YOUNG concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I do not believe that Judge Harrison abused his discretion by ordering Defendant to pay attorneys' fees in this case. Accordingly, I dissent.

The majority takes issue that Judge Harrison considered the fact that Plaintiff was about to lose income she earned as an adjunct professor at Appalachian State University because she was having to move away. She testified that her income as an adjunct was sporadic and varied from semester to semester. Judge Harrison did not ignore this income in his order, but made a finding as to what she was earning when he entered the order in late November 2019. He also found, though, that this income was about to end. I do not think it was an abuse of discretion for Judge Harrison to consider this fact in considering whether Plaintiff had sufficient means to defray her legal expenses.

The majority suggests that it is error for a trial court to consider anything other than a party's current income, without regard as to whether the income is likely to be recurring. I disagree. What if the party was a real estate broker and earned a one-time, large commission in the month of the hearing or if the party earned a one-time capital gain?[1] I believe it is appropriate for the trial court to consider that certain income is not likely to continue in exercising its discretion in determining whether a party has the ability to pay her attorneys' fees, so long as the trial court does not ignore the fact that the party earned the non-recurring income, as occurred here. Indeed, the statute requires the trial court to determine whether a party seeking attorneys' fees "has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2019).

Also, Defendant argues that the trial court should have considered the $900 of child support that he was paying Plaintiff as part of Plaintiff's income. Judge Harrison *did* consider this income to find that Plaintiff's income slightly exceeded her expenses. But Judge Harrison also found that Plaintiff's tax withholding was increasing, which would reduce her net cash flow, a finding that was supported by evidence in the record.[2]

Defendant, though, further argues that it was error for Judge Harrison to order Defendant to defray Plaintiff's attorneys' fees where he made a finding that Plaintiff's income slightly exceeded her expenses. Defendant cites cases supporting this proposition. However, in these cases, we simply held that it was not an abuse of discretion for a trial court to deny a request for attorneys' fees based on findings that the party requesting the fees has income that exceeds her expenses. But those cases do not hold that it would necessarily be an abuse of discretion for a trial court to award attorneys' fees in certain situations where the party may currently have a slight surplus in her *net* income. And here, Judge Harrison found that Plaintiff's temporary surplus would be diminishing because of the increase in tax withholdings.

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1. By way of example, consider a party whose attorneys' fees are $50,000.00 and normally makes just enough to live on. If that party happens to earn a one-time $10,000 bonus in the month of the hearing, I do not think it is an abuse of discretion for the trial court *not* to assume that the party has $10,000 in excess income each month and could pay her attorney's fees in five months. It would certainly be appropriate for the trial court to still award some amount of fees based on a finding, supported by the evidence, that the party will not have excess income going forward.

2. Defendant notes that it was a non-CPA who testified that the withholdings were increasing. However, Defendant does not argue that he objected to the testimony. Accordingly, it was not inappropriate for Judge Harrison, as the fact-finder, to consider the testimony in making his findings.

I, therefore, conclude that Judge Harrison's order was not an abuse of discretion. Perhaps other judges would not have ordered fees to be paid on the same findings. But I do not believe that Judge Harrison exceeded his discretionary authority.

CARTER TANKARD SMITH AND AMANDA BRAMBLE, AS ADMINISTRATRIX, C.T.A. OF THE ESTATE OF RUTH B. SMITH WATERS, PLAINTIFFS

v.

CHARLES B. SMITH, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF RUTH B. SMITH WATERS, DEFENDANT

No. COA19-807

Filed 21 July 2020

1. Powers of Attorney—attorney-in-fact—fiduciary duty—transfers of funds to jointly held accounts—funds used for personal benefit

In a suit alleging that an attorney-in-fact (the principal's son) improperly transferred his mother's money from her individually-owned accounts to accounts held jointly by the two of them, and that the son used funds from those accounts for his personal benefit or that of his family members, the trial court erred by granting summary judgment in favor of the son on claims of constructive fraud, breach of fiduciary duty, and constructive trust. The evidence presented a genuine issue of material fact regarding whether the son breached his fiduciary duty to his mother by making gifts beyond the scope suggested by her history of gifting, and regarding the extent of the mother's knowledge and authorization of the transfers.

2. Conversion—attorney-in-fact—transfer of funds to jointly held account—principal not deprived of funds

There was no genuine issue of material fact regarding a conversion claim against an attorney-in-fact (the principal's son) who transferred the principal's money from her individually-owned accounts to accounts held jointly by the two of them because the principal was never deprived of her funds, and therefore the trial court properly granted summary judgment in favor of the attorney-in-fact.

3. Conversion—attorney-in-fact—expenditure of principal's funds—personal use

In a conversion claim against an attorney-in-fact (the principal's son) who used the principal's money, which was held in accounts

held jointly by both of them, to pay his personal expenses and those of his family, summary judgment for the attorney-in-fact was improper because the evidence showed a genuine issue of material fact regarding the extent of the principal's authorization and whether the amounts exceeded the scope suggested by the principal's history of gifting.

4. Fiduciary Relationship—division of land—dispute over value—between estate co-beneficiaries—no fiduciary relationship

In a suit by an estate beneficiary against the executor of the estate (also an estate beneficiary) alleging that the executor misrepresented the value of land that had timber on it when he negotiated a division of the land between them, the trial court properly granted summary judgment in favor of defendant on plaintiff's claims for constructive fraud, breach of fiduciary duty, negligent misrepresentation, and punitive damages, because there was no fiduciary relationship between the parties. The land passed outside of the estate to the two parties as tenants in common, plaintiff did not trust or rely on defendant to represent her best interest and instead hired an attorney, and an appraisal of the land clearly stated it only evaluated the value of the underlying land and not any standing timber on the land.

Appeal by plaintiff Carter Tankard Smith from order entered 2 April 2019 by Judge Jeffery B. Foster in Beaufort County Superior Court. Heard in the Court of Appeals 4 March 2020.

Fitzgerald Litigation, by Andrew L. Fitzgerald and D. Stuart Punger, Jr., and Colombo, Kitchin, Dunn, Ball & Porter, LLP, by Micah D. Ball, for plaintiff-appellant Carter Tankard Smith.

Ward and Smith, P.A., by John M. Martin, for defendant-appellee.

ZACHARY, Judge.

Plaintiff Carter Tankard Smith appeals from an order entered granting summary judgment in favor of Defendant Charles B. Smith, and denying Plaintiffs' motion for partial summary judgment. After careful review, we affirm in part, and reverse in part.

Background

This appeal arises out of the division of the property of Ruth B. Smith Waters. Plaintiff Carter Tankard Smith is one of Ruth's grandchildren,

and a beneficiary of Ruth's estate; Defendant Charles B. Smith is Ruth's only living son, and a beneficiary of Ruth's estate. He served as Ruth's attorney-in-fact and as a former co-executor of Ruth's estate.

In 2007, Ruth executed a power of attorney naming Charles as her attorney-in-fact. Charles acted as Ruth's attorney-in-fact from that time until her death in 2011. In 2007, Ruth and Charles opened a joint account with right of survivorship; they opened another joint account—this one, without right of survivorship—in 2008. These accounts were funded with Ruth's money, and the bank statements were mailed to Ruth. Charles had online access to all of Ruth's accounts. While serving as Ruth's attorney-in-fact, Charles transferred substantial amounts of Ruth's funds from her individual accounts to the joint accounts, and he spent a portion of Ruth's funds on his expenses, as well as some of his wife's and stepdaughter's expenses.

In 2010, Ruth prepared her holographic will. In her will, Ruth named Charles and her cousin, Betty Gurganus, to serve as co-executors of her estate. She also directed that her residuary estate be divided equally between Charles and Carter. Ruth died on 24 December 2011, and her will was offered for probate on 4 January 2012. That same day, Charles and Betty qualified as co-executors of Ruth's estate. Betty resigned as co-executor in 2013.

Upon Ruth's death, several valuable parcels of real property that she owned passed by operation of law, outside of the administration of the estate, to Charles and Carter as tenants in common. In 2013, Carter told Charles that she wanted to work on "settling the estate and . . . divid[ing] the assets." However, shortly after Ruth's death, Carter began to have suspicions regarding Charles's handling of the administration of the estate. Carter shared her misgivings with Betty, who implied that Charles could not be trusted. Upon Betty's advice, Carter hired an attorney to protect her interest in the estate. Carter and her attorney began negotiating the property division with Charles.

Charles testified at his deposition that he "talked to [Carter] about [thinning the timber on the property] and told her that . . . it needed to be thinned." However, Carter averred that Charles merely "mentioned there would be money available if it was cut, but not the value and not any details." In May 2013, Charles had the timber thinned on the "Jackson Swamp parcel." Charles deposited the proceeds from the timber sale into the estate checking account. Thereafter, Charles periodically sent checks to Carter's attorney, which Carter eventually confirmed were for her half of the proceeds from the timber sale.

Later, Charles, Carter, and Carter's attorney agreed to have the real property appraised, both for tax purposes and to facilitate a division. The appraisal of all of the real property was completed on 18 September 2013; however, the appraisal noted that "[i]t is not the intent of this report to evaluate any standing timber or wood products present on any of the tracts." According to the appraiser, wooded land is typically valued as if it were "cut over."

The appraisal also provided that "only the value of the underlying land [was] considered" in estimating the value of the wooded portions of the properties, and that "[t]he client is in the process of obtaining an independent timber valuation." Although she was represented by counsel, Carter assumed that this language indicated that "a general value, instead of a specific value, for the timber had been applied to the full appraised value of the real property." Charles emailed Carter's attorney and asked whether he and Carter wanted to have the timber valued in addition to the real property appraisal, offering to "do whatever [Carter and her attorney] wish[ed,]" but neither party asserts that the topic was broached again.

With appraisal in hand, and after extensive negotiation, on 2 April 2014, the parties reached an agreement regarding the division of the real property, with Charles receiving the Jackson Swamp parcel and house, which were appraised at $1,119,816.00, and Carter receiving two other pieces of real property, which were appraised at $1,119,500.00. After the requisite deeds were executed and recorded, Charles sold the timber on the Jackson Swamp parcel for $258,004.96.

On 16 June 2016, Carter filed a complaint against Charles, asserting claims for (1) constructive fraud while acting as attorney-in-act, (2) breach of fiduciary duty while acting as attorney-in-fact, (3) actual fraud, (4) constructive fraud while acting as executor, (5) negligent misrepresentation, (6) intentional interference with inheritance, (7) constructive trust, (8) accounting, (9) conversion while acting as attorney-in-fact, (10) undue influence, (11) breach of fiduciary duty while acting as executor, (12) conversion while acting as executor, (13) punitive damages, and (14) injunctive relief. Charles filed his answer to Carter's complaint on 3 August 2016, and his amended answer on 26 January 2017.

At some point in 2016, Charles resigned as executor. Amanda Bramble was appointed to serve as administratrix c.t.a. of the estate, and on 19 April 2017, the trial court ordered that Bramble, in her capacity as administratrix c.t.a., be joined as a necessary plaintiff in the instant action. On 5 December 2018, the Chief Justice of the North Carolina Supreme Court designated this matter as an exceptional civil

case pursuant to Rule 2.1 of the General Rules of Practice, and assigned the Honorable Jeffery B. Foster to preside over the case.

On 4 February 2019, Charles moved for summary judgment on all claims. The following day, Plaintiffs moved for partial summary judgment. Judge Foster held a hearing on both parties' motions on 14 February 2019 in Beaufort County Superior Court. By order entered 2 April 2019, the trial court granted Charles's motion for summary judgment on all claims, and denied Plaintiffs' motion for partial summary judgment. Carter timely appealed the order on 24 April 2019.[1]

Discussion

Carter raises two arguments on appeal in support of her position that the trial court erred by granting summary judgment in favor of Charles. She asserts that there exists a genuine issue of material fact as to (1) whether Charles improperly transferred Ruth's assets to himself and others while he was acting as her attorney-in-fact; and (2) whether Charles "misrepresented and failed to disclose" the true value of the Jackson Swamp parcel while the parties negotiated the division of real property.

I. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. Moreover, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (internal quotation marks and citations omitted).

"The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact": either that "an essential element of the opposing party's claim is nonexistent," or that "the opposing party cannot produce evidence to support an essential element of his claim[.]" *Badin Shores Resort Owners Ass'n v. Handy Sanitary Dist.*, 257 N.C. App. 542, 549, 811 S.E.2d 198, 204 (2018) (citation omitted). "Once the party seeking summary judgment makes the

1. Bramble, as administratrix c.t.a., did not join Carter's appeal.

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." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (emphasis omitted), *disc. review denied*, 353 N.C. 262, 546 S.E.2d 401 (2000).

II. Dead Man's Statute

At the outset, we address Carter's assertion that pursuant to Rule 601(c) of the North Carolina Rules of Evidence, "[e]ven if the authority granted under a power of attorney could be orally expanded by a principal, an attorney-in-fact cannot testify as to those statements if the principal is dead." She then states that Charles "repeatedly testified as to his oral communications with Ruth," and that this Court should disregard those statements.

Commonly referred to as the "Dead Man's Statute," Rule 601 "exclude[s] evidence of the acts or statements of deceased persons, since those persons are not available to respond." *Culler v. Watts*, 67 N.C. App. 735, 737, 313 S.E.2d 917, 919 (1984); *see also* N.C. Gen. Stat. § 8C-1, Rule 601 (2019). However, Carter does not allege that the trial court erred by considering any incompetent evidence, and this issue will not be addressed. 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."). Regardless, to the extent that Charles's testimony contained evidence violative of Rule 601, "we assume the trial court properly disregarded [it]." *Forbis*, 361 N.C. at 526, 649 S.E.2d at 387.

III. Transfer Claims

In her complaint, Carter raised the following claims, among others: (1) constructive fraud while acting as attorney-in-fact, (2) breach of fiduciary duty while acting as attorney-in-fact, (3) constructive trust, and (4) conversion while acting as attorney-in-fact. These claims arise out of Charles's transfers of funds to joint accounts, as well as expenditures made from the joint accounts to his benefit (collectively, the "Transfer Claims").

Carter first argues that "[t]he trial court erred by granting summary judgment in Charles's favor on Carter's claims arising out [of] Charles's transfers of Ruth's assets to himself, his immediate family, and others while he was Ruth's attorney-in-fact." Specifically, she maintains that there are genuine issues of material fact as to whether Charles, while acting as Ruth's attorney-in-fact, improperly transferred substantial funds from Ruth's individual accounts to accounts that he and Ruth held jointly; and whether Charles improperly spent funds from the

joint accounts on his personal expenses and those of his family. Carter explains that "[b]ecause Charles owed a fiduciary duty to Ruth and benefitted [sic] from the transactions he initiated, he bears the duty of proving that his gifts of Ruth's assets were made in accordance with Ruth's lifetime history of gift-giving[,]" which Carter suggests shows that Ruth would not have gifted Charles nearly as much money as he received after becoming her attorney-in-fact.

On 10 January 2007, Ruth executed a "North Carolina Statutory Short Form of General Power of Attorney" appointing Charles to serve as her attorney-in-fact, and authorizing him "to act in [her] name in any way which [she] could act for [her]self," for the purposes set forth in Chapter 32A of our General Statutes. In this power of attorney, Ruth gave Charles the specific authority to make "gifts to charities, and to individuals other than the attorney[-]in[-]fact," and to make "gifts to the named attorney[-]in[-]fact." However, Chapter 32A limits the authority of an attorney-in-fact to make gifts:

> (a) Except as provided in subsection (b) of this section, if any power of attorney authorizes an attorney-in-fact to do, execute, or perform any act that the principal might or could do or evidences the principal's intent to give the attorney-in-fact full power to handle the principal's affairs or deal with the principal's property, *the attorney-in-fact shall have the power and authority to make gifts in any amount of any of the principal's property to any individual or to any organization . . . in accordance with the principal's personal history of making or joining in the making of lifetime gifts. . . .*
>
> (b) Except as provided in subsection (c) of this section, *or unless gifts are expressly authorized by the power of attorney*, a power described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

N.C. Gen. Stat. § 32A-14.1(a)-(b) (repealed 1 January 2018) (emphases added).[2]

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2. Much of Chapter 32A, "Powers of Attorney," was repealed in 2017 and replaced by Chapter 32C, the "North Carolina Uniform Power of Attorney Act," effective 1 January 2018. N.C. Gen. Stat. § 32C-4-403(d) (2019) provides that "the powers conferred by former [N.C. Gen. Stat. §] 32A-2 shall apply to a Statutory Short Form Power of Attorney that was created in accordance with former [N.C. Gen. Stat. §] 32A-1 prior to January 1, 2018."

It is against this backdrop that we evaluate Carter's claims for constructive fraud, breach of fiduciary duty, constructive trust, and conversion.

A. Constructive Fraud, Breach of Fiduciary Duty, and Constructive Trust Claims

[1] The gifting proviso in Chapter 32A is limited by the common law precept that "an attorney-in-fact is presumed to act in the best interests of the principal." *Hutchins v. Dowell*, 138 N.C. App. 673, 676, 531 S.E.2d 900, 902 (2000) (citation omitted). As noted by this Court in *Huneycutt v. Farmers & Merchs. Bank*, 126 N.C. App. 816, 819-20, 487 S.E.2d 166, 168 (1997), the statutory language of N.C. Gen. Stat. § 32A-14.1 was intended to codify North Carolina common law, under which the principal's needs are of paramount importance. *See also Albert v. Cowart*, 219 N.C. App. 546, 554, 727 S.E.2d 564, 570 (2012) ("The relationship created by a power of attorney between the principal and the attorney-in-fact is fiduciary in nature . . . ." (citation and internal quotation marks omitted)). As a fiduciary, an attorney-in-fact "may not place himself in a position where his own interest may conflict with the interest of those for whom he acts." *Moore v. Bryson*, 11 N.C. App. 260, 267, 181 S.E.2d 113, 117 (1971).

The elements of Plaintiff's Transfer Claims for constructive fraud, breach of fiduciary duty, and constructive trust, are similar in nature. Constructive fraud "arises where a confidential or fiduciary relationship exists, which has led up to and surrounded the consummation of the transaction in which [the] defendant is alleged to have taken advantage of his position of trust to the hurt of [the] plaintiff." *Forbis*, 361 N.C. at 528, 649 S.E.2d at 388 (citations and internal quotation marks omitted). "To establish a claim for breach of a fiduciary duty, claimants are required to produce evidence that (1) [the] defendant[ ] owed them a fiduciary duty of care; (2) [the] defendant[ ] violated [his] fiduciary duty; and (3) this breach of duty was a proximate cause of injury to [the] plaintiffs." *French Broad Place, LLC v. Asheville Sav. Bank, S.S.B.*, 259 N.C. App. 769, 787, 816 S.E.2d 886, 899 (2018) (citation and internal quotation marks omitted). A constructive trust "is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it[.]" *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 424-25 (1988) (citation omitted). "[T]he plaintiffs, by alleging that a fiduciary relationship existed, that a fiduciary duty was breached, and that the defendants gained because of that breach have made a claim for

constructive trust." *Cury v. Mitchell*, 202 N.C. App. 558, 561, 688 S.E.2d 825, 828 (citation and internal quotation marks omitted), *disc. review denied*, 364 N.C. 434, 702 S.E.2d 300 (2010).

Here, these three claims—constructive fraud, breach of fiduciary duty, and constructive trust—are all predicated upon Charles's alleged breach of fiduciary duty. *See, e.g.*, *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (breach of fiduciary duty claim); *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293-94, 603 S.E.2d 147, 155-56 (2004) (breach of fiduciary duty and constructive fraud claims), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005); *In re Gertzman*, 115 N.C. App. 634, 640, 446 S.E.2d 130, 135 (constructive trust claim), *disc. review denied*, 337 N.C. 801, 449 S.E.2d 571 (1994).

Upon his motion for summary judgment of these claims, Charles bore the burden of proof of showing either that "an essential element of [Carter's] claim [wa]s nonexistent," or that Carter could not "produce evidence to support an essential element of h[er] claim[.]" *Badin Shores*, 257 N.C. App. at 549, 811 S.E.2d at 204 (citation omitted). Nevertheless, these claims could not survive a motion for summary judgment without a forecast of evidence that Charles breached his fiduciary duty to Ruth. *See* 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.").

To begin, Carter characterizes the transfers as "exorbitant gift-giving" beyond the scope of Charles's gifting authority under the power of attorney, and in violation of his fiduciary duty. However, as Carter acknowledges in support of her challenge to Charles's expenditures from the joint accounts, transferring money from an individual account into a joint account does not constitute a gift. For a deposit to constitute a gift, "there must be an intention to give coupled with a delivery of, and loss of dominion over, the property given . . . . Such gift cannot be made to take place in the future." *Albert*, 219 N.C. App. at 555, 727 S.E.2d at 571 (citation omitted). In the instant case, Ruth did not lose "dominion over" the funds that Charles transferred from her individual accounts into the joint accounts. Ruth maintained the ability to make deposits and withdrawals; she could even close the accounts. Consequently, Charles did not make any gifts to himself when he transferred funds from Ruth's individual accounts into the joint accounts.

Nonetheless, the transfers from Ruth's individual accounts to the joint accounts, as well as Charles's payment of his personal expenses

from the joint accounts, if unauthorized, could constitute a breach of fiduciary duty. Indeed, there is evidence that the actions were authorized. The bank signature cards indicate that the joint accounts were opened by Ruth and Charles together, with Ruth's full consent. Moreover, the power of attorney authorized Charles to make gifts to himself and others, although only to a limited extent. However, it is undisputed that Charles and Ruth were in a fiduciary relationship, by virtue of the power of attorney. *See Estate of Graham v. Morrison*, 168 N.C. App. 63, 74, 607 S.E.2d 295, 303 (2005). If the transfers and expenditures were unauthorized, Charles's actions could have breached his fiduciary duty to Ruth.

In response, Charles supported his motion for summary judgment with his 12-page affidavit, together with the affidavits of Thomas B. Ormond, Jr., Tori Wicker, Betty Gurganus, John Baldwin, and Reuben Braddy. Charles attested that Ruth both knew and approved of the transfers and expenditures. Others averred that the gifts were in accordance with Ruth's established pattern of gifting, and that Ruth was a mentally sharp and alert businesswoman: she was aware of every monetary decision, and she would never allow anyone to take advantage of her.

Regarding Charles's attempt to start a business, Braddy averred that, because Ruth "wanted Charles to move back to Bath[,]" "she suggested that he start some type of business venture in Beaufort County[,]" and that he use funds from one of the joint accounts to pay for it. As for other expenditures, Charles consistently maintained that Ruth approved of such transactions "out of love" and to make it possible for him to live closer to her. Betty similarly attested that Ruth intended to provide for Charles, while Braddy noted that Ruth "allowed Charles to have full access to their joint accounts."

Carter forecast evidence that Charles benefited from the payment of his personal expenses, and that he benefited at Ruth's death from the transfers into the joint accounts, and that Ruth's estate was damaged by Charles's transfers and expenditures. Charles admitted, in response to Carter's requests for admission, that (1) "not all transfers of money made . . . from [Ruth's] financial accounts . . . from 10 January 2007 to the date of [Ruth's] death were gifts from [Ruth]"; (2) "some transfers . . . were not made to compensate [him] for services rendered to [Ruth]"; and (3) he "did not deposit any of [his] personal funds into any of [Ruth's] individual or joint financial accounts after 10 January 2007." Furthermore, there were numerous instances in which Charles withdrew money from Ruth's accounts to cover his own expenses, and those of his family members. When asked, Charles could not explain how all of these expenditures benefited Ruth.

Thus, contrary to the trial court's determination, the evidence presented at the summary judgment hearing raised a genuine issue of material fact as to whether Charles breached his fiduciary duty to Ruth by paying his personal expenses and those of his immediate family from the joint accounts, or by transferring funds from Ruth's individual accounts to accounts held jointly by Charles and Ruth. In particular, a genuine issue of fact exists regarding Ruth's history of gifting, as well as her knowledge and authorization of Charles's transfer of a substantial portion of her funds into joint accounts. Therefore, the trial court erred in granting summary judgment in favor of Charles as to Carter's claims for constructive fraud, breach of fiduciary duty, and constructive trust.

B. Conversion Claim

Conversion is defined as "the unauthorized assumption and exercise of the right of ownership over the goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *White v. White*, 76 N.C. App. 127, 129, 331 S.E.2d 703, 704 (1985) (citation omitted).

(i) Transfers to Joint Accounts

[2] Charles's transfers of funds from Ruth's individual accounts to the joint accounts do not satisfy the elements of a claim for conversion. Although Charles acquired access to the funds in the joint accounts, and the transfers substantially reduced the size of Ruth's estate, Ruth was never deprived of her funds. "The essence of conversion is not the acquisition of property by the wrongdoer, but a *wrongful deprivation* of it to the owner[.]" *Lake Mary Ltd. P'ship. v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552 (emphasis added) (citation omitted), *disc. review denied*, 354 N.C. 363, 557 S.E.2d 539 (2001). Therefore, there being no genuine issue of material fact, summary judgment in favor of Charles was proper on the claim of conversion by transfer of funds from individual accounts to joint accounts.

(ii) Use of Funds for Personal Expenses

[3] We next address Charles's use of Ruth's funds to pay his personal expenses, as well as those of his immediate family. Here, Ruth was clearly deprived of her funds, but it is not evident that Charles's actions were unauthorized. In addition, the power of attorney under which Charles acted provided him with the limited authority to make gifts to himself and others "in accordance with [Ruth's] personal history of making or joining in the making of lifetime gifts." *Hutchins*, 138 N.C. App. at 677, 531 S.E.2d at 902 (citation omitted).

As described above, the parties' forecast of the evidence demonstrated that genuine issues of material fact exist as to whether the expenditures were unauthorized by Ruth, or not made in accordance with Ruth's history of gifting. Thus, summary judgment in favor of Charles was improper on the claim of conversion by expenditure of Ruth's funds on personal expenses.

IV. Real Property Division Claims

[4] Carter next asserts separate claims against Charles arising from the land division, namely (1) constructive fraud while acting as executor, (2) breach of fiduciary duty while acting as executor, (3) negligent misrepresentation, and (4) punitive damages (collectively, the "Real Property Division Claims"). These claims originate from Carter and Charles's division of the real property that they inherited as tenants in common upon Ruth's death.

Here, Carter contends that "[t]he trial court erred when it granted summary judgment in Charles's favor on Carter's claims arising out of Charles's misrepresentation of, and failure to disclose, the true value of land that he was splitting with Carter while he was her cotenant and executor of Ruth's estate." According to Carter, during negotiations regarding the parties' division of the real property, Charles misrepresented the true value of the Jackson Swamp parcel by failing to inform Carter that it contained valuable standing timber, and by allowing Carter and her attorney to rely on an appraisal of the property that valued the property as if it were "cut over." Carter further claims that Charles's actions constituted a breach of his fiduciary duty to her, both as a cotenant of the real property that they inherited, and as the executor of Ruth's estate. We disagree.

As presented by Carter, the success of each of these claims is dependent upon a forecast of evidence establishing that Charles had a fiduciary duty to Carter, which he breached. While the existence of a breach of fiduciary duty is an element of claims for constructive fraud and breach of fiduciary duty, *see, e.g.*, *Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 28, 560 S.E.2d 817, 823, *disc. review denied*, 356 N.C. 164, 568 S.E.2d 196 (2002), it is not an element of a claim for negligent misrepresentation.

"It has long been held in North Carolina that the tort of negligent misrepresentation occurs when (1) a party 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." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 30, 712 S.E.2d 239, 244 (2011) (citation and internal quotation marks omitted). Nonetheless, Carter maintains that a

fiduciary relationship existed between Charles and her, and that therefore Charles had a duty to disclose, she had no duty to investigate, and she need not prove reasonable reliance. In Carter's analysis, she prevails on each of these claims—constructive fraud, breach of fiduciary duty, and negligent misrepresentation—upon a forecast of evidence that "Charles owed her a fiduciary duty and failed to fully disclose all material facts surrounding the division of the property." Carter did not make that forecast at summary judgment.

"Fiduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act." *Albert*, 219 N.C. App. at 554-55, 727 S.E.2d at 570 (citation omitted). A fiduciary duty exists where there is a fiduciary relationship, with "confidence reposed on one side, and resulting domination and influence on the other." *Id.* at 554, 727 S.E.2d at 570 (citation and emphasis omitted).

It is axiomatic that "[a]n executor acts in a fiduciary capacity." *In re Will of Covington*, 252 N.C. 551, 553, 114 S.E.2d 261, 263 (1960). However, the duties of an executor do not extend to assets passing outside of the estate. *See* N.C. Gen. Stat. §§ 28A-13-3 & 28A-15-1(a). Where the estate has sufficient assets to satisfy its debts, the real property ordinarily passes by operation of law to the heirs, who inherit the property as tenants in common. *See id.* § 28A-15-2(b).

"[A] fiduciary relationship ordinarily does not arise between tenants in common[.]" *Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116. Nonetheless, a fiduciary relationship "may be created by . . . conduct, as where one cotenant assumes to act for the benefit of [his] cotenants." *Id.* (citation and internal quotation marks omitted). As our Supreme Court has explained, "a fiduciary relationship exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Kapp v. Kapp*, 336 N.C. 295, 301, 442 S.E.2d 499, 502 (1994).

In the instant case, we consider whether Charles, "as an executor[,] . . . as a cotenant, or simply as an individual, . . . undertook to manage and generally control" the parties' inherited real property for Carter's benefit, causing her to repose "special faith, confidence and trust in him to represent [her] best interest with respect to the property[,]" and thereby creating a fiduciary relationship between them, which she alleges he breached. *Moore*, 11 N.C. App. at 265, 181 S.E.2d at 116. After careful review, it is evident that Carter did not repose a special faith or trust in Charles, that she did not rely on his advice, and therefore, that no fiduciary relationship existed.

First, Carter did not trust Charles "to represent [her] best interest with respect to the property." *Id*. Indeed, she repeatedly expressed her distrust of Charles. As Carter explained in her deposition, she became suspicious of Charles shortly after Ruth passed away, during the estate administration. Because of her skepticism, Carter spoke to Betty, who implied that Charles could not be trusted. She also testified that "[Betty] felt because she was being left unaware" of what Charles was doing in the administration of the estate, Carter should "protect [her]self" by securing legal representation, which she did. Furthermore, Carter testified that even after hiring an attorney, she was "suspicious that [Charles] was not administering the estate correctly[,]" and thought Charles "was dishonest at that point in time[.]"

Moreover, it is clear that upon retaining an attorney, Carter did not rely on Charles's advice. *Cf. Albert*, 219 N.C. App. at 554, 727 S.E.2d at 570. Carter hired an attorney to represent her interest in the division of Ruth's estate approximately one year after Ruth died. From that point forward, Charles dealt with Carter's attorney, or with Carter and her attorney together. Charles testified at his deposition that Carter instructed Charles "not to talk to her directly anymore." Consequently, upon receipt of the appraisal, Charles sent a copy to Carter's attorney. Carter testified that after receiving the appraisal, she read it carefully, her attorney reviewed it in detail, and they discussed it multiple times before they engaged in further negotiations with Charles. By October 2013, Carter had authorized her attorney to communicate directly with Charles, and they "commonly conversed . . . and then . . . just copied [Carter] on the emails[,]" although Carter also occasionally made direct proposals to Charles regarding the property division. Negotiations between Carter's attorney and Charles continued for "[q]uite some time" before Carter accepted any offer regarding the land division. Thus, Carter's own testimony demonstrated that she relied on the advice and counsel of her attorney, rather than Charles.

Nor does the evidence forecast in this matter establish that Charles attempted to dominate Carter or influence her decisions. Charles emailed Carter's attorney to discuss having the real property appraised, and he offered to hire "Respess or someone else of your choosing" to conduct the appraisal. Carter decided to hire Respess of her own volition. Charles also asked Carter's attorney for input on whether to have the timber valued; Charles agreed to "do whatever [Carter and her attorney] wish[ed]," but neither party contends that the issue was raised again.

Finally, Carter makes no forecast that she was dependent on Charles to protect her interest in the real property. In addition to retaining an attorney because she did not trust Charles, evidence was forecast that Charles told Carter that "there would be money available if [the timber]

was cut," that she received checks from Charles for the earlier sale of timber, and that Charles asked whether she wanted the remaining timber valued. The evidence also shows that the appraisal itself makes clear that the property was valued as "cut over," as Respess stated is typical, explicitly noting that "[i]t is not the intent of this report to evaluate any standing timber or wood products present on any of the tracts"; that "only the value of the underlying land is considered" in estimating the value of the wooded portions of the properties; and that "[t]he client is in the process of obtaining an independent timber valuation."

In sum, even when viewing the evidence presented in the light most favorable to Carter, there exists no genuine issue of material fact regarding the Real Property Division claims. Accordingly, the trial court properly granted summary judgment on Carter's Real Property Division Claims for constructive fraud, breach of fiduciary duty, negligent misrepresentation, and punitive damages.

V. Claims Abandoned on Appeal

Carter makes no argument that the trial court erred in granting summary judgment in favor of Charles with regard to her claims of actual fraud, intentional interference with inheritance, undue influence, conversion while acting as executor, accounting, injunctive relief, and punitive damages for the Transfer Claims. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6); *see Forbis*, 361 N.C. at 526, 649 S.E.2d at 387 ("Although the original complaint alleged various causes of action including fraud, undue influence, and breach of fiduciary duty, [the] plaintiffs did not brief the undue influence and breach of fiduciary duty claims before this Court and thereby abandoned them."). Accordingly, these issues will not be addressed.

Conclusion

For the foregoing reasons, we reverse the trial court's order granting summary judgment of the claims for (1) constructive fraud while acting as attorney-in-fact, (2) breach of fiduciary duty while acting as attorney-in-fact, (3) constructive trust, and (4) conversion while acting as attorney-in-fact with regard to the expenditure of the principal's funds. We affirm the trial court's order granting summary judgment of the remaining claims.

AFFIRMED IN PART AND REVERSED IN PART.

Judges DILLON and HAMPSON concur.

STATE v. CAMPBELL

[272 N.C. App. 554 (2020)]

STATE OF NORTH CAROLINA
v.
ANTIWUAN TYREZ CAMPBELL

No. COA18-998-2

Filed 21 July 2020

1. Appeal and Error—appellate record—Batson claim—failure to include transcript of jury selection—minimally sufficient for review

In a first-degree murder case in which defense counsel did not request recordation of jury selection but later entered a *Batson* challenge regarding the State's peremptory challenges, the record contained minimally sufficient information to permit review on appeal, including a narrative summary of the voir dire proceedings. The Court of Appeals therefore denied the State's motion to dismiss, since resolution of a *Batson* claim does not require a transcript as long as the defendant presents some evidence of the factors needed to establish a prima facie case of discrimination. However, without a voir dire transcript that might shed light on whether there were material conflicts in the evidence, remand for additional findings was not appropriate.

2. Jury—selection—Batson claim—three-step analysis—first step—prima facie showing

In a first-degree murder trial, there was no error in the trial court's order determining that defendant failed to show a prima facie *Batson* claim of purposeful discrimination by the State during jury selection. Although the trial court asked the State to provide nondiscriminatory reasons for its peremptory challenges after ruling no prima facie showing was made, the first step of the *Batson* inquiry was not moot because the court did not make any findings assessing the State's reasons, and since the court did not reach step two of the *Batson* inquiry, those reasons could not be considered on appeal.

3. Jury—selection—Batson claim—three-step analysis—trial court's order—sufficiency of findings

In a first-degree murder trial, the trial court's order denying defendant's *Batson* claim was not facially deficient for failing to include findings of fact regarding the State's proffered nondiscriminatory reasons for its peremptory challenges made during jury selection. Because the trial court ruled that defendant failed to

make a prima facie showing that the challenges were racially discriminatory, the court never reached the second step of the *Batson* three-step analysis, despite asking the State to provide reasons, and therefore was not required to make findings on those reasons.

4. Jury—selection—Batson claim—prima facie case—limited appellate record

In a first-degree murder trial, no error could be found in the trial court's determination that defendant failed to make a prima facie showing of racial discrimination by the State during jury selection, where defendant did not request recordation of the jury voir dire, and the record on appeal lacked information on the victim's race, the race of key witnesses, questions and statements of the prosecutor which might implicate discriminatory intent, the State's acceptance rate of potential African American jurors, or the final racial makeup of the jury.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by defendant from judgment entered 2 August 2017 by Judge Douglas B. Sasser in Columbus County Superior Court. Originally heard in the Court of Appeals 19 September 2019, and opinion filed 21 January 2020 upholding defendant's convictions, __ N.C. App. __, 838 S.E.2d 660 (2020). Remanded to the Court of Appeals by Special Order of the North Carolina Supreme Court entered 5 June 2020 for reconsideration in light of *State v. Hobbs*, __ N.C. App. __, 841 S.E.2d 492 (2020), and *State v. Bennett*, __ N.C. __, 843 S.E.2d 222 (2020).

Attorney General Joshua H. Stein, by Assistant Attorney General Peter A. Regulski, for the State.

Geeta N. Kapur for defendant-appellant.

ARROWOOD, Judge.

I. Appellate History

We review the instant case on remand from the Supreme Court of North Carolina. In his initial appeal before this Court, Antiwuan Tyrez Campbell ("defendant") appealed from judgment entered against him for first-degree murder. Defendant argued that the trial court erred by concluding that he failed to establish a *prima facie* claim of racial discrimination in jury selection, as set forth by *Batson v. Kentucky*, 476

U.S. 79, 90 L. Ed. 2d 69 (1986). In our first opinion, we denied the State's motion to dismiss defendant's appeal for insufficiency of the record and found no error in the trial court's holding that defendant did not make a *prima facie* claim pursuant to *Batson*. *Campbell*, 269 N.C. App. at 430, 435, 838 S.E.2d at 663, 666 (2020).

Our Supreme Court granted defendant's Petition for *Writ of Certiorari* and remanded the appeal to this Court by Special Order for review of our prior ruling, in light of the Supreme Court's recent decisions in *Hobbs*, 374 N.C. App. 345, 841 S.E.2d 492, and *Bennett*, 374 N.C. 579, 843 S.E.2d 222. Based upon our review of *Hobbs* and *Bennett* and their application to the facts of the instant case, we reach the same result for the reasons set forth below.

II. Background

On 15 April 2015, defendant was indicted for the first-degree murder of Allen Wilbur Davis, Jr., as well as the second-degree kidnapping of K.J.[1] The case came on for trial in Columbus County Superior Court before the Honorable Douglas B. Sasser on 24 July 2017. On that date, the trial court addressed several pretrial motions filed by defense counsel, including "a motion for a complete recordation of all the proceedings." Counsel specifically noted that she was "not requesting that [complete recordation] include jury selection," and that her motion was "[j]ust for appeal purposes." The trial court granted the motion for recordation. Jury selection commenced the following day. However, as requested by defense counsel, those proceedings were not recorded.

On the second day of jury selection, as the parties were seating alternate jurors, defense counsel objected to the State's use of peremptory challenges, alleging that they were exercised in a racially discriminatory manner in violation of *Batson*. By this point in the proceedings, the State had exercised four peremptory challenges, three of which were used to strike African American prospective jurors: Ms. Vereen, Ms. Holden, and Mr. Staton. Defense counsel asserted that "the State . . . has tried extremely hard for every African-American, to excuse them for cause[,]" adding that "the last two alternate [African American] jurors . . . excused showed no leaning one way or the other or indicated that they would not be able to hear the evidence, apply the law, and render a verdict." Defense counsel further noted that

> [w]e had Ms. Vereen on the front, who the State stayed on her over and over again, trying to get her removed for

1. A pseudonym is used to protect the juvenile's privacy.

> cause, and they finally used a peremptory on her. And then we move to our alternate, Mr. Staton. [The prosecutor] tried twice to get him removed for cause.

After considering defense counsel's argument, the trial court denied defendant's *Batson* challenge.

Later that day, however, Judge Sasser stated that "upon further reflection, although I do not find that a *prima facie* case has been established for discrimination pursuant to *Batson*, in my discretion, I am still going to order the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges[.]" The State then offered the following the bases for the exercise of its peremptory challenges for each of the stricken African American prospective jurors:

1. The first juror, Ms. Vereen, had indicated that she knew Clifton Davis ("Mr. Davis") and had dated his brother, both of whom were potential witnesses at defendant's trial. Mr. Davis was a friend of defendant, and was allegedly at the scene with him at the time of the crimes.

2. The second juror, Mr. Staton, was challenged because he "made several conflicting statements during the State's questioning to try to ensure if he could be fair and impartial or not." Further, he knew K.J.'s mother, who was "a fact witness and . . . an eyewitness . . . to the kidnapping."

3. The third juror, Ms. Holden, was stricken because she had been a classmate of two potential witnesses at defendant's trial. The State also explained that

> an additional reason for the peremptory strike against Ms. Holden was the fact when she was describing her political science background and nature as a student, she also was indicating that she was a participant, if not an organizer, for Black Lives Matter at her current college with her professor, and whether or not that would have any implied unstated issues that may arise due to either law enforcement, the State, or other concerns we may have.

Following the State's explanation of the bases for the exercise of its peremptory challenges, the trial court reiterated that it "continues to find . . . that there has not been a *prima facie* showing as to purposeful discrimination" in violation of *Batson*.

At the conclusion of the trial, the jury returned verdicts finding defendant not guilty of second-degree kidnapping, but guilty of first-degree murder. Defendant timely appealed.

III. Discussion

Defendant argues that the trial court erred in ruling that he failed to establish a *prima facie* showing that the State exercised peremptory challenges in a racially discriminatory manner, in violation of *Batson*. The State filed a motion to dismiss defendant's appeal. After first disposing of the State's motion, we turn to the merits of defendant's appeal.

A. Motion to Dismiss

[1] The State argues that defendant's failure to include in the appellate record a transcript of the jury selection proceedings warrants dismissal of defendant's appeal. We disagree and again deny the State's motion to dismiss on this ground.

The record in this case is minimally sufficient to permit appellate review. We disagree with the proposition that, in order to be entitled to review of a *Batson* claim, a defendant *must* include a verbatim transcript of jury selection in the record. We find no support in our statutes or case law which lead to such a result. We hasten to add that if a defendant anticipates making a *Batson* discrimination argument, it is extremely difficult to prevail on such grounds without a transcript of jury selection.

> A three-step process has been established for evaluating claims of racial discrimination in the prosecution's use of peremptory challenges. First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

State v. Cummings, 346 N.C. 291, 307-308, 488 S.E.2d 550, 560 (1997) (citations omitted), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

In determining whether a defendant has established a *prima facie* case of discrimination, our Supreme Court has noted that "[s]everal factors are relevant[.]" *State v. Hoffman*, 348 N.C. 548, 550, 500 S.E.2d 718, 720 (1998).

> Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory

> challenges against [African Americans] such that it tends to establish a pattern of strikes against [African Americans] in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike [African American] jurors in a single case, and the State's acceptance rate of potential [African American] jurors.

Id. (quoting *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995)).

A verbatim transcript need not be furnished in every case for us to review whether a defendant established a *prima facie Batson* claim before the trial court. *See State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412 (1989) (acknowledging even without a verbatim transcript of jury selection, the record contained "the barest essentials" to permit review: "the racial composition of the jury, the number of [African American] jurors excused, and the State's proffered reasons for their exclusion. The record also contains defense counsel's response to the prosecutor's explanations and the trial judge's conclusions."). Yet a defendant must include *some evidence* in the record, in one form or another, shedding light on the aforementioned factors to enable appellate review of a *Batson* claim. A narrative summary of *voir dire* proceedings, made during the *Batson* hearing and agreed to by defense counsel, the prosecutor, and the trial court, as was done here, may suffice to permit review. Moreover, the narrative summary in this case was minimally sufficient to enable review.

While we believe that such a narrative must contain more relevant information in order to prevail, as discussed *infra* in our determination on the merits, unlike the dissent, we find remand to be unnecessary. The dissent opines that the trial court erred in failing to make specific findings of fact as to the *Quick* factors in its determination that defendant had not made a *prima facie* showing, and believes remand for entry of such findings to be appropriate.[2] We disagree. The trial court's findings on defendant's *Batson* claim were indeed conclusory: "[A]t this point, the Court does not find that the State's exercise of peremptory challenges has even reached [the very low hurdle for making a *prima facie* claim] yet. . . . [T]he Court has found at this point there's not a *prima facie* showing, and the Court will deny the *Batson* challenge."

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2. We note that our Supreme Court's recent decisions in *Hobbs* and *Bennett* do not support this proposition. Nor do they address what findings are necessary in an order ruling that a defendant has not made a *prima facie Batson* claim, let alone in the instant circumstances where the record of jury selection is only minimally sufficient to permit our review.

Nonetheless, remand is inappropriate. While the absence of a transcript of *voir dire* does not preclude our review, it does preclude remand in the instant case. "[T]he failure of a trial court to find facts is not prejudicial where there is no '*material* conflict in the evidence on *voir dire*.' " *Sanders*, 95 N.C. App. at 500-501, 383 S.E.2d at 413 (emphasis in original) (quoting *State v. Riddick*, 291 N.C. 399, 408, 230 S.E.2d 506, 512 (1976)). In *Sanders*, where the trial court entered a similar conclusory finding,

> we [were] forced to assume that no material difference in fact existed since the defendant failed her duty to assure the availability of a jury *voir dire* transcript for our review. Thus, the trial judge's failure to make adequate factual findings d[id] not constitute reversible error. Further, the defendant's failure to secure a *voir dire* transcript ma[de] remand for further findings by the trial judge pointless. Without such transcript, we still would be unable to determine whether the trial judge's [new] findings had a basis in fact.

Id. at 501, 383 S.E.2d at 413. The Court then proceeded to review the trial court's conclusory finding based "only [on] the information adduced at the *Batson* inquiry." *Id.* Such is the appropriate course of action in this case.

B. Reviewing the Merits of Defendant's *Batson* Claim

[2] Reviewing defendant's *Batson* claim based upon the transcript of the trial court's hearing on the matter, we find no error.

"[T]he State's privilege to strike individual jurors through peremptory challenges[ ] is subject to the commands of the Equal Protection Clause." *Batson*, 476 U.S. at 89, 90 L. Ed. 2d at 82. "When the government's choice of jurors is tainted with racial bias, that overt wrong casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial." *Miller-El v. Dretke*, 545 U.S. 231, 238, 162 L. Ed. 2d 196, 212 (2005) (internal quotation marks, alterations, and citation omitted). When a defendant makes such an allegation, the trial court is obligated to address defendant's claim with the three-step analysis set forth in *Cummings*, 346 N.C. at 307-308, 488 S.E.2d at 560, detailed *supra* part A.

The trial court's orders concerning jury selection are entitled to deference on review. *See State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997) (noting that the trial court is afforded deference on jury selection rulings because the trial court has "the opportunity to see and

hear a juror and has the discretion, based on its observations and sound judgment, to determine whether a juror can be fair and impartial") (citation omitted). Thus, we "must uphold the trial court's findings unless they are clearly erroneous." *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998) (internal quotation marks and citation omitted).

"[W]hen a trial court rules that the defendant has failed to establish a *prima facie* case of discrimination, this Court's review is limited to a determination of whether the trial court erred in this respect." *State v. Bell*, 359 N.C. 1, 12, 603 S.E.2d 93, 102 (2004) (citation omitted), *cert. denied*, 544 U.S. 1052, 161 L. Ed. 2d 1094 (2005). However, an exception to this limited scope of review applies where the subsequent proceedings of the trial court render moot its initial determination that a defendant has not established a *prima facie Batson* claim. *See Hobbs*, 374 N.C. App. at 352-57, 841 S.E.2d at 499-501 (citations omitted). In such cases, our review proceeds to the remaining steps of the *Batson* inquiry. *Id.*

When the State "volunteers [its] reasons for the peremptory challenges in question before the trial court rules [on] whether the defendant has made a *prima facie* showing, . . . the question of whether the defendant has made a *prima facie* showing becomes moot, and it becomes the responsibility of the trial court to make appropriate findings on whether" the proffered explanation is nondiscriminatory. *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996) (citations omitted), *cert. denied*, 519 U.S. 1061, 136 L. Ed. 2d 618 (1997).

This result does not necessarily follow where the State provides its race-neutral reasons for exercising its peremptory challenges only when required to do so by the trial court after a ruling that no *prima facie* claim has been made. As noted by our Supreme Court in its recent decision in *Hobbs*, two results may follow in such instances. Where the trial court rules that a defendant has not made a *prima facie Batson* claim, proceeds to require the State to provide its nondiscriminatory reasons for its peremptory challenges, and then enters findings approving of the State's offered reasons, step one of the *Batson* inquiry is rendered moot. *Hobbs*, 374 N.C. App. at 354-55, 841 S.E.2d at 500-501 (citations omitted).

In *Hobbs*, the trial court determined that the defendant had not made out a *prima facie Batson* claim. *Id.* at 348-49, 841 S.E.2d at 496. The court then asked the State, for purposes of the record, to explain its use of peremptory challenges against the African American jurors it had excused thus far. *Id.* After the State offered its reasons, the trial court gave the defendant an opportunity to rebut the State's explanations and argue that they were pretextual. *Id.* The trial court characterized the proceedings as "a full hearing on the defendant's *Batson* claim." *Id.*

Following the hearing, the court made extensive oral findings in support of an alternate ruling that the State's offered reasons for the challenges were not pretextual. *Id.* at 347-50, 841 S.E.2d at 496-97. Our Supreme Court held that these steps taken by the trial court after its initial ruling that the defendant had not established a *prima facie Batson* claim rendered the initial ruling moot. *Id.* at 354-57, 841 S.E.2d at 500-501. Thus, the Court engaged in full review of the trial court's findings on the State's offered reasons and the defendant's contention that they were pretextual. *Id.*

On the other hand, where the trial court rules that a defendant has not made a *prima facie Batson* claim, proceeds to require the State to provide its nondiscriminatory reasons for its peremptory challenges, and then does not make any findings assessing the veracity of the State's explanations, step one of the court's *Batson* inquiry is not rendered moot. *See Hoffman*, 348 N.C. at 551-52, 500 S.E.2d at 721.

Here, the trial court's treatment of defendant's *Batson* claim more closely resembles the proceedings in the *Hoffman* line of cases than in *Hobbs*. The State only offered the nondiscriminatory bases for its peremptory challenges after the trial court required it to do so, after the court's ruling that defendant's *prima facie* claim failed. Unlike *Hobbs*, here the court did not allow defense counsel to argue that the State's proffered nondiscriminatory reasons for the challenges were pretextual. The court's language clearly indicated its opinion that the State had provided sufficient nondiscriminatory reasons was not the basis of its decision:

> And the Court continues to find . . . that there has not been a *prima facie* showing as to purposeful discrimination. And the Court finds that even if there had been a showing, that the State has offered a race-neutral justification as to the exercise of each of its peremptory challenges thus far, and there's been no showing or evidence of purposeful discrimination. And, again, the Court denies the Batson challenge.

Furthermore, the court did not make extensive findings on the State's reasons, nor did it characterize the proceedings as a "full hearing" on defendant's *Batson* claim, as did the trial court in *Hobbs*. Indeed, in the case at bar the court clearly did not conduct a full hearing that would have required defendant to have an opportunity to rebut the State's proffered reasons.

Therefore, step one of the trial court's *Batson* inquiry was not rendered moot. Accordingly, we are precluded from considering in our

analysis the reasons given for the State's exercise of the peremptory challenges to the three African American jurors at issue, as we would if the trial court had reached step two of its *Batson* inquiry.

[3] Next, we address defendant's argument that the trial court's order on his *Batson* claim is facially deficient. Defendant asserts that in its written order, the trial court "found only that there was not a *prima facie* showing made to establish any violations by the State for its exercise of peremptory challenges." However, given that the court never reached the second step of the *Batson* analysis, this was the only finding that was required. The trial court is only tasked with making "specific findings of fact at each stage of the *Batson* inquiry that it reaches." *State v. Headen*, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010) (citation omitted). The record on appeal includes the trial court's order on defendant's *Batson* challenge, setting forth the factual basis of the challenge and the court's decision on the matter. Thus, the trial court's order is not facially deficient, as defendant contends.

[4] We now turn to a substantive analysis of the trial court's order finding that defendant failed to establish a *prima facie Batson* claim. From the transcript of the hearing, we are only able to ascertain defendant's race and that the State used three of its four peremptory challenges to remove prospective African American jurors and alternates.[3] However, we do not know the victim's race, the race of key witnesses, questions and statements of the prosecutor that tend to support or refute a discriminatory intent, or the State's acceptance rate of potential African American jurors. Finally, we see nothing in the record from which we can ascertain the final racial composition of the jury.

We will not "assume error by the trial judge when none appears on the record before" us. *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 645 (1983) (citation omitted). Without more information regarding the factors set forth in *Hoffman* and *Quick*, defendant has not shown us that the trial court erred in its finding that no *prima facie* showing had

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3. As noted by the dissent, the hearing transcript sufficiently establishes the race of the challenged jurors for our review by clearly indicating that the trial court and counsel for the State and defendant agreed as to the race of each juror at issue. *See Bennett*, __ N.C. at __, 843 S.E.2d at 232-33 (internal quotation marks and citations omitted) (holding that race of challenged jurors at issue can be established for appellate review where "the record reveals the complete absence of any dispute among counsel for the parties and the trial court concerning the racial identity of the persons who were questioned during the jury selection process, . . . resulting in what amounts to a stipulation of the racial identity of the relevant prospective jurors. . . . [Such a stipulation] may take a variety of forms and may be found by implication.").

been made. Therefore, we uphold the trial court's ruling on the merits of defendant's *Batson* claim.

Our Supreme Court's recent decision in *Bennett* does not affect the result of this case. In *Bennett*, our Supreme Court held that the defendant had made a *prima facie Batson* claim where record revealed that "all of the State's peremptory challenges were directed to African American prospective jurors, . . . the State did not peremptorily challenge any white prospective juror, and . . . neither of the African American jurors that the State peremptorily challenged provided any answers during the course of the jury selection process that cast any doubt upon their ability to be fair and impartial to the State." 374 N.C. at 602, 843 S.E.2d at 237-38 (footnote omitted).

Here, one of the State's peremptory challenges was exercised against a white prospective juror and three were exercised against African American prospective jurors. Defendant has failed to preserve an adequate record concerning the challenged jurors' answers to any questions asked by the State. While we are concerned that it appears seventy-five percent of the State's peremptory challenges involve African American prospective jurors, this standing alone is not sufficient to sustain a *Batson* challenge. *See State v. Barden*, 356 N.C. 316, 344, 572 S.E.2d 108, 127 (2002) (citation omitted) (stating that numerical analyses of relative proportion of State's strikes used against potential jurors of each race and overall acceptance rate of potential jurors of each race not alone dispositive of question whether defendant has established *prima facie Batson* claim), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003); *State v. Maness*, 363 N.C. 261, 275-76, 677 S.E.2d 796, 805-806 (2009) (citations omitted) (holding State's use of five of eight peremptory strikes against African American potential jurors insufficient to establish *prima facie Batson* claim), *cert. denied*, 559 U.S. 1052, 176 L. Ed. 2d 568 (2010); *State v. Lemons*, No. COA12-913, 2013 WL 152353, at *3-*4 (N.C. Ct. App. Jan. 15, 2013) (holding State's use of four peremptory challenges against potential African American jurors and none against potential white jurors did not amount to *prima facie Batson* claim); *State v. Mays*, 154 N.C. App. 572, 577, 573 S.E.2d 202, 206 (2002) (holding mere fact of State's use of seventy percent, or nine of thirteen, of peremptory challenges against African American prospective jurors insufficient to establish *prima facie Batson* claim). Given the posture in which we find this case, where defendant's trial counsel specifically declined to have jury selection recorded and the deficient record with respect to the other *Quick* factors, we are unable to find the trial court erred in its determination that defendant failed to establish a *prima facie Batson* violation.

Defendants are entitled to have their *Batson* claims and the trial court's rulings thereon subjected to appellate scrutiny. To do so, it is incumbent on counsel to preserve a record from which the reviewing court can analyze the *Quick* factors. Thus, we urgently suggest that all criminal defense counsel follow the better practice and request verbatim transcription of jury selection if they believe a *Batson* challenge might be forthcoming. However, if that is not initially done, it is incumbent upon counsel to place before the trial court evidence speaking to all the *Quick* factors for evaluation on appeal. Without such information, it is highly improbable that such a challenge will succeed. Such is the pitfall of defendant's case in this appeal.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judge ZACHARY concurs.

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

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

Having reconsidered this matter in light of our Supreme Court's recent decisions in *State v. Hobbs*, ___ N.C. ___, 841 S.E.2d 492 (2020), and *State v. Bennett*, ___ N.C. ___, 843 S.E.2d 222 (2020), I continue to concur in the majority opinion in part and dissent in part. In my prior dissent, I concluded the appropriate remedy in this case was a remand for purposes of allowing the trial court to make an additional record on the preliminary question of whether Defendant had established a *prima facie Batson*[1] challenge. I reach the same result here.

First, I continue to agree with the majority the record before us is sufficient to permit appellate review. *See State v. Sanders*, 95 N.C. App. 494, 499, 383 S.E.2d 409, 412 (1989) (acknowledging that although the "lack of a *voir dire* transcript detracts from our ability to review the substance of the proffered reasons," the record contained "the barest essentials" to permit review: "the racial composition of the jury, the number of black jurors excused, and the State's proffered reasons for

1. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

their exclusion[,]" while also noting "[t]he record also contains defense counsel's response to the prosecutor's explanations and the trial judge's conclusions"). Consequently, I concur that the State's Motion to Dismiss the Defendant's Appeal was and remains correctly denied.

Despite concluding Defendant in this case preserved his *Batson* challenge for review even without complete recordation or a transcript of voir dire, the majority, in effect, still concludes the record is insufficient to review Defendant's *Batson* challenge and holds Defendant has failed to show error in his case. Thus, this case continues to illustrate the immense difficulty in preserving a *Batson* challenge for appellate review that still remains under our existing caselaw. I agree a verbatim transcript of jury selection is not always necessary to preserve a *Batson* challenge. Indeed, I suspect in many cases the need to make a *Batson* challenge only becomes apparent during the voir dire and after a defendant's opportunity to request complete recordation. Nevertheless, if there is any lesson to be drawn here from the majority result, it appears it is that the surest (if not the only) way to preserve a *Batson* challenge is to request recordation of jury voir dire in every single case for every single defendant.

Of course, this recordation is expressly *not* required by statute in noncapital cases. *See* N.C. Gen. Stat. § 15A-1241(a)(1) (2019). Thus, there must be another way to establish the necessary record to preserve the issue for appellate review. *See*, *e.g.*, *State v. Shelman*, 159 N.C. App. 300, 310, 584 S.E.2d 88, 96 (2003) (requiring "a transcript *or some other document setting out pertinent aspects of jury selection*" in order to review a defendant's *Batson* challenge (emphasis added)). Our Supreme Court in *Bennett* illustrated through its prior caselaw such a pathway already exists: this path simply requires the trial court and counsel for the parties to work cooperatively to recreate the record by agreement or denoting where there is a disagreement of fact. *See* ___ N.C. at ___, 843 S.E.2d at 231-34 (citations omitted). Such a mechanism also already exists in our statutes governing North Carolina criminal procedure. *See* N.C. Gen. Stat. § 15A-1241(c) ("When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made."). Here, for example, the trial court and lawyers cooperated to partially recreate the record. Specifically, the parties each put on the record their respective positions as to each peremptory challenge agreeing the State used three out of four challenges on African American jurors and another African American juror was excused for cause.

The Supreme Court's decision in *Hobbs* illustrates another task of vital importance for trial courts: a trial court should explain the reasoning behind its decision after considering all the circumstances relevant to the *Batson* challenge. ___ N.C. at ___, 841 S.E.2d at 502. While *Hobbs* was not addressing the prima facie inquiry, its lesson still holds. The trial court's ability to make firsthand observations of jury selection and inquiries of trial counsel is exactly why we—as an appellate court—must show great deference to the trial court. *See State v. Nicholson*, 355 N.C. 1, 21, 558 S.E.2d 109, 125 (2002) ("The trial court's determination is given deference on review because it is based primarily on firsthand credibility evaluations." (citation omitted)); *see also State v. Hoffman*, 348 N.C. 548, 554, 500 S.E.2d 718, 722 (1998) (citations omitted). This is also why, however, it is so imperative that " '[t]o allow for appellate review, the trial court must make specific findings of fact at each stage of the *Batson* inquiry that it reaches.' " *State v. Headen*, 206 N.C. App. 109, 114, 697 S.E.2d 407, 412 (2010) (quoting *State v. Cofield*, 129 N.C. App. 268, 275, 498 S.E.2d 823, 829 (1998)). Here, the trial court did not make specific findings of fact to permit appellate review regarding the relevant factors set out in *State v. Quick*[2] in determining whether there was a prima facie showing by Defendant under our *Batson* analysis. *See* 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995) (citation omitted). In my view, the failure to explain how the trial court reached its decision—Defendant failed to establish even a prima facie *Batson* challenge despite 75% of peremptory challenges being exercised against African American jurors—was error.

On the record we do have before us, I am persuaded Defendant's objection to the use of 75% of the State's peremptory challenges on African American jurors in this case sufficiently places this case in line with *State v. Barden* so as to require the trial court to conduct a more fulsome analysis of Defendant's objection and whether Defendant established a prima facie *Batson* challenge, including making specific findings of fact sufficient for appellate review. *See* 356 N.C. 316, 344-45, 572 S.E.2d 108, 127-28 (2002) (holding the use of 71.4% of peremptory challenges on African American jurors was supportive of a prima facie *Batson* violation). *Barden*, on a more complete record, held a prima

2. *State v. Quick*, 341 N.C. 141, 145, 462 S.E.2d 186, 189 (1995) ("Those factors include the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors." (citation omitted)).

facie *Batson* violation had been established. Notably, there, our Supreme Court pointed out there was "no hint of racism" in the prosecutor's questions and even noted the prosecutor accepted two (of seven) African American jurors. *Id.* at 343-44, 572 S.E.2d at 127. Rather, the Supreme Court looked to both the acceptance rate and the rate upon which the State exercised its peremptory challenges against African American jurors.[3] Acknowledging a numerical analysis is not necessarily dispositive, the *Barden* Court nevertheless concluded the numerical analysis was useful in determining a prima facie showing had been made. *Id.* at 344, 572 S.E.2d at 127 (citation omitted). In *Barden*, the numerical analysis revealed, at least from a prima facie standpoint, a stark pattern in the acceptance and rejection rates of African American jurors.

I would still not go so far on this record as to hold Defendant met his burden to establish a prima facie case for a *Batson* violation. In light of *Barden*, however, the use of 75% of peremptory strikes against African American jurors in this case requires more explanation and context for the trial court's determination no prima facie showing had been made. In particular, for example, while we know the State used 75% of its peremptory challenges on African American jurors and struck another for cause, we do not know the overall makeup of the jury pool or the rate at which African American jurors were accepted.[4]

Consequently, I would grant the limited remedy of remanding this case to the trial court for specific findings of fact in order to permit appellate review of the trial court's decision, including any further evidentiary proceedings the trial court deems necessary to accommodate its fact finding as to the factors it deems relevant. *Cf. Hoffman*, 348 N.C. at 555, 500 S.E.2d at 723. As such, I respectfully dissent from the majority result affording Defendant no relief from judgment.

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3. In *Barden*, the State used five of seven peremptory challenges on African American jurors—the other two were used to strike a white juror and a Native American juror. At the same time, it also appears there was a total of only seven African American prospective jurors called for voir dire—of which the State struck five and accepted two. *Id.* at 344, 572 S.E.2d at 127. In other words, in that case, the State used 71.4% of its peremptory strikes against African American jurors while also striking 71.4% of all the eligible African American jurors.

4. It is significant neither the defense nor the State set out the makeup of the jury on the record. Under our caselaw, the acceptance rate of jurors seems to be just as applicable as the rejection rate to either establishing or defending a prima facie *Batson* challenge. Further, the fact the *only* African American prospective jurors discussed were the four excused either for cause or peremptorily could imply those were the only four African American prospective jurors subjected to voir dire. Certainly, there is also no record before us of any African American juror actually being seated in this case.

STATE OF NORTH CAROLINA
v.
JOSHUA LEE PATTERSON

No. COA19-662

Filed 21 July 2020

Constitutional Law—right to counsel—forfeiture—standard for finding forfeiture—potential off-the-record evidence

In a prosecution arising from a burglary at a district attorney's home, where defendant's two court-appointed attorneys withdrew because he was argumentative and uncooperative, the record did not support the trial court's finding that defendant forfeited his right to counsel under the Supreme Court's forfeiture standard (decided while defendant's appeal was pending), because nothing indicated that defendant physically abused or threatened his counsel or that his actions delayed or obstructed the proceedings. However, because the court might have received information during off-the-record discussions to support its forfeiture determination and given the court's repeated references to defendant's "abuse" of his counsel, defendant's convictions were vacated and remanded for a new forfeiture hearing.

Appeal by defendant from judgments entered 9 January 2019 by Judge James S. Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 29 April 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.

Law Office of Richard J. Costanza, P.A., by Richard J. Costanza, for defendant.

DIETZ, Judge.

Defendant Joshua Lee Patterson appeals his convictions for multiple charges related to a burglary at the home of the New Hanover County District Attorney.

Patterson was a problematic client for his court-appointed counsel. At least two of his court-appointed attorneys withdrew because he was uncooperative—for example, he insisted that his counsel assert frivolous claims, he raised baseless accusations of bias by his counsel, and

he made unfounded accusations that the State monitored his confidential attorney-client communications.

Ultimately, the trial court determined that Patterson forfeited his right to counsel. Patterson challenges that forfeiture determination on appeal.

While the appeal was pending, our Supreme Court decided its first case concerning forfeiture of counsel. *State v. Simpkins*, 373 N.C. 530, 534–39, 838 S.E.2d 439, 445–48 (2020). Under *Simpkins*, the record on appeal does not support forfeiture. But the parties acknowledge that there was information provided to the trial court in off-the-record proceedings not documented in the record on appeal. Based on these proceedings and multiple references in the trial court's order to Patterson's "abuse" of his counsel, there may have been evidence before the trial court to support its forfeiture determination under the Supreme Court's standard announced in *Simpkins*. We therefore vacate the trial court's judgments and remand for a new forfeiture hearing as explained in more detail below.

Facts and Procedural History

In September 2017, someone broke into the home of the New Hanover County District Attorney and stole various items, including a Visa gift card and several electronic devices. Police later arrested Joshua Lee Patterson, who admitted to breaking into the home, taking the missing items, and using the Visa gift card.

Following Patterson's arrest, the trial court appointed Andrew Nettleman as counsel to represent him. In February 2018, Nettleman moved to withdraw, with a notation that "Conflict has arisen" without providing further details. The trial court allowed the motion, finding that "good cause has been shown so as to necessitate counsel's withdrawal." The court then appointed another attorney, Bill Peregroy, to represent Patterson.

In April 2018, Peregroy also moved to withdraw. In his motion, Peregroy described in detail the issues he faced while representing Patterson. Patterson failed to respond to Peregroy's request for him to review discovery materials. Patterson also believed his initial meeting with Peregroy was recorded by the State and insisted that it was a "judicial discrepancy" warranting the dismissal of his case. Peregroy met with Patterson to attempt to resolve the issue, but Patterson was "insistent upon the Court hearing (a nonexistent) recording in support of his motion for dismissal" of the charges and insisted Peregroy was lying to him about the existence of a recording. Patterson vacillated between

telling Peregroy that he didn't want to speak to him and stating that he did not want Peregroy to withdraw. Peregroy asserted that he was "unable to collect definitive instruction from the defendant with respect to his wishes but has informed him that a motion to dismiss cannot be brought with a good faith basis in law or fact."

Peregroy attempted to contact Patterson's mother to discuss concerns about Patterson's possible mental health or substance abuse issues, but Patterson's mother eventually declined to cooperate because Patterson told her not to speak to his counsel. In May 2018, the trial court allowed Peregroy's motion to withdraw and appointed a third attorney, Margaret Jennings, to represent Patterson.

On 8 November 2018, Jennings, too, filed a motion to withdraw and requested appointment of substitute counsel. The trial court held a hearing on Jennings's motion.

Following an in-chambers discussion between the court and counsel that was not recorded in the transcript or narrated in the record, Jennings told the court that Patterson requested that she withdraw. Then, after Jennings already had filed the motion to withdraw and sent it to Patterson, Patterson told Jennings that he wanted her to remain on the case. Jennings explained that there have "been multiple times that he has requested me to withdraw since being appointed in June. This kind of happens every few weeks. And it has gotten to the point that I feel like I no longer can be effective in representing him if I'm continually trying to defend myself." Jennings told the court she and Patterson "have had discussions about that yesterday and those were civil discussions, which some of our other discussions I would describe would not be civil discussions regarding this matter."

Jennings then asked the court to appoint an out-of-county attorney to represent Patterson. The State had secured an out-of-county prosecutor because the victim in the case was the county's District Attorney and Jennings believed this might address Patterson's concerns about bias by his court-appointed counsel. Although Jennings assured the court that she doesn't "have a type of relationship" with the District Attorney that would affect her ability to represent Patterson, Jennings explained, "I do believe it absolutely has affected [Patterson's] perception of what I'm doing in the case because [the District Attorney] is the victim." Finally, Jennings informed the court that she had difficulties because Patterson insisted she propose a plea deal that Jennings believed was unrealistic. The State offered "60 to 84 months" and, in response, Patterson insisted that Jennings propose "a counteroffer of time served."

The State responded that Patterson's "problems" all stem "from the defendant's attitude" or "eccentricities" and that "[t]here comes a time to start having a conversation about forfeiture of his right to counsel by his own actions of abuse." The State asserted that "[a]ll three of these lawyers would characterize or have characterized their communications with [Patterson] as abusive, argumentative, angry, and conspiratorial."

The trial court then addressed Patterson directly. Patterson explained that he initially asked Jennings to withdraw, but "[s]ince then I've called [and] asked her not to." Patterson went on to briefly describe his issues with Peregroy.

After hearing from Patterson, the trial court announced that it would grant Jennings's motion to withdraw and find that Patterson had forfeited his right to counsel:

> Ms. Jennings indicates that apparently there's an argumentative and perhaps abusive relationship. The Court has also heard, and it has been indicated in this hearing as well as discussions between the Court and counsel that the prior attorneys' relationship with Mr. Patterson also was abusive and argumentative. Apparently, Mr. Patterson dislikes the plea offer which has been tendered by a nondistrict, noncounty ADA in this matter. . . . [T]he Court finds, notes, and concludes that all of the difficulties in this matter at this point have to do with Mr. Patterson's attitude toward counsel, that he continually demands more than the defense counsel has reasonable possibility of controlling . . . . [T]he Court sees that Mr. – foresees that Mr. Patterson's attitude is not going to change should we appoint new counsel, whether in or out of county, and that Mr. Patterson has engaged in conduct and has an attitude such that he has forfeited his right to the assistance of counsel, including court-appointed because of his own incessant demands and badgering.

The court allowed Jennings's motion to withdraw and "ordered that Mr. Patterson has forfeited his right to counsel, including court-appointed, because of his own attitude and actions and treatment of counsel." The court instructed that Patterson "should be required and allowed to proceed on a pro se basis." The court appointed Jennings as standby counsel.

After addressing other procedural matters, the trial court asked Patterson, "Do you have any further business for this court this day?"

Patterson responded, "I would like to ask you to reconsider my represent – my public defense." The court responded, "And the record will reflect that I have and my decision remains the same." Patterson responded "Okay" and "That I'm fine with." The trial court later entered a written order memorializing its forfeiture determination which made repeated references to Patterson's "abusive attitude" or "abuse of counsel."

On 7 January 2019, Patterson represented himself at trial and presented no evidence in his defense. The jury convicted Patterson of all charges. After arresting judgment on a conviction for possession of stolen goods, the trial court sentenced Patterson to 84 to 113 months in prison for burglary and a consolidated sentence of 10 to 21 months for larceny and obtaining property by false pretenses.

After sentencing, the trial court noted that Patterson has "rights postjudgment so [he] might want to discuss that with [standby counsel]." Patterson did not give oral notice of appeal and did not file a timely written notice of appeal. He later petitioned for a writ of certiorari to permit this Court to review his arguments.

Analysis

I. Petition for a writ of certiorari

We first address our jurisdiction to hear this appeal. Although Patterson did not properly notice an appeal, he has included a document with his petition, addressed to the Clerk of Superior Court, titled "New Hanover County Detention Facility Inmate Request Form." On it, Patterson wrote his case number and "I am appealing my sentencing my name is Joshua Lee Patterson. Contact me as soon as possible." The form was dated "1-18-18" by Patterson and filed stamped by the clerk on 25 February 2019.

"This Court has discretion to allow a petition for a writ of certiorari 'to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action.' N.C. R. App. P. 21(a)." *State v. Bishop*, 255 N.C. App. 767, 769, 805 S.E.2d 367, 369 (2017). "[A] petition for the writ must show merit or that error was probably committed below." *Id.*

Patterson's inmate request form demonstrates that he intended to exercise his right to appeal but lost that right due to failure to take timely action. Moreover, as discussed below, he has demonstrated that he has a potentially meritorious argument. In our discretion, we allow Patterson's petition for a writ of certiorari to reach to the merits of his appeal. N.C. R. App. P. 21(a)(1).

II. Forfeiture of right to counsel

Patterson argues that the trial court erred by determining that he forfeited his constitutional right to counsel. While Patterson's appeal was pending, our Supreme Court issued its opinion in *State v. Simpkins*, 373 N.C. 530, 838 S.E.2d 439 (2020). Under *Simpkins*, the record on appeal does not support the trial court's determination that Patterson forfeited his right to counsel.

This Court reviews a trial court determination concerning forfeiture of counsel de novo. *Id.* at 533, 838 S.E.2d at 444. "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).

"A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Blakeney*, 245 N.C. App. 452, 459, 782 S.E.2d 88, 93 (2016). But the law recognizes that, in certain circumstances, a criminal defendant can forfeit this constitutional right through "egregious misconduct." *Simpkins*, 373 N.C. at 535, 838 S.E.2d at 446.

In *Simpkins*, the Supreme Court acknowledged that it had "never previously held that a criminal defendant in North Carolina can forfeit the right to counsel" but that this Court had done so in many published decisions. *Id.* at 530, 838 S.E.2d at 445. The Supreme Court synthesized our precedent and announced the test to apply in forfeiture cases: "A finding that a defendant has forfeited the right to counsel requires egregious dilatory or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel." *Id.* at 541, 838 S.E.2d at 449.

The Court further divided this test into two distinct categories. First, forfeiture is appropriate if the defendant's behavior is so threatening or abusive towards counsel that it makes "the representation itself physically dangerous." *Id.* at 538, 838 S.E.2d at 447. There is no evidence in the record that suggests Patterson threatened or physically abused his counsel and thus this analysis from *Simpkins* is inapplicable.

Second, the Court held that forfeiture is permissible where "the defendant is attempting to obstruct the proceedings and prevent them from coming to completion." *Id.* The Court offered some examples of the sort of conduct that might result in this finding of obstruction, such as a defendant who "refuses to obtain counsel after multiple opportunities to

do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings." *Id.*

Importantly, the Supreme Court rejected this Court's precedent holding that "willful actions on the part of the defendant that result in the absence of defense counsel," standing alone, can support forfeiture. *Id.* at 539 & n.7, 838 S.E.2d at 448 & n.7. Those willful actions amount to forfeiture only if they "obstruct the proceedings and prevent them from coming to completion." *Id.* at 538, 838 S.E.2d at 447.

Here, the record indicates that two of Patterson's attorneys withdrew because of Patterson's actions.[1] The first, Peregroy, explained that he sought to withdraw primarily because Patterson was uncooperative and insisted that his case should be dismissed based on an unfounded belief that the State made illegal recordings of his attorney-client communications.

The record also shows that Patterson had some conversations with his second counsel, Jennings, that Jennings described as "not civil." Jennings also explained that Patterson repeatedly changed his mind about whether or not he wanted Jennings to continue representing him, apparently stemming from his concern that any court-appointed counsel may have a favorable relationship with the District Attorney who was the victim in his criminal case. Finally, Jennings explained that Patterson insisted on proposing an unrealistic plea counteroffer to the State.

Importantly, nothing in the record indicates that Patterson's difficulty cooperating with these two court-appointed attorneys had delayed or obstructed the proceedings. Instead, what drove the trial court's forfeiture determination was the extreme difficulty of representing Patterson because of his argumentative attitude with counsel, his conspiratorial concerns about the State monitoring his communications, and his unfounded belief that his counsel was biased against him. It was, in effect, a determination that once Patterson forced two court-appointed attorneys to withdraw because of his own actions, he could not get any more bites at the apple. But that reasoning—which, to be fair, this Court had endorsed in earlier cases—was expressly rejected by the Supreme Court in *Simpkins*. *Id.* at 539 & n.7, 838 S.E.2d at 448 & n.7. Forfeiture requires egregious misconduct that obstructs or delays the proceedings, and the record simply does not support that determination here.

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1. A third court-appointed attorney withdrew because of a "conflict" not identified in the record.

There is another wrinkle in this case, however. Although nothing in the record on appeal indicates that Patterson threatened or abused his counsel in a way that would meet the Supreme Court's criteria for forfeiture, the trial court's order repeatedly references Patterson's "abusive nature" and "abuse of counsel" and the court explained that this conduct "is not going to change should we appoint new counsel."

The parties acknowledge that there were in-chambers discussions between the parties' respective counsel and the trial court for which there is no record that this Court can review. Thus, we cannot know whether the trial court relied on facts concerning Patterson's conduct that might show either that "the representation itself" was "physically dangerous" or that Patterson was "attempting to obstruct the proceedings and prevent them from coming to completion." *Id.* at 538, 838 S.E.2d at 447.

We therefore vacate Patterson's criminal judgments and remand for further proceedings. On remand, the trial court should conduct a new forfeiture hearing, applying the Supreme Court's test from *Simpkins*, and ensure that the parties put into the trial record all evidence supporting the court's determination. If the trial court determines that, based on the record before it, its initial forfeiture determination was appropriate, the court may enter a new forfeiture order and re-enter the previously imposed criminal judgments. If the record does not support a forfeiture determination under *Simpkins*, the court should appoint new counsel for Patterson and proceed with a new trial if the State chooses to pursue the charges.

Conclusion

We vacate the trial court's judgments and remand for further proceedings.

VACATED AND REMANDED.

Judges ZACHARY and MURPHY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JULY 2020)

CAHN v. SHAVENDER'S BLUFF CMTY. ASS'N, INC. No. 19-1046	Iredell (16CVS814)	Affirmed
COUSIN v. COUSIN No. 19-566	Mecklenburg (16CVD9730)	Affirmed
DACAT, INC. v. JONES LEGACY TRANSP., LLC No. 19-588	Guilford (17CVS9515)	Affirmed
FAIRLEY v. N.C. DEP'T OF TRANSP. No. 19-784	Wake (16CVS14587)	Dismissed
IN RE A.N.R. No. 19-1040	Chatham (19JA17)	Other: NO ERROR IN PART, REMANDED IN PART, DENIED IN PART.
IN RE CLARK No. 19-1119	N.C. State Bar (19BCR1)	Affirmed
IN RE D.L. No. 19-1114	Robeson (17JA251)	Vacated and Remanded
IN RE D.T. No. 19-717	Pitt (17JA86) (17JA88)	Affirmed
IN RE K.M. No. 19-871	Onslow (16JA200) (16JA201)	Reversed in Part; Vacated in Part; Affirmed in Part, and Remanded.
IN RE L.G. No. 19-1134	Robeson (19JA142)	Reversed
STATE v. BEAL No. 19-469-2	Lincoln (18CRS50782)	No error in part; Dismissed in part.
STATE v. BENNETT No. 19-1122	Forsyth (18CRS1466-67) (18CRS51294)	No Error
STATE v. COLYN No. 19-778	Sampson (17CRS50472)	Affirmed

STATE v. GRAY No. 19-1061	Nash (17CRS1197) (17CRS1286-88) (17CRS50956) (17CRS50959)	No error; remanded for correction of clerical error.
STATE v. MILLSAPS No. 19-902	Iredell (13CRS55419)	No Error
STATE v. RAY No. 19-51	Onslow (16CRS50667)	No error in part; Dismissed in part.
STATE v. RE No. 19-1088	Cumberland (15CRS51647) (15CRS55455-6) (15CRS58657) (15CRS62952)	Affirmed
STATE v. ROBINSON No. 19-750	Forsyth (15CRS59260-61)	Affirmed
STATE v. SANDERS No. 19-659	Watauga (17CRS51785)	No Plain Error in Part; Vacated and Remanded in Part.
STATE v. SPRINGLE No. 17-652-2	Carteret (13CRS54303)	Reversed
STATE v. WILSON No. 19-862	Craven (15CRS52302) (15CRS52978) (18CRS498-499)	Affirmed
TOUSSAINT v. KING No. 19-851	Mecklenburg (14CVD3550)	Affirmed in part and remanded.

ALEX HARTER, PLAINTIFF
v.
HAYLEY EGGLESTON, DEFENDANT

No. COA19-493

Filed 4 August 2020

Child Custody and Support—inconvenient forum—findings of fact—statutory factors

The trial court's order in a child custody case concluding that North Carolina was an inconvenient forum and declining to exercise jurisdiction was affirmed where the trial court based its findings on competent evidence (the parties' verified motions and an affidavit) and properly considered all the relevant factors pursuant to N.C.G.S. § 50A-207(b).

Appeal by plaintiff from order entered 8 February 2019 by Judge Don W. Creed, Jr., in Moore County District Court. Heard in the Court of Appeals 7 January 2020.

Guirguis Law, P.A., by Larry C. Economos, for plaintiff-appellant.

Foyles Law Firm, PLLC, by Jody Stuart Foyles, for defendant-appellee.

ZACHARY, Judge.

Plaintiff-Father Alex Harter appeals from an order granting Defendant-Mother Hayley Eggleston's "Motion to Remove to the State of Ohio as North Carolina is an Inconvenient Forum." After careful review, we affirm the trial court's order.

Background

Father and Mother are the parents of one child, born in 2010. The parties never married, but lived together from December 2009 until they separated in September 2012. Since their separation, the parties have engaged in extensive litigation regarding the custody of their minor child.

From June 2011 until the parties' separation, Mother, Father, and their minor child lived in North Carolina. On 21 August 2012, Father filed a complaint in Moore County District Court, seeking custody of the minor child and child support. On 4 September 2012, Mother filed her answer and counterclaim for custody and child support. On 31 January

2013, the trial court entered the parties' consent order, pursuant to which the parties shared joint legal and physical custody of the minor child.

After Mother moved to Ohio in 2013, both parties filed motions to modify the custody order in the Moore County action. On 20 December 2013, the parties executed another consent order for child custody, which, in relevant part, continued the parties' joint legal and physical custody of the minor child, established that Mother had moved to Ohio, and designated North Carolina as the minor child's home state for jurisdictional purposes.

In 2015, both parties again moved to modify custody in the Moore County action. Following a two-day hearing, the trial court entered an order awarding Mother primary physical custody, and Father secondary physical custody, of the minor child.

On 12 July 2018, Father filed a verified motion to modify the 2015 custody order in the Moore County action, seeking primary physical custody of the parties' minor child, and emergency *ex parte*/temporary custody of the minor child. Father attached to his motion and incorporated by reference (i) the affidavit of Stephen Bowser, Mother's ex-husband and the father of her two other minor children (the "Bowser Affidavit"); and (ii) a copy of the emergency *ex parte* motion for temporary and permanent custody that Bowser filed in Ohio on 26 April 2018. Father alleged, in sum, that Mother was struggling with substance abuse; was "engaging in sexual relations in exchange for financial assistance"; had changed their child's school three times during the 2017-2018 academic year; and was dating and living with a man who had "a history of illegal drug use and criminal behavior." Father further alleged that Bowser had already obtained emergency custody of his two children with Mother. Father requested that the trial court accept his "verified complaint as an affidavit for all purposes of this action[.]"

That same day, the Honorable Don W. Creed, Jr., entered an order awarding Father *ex parte* temporary sole custody of the minor child. On 23 August 2018, Judge Creed entered a consent order keeping the 12 July 2018 *ex parte*/temporary custody order in full force and effect, with modifications permitting Mother to visit the minor child.

On 20 September 2018, Judge Creed entered a temporary consent order awarding the parties joint legal custody of the minor child, with Father having primary physical custody, and Mother having secondary physical custody, pending a full hearing in the matter.

Before Father's motion to modify the 2015 order came on for hearing, on 5 November 2018, Mother filed her verified "Motion to Remove"

the case to the State of Ohio on the grounds that North Carolina was an inconvenient forum. As did Father, Mother requested that the trial court accept her verified pleading as an affidavit upon which to base all orders in this matter. Judge Creed heard Mother's motion on 4 December 2018. Neither party was present or offered additional evidence or testimony beyond their verified pleadings and the Bowser Affidavit, but both were represented by their attorneys.

On 8 February 2019, Judge Creed entered an order granting Mother's "Motion to Remove," concluding that North Carolina was an inconvenient forum and that Ohio would be a more convenient forum (the "Order"). Accordingly, the trial court declined to exercise jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA") and stayed proceedings in North Carolina. The trial court based its order on the verified pleadings and arguments of counsel.

Father timely filed written notice of appeal.

Appellate Jurisdiction

The Order determining that North Carolina was an inconvenient forum and Ohio was a more appropriate forum is, for purposes of appellate jurisdiction, a final order. *In re C.M.B.*, 266 N.C. App. 448, __, 836 S.E.2d 746, 753 (2019). Thus, this Court has jurisdiction to consider Father's appeal.

Standard of Review

"We review a trial court's decision to decline to exercise jurisdiction in favor of another forum for an abuse of discretion." *In re M.M.*, 230 N.C. App. 225, 228, 750 S.E.2d 50, 52-53 (2013); *see also Kelly v. Kelly*, 77 N.C. App. 632, 635, 335 S.E.2d 780, 783 (1985) ("Deferring jurisdiction on inconvenient forum grounds rests in the sound discretion of the trial judge.").

Where the trial court "determines that the current forum is inconvenient, [it] must make sufficient findings of fact to demonstrate that it properly considered the relevant factors listed in N.C. Gen. Stat. § 50A-207(b)." *In re M.M.*, 230 N.C. App. at 228-29, 750 S.E.2d at 53 (citation omitted). "We review the trial court's findings of fact to determine whether there is any evidence to support them." *Velasquez v. Ralls*, 192 N.C. App. 505, 506, 665 S.E.2d 825, 826 (2008) (citation omitted).

Discussion

On appeal, Father argues that the trial court erred by making a number of findings of fact that were not based on competent evidence

in support of its determination that North Carolina was an inconvenient forum to litigate the parties' custody dispute. Specifically, Father challenges findings of fact 7, 12, 15, 16, 20, and 21 as unsupported by competent evidence.

The UCCJEA "aims to prevent parents from forum shopping their child-custody disputes and assure that these disputes are litigated in the state with which the child and the child's family have the closest connection." *Hamdan v. Freitekh*, No. COA19-929, __ N.C. App. __, __, __ S.E.2d __, __, slip op. at 7 (filed May 19, 2020) (citation and internal quotation marks omitted), *petition for disc. review filed*, No. 257P20, __ N.C. __, __ S.E.2d __ (filed June 3, 2020). Thus, a North Carolina court that has jurisdiction under the UCCJEA to make a child-custody determination may nonetheless "decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum." N.C. Gen. Stat. § 50A-207(a) (2019). Before determining whether North Carolina is an inconvenient forum, the court must "consider whether it is appropriate for a court of another state to exercise jurisdiction." *Id.* § 50A-207(b).

In making such a determination, the court shall allow the parties to submit information and shall consider all relevant factors, including but not limited to:

> (1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (2) The length of time the child has resided outside this state;
>
> (3) The distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (4) The relative financial circumstances of the parties;
>
> (5) Any agreement of the parties as to which state should assume jurisdiction;
>
> (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

> (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

Id.

In accordance with our standard of review, we consider whether the challenged findings of fact are supported by competent evidence.

Here, the parties submitted information to the trial court, in the form of their verified motions and the Bowser Affidavit, and the trial court made the requisite findings of fact "regarding the factors listed in North Carolina General Statute § 50A-207 for purposes of determining that North Carolina is an inconvenient forum[.]" *In re C.M.B.*, 266 N.C. App. at __, 836 S.E.2d at 753.

Father maintains, however, without citation to any legal authority, that findings of fact 7, 12, 15, 16, 20, and 21 are unsupported by competent evidence because they "are based on inadmissible hearsay evidence of an affidavit that was not properly introduced into evidence, arguments of [Mother's] counsel without the introduction of any evidence, and otherwise . . . devoid of any competent evidence whatsoever." This argument lacks merit.

Both parties' motions were verified, and supplied information concerning the various factors pertinent to the trial court's determination.[1] In addition, Father's motion to modify incorporated by reference the Bowser Affidavit. Affidavits and verified motions constitute competent evidence in the determination of an inconvenient forum under the UCCJEA. *See id.* at __, 836 S.E.2d at 754 (concluding that the trial court had no evidence upon which to base its findings of fact supporting its determination under the UCCJEA that North Carolina was an inconvenient forum, where the parties' "motions . . . were unverified, and neither party presented any affidavits or other documentary evidence[,]" and the trial court relied solely on the arguments of counsel).

Father further asserts that the trial court erroneously based two findings solely on the arguments of counsel:

> 15. Based on the arguments of [Father's] counsel it appears [Father] is financially able to handle the distance and expense of going to Lake County, Ohio more so than [Mother] will be able to handle the distance and expenses of traveling to Moore County, North Carolina. The affidavit

1. We note that the parties specifically asked that their verified motions be taken as affidavits in this matter.

> of Steven Bowser does indicate [Mother] is having financial difficulties.
>
> 16. Based on the arguments of Counsel for [Mother], [Mother] has primarily been a stay at home mom until her recent divorce. Counsel for [Mother] did corroborate the testimony of Steven Bowser regarding [Mother] not being in as good a position financially as [Father]. The financial burden on [Father] having to go to Ohio as opposed to [Mother] having to come here to North Carolina can be better handled by [Father].

It is long established that the "arguments of counsel are not evidence." *Crews v. Paysour*, 261 N.C. App. 557, 561, 821 S.E.2d 469, 472 (2018). In the instant case, however, it is evident upon close examination that findings 15 and 16 were based not only on the arguments of counsel, but also on the Bowser Affidavit and the parties' verified motions. Thus, these two findings were properly supported by competent evidence before the trial court.

In determining whether North Carolina is an inconvenient forum, the trial court must "consider all relevant factors[.]" N.C. Gen. Stat. § 50A-207(b). Here, the trial court considered the relevant factors, and made appropriate findings of fact on those relevant factors, based on the evidence that the parties chose to submit to the court. There was sufficient competent evidence to support the findings of fact, and the findings support the trial court's conclusions of law.

Conclusion

Accordingly, we affirm the trial court's order granting Mother's motion requesting that the trial court decline to exercise jurisdiction over this custody case.

AFFIRMED.

Judges BRYANT and COLLINS concur.

IN RE E.P.-L.M.

[272 N.C. App. 585 (2020)]

IN THE MATTER OF E.P.-L.M., A JUVENILE

No. COA19-803

Filed 4 August 2020

1. Appeal and Error—preservation of issues—juvenile adjudication—abuse, neglect, and dependency—stipulations

In a juvenile proceeding, a mother failed to preserve for appellate review her arguments against the trial court's admission of and reliance upon certain stipulations (tendered by the department of social services, the guardian ad litem, and the father regarding the mother's alleged conduct in the case) in adjudicating the parties' child as abused, neglected, and dependent, where the mother did not object to the admission or use of the stipulations at any point during the proceeding.

2. Child Abuse, Dependency, and Neglect—adjudication—abuse, neglect and dependency—unchallenged findings of fact—sufficiency

The adjudication of a child as abused, neglected, and dependent was affirmed where the unchallenged findings of fact showed the mother lacked employment, income, and proper housing; attempted to thwart potential kinship placements, including any with paternal relatives; and continually reported unsubstantiated allegations of the father sexually abusing the child, causing the child to undergo several unnecessary, harmful medical inspections before the age of four. These findings supported an adjudication of abuse based on "serious emotional damage" to the child and neglect based on the child suffering a physical, mental or emotional impairment (or substantial risk of such impairment). Further, the trial court properly considered the parents' availability to provide child care or supervision at the time the petition was filed when adjudicating dependency.

3. Child Abuse, Dependency, and Neglect—juvenile jurisdiction—termination—transfer to civil custody action—order—requisite statutory finding

After adjudicating the parties' child abused, neglected, and dependent, the trial court properly terminated the juvenile proceeding and transferred the case to the parties' ongoing civil custody action, where it entered a dispositional order containing the language required under N.C.G.S. § 7B-911(c)(2)(a) to terminate juvenile court jurisdiction and modify custody in a corresponding civil case.

4. Child Custody and Support—separate juvenile and civil proceedings—modification of custody—change in circumstances—sufficiency of findings

The trial court in a juvenile proceeding did not err by entering an order under N.C.G.S. § 7B-911 and a disposition order modifying child custody in the parents' separate civil custody action after determining its adjudication of the child as abused, neglected, and dependent constituted a substantial change in circumstances. The court was not required to consider a prior custody order in the civil case where it based its "changed circumstances" conclusion on events occurring after that order was entered. Further, the court's findings—including that the mother submitted the child to numerous unnecessary and harmful medical procedures based on unsubstantiated allegations of sexual abuse by the father—supported that conclusion, and its determination of the child's best interests was based on sufficient evidence.

5. Child Visitation—juvenile proceeding—orders modifying visitation in separate civil case—ability to pay for supervised visitation

In a juvenile proceeding where the trial court entered an order under N.C.G.S. § 7B-911 and a disposition order modifying child custody in the parents' separate civil custody action, the provisions of those orders allowing the mother supervised visitation only were vacated because the court failed to make any findings regarding the mother's ability to pay costs associated with supervised visitation, as required under N.C.G.S. § 7B-905.1. The visitation issue was remanded for entry of these findings.

Judge MURPHY concurring by separate opinion.

Appeal by Respondent-Mother from orders entered 15 January 2019, 22 April 2019, and 15 May 2019, by Judge Shelly Holt in Duplin County District Court. Heard in the Court of Appeals 27 May 2020.

Elizabeth Myrick Boone for Petitioner-Appellee Duplin County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for Respondent-Appellant Mother.

Matthew D. Wunsche for guardian ad litem.

INMAN, Judge.

This appeal arises from a trial court's adjudication of a child as abused, neglected, and dependent, termination of the juvenile proceeding, and modification of visitation in a civil custody proceeding. Because the adjudication order is supported by findings of fact not challenged on appeal, the adjudication will not be disturbed, and it is not necessary for this Court to review other findings of fact. Because the trial court entered an order complying with statutory requirements to terminate juvenile jurisdiction and determine visitation in a civil custody proceeding, we will affirm the transfer of jurisdiction and the trial court's finding that supervised visitation is in the best interest of the child. But because the trial court failed to make a necessary finding regarding a parent's ability to pay costs associated with supervised visitation, we vacate the visitation provisions and remand for further findings on that issue.

Respondent-Mother ("Mother") appeals. After careful review, we affirm in part the orders of the trial court but vacate the provisions of the trial court's orders allowing supervised visitation by Mother and remand for necessary findings on her ability to pay associated costs.

I. Factual and Procedural Background

Ellen was born in December 2014 in Onslow County to parents Mother and Father. Four months later, Mother and Father separated due, in part, to drug use by Mother, and Father moved to Georgia. Father initiated a civil custody proceeding (the "Civil Custody Case") in Onslow County District Court. The trial court granted Mother and Father joint physical custody of Ellen and instructed Mother to allow Father routine visitation with Ellen. Ellen continued to live primarily with Mother in the home of Ellen's maternal grandmother ("Grandmother") in Onslow County.

Beginning in 2016, the Onslow Department of Social Services ("DSS") provided continuing in-home services to Mother. DSS also received reports concerning Ellen since her birth, including claims of substance abuse by Mother, concerns that the family lacked resources to properly care for Ellen, and repeated allegations that Ellen had been sexually abused by Father. In September 2016, Grandmother reported finding a small object inside Ellen's vagina, removed the object at home, then took Ellen to the hospital for examination. Grandmother stated she feared Father had sexually abused Ellen, but the hospital found no evidence of sexual trauma. In June 2017, Mother and Grandmother again reported that Father had sexually abused Ellen. DSS, law enforcement

in North Carolina and Georgia, and a child advocacy center investigated the reports and found no evidence of sexual abuse. Mother and Grandmother thereafter continued to report sexual abuse allegations against Father to DSS.

On 5 December 2017, the trial court entered an order in the Civil Custody Case instructing DSS to investigate Mother's allegations of sexual abuse by Father. DSS attempted to temporarily place Ellen with paternal relatives during the investigation and family evaluation, but Mother expressed fears that other members of Father's family had also sexually abused Ellen. Mother continually refused to allow placement of Ellen with any paternal relatives. Due to the "high conflict and severity of the allegations" in the case, the trial court appointed an independent expert, forensic psychologist Dr. Amy James, to evaluate Ellen.

Dr. James concluded that it was "improbable" that Ellen had been sexually abused; that it was "highly probable" Ellen had been subjected to circumstances that could cause emotional abuse; that it was "possible" that subjecting Ellen to multiple invasive medical procedures as a result of sexual abuse allegations had a negative impact on Ellen's well-being; and that she had "concerns regarding [Mother's] current ability to parent."

On 26 January 2018, DSS[1] filed a petition alleging that Ellen was abused, neglected, and dependent. The petition alleged that Mother had a substance abuse history, that Mother and Ellen lived with Grandmother, and that Mother and Grandmother had submitted multiple unsubstantiated sexual abuse allegations against Father. Later that same day, the trial court removed Ellen from Mother's residence and placed Ellen in non-secure custody pending an outcome in the case.

The trial court held a hearing on DSS's petition on 19 December 2018, with all parties present and represented by counsel. DSS, the GAL, and Father tendered stipulations to the trial court concerning Mother's alleged conduct giving rise to the petition; Mother, however, did not sign the stipulations. DSS and the GAL both argued that the stipulations could be used to establish Mother's conduct even absent her agreement to them. When the stipulations were first proffered, the trial court directly asked DSS, "is it your contention . . . that if I accept these stipulated facts, that shifts the burden now to Mom?" DSS replied, "I wouldn't say

1. The Onslow County Department of Social Services filed the initial petition in this case, but the trial court transferred the matter to Duplin County in August 2018. We use "DSS" to refer to both counties' departments interchangeably for simplicity and ease of reading.

it shifts the burden, but those stipulations become evidence, [Mother is] allowed to present [her] own evidence." Father's counsel offered that, "It's still the—DSS (inaudible) to prove what's in the stipulation. . . . They still have to put on evidence to prove the allegation of abuse, neglect, dependency through DSS testimony or whatever type of evidence they have." The GAL confirmed this understanding of DSS's burden, telling the court "these stipulations do not shift the burden." As discussion continued, DSS argued to the court that the stipulations could—without more—be used to meet its burden.

At no point did Mother object to the stipulations or argue that they could not be used to establish her conduct; although her counsel did argue against a motion to admit *other* evidence during the discussion of the stipulations, the transcript reveals that Mother and her counsel made no mention of the stipulations whatsoever at any stage of the proceeding.

The trial court ultimately accepted the stipulations as "between three out of the four parties as to the facts in the stipulation[s]." It then asked DSS if it intended to put forth additional evidence. In response, DSS presented testimony from a DSS social worker regarding, among other things, the reports of sexual abuse, investigations of those reports, and Mother's refusal to cooperate with efforts by DSS to place Ellen in the household of any relative of Father. Mother testified on her own behalf and called her substance abuse counselor as an additional witness.

After all the evidence on adjudication had been received, DSS argued that "the Department's shown by clear, cogent, convincing evidence, the child is depend[e]nt, neglected, and abused at the time the petition was filed. . . . [T]hese are just the same things that are in the stipulated facts[.]" The GAL argued next, expressly contending the stipulation was sufficient to establish proof of abuse, neglect, and dependency: "we agree with . . . [DSS's] assessment of the case and would ask that you accept the stipulation. Using those facts into evidence . . . the mother is essentially causing the child to be depend[e]nt[.]" Father's counsel followed, presenting an alternative argument that, "even if the stipulations we handed you at the beginning, if you were to not give them any weight today, Ms. Brown testified . . . . But without the stipulations, Judge, if you didn't feel comfortable with those, Ms. Brown's testified fully to that type of neglect and abuse that's occurred[.]"

The trial court asked Mother to respond to the arguments of the other parties. Her counsel conceded that Mother's allegations of sexual abuse were unsubstantiated and simply "ask[ed] that the Court acknowledge it's not abuse just because they went and sought medical help."

Mother did not discuss the stipulations, address the argument that the stipulations alone established DSS's burden of proof, or contend that the stipulations were inadmissible or incompetent in any way. Indeed, Mother did not address the stipulations at all.

Immediately following Mother's closing argument, the trial court asked if there would be "[a]ny closing argument then for DSS since you're the—having the burden?" DSS responded by arguing that the social worker's testimony constituted clear, cogent, and convincing evidence of "the allegations in the petition . . . specifically, those outlined in the stipulation[s], and other than that, just to reiterate what everyone else says."

The trial court adjudicated Ellen abused, neglected, and dependent in open court, stating:

> All right, on the adjudication then, this order is based on the stipulated facts between [DSS], the [GAL], and [Father], the evidence presented by [DSS], and the evidence presented by [Mother], and the arguments of all four counsel.
>
> And going through the stipulated facts that make a finding that [Mother] did not stipulate to these facts [sic], however, after [Mother] presented evidence, the Court finds that with regard to all of the stipulated facts, the Court finds them to be fact. That [Mother's] evidence did not convince the Court that any of these stipulations were not in fact accurate.
>
> . . . .
>
> So the Court does adjudicate abuse, neglect, and dependency.

Immediately after the adjudication hearing, the trial court proceeded with a disposition hearing. DSS and the GAL presented additional testimonial evidence. At the conclusion of that hearing, the trial court found that juvenile court supervision of the child was no longer necessary, and that the adjudication of the child as abused, neglected, and dependent constituted a change in circumstances warranting a modification of the custody order previously entered in the Civil Custody Case. The trial court instructed counsel for the parties prepare and submit proposed orders providing, among other things, that Father would have primary physical custody of Ellen and was required to allow Mother supervised visitation with Ellen both electronically and in person.

On 15 January 2019, the trial court entered a written order adjudicating Ellen abused, neglected, and dependent, "based upon the stipulated facts, the evidence presented, testimony of [Mother], and arguments of counsel[.]"

On 3 April 2019, the trial court entered a Chapter 7B-911 Disposition Order in the ongoing Civil Custody Case (the "7B-911 Order"), finding that a substantial change of circumstances existed which warranted modification of the prior custody order in the case. The 7B-911 Order awarded Mother and Father joint legal custody, awarded Father primary physical custody of Ellen, and ordered supervised in-person and electronic visitation by Mother. On 15 May 2019, the trial court entered a disposition order (the "Disposition Order") mirroring the terms of the 7B-911 Order while also finding there was no longer a need for State intervention on behalf of Ellen in a juvenile proceeding. Mother timely appealed.

II. Analysis

Mother challenges the trial court's adjudication of Ellen as abused, neglected, and dependent, as well as the 7B-911 and Disposition Orders. We address each of Mother's arguments in turn.

A. Stipulations and Burden of Proof

[1] Mother first contends that the stipulations are not admissible evidence. She further argues that the trial court, in erroneously considering the inadmissible stipulations as competent evidence of Mother's conduct, impermissibly placed a burden of production on Mother to refute the stipulations' contents. After careful review, we hold Mother has failed to preserve these issues for appellate review.

Mother did not object to the admission of the stipulations into evidence. "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) (2019). "It is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal." *State v. Bell*, 359 N.C. 1, 28, 603 S.E.2d 93, 112 (2004) (citation and internal quotation marks omitted). This rule is equally applicable to evidentiary arguments in the context of abuse, neglect, and dependency proceedings. *See In re H.D.F.*, 197 N.C. App. 480, 488-89, 677 S.E.2d 877, 883 (2009) (holding a mother could not challenge admissibility of evidence—or the findings in adjudication and disposition orders based on that evidence—when no

objection to the evidence was raised at the hearing). Because Mother raised no objection to the introduction of the stipulations into evidence at the hearing, we hold this issue has not been preserved for review. *Id.*

By extension, Mother's argument that the trial court impermissibly considered the stipulations as "competent for adjudication" as to her and erroneously shifted the burden of production to "[Mother] to refute the incompetent stipulations" is also unpreserved.[2] The transcript reveals that Mother and her counsel were completely silent on the competency and use of the stipulations to show her alleged misconduct, even in the face of direct argument by DSS and the GAL that the stipulations were admissible and sufficient, standing alone, to prove Mother's abuse, neglect, and dependency by clear, cogent, and convincing evidence. Just as she failed to object to the admission of the stipulations, Mother did not object to the use of the stipulations as competent evidence establishing Mother's conduct. When a party fails to object to incompetent evidence, she cannot complain of its admission—or the trial court's reliance on it—on appeal: "*Evidence admitted without objection is properly considered by the court* and, on appeal, the question of its competency cannot be presented for the first time." *Joyner v. Garrett*, 279 N.C. 226, 234, 182 S.E.2d 553, 559 (1971) (emphasis added) (citation omitted). *See also In re H.D.F.*, 197 N.C. App. at 488-89, 677 S.E.2d at 883 (holding that findings of fact were binding on appeal as supported by competent evidence—notwithstanding the mother's argument that the evidence in question was inadmissible—as the mother failed to object to the admissibility of the evidence at trial).

B. Evidence Supporting Adjudication

[2] Mother next argues that the trial court's order adjudicating Ellen abused, neglected, and dependent was not supported by sufficient evidence and that the trial court did not make appropriate findings of fact. We review a trial court's abuse, neglect, and dependency adjudication "to determine whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law." *In re I.G.C.*, 373 N.C. 201, 203, 835 S.E.2d 432, 434 (2019) (citation and quotation omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93,

2. We note that DSS, the GAL, and Father's attorney all contended that DSS bore the burden of proof notwithstanding the stipulations, and the trial court expressly placed the burden of proof on DSS prior to making its findings on adjudication when it asked "[a]ny closing argument then for DSS since you're the—having the burden?"

97, 408 S.E.2d 729, 731 (1991). A trial judge sitting without a jury has the duty to consider and weigh the evidence, pass upon the weight and credibility of witness testimony, and draw reasonable inferences therefrom. *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019).

The purpose of the adjudication hearing is to determine the existence of the juvenile's conditions as alleged in the petition. *In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 14 (2006); N.C. Gen. Stat. § 7B-802 (2015). At this stage, the court's decisions must often be "predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." *In re McLean*, 135 N.C. App. 387, 396, 521 S.E.2d 121, 127 (1999).

Here, the trial court made the following findings of fact not challenged on appeal:

> 11. That [Mother] lacks housing of her own. The [Mother] lives with [Grandmother], who lives in her ex-husband's home.
>
> 12. That [Mother] has no employment or income.
>
> 13. That since [Ellen] was three months old, [Mother] and [Grandmother] have made several reports of sexual abuse against [Father] that were found to be unsubstantiated.
>
> 14. That while in the home and under [Mother's] care, [Grandmother] stated that she removed a foreign object from [Ellen's] vagina with mineral oil.
>
> 15. That while under [Mother's] care, [Grandmother] has taken pictures of the [Ellen's] vagina and attempted to give them to [DSS].
>
> 16. That [Mother] disrupted a potential kinship placement by contacting the potential placement despite [DSS's] recommendations to not contact the potential placement.
>
> 17. That [Mother] failed to bring [Ellen] to [DSS] as directed to meet with a potential temporary resource provider (the paternal aunt).
>
> . . . .

> 19. That [Mother] stated that she would rather [Ellen] be placed in foster care than with a paternal relative.
>
> 20. That [Mother] and [Grandmother] have attempted to thwart any placement of [Ellen] with any paternal relative.
>
> 21. That [Mother], by raising unsubstantiated sexual abuse allegations, has caused [Ellen] to receive unnecessary and harmful medical care, including:
>
> > a. Multiple invasive vaginal inspections by various medical providers (none of which showed any physical findings); and
> >
> > b. Two interviews by Child Forensic interviewers (both found no findings consistent with sexual abuse).
>
> 22. That [DSS] and law enforcement from two states have conducted investigations due to the [Mother's] allegations, all of which were unsubstantiated.

The trial court then made the following conclusions of law:

> 2. That [Ellen] is an abused juvenile pursuant to N.C. Gen. Stat. §7B-101 (1).
>
> 3. That [Ellen] is a neglected juvenile pursuant to N.C. Gen. Stat. §7B-101(15).
>
> 4. That [Ellen] is a dependent juvenile pursuant to N.C. Gen. Stat. §7B-101 (9).

We hold that the trial court's unchallenged findings of fact were sufficient to support the trial court's adjudication of Ellen as abused, neglected, and dependent.

1. Abuse

Mother argues that the evidence presented at the hearing did not support an adjudication of abuse based on the grounds DSS alleged in its petition. DSS alleged that Mother (1) "has used or allowed to be used upon the juvenile cruel or grossly inappropriate devices or procedures to modify behavior," one definition of abuse provided in N.C. Gen. Stat. § 7B-101(1)(c), and (2) "has created or allowed to be created serious emotional damage to the juvenile," another definition of abuse provided in N.C. Gen. Stat. § 7B-101(1)(e).

Our Court has held that the term "cruel or grossly inappropriate" typically refers to "extreme examples of discipline" beyond what a

reasonable parent would employ. *See In re F.C.D.*, 244 N.C. App. 243, 249, 780 S.E.2d 214, 219 (2015). We need not address this issue, because we hold that the evidence supports an adjudication of abuse based on serious emotional damage.

An abused juvenile is defined, in relevant part, as one whose caretaker by act or omission allows serious emotional damage to the juvenile, evidenced by the juvenile's anxiety, depression, withdrawal, or aggressive behaviors. N.C. Gen. Stat. § 7B-101(1)(e) (2015). "[T]he nature of abuse, based upon its statutory definition, is the existence or serious risk of some nonaccidental harm inflicted or allowed by one's caretaker." *In re M.G.*, 363 N.C. 570, 574, 681 S.E.2d 290, 292 (2009).

Mother contends that the trial court "erred in adjudicating Ellen abused because neither the findings nor the evidence show Ellen having any physical harm, severe anxiety, depression, withdrawal or aggressive behavior." Mother specifically challenges findings of fact 10 and 18 as unsupported by the evidence. However, finding 18 is supported by the stipulations and, because the competency of the stipulations as evidence has not been preserved for review, that finding is deemed supported and binding on appeal. *In re H.D.F.*, 197 N.C. App. at 489, 677 S.E.2d at 883. She does not challenge findings of fact 11 through 17, or 19 through 22. As such, these findings are binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. And, assuming, *arguendo*, that findings of fact 10 and 18 are unsupported by clear and convincing evidence, we hold that the trial court's remaining, unchallenged findings of fact support its abuse adjudication. *See In re J.R.*, 243 N.C. App. 309, 312, 778 S.E.2d 441, 443 (2015) ("[E]rroneous findings unnecessary to the determination do not constitute reversible error where an adjudication is supported by sufficient additional findings grounded in competent evidence." (citation and quotation omitted)).

The trial court found, in finding 21, that Ellen had been subjected to repeated unnecessary and harmful medical procedures, including invasive vaginal examinations and forensic interviews involving sexual content. The DSS social worker who filed the petition testified at the hearing that DSS had documented at least four allegations of sexual abuse for which Ellen received medical examinations, in addition to an informal examination by Grandmother to allegedly remove a "pebble" from Ellen's vagina. Each of these five examinations occurred before Ellen reached four years old. Law enforcement and child welfare agencies in two states found no signs of physical or sexual abuse but did report that Ellen displayed signs of emotional abuse. Mother and Grandmother nonetheless continued to make claims of sexual abuse,

and to subject Ellen to additional invasive medical procedures. The trial court found that these procedures were harmful and inflicted as a result of Mother's actions. The trial court did not err in concluding that Ellen was an abused juvenile.

2. Neglect

Mother argues the trial court failed to make the necessary findings of fact that Ellen was experiencing, or at a substantial risk of experiencing, any kind of emotional, psychological, or behavioral impairment, and that the record evidence did not support such a finding. We disagree.

A neglected juvenile is defined, in relevant part, as one whose caretaker "does not provide proper care, supervision, or discipline; . . . or who is not provided necessary medical care; . . . or who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (2015). The petition in this case alleged Ellen neglected on those grounds. Additionally, our Courts have required "some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline" in order to adjudicate a juvenile neglected. *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (citation and quotation omitted). "Section 7B-101(15) affords the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside." *In re N.G.*, 186 N.C. App. 1, 8–9, 650 S.E.2d 45, 50 (2007) (citation and quotations omitted).

Mother does not challenge the trial court's findings that Ellen has been subjected to numerous harmful and invasive medical procedures following repeated, unsubstantiated allegations of sexual abuse and that Mother repeatedly claimed that Ellen had been abused by others following determinations that each prior allegation was unsubstantiated. Finding 21 states that these procedures were already harmful to Ellen. The trial court's unchallenged findings establish that Mother's improper care of Ellen and repeated allegations of sexual abuse exposed Ellen to harmful medical procedures, creating an environment injurious to Ellen's welfare. Although the trial court's unchallenged findings do not track the language used in N.C. Gen. Stat. § 7B-101(15) or expressly state Ellen has suffered some impairment, we hold they are sufficient to show the existence, or risk, of neglect when Ellen is in Mother's care. *See In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) ("The trial court's written findings must address the statute's concerns, but need not quote its exact language."). The trial court did not err in adjudicating Ellen neglected.

3. Dependency

Mother's last challenge to the trial court's adjudication argues that it was improper to adjudicate Ellen dependent when Father was able to provide proper care and supervision at the time of the adjudication hearing. We disagree. Mother's argument misconstrues the law.

A juvenile may be adjudicated dependent where DSS proves "the juvenile's parent, guardian, or custodian [1] is unable to provide for the juvenile's care or supervision and [2] lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (2015). "Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent[.]" *In re B.M.*, 183 N.C. App. 84, 90, 643 S.E.2d 644, 648 (2007). Further, a child may not be adjudicated dependent when she has at least one parent capable of providing care or supervision. *In re V.B.*, 239 N.C. App. 340, 342, 768 S.E.2d 867, 868 (2015) (citation omitted).

Mother's argument fails because it requires consideration of Father's status at the time of the adjudication hearing, rather than the circumstances as they existed at the time the petition was filed. Section 7B-802 expressly provides "[t]he adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions *alleged in a petition*." N.C. Gen. Stat. § 7B-802 (emphasis added). Absent exceptional circumstances, the trial court may only look to the circumstances before the court at the time the petition was filed when considering whether a juvenile is dependent at the adjudication stage. *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 869 ("[P]ost-petition evidence generally is not admissible during an adjudicatory hearing for abuse, neglect, or dependency."); *see also In re A.B.*, 179 N.C. App. 605, 609, 635 S.E.2d 11, 15 (2006) (holding that "post-petition evidence is admissible for consideration of the child's best interest in the dispositional hearing, but not an adjudication[.]").

Our Court has carved out exceptions to this general rule; for instance, when evidence is discovered after the filing of the petition that reflects a "fixed and ongoing circumstance" rather than a "discreet event or one-time occurrence," that evidence may be considered in a dependency adjudication. *In re V.B.*, 239 N.C. App. at 344, 768 S.E.2d at 870 (considering post-petition evidence of father's paternity in dependency adjudication because paternity was a "fixed and ongoing circumstance" relevant to whether the juvenile had a parent capable of supervision and care).

More recent case law has muddied the waters regarding what evidence a trial court may consider in an adjudication hearing. Although

this case is factually distinguishable from those decisions, we take the opportunity here to survey the state of the law in hopes that it may be clarified by our Supreme Court or the legislature.

In *In re F.S.*, this Court reversed a dependency adjudication because there was no evidence that, at the time of the adjudication, the mother was unable to care for her child. *In re F.S.*, 268 N.C. App. 34, ___, 835 S.E.2d 465, 473 (2019). The Court explained that because the child had not been in the mother's custody for several months both before DSS filed a petition alleging dependency or during the four months pending the adjudication hearing, the trial court needed to consider evidence of the mother's ability to care for the child at the time of the adjudication hearing. *Id.*[3] This case is distinguishable from *In re F.S.* because Ellen was in Mother's custody until and at the time DSS filed its petition.

When DSS filed the petition in this case, neither Mother nor Father was available to provide care or supervision to Ellen, and Mother disrupted DSS's attempts to temporarily place Ellen with relatives. Mother was not available because of her then-alleged emotional abuse of Ellen stemming from the unsubstantiated belief that Ellen was being sexually victimized. Father was not available because Mother and Grandmother had alleged Father sexually abused Ellen. The trial court adjudicated Ellen dependent after finding that, at the time the petition was filed, each parent was "unable to provide for [Ellen's] care or supervision and lack[ed] an appropriate alternative child care arrangement[.]" The trial court also found that, contrary to Mother's allegations, there was no evidence Father had sexually abused Ellen.

In addition to not fitting within the narrow exceptions to the rule that only pre-petition facts can be considered by the court in an adjudication

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3. The decision in *In re F.S.* also included the broad statement that "[t]he trial court must look at the situation before the court at the time of the hearing when considering whether a juvenile is dependent." *Id.* The Court cited a previous decision, *In re B.P.*, 257 N.C. App. 424, 809 S.E.2d 914 (2018), which quoted another case, *In re K.J.D.*, 203 N.C. App. 653, 661, 692 S.E.2d 437, 443 (2010), for the proposition. *B.P.* and *K.J.D.* discussed this language in the context of adjudications based on the risk of future neglect where the parents did not have custody of the children prior to the filing of the petitions. *See In re K.J.D.*, 203 N.C. App. at 660, 692 S.E.2d at 443 ("This case resembles those that deal with termination of parental rights based upon neglect in that the child has not lived in a home with a parent for a substantial period of time prior to the filing of the petition."); *In re B.P.*, 257 N.C. App. at 433-34, 809 S.E.2d at 919-20 (discussing *K.J.D.* but distinguishing it in part because the trial court did *not* find a substantial risk of harm if B.P. were returned to her mother's custody and such a finding could not be implied from the evidence). Here, Ellen was in Mother's custody at the time of the petition, and Mother's challenge to post-petition evidence in this case concerns the adjudication of Ellen as *dependent*, not as neglected based on any future risk should she be returned to Mother's custody.

hearing, this case is uniquely distinguishable because Mother was responsible for the allegations and DSS investigation which rendered Father unavailable to provide care or supervision to Ellen at the time of the petition.

C. Disposition

In the disposition hearing, based upon additional, post-petition facts, the trial court found that it was in Ellen's best interests to reside with Father and awarded Father primary physical custody of Ellen. Mother challenges the trial court's 7B-911 and Disposition Orders modifying custody and transferring the case from juvenile court to the parents' civil custody action. "[D]ispositional orders of the trial court after abuse, neglect and dependency hearings must contain findings of fact based upon the credible evidence presented at the hearing." *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003). Findings based upon competent evidence are conclusive on appeal. *Id.* "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for abuse of discretion." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019).

1. Termination and Transfer to Civil Custody Proceeding

[3] In addition to the Disposition Order, the trial court entered its 7B-911 Order terminating the juvenile proceeding. Mother contends the 7B-911 Order is void because it did not contain a finding required to transfer jurisdiction to the civil case. *See* N.C. Gen. Stat. § 7B-911(c)(2)(a) (2015) (stating the trial court must make a finding that "[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding" to modify custody in a corresponding civil case). This deficiency in the 7B-911 Order is immaterial because the trial court's Disposition Order contained the requisite language to transfer the matter from juvenile court to a private civil proceeding. *In re A.S.*, 182 N.C. App. 139, 142, 641 S.E.2d 400, 402 (2007) ("The trial court may enter one order for placement in both the juvenile file and the civil file as long as the order is sufficient to support termination of juvenile court jurisdiction and modification of custody.").

2. Change of Custody

[4] Mother argues the trial court erred in entering a "7B-911 order and initial disposition order that changed custody of Ellen without considering the prior custody order and otherwise did not make sufficient findings to modify the underlying custody order." Mother contends that in order to determine whether there had been a change of circumstances

since the prior custody order, entered on 18 July 2017, the trial court was required to consider that prior custody order.

We reject Mother's argument concerning the trial court's failure to literally examine the 18 July 2017 custody order. The only authority Mother cites as squarely supporting this proposition, *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 19 (2013),[4] concerns an entirely different scenario. *See Woodring* at 645-46, 745 S.E.2d at 19-20 (holding the trial court erred in modifying a temporary custody order entered in 2010 based on a substantial change in circumstances without regard to a more recent 2011 permanent custody order that had already litigated those purportedly changed circumstances).[5] *Woodring* itself states that, "when evaluating whether there has been a substantial change in circumstances, courts may only consider *events which occurred after the entry of the previous order*, unless the events were previously undisclosed to the court." *Id.* at 645, 745 S.E.2d at 20 (citations omitted) (emphasis added). We based this statement on the underlying rationale for showing a substantial change in circumstances: " 'The reason behind the often stated requirement . . . is to prevent *relitigation* of conduct and circumstances that antedate the prior custody order.' " *Id.* at 645, 745 S.E.2d at 19 (quoting *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979)).

The events relied upon by the trial court in identifying a substantial change in circumstances—specifically, Mother's continuing allegations of abuse, the investigation and evaluation of those allegations, the

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4. Plaintiff also suggests *Kenney v. Kenney*, 15 N.C. App. 665, 190 S.E.2d 650 (1972), requires the trial court to directly examine the specific findings and terms of the earlier custody decree in order to modify it. Although we did compare the prior custody order and the appealed order modifying custody in *Kenney*, we did so to identify whether the facts and circumstances themselves had changed between the entry of the two orders. *Id.* at 668-69, 190 S.E.2d at 652-53. Here, the facts giving rise to the modification of custody in the Disposition and 7B-911 Orders occurred after the 18 July 2017 custody order and remained unsettled at the time of the trial court's most recent 5 December 2017 temporary custody order.

5. Here, the trial court considered the most recent temporary custody order—entered on 5 December 2017 and directing DSS to investigate Mother's allegations of abuse against Father—in determining a substantial change in circumstances existed. Although the December 2017 order stated that an earlier temporary custody order, entered on 18 July 2017, "shall remain in full force and effect[,]" it also made clear that a full investigation into Mother's allegations and their effect on Ellen had not been completed as of the previous order. This is unlike *Woodring*, where the most recent permanent order had not been considered in determining whether a change in circumstances required for modification under N.C. Gen. Stat. § 50-13.7 existed and the trial court relied on events that were previously litigated in that most recent permanent order. 227 N.C. App. at 645-46, 745 S.E.2d at 19-20.

determination that those allegations and examinations were unfounded and harmful to Ellen, and the adjudication of Ellen as abused, neglected, and dependent—occurred after the 18 July 2017 order pointed to by Mother and had not been resolved at the time of the most recent 5 December 2017 order. Mother does not contend that those events were previously litigated in the 18 July 2017 order. As a result, we reject this argument that a literal examination of the earlier 2017 order was necessary to find a change of circumstances here.

We also disagree with Mother's contention that the trial court's findings are inadequate to support the conclusion of a substantial change in circumstances. In its 7B-911 Order, the trial court found that Ellen "was adjudicated abused, neglected and dependent *due to actions of the defendant* as detailed in the aforesaid Adjudication Order." That Adjudication Order, in turn, recounted those actions, namely, her submission of Ellen to numerous unnecessary and harmful medical procedures based on continuing allegations of sexual abuse by Father that were ultimately determined to be unsubstantiated. In the Disposition Order, the trial court found that Mother continuously levelled unfounded allegations of sexual abuse by Father, and that those allegations led to a determination that Ellen was abused, neglected, and dependent. We hold that these findings were adequate to support a conclusion of law that a substantial change in circumstances had occurred.

Mother also argues that the trial court "erred in concluding a change in circumstances existed warranting modification of a custody order without affirmatively stating the standard of proof." Mother correctly states that, where a standard of proof is necessary, "there is clear case law that holds the order of the trial court must affirmatively state the standard of proof utilized." *In re E.N.S.*, 164 N.C. App. 146, 152, 595 S.E.2d 167, 171 (2004). However, Mother cites to no case law defining a standard of proof required in dispositional orders. Rather, as our Supreme Court has explained, no party "bears the burden of proof in [dispositional] hearings, and the trial court's findings of fact need only be supported by sufficient competent evidence." *In re L.M.T.*, 367 N.C. 165, 180, 752 S.E.2d 453, 462 (2013). It is only essential that the court receive sufficient evidence to determine what is in the best interests of the child. *Id.* (citation omitted). The trial court's determination of Ellen's best interests "based upon evidence and the records" was sufficient.

3. Visitation

[5] Lastly, Mother argues the trial court "erred in effectively denying [Mother] appropriate visitation and in making no findings as to [Mother]'s obligations or ability to pay for supervised visitation." We agree.

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

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

N.C. Gen. Stat. § 7B-905.1(a), (c) (2015).

The Disposition Order in the present case ordered the following:

> 3. That until further order of the Court regarding the [Mother's] visitation, the [Mother] shall have the following supervised visitation:
>
> > a. Facetime twice a week, Sundays from 2-3 pm and Wednesdays from 7-8 pm;
> >
> > b. Christmas day Facetime from 2-3 pm;
> >
> > c. If [Mother] travels to the [Father's] hometown, Ackworth, Cobb County, Georgia, prior to further hearing on visitation, she can have supervised visitation for 2 hours on a Saturday and 2 hours on a Sunday.
>
> 4. That each of the parties need to come up with a supervision plan for supervised visits for the [Mother].
>
> 5. That Charlotte, North Carolina is the half-way point between the parties, and the parties need to explore visitation centers in the City of Charlotte, to include hours and costs, possibly at the Mecklenburg County Supervised Visitation Center.

First, the visitation provisions appropriately (1) provide for physical and electronic visitation, (2) set out the length and frequency of

visitation, and (3) direct whether the visitation should be supervised, but they "fail[] to provide any direction as to the frequency or length of [Mother's] visits in the event that she does not [go to Georgia]." *In re J.D.M.-J.*, 260 N.C. App. 56, 69, 817 S.E.2d 755, 757 (2018).

Second, in setting out instructions for future visitation in a supervised visitation center, the trial court failed to make findings as to who would pay for the resulting costs of visitation and the chosen party's ability to pay. In *In re J.C.*, 368 N.C. 89, 772 S.E.2d 465 (2015), the trial court specifically ordered that visitation be supervised and that the mother pay for supervision expenses. *Id.* at 89, 772 S.E.2d at 465. Our Supreme Court ordered that the visitation provisions be vacated and the matter remanded for further findings because "[t]he district court made no findings whether respondent mother was able to pay for supervised visitation once ordered." *Id.* In doing so, the Supreme Court held that such findings were necessary "to determine if the trial court abused its discretion" and "to support meaningful appellate review." *Id.*

Our Court then expanded on *J.C.* in *In re Y.I.*, 262 N.C. App. 575, 582, 822 S.E.2d 501, 506 (2018). In *Y.I.*, the trial court ordered supervised visitation but did not order a specific party to pay for supervision and did not make any assessment of the mother's ability to pay. *Id.* We found error and reversed because it appeared likely that the mother would be required to pay for visitation, as DSS was relieved of authority in the case, and the trial court failed to determine whether the mother could pay for supervised visitation. *Id.* Our Court has since squarely relied on *Y.I.* and reversed without further discussion where "the trial court made no findings as to the costs associated with supervised visitation, who would bear the responsibility of paying such costs, or [the visiting party]'s ability to pay the costs." *In re J.T.S.*, 268 N.C. App. 61, 74, 834 S.E.2d 637, 646 (2019).

In the present case, the trial court ordered that Mother only gets visitation (1) if she travels from Onslow County to Georgia or (2) if visitation is supervised in Charlotte. Having determined that it is in the best interests of Ellen that Mother have in-person visitation with her child, the trial court was required to determine whether any inability to pay for visitation on Mother's part would prevent the best interests of Ellen from being met. Without such findings, we cannot determine whether the trial court abused its discretion in setting the conditions for Mother's visitation with Ellen. *See In re Y.I.*, 262 N.C. App. at 582, 822 S.E.2d at 505 ("[T]he trial court's order is not specific enough to allow this Court to determine whether the trial court abused its discretion in setting the conditions of visitation." (citing *In re J.C.*, 368 N.C. at 89, 772 S.E.2d at

465)). Therefore, we vacate and remand the portion of the dispositional order setting out Mother's visitation for additional findings regarding Mother's ability to pay for costs associated with visitation.

III. Conclusion

We hold that the trial court did not commit error in adjudicating Ellen abused, neglected, and dependent and did not err in its transfer of proceedings from Chapter 7B to Chapter 50 under Section 7B-911. However, we hold that the trial court failed to make necessary findings as to Mother's ability to pay for visitation as ordered in the 7B-911 and Disposition Orders. As a result, we vacate the visitation provisions of those orders and remand for further findings on Mother's ability to pay for visitation. The trial court may elect to take further evidence on the question in its discretion.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judge ARROWOOD concurs.

Judge MURPHY concurs by separate opinion.

MURPHY, Judge, concurring.

I concur with the Majority that Mother's arguments regarding the "stipulation" entered into by Father, DSS, and the GAL, but not Mother, were not properly preserved for our review. *Supra* at 591. However, I write separately to reject the GAL's and DSS's arguments that, were the issues related to the "stipulation" preserved, the trial court's use of the "stipulation" against Mother was appropriate and did not impermissibly shift the burden to Mother.

DSS and the GAL would urge us to approve of the trial court's reliance on the "stipulation," a document that discusses the alleged actions of a party to the litigation who did not assent to the "stipulation." The trial court improperly relied on the document during the adjudication stage of the proceeding despite Mother not being a party to it:

> All right, on the adjudication then, *this order is based on the stipulated facts between [DSS]*, *the [GAL]*, *and [Father]*, the evidence presented by [DSS], and the evidence presented by [Mother], and the arguments of all four counsel.

(Emphasis added). The trial court went on to improperly place the burden of disproving the "stipulation" on Mother:

> And going through the stipulated facts that make a finding that the [Mother] did not stipulate to these facts, however, after the mother presented evidence, the Court finds that with regard to all of the stipulated facts, the Court finds them to be fact. That *the mother's evidence did not convince the Court that any of these stipulations were not in fact accurate.*

(Emphasis added). Ultimately, the trial court "adjudicate[d the child to be] abuse[d], neglect[ed], and dependen[t]."

There are two errors in the trial court's actions regarding the "stipulation"—first, the "stipulation" was not properly considered as evidence against Mother given that she did not stipulate to it; and, second, the trial court placed a burden on Mother to disprove the allegations of her adversaries.

To adjudicate a child as abused, neglected, and dependent the trial court must "find[] from the evidence, *including stipulations by a party*, that the allegations in the petition have been proven by clear and convincing evidence[.]" N.C. G. S. § 7B-807(a) (2019) (emphasis added). Despite the contemplation of "stipulations by a party" in the statute, our caselaw has made clear that stipulations do not extend beyond what was agreed to by those stipulating. *See Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972). Stipulations do not extend beyond what was agreed to, and do not extend to parties who did not agree to them either. The GAL suggests that a party who did not agree to a stipulation may be bound by the content of the stipulation. This is not the law, this has never been the law, and this should never be the law in an adversarial system.[1]

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1. "Where facts are stipulated, they are deemed established as fully as if determined by the verdict of a jury. A stipulation is a judicial admission. As such, [i]t is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact." *Moore v. Humphrey*, 247 N.C. 423, 430, 101 S.E.2d 460, 466-467 (1958) (internal citations and quotation marks omitted). Similar to our caselaw, Black's Law Dictionary's second definition of stipulation is "[a] voluntary agreement between opposing parties concerning some relevant point; esp. an agreement relating to a proceeding, made by attorneys representing adverse parties to the proceeding [for example,] the plaintiff and defendant entered into a stipulation on the issue of liability[]. . . . A stipulation relating to a pending judicial proceeding, made by a party to the proceeding or the party's attorney, is binding without consideration." *Stipulation*, Black's Law Dictionary (11th ed. 2019). Its third definition is "*Roman law*. A formal contract by which a promisor (and only the promisor) became bound by oral question and answer. []By the third century A.D., stipulations were always evidenced in writing." *Stipulation*, Black's Law Dictionary (11th ed. 2019). In fact, even the first edition of Black's Law Dictionary states "[t]he name 'stipulation' is

Our Supreme Court has discussed the rules regarding stipulations and how those rules apply when the stipulation is used beyond its intended scope to also include attorney fees, as follows:

> It has been said in North Carolina that courts look with favor on stipulations, because they tend to simplify, shorten, or settle litigation as well as saving cost to the parties. . . .
>
> In *Lumber Co. v. Lumber Co.*, . . . this Court considered judicial admissions, and Walker, J., speaking for the Court, stated: "Such agreements and admissions are of frequent occurrence and of great value, *as they dispense with proof and save time in the trial of causes*. The courts recognize and enforce them as substitutes for legal proof, and there is no good reason why they should not. . . . While this is so, the court will not extend the operation of the agreement beyond the limits set by the parties or by the law."
>
> It has been the policy of this Court to encourage stipulations and to restrict their effect to the extent manifested by the parties in their agreement. . . . In determining the extent of the stipulation we look to the circumstances under which it was signed and the intent of the parties as expressed by the agreement. Similarly, stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished, . . .
>
> Judge Martin's order enumerated concisely each of defendant's obligations, all of which related to subsistence and child custody. Further, the fact that the stipulation did not include an award of counsel fees is reflected in the following portion of Judge Martin's order: "The court expressly refrains from ruling on the question of attorneys' fees for plaintiff's attorneys at this time, and that said motion for

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familiarly given to any agreement made by the attorneys engaged on opposite sides of a cause, (especially if in writing,) regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction. Such, for instance, are agreements to extend the time for pleading, to take depositions, to waive objections, to admit certain facts, to continue the cause." *Stipulation*, Black's Law Dictionary (1st ed. 1891) (emphasis added).

> attorneys' fees may be ruled upon at the final determination of this action."
>
> Recognition that allowance of counsel fees had not been considered by either judge was again clearly shown by paragraph 15 of the consent order awarding permanent alimony and child custody signed by Judge Allen on 25 July 1971, . . .

Rickert, 282 N.C. at 379-381, 193 S.E.2d at 83-84 (internal citations and marks omitted) (emphasis added).

The language above recognized the longstanding application of the limits of stipulations to only what is *agreed* upon. Our Supreme Court in *Rickert* goes on to state:

> Manifestly, it was not the intent of the parties or the understanding of the respective trial judges that allowance of counsel fees be affected by defendant's stipulation. We cannot by construction broaden or extend this stipulation to encompass allowance of counsel fees. We therefore hold that defendant's stipulation, standing alone, did not support the award of counsel fees.
>
> The trial judge could not have, without more, awarded counsel fees even if we concede defendant's stipulation included admissions of all requirements of [N.C.]G.S. [§] 50-16.3 as relating to subsistence, and that the stipulation met the statutory prerequisite that plaintiff was entitled to the principal relief demanded.

Id. at 381,193 S.E.2d at 84. Stipulations are not evidence of anything against a party beyond what is stipulated to by that party. As our Supreme Court stated, even if a stipulation could fully establish a claim on its own, it still would not entitle a party to relief on that claim when the stipulation was not intended to extend to the claim. This further demonstrates that a stipulation is not evidence to the extent there is not agreement to its terms. *See also Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004) ("A stipulation need not follow any particular form, but its terms must be sufficiently definite and certain as to form a basis for judicial decision, and it is essential that the parties or those representing them assent to the stipulation."). If a stipulation is not evidence beyond the extent of the parties agreed-upon terms, it cannot be evidence against a party who does not agree to it. If this were not true, it would make the requirement "that the parties or those representing them assent to the stipulation" pointless, as in any

action with three or more parties, two parties could enter a stipulation only about the other party, as happened here, that would be included in evidence against all other parties despite the other parties not agreeing to the stipulation. *Id.* Using the "stipulation" here as evidence against Mother despite her not being a party to it was improper, and the trial court erred in considering the "stipulation" as evidence against her.

The error here, if it was preserved, would be reversable due to the trial court's apparent reliance on the "stipulation" to shift the burden of proof to Mother when it came to the facts in the "stipulation." The trial court stated:

> And going through the stipulated facts that make a finding that the mother did not stipulate to these facts, however, after the mother presented evidence, the Court finds that with regard to all of the stipulated facts, the Court finds them to be fact. That the *mother's evidence did not convince the [trial c]ourt that any of these stipulations were not in fact accurate.*

(Emphasis added). The plain meaning of this statement shows the trial court placed a burden of disproving the content of the stipulation on Mother.

DSS suggests that the language above instead reflects the trial court having weighed and considered conflicting evidence. The language itself is that Mother had to "convince the [trial c]ourt" that the "[contents of the] stipulation[] were not in fact accurate." Placing a burden on Mother to disprove the facts in the "stipulation" DSS provided to the trial court as evidence that the child was neglected, dependent, and abused is the same as placing a burden on Mother to disprove DSS's evidence that the child was neglected, dependent, and abused. This impermissibly shifted the burden of proof to Mother to show her child was not neglected, dependent, or abused. Placing this burden of proof on Mother was erroneous, as "[t]he burden of proof in an adjudicatory hearing lies with the petitioner to show by clear and convincing evidence that a minor child has been neglected[, abused, or is dependent]." *In re E.P.*, 183 N.C. App. 301, 306, 645 S.E.2d 772, 775 (2007).

Our Supreme Court has held:

> "The rule as to the burden of proof (the burden of the issue) constitutes a substantial right, for upon it many cases are made to turn, and its erroneous placing is regarded as reversible error."

> . . .
>
> When [a] judge has *expressly* placed the burden of proof upon the wrong party, and conflicting inferences may be drawn from the evidence, it is impossible for an appellate court to know whether the erroneous allocation of the burden dictated his findings of fact. [Such a] proceeding, therefore, must be remanded to the Superior Court for a rehearing.

Joyner v. Garrett, 279 N.C. 226, 236-237, 182 S.E.2d 553, 560-561 (1971) (quoting *Williams v. Insurance Company*, 212 N.C. 516, 518, 193 S.E. 728, 730 (1937)). According to the rule set out in *Joyner*, if this issue was preserved, we would be required to vacate the trial court's order and remand.

Here, as established above, the trial court expressly placed the burden of proof on Mother to disprove the evidence presented by DSS, while DSS should have had the burden of proof. Additionally, conflicting inferences may be drawn from the evidence here, as Mother testified to the allegedly legitimate reasons for her concerns of sexual abuse. The trial court's order was based on the conflicting evidence, including "the stipulated facts," that supported the findings of fact relied on to adjudicate the child as dependent, neglected, and abused. As a result, "it is impossible for an appellate court to know whether the erroneous allocation of the burden dictated [the trial court's] findings of fact" where the trial court "expressly placed the burden of proof upon the wrong party, and conflicting inferences may be drawn from the evidence." *Id.* According to *Joyner*, if this issue was preserved, we would be required to vacate the order and remand for determination of this issue without considering the "stipulation" against a stranger to the document. *Id.*

Were the trial court able to consider this stipulation against Mother in the manner the trail court did, it would allow a filing entitled "stipulation" to be considered as evidence of a claim, even if the party it is used against does not agree to it, unless she is able to disprove the contents of the "stipulation." In other words, for a party to not be bound by a "stipulation" she never agreed to, she must disprove its contents. Such a rule greatly expands how stipulations may be used by parties as the law otherwise requires stipulations to be limited to the agreeing parties' intentions and to the agreeing parties. Such a rule would turn our adversarial system on its head. The GAL's and DSS's positions before the trial court and on appeal as to the trial court's use of the "stipulation" are incorrect and have no place in our adversarial system.

LEONARD v. BELL

[272 N.C. App. 610 (2020)]

MARTIN LEONARD, PLAINTIFF
v.
RONALD BELL, M.D., INDIVIDUALLY, PHILLIP STOVER, M.D., INDIVIDUALLY, DEFENDANTS

No. COA19-742

Filed 4 August 2020

Medical Malpractice—Rule 9(j)—reasonable inquiry—record not produced by defendant

A plaintiff in a medical malpractice case properly complied with Civil Procedure Rule 9(j) in requesting and having a medical expert review all of his medical records—beginning several months before his first visit to one of the defendant doctors to complain of back pain and other symptoms—where plaintiff alleged that defendant doctors were negligent in their evaluation and treatment of his condition, which was finally diagnosed as spinal infection caused by tuberculosis. The Court of Appeals rejected defendants' argument that the complaint was properly dismissed due to the failure of plaintiff's expert to review records related to plaintiff's earlier diagnosis of tuberculosis, because defendants failed to provide a document (that was responsive to plaintiff's first records request) showing plaintiff's tuberculosis diagnosis until four years after plaintiff's request.

Judge TYSON dissenting.

Appeal by plaintiff from order entered 22 January 2019 by Judge Beecher R. Gray in Superior Court, Cumberland County. Heard in the Court of Appeals 3 March 2020.

Knott & Boyle, PLLC, by Ben Van Steinburgh and W. Ellis Boyle, for plaintiff-appellant.

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

Attorney General Joshua H. Stein, by Assistant Attorney General Kenzie M. Rakes, for defendant-appellee Stover.

STROUD, Judge.

Martin Leonard ("Plaintiff") appeals from an order granting Ronald Bell, M.D.'s and Phillip Stover, M.D.'s (collectively "Defendants") motions to dismiss Plaintiff's complaint with prejudice. Viewing the record "in the light most favorable to plaintiff," *Preston v. Movahed*, ___ N.C. ___, ___, 840 S.E.2d 174, 190 (2020), because Plaintiff's medical expert reviewed all the medical records pertaining to the alleged negligence available to Plaintiff after reasonable inquiry prior to filing his complaint, we conclude at the time of the filing of the complaint, Plaintiff had complied with the requirements of North Carolina General Statute § 1A-1, Rule 9(j). The production by Defendants' employer, the North Carolina Department of Public Safety, Division of Adult Corrections ("DAC"), of additional records regarding Plaintiff's medical care four years after the filing of the complaint does not defeat Plaintiff's complaint under Rule 9(j), particularly where the records produced were responsive to Plaintiff's first request for records in 2013 but were not produced until years later. We therefore reverse the trial court's order dismissing Plaintiff's complaint and remand for further proceedings.

I. Procedural and Factual Background

This case was appealed to this Court previously. *Leonard v. Bell*, 254 N.C. App. 694, 803 S.E.2d 445 (2017). Defendants appealed the trial court's denial of their motion to dismiss based upon public official immunity, and this Court affirmed. This Court set out the background of this case as follows:

> Martin Leonard ("plaintiff") initiated this case against defendants in their individual capacities with the filing of summonses and a complaint on 5 May 2016. In the complaint, plaintiff asserts negligence claims against Dr. Bell and Dr. Stover, both physicians employed by the Department of Public Safety ("DAC"), albeit in different capacities. Those claims are based on allegations that Dr. Bell and Dr. Stover failed to meet the requisite standard of care for physicians while treating plaintiff, who at all relevant times was incarcerated in the Division of Adult Correction (the "DAC").
>
> Specifically, plaintiff alleges that he began experiencing severe back pain in late October 2012 and submitted the first of many requests for medical care. Over the next ten months, plaintiff was repeatedly evaluated in the DAC system by nurses, physician assistants, and Dr. Bell in response to plaintiff's complaints of increasing back pain and other attendant symptoms. Dr. Bell personally

> evaluated plaintiff nine times and, at the time of the seventh evaluation in June 2013, submitted a request for an MRI to the Utilization Review Board (the "Review Board"). Dr. Stover, a member of the Review Board, denied Dr. Bell's request for an MRI and instead recommended four weeks of physical therapy. Plaintiff continued to submit requests for medical care as his condition worsened. Upon further evaluations by a nurse and a physician assistant in August 2013, the physician assistant sent plaintiff to Columbus Regional Health Emergency Department for treatment. Physicians at Columbus Regional performed an x-ray and an MRI. Those tests revealed plaintiff was suffering from an erosion of bone in the L4 and L3 vertebra and a spinal infection. Plaintiff asserts Dr. Bell's failure to adequately evaluate and treat his condition, and Dr. Stover's refusal of requested treatment, amounts to medical malpractice.

Id. at 695–96, 803 S.E.2d at 447.

Prior to filing the complaint, Plaintiff requested all his medical records from many medical providers and provided these to Dr. Parker McConville to review. On 27 November 2013, Plaintiff made his first request for medical records to DAC and requested "[a]ll medical records, declarations of medical emergencies, sick call filings, and grievances" from "January 1, 2012-Present." Dr. McConville initially reviewed the medical records in April 2014 and then received additional records in April 2016. He reviewed medical and imaging records from UNC Health Care, Rex Healthcare, Columbus Regional Healthcare, FirstHealth Moore Regional Hospital, Southeastern Regional, Southeastern Health, Wilmington Health Associates, New Hanover Regional Hospital, and DAC. Thus, Plaintiff's initial request for medical records extended back ten months prior to plaintiff's first visit to Defendant Bell. Plaintiff received 512 pages of medical records in response to his initial request, and Dr. McConville reviewed all these records before Plaintiff filed his complaint.

On 5 May 2016, Plaintiff filed the medical malpractice complaint, with the Rule 9(j) certification based upon Dr. McConville's review of all the medical records noted above. On or about 14 October 2016, Plaintiff served his First Request for Production upon Dr. Bell and requested

> [a]ll medical records of any sort in your possession, regarding any health care provider's medical treatment or care of Martin Leonard, including but not limited to: duty log or

> schedule of when you were on call or physically present at the Prison in 2012 and 2013; all medical billing statements, medical charts, physician's office records, correspondence to or from any person, entity or organization; all hospital or medical records regularly maintained concerning patients such as physicians' notes, nurse or staffing logs, nursing administration reports, incident/occurrence report forms, shift records, psychiatry flow sheets, patient data logs, medication administration logs, physical/occupational therapy notes, nursing notes, and handwritten notes; all orders requesting any laboratory study or test or imaging; all laboratory reports; all radiological images in electronic format and corresponding reports to include MRIs, CT Scans, and photographs; all medication and prescription records; all surgical and pathology reports; all medical reports furnished routinely or specially to any person, organization, or entity including the patient, any representative of the patient, or any insurance company; and any record of any conversations, correspondence, or emails with any pathologists or other employee or agent of North Carolina Department of Public Safety.

Dr. Bell responded, "The only medical records related to Plaintiff that are in Dr. Bell's possession were produced by Plaintiff's counsel in connection with the pending Industrial Commission matter related to Plaintiff's claims."[1]

On 17 October 2016, Plaintiff served his First Request for Production of documents on Dr. Stover, requesting the same information as the request to Dr. Bell. On 20 September 2017, Dr. Stover responded as follows:

> Objection: This request is overly broad, unduly burdensome and not relevant to this matter. Seeks information not reasonably calculated to lead to the discovery of admissible [sic]. This request seeks matters and/or documents protected by the work product doctrine and/

1. Plaintiff had also instituted a Tort Claims action before the Industrial Commission arising from the same alleged negligence. At oral argument of this case, counsel noted that the Industrial Commission matter was stayed pending resolution of this case. The record from Defendant's first appeal contains the order staying the Industrial Commission proceedings, and it states in relevant part: "1. The above-captioned action under the State Tort Claim Act is STAYED pending the resolution of the civil action in the General Court of Justice in Columbus County, save discovery. 2. The above captioned case is REMOVED from the active hearing docket and all further proceedings."

> or attorney client privilege. As discovery proceeds in this case, Defendant will supplement this response to the extent appropriate under the North Carolina Rule of Civil Procedure.

(Alteration in original.)

Defendants then filed motions to dismiss "pursuant to Rule 12(b)(1), (2), and (6)" addressed in their first appeal. *Leonard v. Bell*, 254 N.C. App. at 696, 803 S.E.2d at 447. The trial court denied the motions on 25 October 2016 and both defendants appealed. *Id.* This Court's opinion in the prior appeal was filed in August 2017, and, upon remand, discovery resumed.

On or about 11 April 2018, Plaintiff served a subpoena upon DAC requesting production of his medical records. Our record does not reveal if DAC itself responded directly to the subpoena, but soon after the subpoena, Dr. Stover supplemented his September 2017 discovery responses.[2] On 19 June 2018, Dr. Stover sent a supplemental document production to Plaintiff including 1172 pages of prison and medical records. Of these documents, 354 pages were some of the same medical records produced in December 2013 by DAC in response to Plaintiff's request prior to filing the complaint, but Dr. Stover provided an additional 818 pages of records from DAC. In their arguments before the trial court and this Court, Defendants stressed *one* of these 818 pages of documents included in the new information was a sheet recording Plaintiff's TB skin tests over several years.[3] This document, a "North Carolina Department of Correction Immunization Record/T.B. Skin Test" form, ("TB skin test form") included entries from 13 July 2011, 29 July 2012, and 2 July 2013. TB skin test records from July 2011, July 2012, and July 2013 were included on this sheet, along with prior years back to 2006. For each year from 2010 until 2013, the sheet also recorded whether Plaintiff was having symptoms of unexplained productive cough, unexplained weight loss, unexplained appetite loss, unexplained fever, night sweats, shortness of breath, chest pain, and increased fatigue. For 2010, this screening noted "yes" for night sweats,

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2. Since both Defendants are employees of DAC, these documents may have been intended as responsive to the subpoena. But whether defendant Dr. Stover provided the records as a supplement to his prior discovery responses, in response to the subpoena, or for some other reason makes no difference in this analysis.

3. Defendants noted other information in the records as well, but in their argument regarding records "pertaining to the alleged negligence," the TB skin test form was the primary document they stressed.

chest pain, and increased fatigue. For 2011, each symptom is marked "no." For 29 July 2012, every symptom is marked "no." For 2013, again, every symptom is marked "no."[4] This record of TB skin tests and symptoms was in Plaintiff's DAC medical file as of 1 January 2012 and should have been provided in response to Plaintiff's initial request for records to DAC prior to filing of the complaint, based upon the starting date of Plaintiff's request for records from January 2012 forward, since the July 2012 and July 2013 tests occurred after January 2012 and prior to 27 November 2013, the date of Plaintiff's request. This record was not included in the previous productions of documents to Plaintiff, either upon his request prior to filing the lawsuit, in the Industrial Commission matter, or from Defendants in response to his request for production of documents. Although the TB skin test form was responsive to all of Plaintiff's prior requests, both prior to and after filing his complaint, neither DAC nor the Defendants in this case produced it until nearly four and a half years after the first request.

Neither DAC nor either Defendant ever offered any explanation or excuse for why it was not produced earlier, nor do Defendants argue that the document was not responsive to each of Plaintiff's requests. In addition, this is not a case where the relevant records, for purposes of Defendants' motions to dismiss under Rule 9(j), were in the possession of another medical provider. The relevant records in this case are the medical records of Defendants' employer, DAC; in other words, they are effectively the medical records of Defendants' own care of Plaintiff.

On 25 July 2018, less than a month after producing the additional 818 pages of DAC records to Plaintiff, Defendants took Dr. McConville's deposition. He could not produce or definitively identify all the records he had reviewed before the complaint was filed because his personal copy of Plaintiff's records had been destroyed by a fire in his office. However, he did identify the records based upon the prior responses to discovery. He also discussed his review of the records just produced by Defendant Dr. Stover. Defendant's counsel asked Dr. McConville if the TB skin test form changed "any of [his] opinions in this matter." Dr. McConville testified neither the TB skin test form nor the other

4. Other medical records from DAC clearly document that Plaintiff was suffering from unexplained weight loss, night sweats, and worsening pain starting in October of 2012. His *eighth* visit to Dr. Bell for these worsening symptoms was on 9 July 2013—only 3 days prior to the entries for the 2013 TB skin test. But the TB skin test form states that he had no symptoms and the entry for "Refer to Physician/Health Department" is also marked "no." Dr. McConville noted this conflict in DAC's records of plaintiff's care in his deposition as discussed in more detail below.

additional records had changed his opinions regarding Plaintiff's medical care.

On 17 December 2018, Dr. Bell filed a motion to dismiss Plaintiff's complaint based upon Civil Procedure Rules 7, 9(j), and 12(b)(6) and alleged that "Plaintiff's reviewing expert, Dr. Parker McConville did not review all medical records pertaining to the alleged negligence that were available to Plaintiff after reasonable inquiry prior to the filing of Plaintiff's complaint." Dr. Stover did not file a written motion but made an oral motion to dismiss for the same reason at the hearing on Dr. Bell's motion. At the hearing, in January 2019, Dr. Bell introduced the records including Plaintiff's TB skin tests covering the years from 2006 to 2013. Plaintiff had a positive test in 2009. As noted above, this record should have been included in Plaintiff's medical records as of January 2012, as it included test results from 2006 until 2013, but it was not produced until June 2018 in Dr. Stover's supplemental production of documents of 818 pages which had not been provided to Plaintiff previously, in either the Industrial Commission matter or in this case.

The trial court concluded Defendants' motions to dismiss should be granted based upon Plaintiff's failure to comply with Rule 9(j):

> (16) The totality of the evidence before the Court indicates Dr. McConville failed to review all medical records pertaining to Defendants' alleged negligence that were available to Plaintiff after reasonable inquiry prior to Plaintiffs' filing of his civil action.
>
> (17) Based on the foregoing, the Court determines Plaintiff has failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure and this action is dismissed with prejudice.

Plaintiff timely appealed.

II. Standard of Review of Order Addressing Rule 9(j) Motion

Our Supreme Court has recently clarified the standard under which the trial court should consider the issue of compliance with Rule 9(j) and this Court's standard of review of the trial court's order. In *Preston v. Movahed*, the Supreme Court reversed the dismissal of the plaintiff's claim for medical malpractice for evaluation and treatment of chest pain based upon the trial court's finding that the plaintiff's expert cardiologist "could not reasonably be expected to qualify as an expert witness" against the defendant nuclear cardiologist. ___ N.C. at ___, 840 S.E.2d at 180. Although the issue here arises from the adequacy of the medical

records provided to Plaintiff for expert review prior to the filing of the complaint, the Supreme Court noted that the "analytical framework set forth in *Moore* applies equally to other Rule 9(j) issues in which 'a complaint facially valid under Rule 9(j)' is challenged on the basis that 'the certification is not supported by the facts.' " *Id.* at ___, 840 S.E.2d at 183 (quoting *Moore v. Proper*, 366 N.C. 25, 31-32, 726 S.E.2d 812, 817 (2012)).

The Supreme Court noted that both the trial court and this Court must view the evidence regarding the plaintiff's compliance with Rule 9(j) "in the light most favorable to plaintiff." *Id.* at ___, 840 S.E.2d at 190. The trial court is not to resolve credibility issues or disputes of fact at this stage in a medical malpractice proceeding but is only to determine if the plaintiff acted reasonably in his efforts to comply with Rule 9(j):

> "Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review before filing of the action." The rule provides, in pertinent part:
>
> > Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
> >
> > > (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]
>
> Thus, the rule prevents frivolous claims "by precluding any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care."

Id. at ___, 840 S.E.2d at 190 (footnote omitted) (citations omitted) (quoting *Vaughan v. Mashburn*, 371 N.C. 428, 434-35, 817 S.E.2d 370, 375 (2018)).

As part of its analysis in *Preston*, the Supreme Court discussed *Moore v. Proper*, which addressed the "manner in which a trial court should evaluate compliance with Rule 9(j), as well as the standard of review for a reviewing court on appeal." *Preston*, ___ N.C. at ___, 840 S.E.2d at 182 (quoting *Moore v. Proper*, 366 N.C. at 26, 726 S.E.2d 814). In *Moore*, the Rule 9(j) analysis was done in the context of the defendant's motion for summary judgment instead of a motion to dismiss:

> In addressing the Rule 9(j) inquiry, the Court explained that "[b]ecause Rule 9(j) requires certification at the time of filing that the necessary expert review has occurred, compliance or noncompliance with the Rule is determined at the time of filing." The Court agreed with previous Court of Appeals precedent holding that "a court should look at 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing," "as any reasonable belief must necessarily be based on the exercise of reasonable diligence under the circumstances[.]" Additionally, the Court noted that "a complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the certification is not supported by the facts, at least to the extent that the exercise of reasonable diligence would have led the party to the understanding that its expectation was unreasonable." The Court further explained:
>
> > Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from subsequent discovery materials. But to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage of determining whether the party reasonably expected the expert witness to qualify under Rule 702. When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are

> supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination. We note that because the trial court is not generally permitted to make factual findings at the summary judgment stage, a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely.
>
> Applying this standard, the *Moore* Court—construing all disputes or ambiguities in the factual record in favor of the plaintiff—determined that plaintiff's complaint complied with Rule 9(j) in that plaintiff reasonably expected her proffered expert to qualify under Rule 702. The Court expressed no opinion on whether the plaintiff's expert would actually qualify under Rule 702 and "note[d] that, having satisfied the Rule 9(j) pleading requirements, plaintiff has survived the pleadings stage of her lawsuit and may, at the trial court's discretion, be permitted to amend the pleadings and proffer another expert" in the event that her proffered expert later failed to qualify under Rule 702.

Preston, ___ N.C. at ___, 840 S.E.2d at 183 (first and third alterations in original) (citations omitted).

In *Preston*, the Supreme Court noted that the analytical framework for a Rule 9(j) issue is the same, whether the motion to dismiss is in the form of a motion for summary judgment or a motion to dismiss under Rule 12(b)(6). *Id.* at ___, 840 S.E.2d at 183. The trial court must consider the facts and circumstances known to the plaintiff, or which should have been known, at the time of the filing, and if there are any disputes or ambiguities in the evidence, the trial court "should draw all reasonable inferences" in favor of the plaintiff at this preliminary stage of the case:

> While the Rule 9(j) issue in *Moore* arose in the context of a motion for summary judgment and focused specifically on whether the plaintiff's expert was reasonably expected to qualify as an expert witness, we conclude that the analytical framework set forth in *Moore* applies equally to other Rule 9(j) issues in which "a complaint facially valid under Rule 9(j)" is challenged on the basis that "the certification is not supported by the facts." For instance, where, as here, a defendant files a motion to dismiss under Rule 12(b)(6) challenging a plaintiff's facially

> valid certification that the reviewing expert was willing to testify at the time of the filing of the complaint, the trial court must examine " 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing," and "to the extent there are reasonable disputes or ambiguities in the forecasted evidence, the trial court should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage[.]" "When the trial court determines that reliance on disputed or ambiguous forecasted evidence was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence."
>
> We stress that Rule 9(j) is unique and that because the evidence must be taken in the light most favorable to the plaintiff, the nature of these "findings," and the "competent evidence" that will suffice to support such findings, differs from situations where the trial court sits as a fact-finder. We do not view the legislature's enactment of Rule 9(j) as intending for the trial court to engage in credibility determinations and weigh competent evidence at this preliminary stage of the proceedings.

Id. at ___, 840 S.E.2d at 183-84 (citations omitted).

Thus, under *Preston* and *Moore*, we review *de novo* the trial court's order regarding Plaintiff's compliance with Rule 9(j). *Id.* In this *de novo* review, we do not defer to the trial court's findings of fact but review the Plaintiff's forecast of evidence in the light most favorable to Plaintiff. *Id.* at ___, 840 S.E.2d at 181-82 ("[W]e conclude that both of the lower courts erred in failing to view the evidence regarding [plaintiff's expert's] willingness to testify under Rule 9(j) in the light most favorable to plaintiff and that the Court of Appeals, in its *de novo* review, erred by deferring entirely to the findings of the trial court.").

III. Rule 9(j) Compliance

There is no dispute in this case that Plaintiff's complaint was facially compliant with Rule 9(j) and that Dr. McConville reviewed the medical care and medical records *available* to Plaintiff pertaining to the alleged negligence before Plaintiff filed the complaint. This appeal does not present any question regarding Dr. McConville's qualifications as an expert witness under Rule 702. Here, the issue is whether Dr. McConville reviewed "all medical records pertaining to the alleged negligence that

are available to the plaintiff after reasonable inquiry." N.C. Gen. Stat. § 1A-1, Rule 9(j). In conducting our analysis of this question, we must consider " 'the facts and circumstances known or those which should have been known to the pleader' at the time of filing. We find this rule persuasive, as any reasonable belief must necessarily be based on the exercise of reasonable diligence under the circumstances." *Moore*, 366 N.C. at 31, 726 S.E.2d at 817 (citation omitted) (quoting *Trapp v. Maccioli*, 129 N.C. App. 237, 241, 497 S.E.2d 708, 711 (1998)).

The trial court's order includes the following findings of fact:

> (5) Plaintiff had a positive PPD test in July 2009 that indicated the potential presence of tuberculosis in his system. At the time Plaintiff's complaint was filed, it was apparent that his prior tuberculosis exposure and related treatment were relevant to his medical malpractice claim. (Compl. ¶¶ 93,94,114). Yet, Plaintiff's medical records relevant to his tuberculosis history and related treatment were not requested from the Department of Correction. Rather, the request was limited to Plaintiff's medical records from, "January 1, 2012- Present."
>
> (6) Plaintiff designated Dr. Parker McConville ("Dr. McConville") as his Rule 9(j)expert.
>
> (7) Plaintiff's Rule 9(j) expert, Dr. Parker McConville, was deposed on July 25, 2018.
>
> (8) Dr. McConville testified as his deposition that Plaintiff's medical records related to Plaintiff's positive tuberculosis test and subsequent treatment and monitoring were relevant to the alleged negligence of Dr. Bell in that Dr. Bell should have reviewed these records and been aware of their contents in developing his differential, diagnosis related to Plaintiff's symptoms.
>
> (9) The Court finds that based on Dr. McConville's own testimony, the medical records related to Plaintiff's positive tuberculosis test and subsequent treatment and monitoring are pertinent to the alleged negligence of Dr. Bell.
>
> (10) Dr. McConville further testified at his deposition, however, that he had not received or reviewed the medical records related to Plaintiff's positive tuberculosis test and subsequent treatment and monitoring and was

not aware of the content of those records despite being aware of Plaintiff's prior tuberculosis exposure during his Rule 9(j) review in this matter and prior to the filing of Plaintiff's Complaint.

(11) Based on the documentary exhibits submitted by counsel at the hearing on the Motion, including the Authorization for Release of Information submitted to the North Carolina Department of Correction and signed by Plaintiff on October 12, 2013, it does not appear the medical records related to Plaintiff's positive tuberculosis test and subsequent treatment and monitoring were requested from the Department of Correction and the Court therefore finds there was no "reasonable inquiry" into the availability of these records as required by Rule 9(j).

Even if this Court were bound by the trial court's findings of fact if supported by competent evidence—and it is not, according to *Preston*—Finding 5 is not accurate. Plaintiff's TB skin test form should have been included in the records Plaintiff received prior to filing his complaint. Although the form goes back to tests from 2006, the form was part of his existing record as of 1 January 2012.

The trial court also made the following pertinent conclusions of law:

(12) A civil action alleging medical malpractice will receive strict consideration for Rule 9(j) compliance and is subject to dismissal without strict statutory compliance. *Thigpen v, Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (internal citations omitted).

(13) A Rule 9(j) motion does not contain a procedural mechanism by which a defendant may file a motion to dismiss a plaintiff's complaint. *See, e.g.*, *Barringer v. Forsyth County Wake Forest University Medical Center*, 197 N.C. App. 238, 255-256, 677 S.E.2d 465, 477 (2009). "The Rules of Civil Procedure provide other methods by which a defendant may file a motion alleging a violation of Rule 9(j). E.G., N.C.G.S. § 1A-1, Rules 12, 41, and 56. Rule 9(j) does not itself, however, provide such a method." *Id.* In such a case, the Court's analysis is not whether a genuine issue of material fact exists, or whether the evidence is viewed in the light most favorable to Plaintiff, but a question of law. *Id. See also Rowell v. Bowling*, 191

N.C. App. 691, 695, 678 S.E.2d 748, 751 (2009) (stating a trial court's review of a Rule 9(j) motion is a question of law, and the Court is not to inquire into the evidence in the light most favorable to plaintiff); *Phillips v. A Triangle Women's Health Clinic*, 155 N.C. App. 372, 316, 573 S.E.2d 600, 603 (2002) (stating compliance with Rule 9(j) is a question of law, not a question of fact).

(14) A complaint facially valid under Rule 9(j) may be dismissed if subsequent discovery establishes that the Rule 9(j) certification is not supported by the facts. *See, e.g*, *Moore v. Proper*, 366 N.C. 25 at 32, 726 S.E.2d at 717; *Ratledge v. Perdue*, 239 N.C. App. 377, 381, 773 S.E.2d 315, 318 (2015); *McGuire v. Riedle*, 190 N.C. App. 785, 786, 661 S.E.2d 754, 756 (2008); *Winebarger v. Peterson*, 182 N.C. App. 510, 514, 642 S.E.2d 544, 547 (2007).

(15) Rule 9(f) contains no good-faith exception. When the language of a statute is clear and without ambiguity, it is the duty of the Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *Oxedine v. TWL, Inc.*, 184 N.C. App. 162, 167, 645 S.E.2d 864, 867 (2007).

(16) The totality of the evidence before the Court indicates Dr. McConville failed to review all medical records pertaining to Defendants' alleged negligence that were available to Plaintiff after reasonable inquiry prior to Plaintiffs' [sic] filing of his civil action.

(17) Based on the foregoing, the Court determines Plaintiff has failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure and this action is dismissed with prejudice.

Based upon the trial court's order, it is apparent that the trial court did not view the forecast of evidence "in the light most favorable to the Plaintiff" as required by *Moore* and *Preston*. Instead, the trial court concluded that

> "Rule 9(j) does not itself, however, provide such a [procedural mechanism by which a defendant may file a motion to dismiss a plaintiff's complaint]." In such a case, the Court's analysis is not whether a genuine issue of material fact exists or whether the evidence is viewed in the light most favorable to Plaintiff, but a question of law.

. . . .

(15) Rule 9(j) contains no good-faith exception. . . .

(16) The totality of the evidence before the Court indicates Dr. McConville failed to review all medical records pertaining to the alleged negligence that were available to Plaintiff after reasonable inquiry prior to Plaintiff's filing of his civil action.

(Citations omitted).

The trial court's order focused on the first portion of the phrase in Rule 9(j): "all medical records *pertaining to* the alleged negligence." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (emphasis added). The trial court found that because Plaintiff did not provide Dr. McConville with his records from DAC prior to January 2012, and because the ultimate diagnosis was a spinal infection caused by tuberculosis and Plaintiff had first had a positive TB test in 2009, Plaintiff had not provided "all medical records pertaining to the alleged negligence." This analysis overlooks the actual allegation of negligence, which is not specifically a failure to diagnose and treat tuberculosis; "Plaintiff asserts Dr. Bell's failure to adequately evaluate and treat his condition, and Dr. Stover's refusal of requested treatment, amounts to medical malpractice." *Leonard v. Bell*, 254 N.C. App. at 696, 803 S.E.2d at 447. The allegation is negligence in the evaluation of Plaintiff's worsening back pain and other symptoms over a period of months. But it is not this Court's role in regard to ruling on a Rule 9(j) motion to determine the importance or weight of additional medical records or to rule on how "pertinent" the records of Plaintiff's diagnosis and treatment of tuberculosis prior to 2012 may be to a determination of liability in this case. Based upon the record in this case, that issue is a factual dispute to be addressed by medical experts and resolved by a jury.

After Defendant Dr. Stover provided additional DAC records in 2018 regarding Plaintiff's care and Dr. McConville reviewed this information, Dr. McConville testified in his deposition that the additional records did not change his opinion regarding Defendants breach of the standard of care in Plaintiff's medical treatment. Defendant's counsel asked Dr. McConville if the TB skin test form changed "any of [his] opinions in this matter." Dr. McConville testified it did not change his opinions. He noted that he "would question [the TB skin test form's] accuracy first of all" because it conflicts with "what was documented in [Dr. Bell's] notes from the nurses and the P.A. and Dr. Bell, the answer to some of these questions [regarding symptoms] would be yes. So I'm not sure why this

doesn't match up with his records." In response to further questions, he clarified that even if the TB skin test form was "accurate," his opinions had not changed. He explained that "the notes from the physicians and the P.A. and the nurses" contradicted the notations on the TB skin test form that Plaintiff had no symptoms. In addition, he noted even if Plaintiff had not been having weight loss, fever, or night sweats, Dr. Bell had seen Plaintiff about nine times over the

> course of about seven or eight months complaining of back pain, then radicular pain, other physical symptoms like weakness in his legs. And--and I believe he complained of numbness at some point. . . . [T]here's still a process going on that has not been adequately investigated and--basically in my opinion. So the standard of care for that would have been . . . further testing, whether it be via an MRI or a CT scan with contrast or bloodwork, you know, or--or a referral to a specialist.

He further explained that since Dr. Bell had prescribed

> three different NSAIDs I believe--was it--ibuprofen, Voltaren, and Naprosyn, all of which would have suppressed a fever or temperature. . . . But if he did have a temperature, that may have masked the-- the fever. So that's another thing . . . to consider--you know, that I had hoped Dr. Bell would have considered because he was prescribing them.

As in *Preston*, there is a dispute regarding how to interpret certain medical records and the basis for any change, or lack of change, in an expert's opinion regarding the standard of care and an appropriate course of evaluation and treatment. But it is not the role of the trial court or this Court, at this early stage in the case, to resolve any ambiguities or issues of fact against the Plaintiff. Instead, the trial court, and this Court, must view the evidence in the light most favorable to the plaintiff. *Preston*, ___ N.C. at ___, 840 S.E.2d at 181-82.

The primary issue under the facts of this case is not whether the additional records produced by DAC in 2018 were "pertinent" to the alleged negligence. The question is whether Plaintiff made "reasonable inquiry" to obtain all the medical records pertaining to the alleged negligence. The trial court did not address this issue except to note that "Rule 9(j) contains no good-faith exception," which essentially acknowledges Plaintiff's "good faith" in requesting records but holds Plaintiff to the

impossible standard of ensuring that every medical provider's response to a record request is absolutely complete and accurate.

In addition, the trial court's Finding of Fact 5 states that Plaintiff's initial request for records to DAC, did not include records regarding "his tuberculosis history and related treatment." But Plaintiff's initial request asked for "*[a]ll* medical records, declarations of medical emergencies, sick call filings, and grievances" from "January 1, 2012-Present." (Emphasis added). Plaintiff's records related to tuberculosis, including the TB skin test form, which was the focus of Defendants' motions to dismiss, would have been included in a complete response to a request for "all" of the records for this time period. Plaintiff's request was not limited to any particular type of records or related to any particular diagnosis; he requested "all" of his medical records from DAC, as is required by Rule 9(j).

Prior to filing the complaint, Plaintiff requested records from DAC and other medical providers outside DAC who evaluated and treated Plaintiff. The record demonstrates that Plaintiff made "reasonable inquiry" to obtain his medical records, and the trial court did not find otherwise. Defendants have not identified a reason plaintiff should have known that DAC had failed to provide the records he requested in 2013. It is apparent from the records themselves the TB skin test form stressed by Defendants before the trial court and this Court should have been included in DAC's response to Plaintiff's first request for medical records, as it was part of Plaintiff's existing medical records with DAC on 1 January 2012 and at the time of his request.

The trial court also found that Plaintiff's diagnosis and treatment for TB were pertinent to the alleged negligence. Even if the records are "pertinent," the question is whether plaintiff provided to Dr. McConville "*all medical records* pertaining to the alleged negligence that are available to the plaintiff *after reasonable inquiry*." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (emphasis added). Rule 9(j) does not ask the plaintiff to make a selective request for the medical records he deems "pertinent" to his medical condition. For example, instead of requesting *all* his medical records from 1 January 2012 forward, if Plaintiff had requested DAC to produce Plaintiff's medical records regarding his diagnosis and treatment for tuberculosis, Defendants would have a valid objection to Plaintiff's limiting the records to "certain records" the plaintiff deemed relevant. This type of limited review of medical records has been specifically disapproved by *Fairfield v. WakeMed*, 261 N.C. App. 569, 821 S.E.2d 277 (2018). Instead, Rule 9(j) requires the plaintiff to make "reasonable inquiry" for production of "*all* medical records pertaining to

the alleged negligence" and to have the expert witness review all of the records "available to plaintiff after reasonable inquiry." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (emphasis added). The "alleged negligence" here was Defendants' failure to evaluate and diagnose Plaintiff's medical issues over a period of months beginning at the end of 2012, not whether Plaintiff had received proper care for his initial diagnosis of tuberculosis prior to 2012. And although the TB skin test form was "pertinent to the alleged negligence," it also should have been provided in response to Plaintiff's initial request for medical records prior to filing his complaint. If DAC had provided this form in response to Plaintiff's request *prior* to filing the lawsuit, it is possible Plaintiff would have then requested additional records going back to Plaintiff's initial positive TB skin test, but DAC's response was incomplete, and the TB skin test form was not provided. Defendants have not identified anything in the records produced that may have alerted Plaintiff of a reason to request more information. Instead, the record demonstrates that Plaintiff's requests for all medical records from January 2012 was reasonable and that Plaintiff provided all the records reasonably available to him to Dr. McConville. The fact that DAC produced some records which include "pertinent" information several years after Plaintiff's record requests and Defendants' responses to discovery which did not reveal the records does not require dismissal of Plaintiff's complaint.

Plaintiff's symptoms and complaints of back pain started in October 2012; his symptoms progressed to include chills, unexplained weight loss, and worsening pain over the next several months. He saw Dr. Bell nearly every month for about 10 months. There is also no indication Dr. Bell asked Plaintiff about his TB status or consulted Plaintiff's DAC medical records which would have revealed this information.[5] At the beginning of Plaintiff's course of treatment, the cause of his back pain was not obvious to anyone. Both Defendants presumably would have reviewed Plaintiff's medical records maintained by the facility in which they were employed, including Plaintiff's TB skin test results from tests conducted at that same facility as part of his evaluation of Plaintiff's symptoms. If they failed to do so, that failure could be pertinent as it may tend to support Plaintiff's claim of breach of the standard of care. But Plaintiff's claim is not subject to dismissal based upon DAC's failure to give a complete response to Plaintiff's initial request for his records,

5. In August of 2013, Plaintiff informed physicians at New Hanover Regional Hospital that he had previously been exposed to TB. However, his initial diagnosis of the infection in his back was attributed to E. coli. TB was not identified as the cause until October of 2013, when Plaintiff was treated at UNC Health Care.

as he made "reasonable inquiry" for "all medical records pertaining to the alleged negligence" as required by Rule 9(j). N.C. Gen. Stat. § 1A-1, Rule 9(j)(1).

Rule 9(j) notably does *not* require a plaintiff to provide "all" medical records in existence regarding the plaintiff's medical condition, even years prior to a plaintiff's medical treatment and prior to the alleged negligence, to an expert for review prior to filing suit. *See* N.C. Gen. Stat. § 1A-1, Rule 9(j). Many factors may be pertinent to a medical diagnosis, even going back many years before the alleged negligent care which is the subject of the claim. Such a standard would likely be nearly impossible to meet; if even one medical provider inadvertently omitted a single page of records, the plaintiff's case would be subject to dismissal. Instead, Rule 9(j) sets a high but reasonable standard. *See id.* It requires the plaintiff to make "reasonable inquiry" for "all medical records pertaining to the alleged negligence" prior to filing suit and to have a medical expert review all the records "available to the plaintiff" after "reasonable inquiry." *Id.* After filing the complaint, Plaintiff served discovery requests for medical records on both Defendants in this case and subpoenaed records from DAC. Both Defendants had effectively certified by their discovery responses that Plaintiff already had "all" of the medical records, to the best of their knowledge.[6] Yet the recently-produced records upon which they based their motion to dismiss were records from the very medical facility where they were employed—not records from another medical provider they may not have been aware of or records unavailable to them.

Defendants argue that this case is controlled by *Fairfield v. WakeMed*, 261 N.C. App. 569, 821 S.E.2d 277. But *Fairfield* is not applicable to this case. In *Fairfield*, the plaintiff's certification was not in accord with Rule 9(j), as the complaint stated:

> Counsel for the Plaintiffs hereby certify and affirm, that prior to the filing [sic] this lawsuit, pursuant to Rule 9 (j) of

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6. Defendants argue Dr. McConville's inability to review the TB skin test form prior to the filing of the complaint defeats Plaintiff's malpractice claim because this information was crucial in Plaintiff's diagnosis. But Dr. McConville testified this information did not change his opinion. And viewing the evidence in the light most favorable to Plaintiff, as *Preston* directs, according to their own discovery responses, Defendants themselves apparently did not review his TB skin test results which were kept in the DAC medical files or they did not consider this to be "pertinent" to Plaintiff's evaluation. Their argument would tend to support Plaintiff's argument regarding negligence in failing to suspect a TB-related infection, since they either (1) did not review the TB skin test form when treating Plaintiff or (2) reviewed it but still did not suspect TB *and* misrepresented the records they relied upon in discovery.

> the North Carolina Rules of Civil Procedure, that *certain medical records and the medical care* received by Mrs. Fairfield has been reviewed by a physician 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 standard of care provided by Defendants did not comply with the applicable standard of care.

261 N.C. App. at 571, 821 S.E.2d at 279 (alteration in original) (emphasis added).

This Court noted Rule 9(j) does not allow the plaintiff to have his expert review only "certain" chosen records regarding the medical care; the expert must review *all records reasonably available* to plaintiff:

> Allowing a plaintiff's expert witness to selectively review a mere portion of the relevant medical records would run afoul of the General Assembly's clearly expressed mandate that the records be reviewed in their totality. Rule 9(j) simply does not permit a case-by-case approach that is dependent on the discretion of the plaintiff's attorney or her proposed expert witness as to which of the available records falling within the ambit of the Rule are most relevant. Instead, Rule 9(j) requires a certification that *all* "medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" have been reviewed before suit was filed.
>
> The certification here simply did not conform to this requirement. Therefore, the trial court properly ruled that Plaintiffs had failed to comply with Rule 9(j).

Id. at 574-75, 821 S.E.2d at 281 (citation omitted).

Plaintiff had requested all of his medical records from DAC and the particular record Defendants focus on as "pertinent" to the alleged negligence should have been included in a complete response to the request. The TB skin test form, finally produced over four years after Plaintiff's first request to DAC, was clearly responsive to Plaintiff's initial request for records. The problem arose not from Plaintiff's request for records but from DAC's incomplete response.

The record in question was held by DAC but based upon our record was not included in any of the records produced by any other medical group or any of Plaintiff's treating physicians, including Defendants. Defendants do not argue that Plaintiff's initial request for records was

unreasonable or insufficient, but they contend it should have extended back further before his diagnosis. Plaintiff's request started with records from 1 January 2012, about nine months prior to Plaintiff's initial visit to Dr. Bell.[7] Defendants have not demonstrated that the time period of this request is unreasonable, particularly since the records in question, particularly the TB skin test form, should have been produced in response to Plaintiff's first request. Although the sheet included tests from prior years, it also included tests for 2012 and 2013. The relevant fact in this case, for purposes of Plaintiff's medical malpractice claim, is whether TB should have been part of the differential diagnosis by Dr. Bell much earlier in his treatment of Plaintiff. The TB skin test form—which should have been produced in the records Plaintiff requested prior to filing suit—shows Plaintiff first had a positive TB test in 2009. Defendants have not demonstrated why Plaintiff's initial request should have extended back some period of time prior to 1 January 2012, since the record in question was responsive to Plaintiff's initial request.[8]

Nor have Defendants shown Plaintiff should have known, based upon any characteristics of the records produced, that the records produced in response to his initial request were not complete. The medical providers produced hundreds of pages of records and there was no way for Plaintiff to tell if something had been omitted. Plaintiff made "reasonable inquiry" for all of his "medical records pertaining to the alleged negligence" prior to filing suit and then requested records again after filing suit. N.C. Gen. Stat. § 1A-1, Rule 9(j). Plaintiff received hundreds of pages of medical records from many providers, some duplicative. Even if we assume DAC and Defendants were merely negligent in failing to find all of the records when Plaintiff first requested them, and not that they intentionally withheld them to defeat Plaintiff's malpractice claim, Plaintiff made reasonable inquiry and his expert witness reviewed all of the records he received.

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7. Since Defendants have not yet presented any expert medical opinions regarding the scope of records which should have been considered "pertinent" to the alleged negligence, and Plaintiff's expert testified he would not change his opinion based upon the newly-produced records, Defendants ask this Court to exercise a level of medical expertise it does not have—and could not exercise even if it did—regarding the potential relevance of Plaintiff's medical care several *years* before the alleged negligence.

8. Plaintiff's expert was aware of his positive TB skin tests based upon other information in Plaintiff's medical records and considered his medical history as part of his initial opinion developed prior to the filing of the complaint. Records from Plaintiff's treating physicians show they were also aware of his positive TB history. Defendants have not demonstrated why the one-page TB skin test form or other documents produced in 2018 would have made any meaningful difference in the expert review of the medical care. After reviewing the additional records, Dr. McConville testified that they did not change his opinion.

IV. Conclusion

Plaintiff made reasonable inquiry for all of his medical records pertaining to the alleged negligence and he provided these records to his expert witness for review prior to filing of the complaint as required by North Carolina General Statute § 1A-1, Rule 9(j). We reverse the trial court's order dismissing Plaintiff's complaint based upon Rule 9(j) and remand for further proceedings.

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

Plaintiff's undisclosed test for tuberculosis occurred more than three years prior to any treatment of Plaintiff by Defendants in 2012 and 2013. Nothing shows Defendants were privy to or aware of Plaintiff's prior tuberculosis test. This prior 2009 test was part of Plaintiff's medical history. Plaintiff failed to request and provide these records for Dr. McConville to review.

Dr. McConville's Rule 9(j) certification opines Defendants' treatment of Plaintiff failed to meet the statutory standard of care by their failing to consider Plaintiff's prior and undisclosed history of tuberculosis. Plaintiff's remedy, if any, is properly pursued before the Industrial Commission. The trial court's dismissal is properly affirmed. I respectfully dissent.

I. Rule 9(j)

Rule 9(j) is both a threshold and gatekeeper statute. It was enacted to prevent frivolous malpractice claims "by *precluding any filing in the first place* by a plaintiff who is unable to *procure an expert* who both meets the appropriate qualifications and, *after reviewing* the medical care and *available records*, is willing to testify that the medical care at issue fell below the standard of care." *Vaughan v. Mashburn*, 371 N.C. 428, 435, 817 S.E.2d 370, 375 (2018) (emphasis supplied).

Rule 9(j) requires a plaintiff asserting medical malpractice to make "reasonable inquiry" for production of "all medical records pertaining to the alleged negligence" and to have his expert witness to review all

records "available to plaintiff after reasonable inquiry." N.C. Gen. Stat. § 1A-1, Rule 9(j)(1) (2019).

A. Proper Standard of Review

The trial court's order accurately reflects the statute's mandate that a medical malpractice complaint is to be strictly reviewed for Rule 9(j) compliance and is properly dismissed in the absence of Plaintiff's and his expert's strict statutory compliance therewith. *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002).

> [W]here, as here, a defendant files a motion to dismiss under Rule 12(b)(6) challenging a plaintiff's facially valid certification that the reviewing expert was willing to testify at the time of the filing of the complaint, *the trial court must examine "'the facts and circumstances known or those which should have been known to the pleader' at the time of filing*[.]"

Preston v. Movahed, 374 N.C. 177, 189, 840 S.E.2d 174, 183 (2020) (emphasis supplied).

The majority's opinion asserts: "The relevant records in this case are the medical records of Defendants' employer, DAC; in other words, they are effectively the medical records of Defendants' own care of Plaintiff." Contrary to the majority's notion, Plaintiff bears the burden to secure all his records needed to allow his asserted expert witness to review and to certify Plaintiff's threshold compliance with Rule 9(j) with history and records "*known or those which should have been known to the pleader* at the time of filing." *Id.* (emphasis supplied). The majority's opinion correctly notes Dr. Bell's response to Plaintiff's request: "The only medical records related to Plaintiff that are in Dr. Bell's possession were produced by Plaintiff's counsel in connection with the pending Industrial Commission matter related to Plaintiff's claims."

Plaintiff's complaint of Defendants' alleged individual actions and liabilities are asserted in superior court, and not as public officials of the DAC before the Industrial Commission. DAC's actions or omissions relative to Plaintiff's undisclosed medical records are irrelevant and cannot be imputed to Defendants in this action. *See Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017) ("*Leonard I*").

As noted, our Supreme Court in *Preston* held: "The trial court must examine the facts and circumstances, *known or those which should have been known to the pleader*, at the time of filing . . . , *and* [*if any*] *disputes* or ambiguities in the forecasted evidence, the trial court

should draw all reasonable inferences in favor of the plaintiff." *Preston*, 374 N.C. at 189, 840 S.E.2d at 184 (emphasis supplied) (internal quotation marks and citations omitted).

Here, no "disputes or ambiguities in the evidence" exist. *Id.* Plaintiff admits knowledge of his prior positive tuberculosis test. He also admits not informing neither his expert witness nor Defendants of his prior test in his medical history. The majority's opinion erroneously applies analysis from *Preston* to require and to "draw all reasonable inferences in favor of the [plaintiff]" where the record shows no "disputes or ambiguities in the evidence" exist. *Id.*

A medical malpractice complaint, even if initially facially valid under Rule 9(j), shall be dismissed when subsequent events establish the Rule 9(j) certification is not supported or is false. *Moore v. Proper*, 366 N.C. 25, 32, 726 S.E.2d 812, 817 (2012). The appellate court's review of undisputed facts is purely a question of law, not a factual review in the light most favorable to Plaintiff. *Id.*; *see Preston*, 374 N.C. at 189, 840 S.E.2d at 184.

In *Preston*, our Supreme Court stated the "analytical framework set forth in *Moore* applies equally to other Rule 9(j) issues in which 'a complaint facially valid under Rule 9(j)' is challenged on the basis that 'the certification is not supported by the facts.' " *Preston*, 374 N.C. at 189, 840 S.E.2d at 183 (quoting *Moore v. Proper*, 366 N.C. at 31-32, 726 S.E.2d at 817).

In both *Moore* and in *Preston*, the Court was reviewing a summary judgment order, while the dismissal order before us does not raise or resolve credibility issues or show any ambiguities or disputes of fact. The sole issue before us is the trial court's dismissal based upon Plaintiff's and his expert witness' admitted failures to request and review applicable records and to strictly comply with Rule 9(j) to file the complaint. *Vaughan*, 371 N.C. at 434-35, 817 S.E.2d at 375. That order is properly affirmed.

B. Plaintiff's Failure to Request

On 27 November 2013, Plaintiff made his first request for medical records to DAC. He specifically requested "[a]ll medical records, declarations of medical emergencies, sick call filings, and grievances" *from "January 1, 2012-Present."* Plaintiff's initial medical records request states a specific beginning date that is approximately ten months *prior* to Plaintiff's *first visit* to Defendant, Dr. Bell. The record does not show Plaintiff made any medical record requests upon Dr. Bell or Dr. Stover in their individual capacities.

Plaintiff received 512 pages of DAC medical records in response to his post January 1, 2012 request. Dr. McConville was provided all these responsive DAC records to review and provide his Rule 9(j) certification to challenge Defendants' compliance with the standard of care before Plaintiff filed his initial and subsequent complaints.

The trial court's unchallenged Finding of Fact 5 states Plaintiff's initial request for records to DAC, did not include any records regarding "his tuberculosis history and related treatment." Plaintiff's initial request specifically asked for "[a]ll medical records, declarations of medical emergencies, sick call filings, and grievances" *from "January 1, 2012-Present*," which pre-dates by months *any care* rendered by Defendants.

The trial court also found Plaintiff had failed to request or provide Dr. McConville with his records from DAC prior to 1 January 2012. This finding of fact is also unchallenged. Because the ultimate diagnosis was a spinal infection caused by tuberculosis, and Plaintiff had a positive TB test in 2009, the trial court correctly found Plaintiff had failed to provide Dr. McConville with "all medical records pertaining to the alleged negligence" by Defendants and properly dismissed the complaint.

Dr. McConville condemns Defendants for breach of their statutory standard of care by not reviewing a 2009 PPD test, which Plaintiff did not disclose, request, or provide, and which he did not review prior to rendering, and upon which he bases his certification. It is the Plaintiff-patient's duty to provide and fully disclose their prior medical history to subsequent treating physicians and Rule 9(j) expert witness. *See Lowe v. Branson Auto.*, 240 N.C. App. 523, 534, 771 S.E.2d 911, 918 (2015) ("[P]laintiff's [rejected] claim for benefits hinged on . . . plaintiff's failure to disclose his prior back problems . . . and the doctors' reliance on plaintiff's incomplete medical history.").

Plaintiff makes no assertion or showing this 2009 PPD test was disclosed or available to Defendants in their individual capacities during their treatment of Plaintiff in late 2012 through mid-2013. If knowledge of this undisclosed medical record is to be imputed to them by virtue of their employment by DAC, Plaintiff's claim lies solely before the Industrial Commission and not in the superior court. Plaintiff does not allege Defendants either improperly failed to produce or improperly withheld evidence.

Strict compliance with Rule 9(j)'s pleading requirement rests *solely upon* Plaintiff and his expert witness. *See id.* Admitted, unchallenged, and undisputed evidence in the record supports the trial court's findings and conclusions to dismiss. *Thigpen*, 355 N.C. at 202, 558 S.E.2d at

165. No burden shifting, review in light most favorable, or the existence of genuine issues of material fact relieves Plaintiff of strict compliance with the pleading requirement under Rule 9(j). *Moore*, 366 N.C. at 32, 726 S.E.2d at 817. The appellate court's review of undisputed facts is purely a question of law, not a factual review in the light most favorable to Plaintiff. *Preston*, 374 N.C. at 189, 840 S.E.2d at 184.

II. Plaintiff's Rule 9(j) Certification

A. Prior to Filing Claim

The trial court properly dismissed Plaintiff's complaint for failure to comply with Rule 9(j). Dr. McConville admitted he had failed to reference or review Plaintiff's PPD test from 1 July 2009 prior to making his certification.

N.C. Gen. Stat. § 1A-1, Rule 9(j) provides:

> Medical malpractice. Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 *shall be dismissed* unless:
>
> (1) The pleading specifically asserts that the medical care *and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;
>
> (2) The pleading specifically asserts that the medical care and *all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person* that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint.

N.C. Gen. Stat. § 1A-1, Rule 9(j) (2019) (emphasis supplied).

The plain language of Rule 9(j) mandatorily requires a plaintiff's medical malpractice action "*shall be dismissed*" unless a qualified

medical expert reviews "*all medical records pertaining to the alleged negligence* that are available to the plaintiff after reasonable inquiry" prior to filing the complaint. N.C. Gen. Stat. § 1A-1, Rule 9(j) (1)-(2) (emphasis supplied).

"[C]ompliance with Rule 9(j) is determined at the time the complaint is filed." *Mangan v. Hunter*, __ N.C. App. __, __, 835 S.E.2d 878, 883 (2019). This Court held: "Rule 9(j) unambiguously requires a trial court to dismiss a complaint if the complaint's allegations do not facially comply with the rule's heightened pleading requirements." *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255, 677 S.E.2d 465, 477 (2009). This Court further held "even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Id.*

Based upon Dr. McConville's review, expert opinion, and certification, Plaintiff's complaint included the following false Rule 9(j) certification:

> Plaintiff states that the medical health providers who Plaintiff reasonably believes will qualify as expert witnesses under Rule 702 of the North Carolina Rules of Evidence reviewed all of the allegations of negligence related to medical care that is described in this Complaint and *all the medical records pertaining to the alleged negligence that are available to Plaintiff after a reasonable inquiry.*

(emphasis supplied).

B. Deposition Testimonies

The majority's opinion asserts Dr. McConville's belief that Defendants should have included tuberculosis in their differential diagnosis earlier. By accepting this premise and sidestepping Rule 9(j), the majority misapplies a level of medical standard of care to determine a prior and undisclosed three-year-old tuberculosis test may create individual liability for Defendants. This notion is contrary to the required standard of care, our statutes, rules, procedures, precedents, and the facts of this case.

Dr. McConville's opines Dr. Bell was individually guilty of medical malpractice, because Dr. Bell should have suspected a tuberculosis infection sooner and ordered an MRI scan due to Plaintiff's prior positive, but undisclosed, 2009 PPD test, more than three years prior to Dr.

Bell's initial treatment. Dr. McConville testified Plaintiff's prior history of tuberculosis was "relevant" to forming and the development of the "differential diagnosis."

Equally, or even more important, is Dr. Bell's and Dr. Stover's lack of knowledge of the prior test that Plaintiff had failed to disclose in his medical history. Dr. McConville testified to Plaintiff's positive 2009 PPD test:

> Defendants' Counsel: I want to break that apart just a little bit, but did you review [Plaintiff]'s medical records related to his positive PPD test in 2009?
>
> Dr. McConville: No. I saw the note from the infectious disease doctor when he was hospitalized that he had a past history of tuberculosis so - - and that was in September - -August, Sep- - August, September when he was hospitalized and had his surgery- - initial surgery.
>
> Dr. McConville: So PPD basically you get a - - you know, a shot, you know, typically just subcutaneously in your forearm, and then you come back two days later and see if there's any - - oh, what's the right word—if it's - - if it's red or indurated. And then that - - that diameter is- - is measured. And there's a cutoff that if it's above a certain, you know, diameter, then there is - - assume that, you know, this person's been exposed to tuberculosis.
>
> Defendants' counsel: Do you know the size of [Plaintiff]'s [PPD] result was in 2009?
>
> Dr. McConville: I don't 'cause I don't believe I reviewed those records.
>
> Defendants' counsel: Do you know what treatment he was provided?
>
> Dr. McConville: I do not, no.

During cross examination by Plaintiff's counsel, Dr. McConville testified:

> Plaintiff's counsel: And would [night sweats] have been something that would be important for Dr. Bell to put in his request for an MRI that he made in June of 2013 for [Dr.] Martin?

> Dr. McConville: I think that *in conjunction with his previous diagnosis of tuberculosis*, yes. It's very pertinent.
>
> . . . .
>
> Plaintiff's counsel: Do you recall seeing any notes from Dr. Bell that referenced that positive tuberculosis test?
>
> Dr. McConville: *Not that I recall, no.*
>
> Plaintiff's counsel: Is that something that's important?
>
> Dr. McConville: Yes
>
> Plaintiff's Counsel: Let me ask that a little more clearly. Is that *something that would be important for Dr. Bell to know*?
>
> Dr. McConville: Yes. I think that would definitely have guided him in his decision-making process in regards to, A, his differential and, B, what test that he might have ordered for [Plaintiff], not only radiographic [X-ray] tests but also bloodwork.
>
> Plaintiff's counsel: So in order to know about that prior tuberculosis test, Dr. Bell would have had to review [Plaintiff]'s previous medical records, correct?
>
> Dr. McConville: I assume, yes.

(emphasis supplied).

During re-direct, Dr. McConville further testified:

> Defendants' counsel: Okay. What would Dr. Bell have needed to know about for the purposes of his providing medical care to [Plaintiff] and abiding by the standard of care in this case - - what would Dr. Bell have needed to know about the prior positive PPD test?
>
> Dr. McConville: A, if he was treated. And B, it might have been prudent to get, you know, chest CT to make sure that he had no had - - developed active tuberculosis again, But also like, you know, with this case, you know, the end result- - you know, you assume with the complaints of night sweats or cold chills or what have you, weight loss and low back pain - - you know, you want to rule out, you know, an infection in the spine from tuberculosis.

C. Motion to Dismiss

Plaintiff sought his medical records from DAC beginning from the time period two and one-half years after his July 2009 PPD positive diagnosis for tuberculosis. As a result, Dr. McConville failed to review the results of this test and any treatment before rendering his Rule 9(j) certification. Nothing in the record shows Plaintiff ever informed or provided either of the Defendants with this PPD test, any treatment thereof, or with any disclosure of his prior tuberculosis to hold them individually liable.

Dr. McConville testified to the importance of this test to Defendants' alleged breach of their standard of care by failing to diagnose Plaintiff's tuberculosis infection earlier. It is undisputed Dr. McConville did not review the results of the 2009 PPD test and bases and certifies his opinion of Defendants' alleged breach of the required standard of care upon their failures to know the undisclosed. When questioned by Defendants' counsel at deposition, Dr. McConville could not ascertain if the 2009 test was the result of latent or active tuberculosis bacteria.

The majority's opinion asserts "Defendants have not demonstrated why the one-page skin test form or other documents produced in 2018 would have made any meaningful difference in the expert review of the medical care." This assertion is erroneous in two different ways. First, it places a burden upon Defendants that is contrary to *Preston*, all precedents, and our statutes. Plaintiff, not Defendants, maintains the burden of compliance with Rule 9(j) prior to filing the complaint. *Preston*, 374 N.C. at 189, 840 S.E.2d at 183. Second, given the nature of tuberculosis and the specific culture found after Plaintiff's surgery, Defendants' purported knowledge of Plaintiff's undisclosed 2009 positive history of tuberculosis is critical to support Dr. McConville's Rule 9(j) certification.

Dr. McConville's testified Plaintiff's prior diagnosis of tuberculosis and any treatment thereafter is pertinent to the standard of care and allegations of negligence against Dr. Bell and Dr. Stover. Dr. McConville opined Plaintiff's history of tuberculosis, in conjunction with his other symptoms, should have made Dr. Bell suspicious of a potential tuberculosis infectious process in diagnosing and treating Plaintiff.

Plaintiff's original complaint filed in Columbus County, which contained Dr. McConville's Rule 9(j) certification, alleged the source of Plaintiff's infection was from tuberculosis. Plaintiff's later complaint, filed in Cumberland County, with a similar certification, only mentions UNC Hospital's tuberculosis cultures post-surgery, and not the 2009

PPD test. Plaintiff's appellate brief alleges tuberculosis as the source of his infection.

This Court in *Mangan* recently examined a similar issue of the statute's mandate requiring the expert's review of "all medical records" to comply with Rule 9(j). *Mangan*, __ N.C. App. at __, 835 S.E.2d at 883. In *Mangan*, and unlike here, the parties disputed whether the Rule 9(j) expert had reviewed all medical evidence. *Id.* Here, Plaintiff concedes in depositions, before the trial court, in briefs, and at oral argument that Dr. McConville did not review Plaintiff's 2009 PPD test or treatment to indicate tuberculosis.

These facts before us mirror those in *Fairfield v. WakeMed*, where a Rule 9(j) medical expert certified he had reviewed "certain" plaintiff's medical records. *Fairfield v. WakeMed*, 261 N.C. App. 569, 574, 821 S.E.2d 277, 280 (2018). This Court affirmed the trial court's dismissal.

"North Carolina courts have strictly enforced the provisions of Rule 9(j)." *Id.* at 574, 821 S.E.2d at 281. More illustratively, this Court held:

> Based on the unambiguous language of the Rule, all of the relevant medical records reasonably available to a plaintiff in a medical malpractice action must be reviewed by the plaintiff's anticipated expert witness prior to the filing of the lawsuit, and a certification of compliance with this requirement must be explicitly set out in the complaint.

Id.

To not strictly follow this rule and allow an expert to "selectively review a mere portion of the relevant medical records would run afoul of the General Assembly's clearly expressed mandate that the records be reviewed in their totality." *Id.*

Dismissing Plaintiffs argument to the contrary, this Court continued:

> Rule 9(j) simply does not permit a case-by-case approach that is dependent on the discretion of the plaintiff's attorney or her proposed expert witness as to which of the available records falling within the ambit of the Rule are most relevant. Instead, Rule 9(j) requires a certification that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" have been reviewed before suit was filed.

Id. at 574-75, 81 S.E.2d at 281.

Rule 9(j) compels the Plaintiff to provide to their expert and requires the expert to review "*all medical records pertaining to the alleged negligence* that are available to the plaintiff after reasonable inquiry" before the filing of the complaint. N.C. Gen. Stat. § 1A-1, Rule 9(j) (emphasis supplied).

Dr. McConville expressly admitted he had failed to review the results of Plaintiff's 2009 PPD test showing his tuberculosis infection before making the certification in the complaint, which is the basis of his alleged breach of the standard of care against Dr. Bell and Dr. Stover. During discovery, Defendants learned Dr. McConville had not reviewed all of Plaintiff's relevant medical records, prior to 1 January 2012, the same type of breach of the standard of care for which he opines Defendants are liable.

This Court's holdings in *Fairfield* and *Barringer* control the analysis and proper outcome of Dr. McConville's failure to review. *Fairfield*, 261 N.C. App. at 574, 821 S.E.2d at 280; *Barringer*, 197 N.C. App. at 255, 677 S.E.2d at 477. "[E]ven when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate." *Barringer*, 197 N.C. App. at 265, 677 S.E.2d at 477. The trial court's order of dismissal complies precisely with both precedents.

D. Reasonableness of Plaintiff's Record Inquiry

The majority's opinion asserts Plaintiff's made a reasonable inquiry for records after "January 1, 2012." Rule 9(j) requires records "available to the plaintiff after reasonable inquiry" before the filing of the complaint. N.C. Gen. Stat. § 1A-1, Rule 9(j). Plaintiff's brief and arguments do not show his specific and dated request for records for his Rule 9(j) expert witness to review and certify Defendant's alleged negligence was reasonable to excuse and give credence to Dr. McConville's certification

Considering Plaintiff's own knowledge of his recent 2009 PPD test and tuberculosis diagnosis, Plaintiff could have requested medical records for an expanded term from the DAC, at least for the period of his incarceration. At the time Plaintiff sought treatment for his back pain, he was or should have been aware of his recent past tuberculosis infection. Plaintiff's counsel failed to request all the records available "after reasonable inquiry" relating to the infection prior to obtaining Rule 9(j) certification and filing his complaint. No allegation or evidence tends to show Plaintiff disclosed or informed Dr. Bell or Dr. Stover of his past PPD test or provided any medical history of tuberculosis infection. It was Plaintiff's duty to disclose.

Dr. McConville opined Defendants breached their standard of care and committed medical malpractice by treating a patient with a history of tuberculosis and without more immediately ordering an MRI study to rule out that infection. Dr. McConville further testified Defendants individually breached their standard of care and committed medical malpractice by not seeking out Plaintiff's medical records when Plaintiff presented his symptoms: numbness in his legs, blood in his stool, night sweats, unexplained weight loss, fatigue, and severe pain.

Dr. McConville testified he did not review nor seek out these same records, but yet he condemns Defendants of breach of the required standard of care and medical malpractice for their alleged same failures. Dr. McConville's basis of Plaintiff's prior history of tuberculosis was disclosed in chart notes from a UNC Hospital infectious disease physician after Plaintiff's surgery and treatment. No information was disclosed to Defendants while they were treating Plaintiff. Dr. McConville's opinion from this record was vital to his assertion and certification of Defendants' alleged breach of the standard of care to support the Rule 9(j) certification in Plaintiff's complaint.

Plaintiff stipulated at oral argument that Defendants and their employers did not withhold any evidence of the PPD test to later ambush Plaintiff or Dr. McConville during the deposition, or that Plaintiff's incarceration limited his knowledge or access to his records or the treatments he received. Plaintiff does not assert the 2009 PPD tuberculosis test was disclosed or known to nor held by Defendants individually.

Additionally, the specific dates in Plaintiff's medical record's request failed to encompass the time frame of his 2009 PPD test of tuberculosis infection. This PPD test was relatively recent to Plaintiff's 2012 complaints of back pain and was not so remote in time to Defendants' treatment to excuse Plaintiff's disclosure thereof or being provided for review. This recentness in time is unlike a diagnosis of a chronic disease at childhood or tests and treatments from many years earlier.

Plaintiff' admittedly failed to comply with the statute or to inform Defendants or Dr. McConville of his past medical history and records at the time of their treatment of Plaintiff and the Rule 9(j) review. His argument is properly overruled, and the trial court's order affirmed.

III. Conclusion

Rule 9(j) affirmatively and mandatorily requires the qualified medical expert to review "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" and

certify breach of the statutory standard of care prior to the filing of the complaint. N.C. Gen. Stat. § 1A-1, Rule 9(j).

The majority's opinion (1) fails to properly apply the statute; (2) misconstrues our precedents to recast undisputed and conceded facts as ambiguities; (3) shifts from Plaintiff and places an improper burden on Defendants; and, (4) misinterprets Plaintiff's expert's own testimony and failures to erroneously reverse the trial court's order.

The trial court's order reflects the correct ruling under the law and precedents and is properly affirmed. I respectfully dissent.

SHEARON FARMS TOWNHOME OWNERS ASSOCIATION II, INC., PLAINTIFF
v.
SHEARON FARMS DEVELOPMENT, LLC; DAN RYAN BUILDERS–NORTH CAROLINA, LLC; ABBINGTON HEIGHTS, LLC; JELD-WEN, INC., AND JELD-WEN HOLDING, INC., DEFENDANTS. DAN RYAN BUILDERS–NORTH CAROLINA, LLC, DEFENDANT/THIRD-PARTY PLAINTIFF
v.
JP&M ENTERPRISE, INC.; JP&M ENTERPRISE, INC. D/B/A ACE VINYL SIDING; ALPHA OMEGA CONSTRUCTION GROUP OF RALEIGH, INC.; ALPHA OMEGA CONSTRUCTION GROUP OF RALEIGH, INC. D/B/A ALPHA OMEGA CONST. GROUP OF RALEIGH; BMC EAST, LLC; BMC EAST, LLC D/B/A BMC; BMC EAST, LLC F/K/A STOCK BUILDING SUPPLY, LLC D/B/A STOCK BUILDING SUPPLY; BRINLEY'S GRADING SERVICE, INC.; BRINLEY'S GRADING SERVICE, INC. D/B/A BRINLEY'S GRADING SERVICE; GMA SUPPLY INC.; GMA SUPPLY INC. F/K/A GMA SUPPLY LLC D/B/A GMA SUPPLY; LOCKLEAR ROOFING INC.; LOCKLEAR INC.; LOCKLEAR ROOFING INC. D/B/A LOCKLEAR ROOFING; LOCKLEAR INC. D/B/A LOCKLEAR ROOFING; TAYLOR'S LANDSCAPING, INC.; TAYLOR'S LANDSCAPING, INC. D/B/A TAYLOR'S LANDSCAPING INC., THIRD-PARTY DEFENDANTS

No. COA18-1308

Filed 4 August 2020

1. Appeal and Error—interlocutory orders—risk of inconsistent verdicts—multiple defendants—overlapping factual allegations

An order dismissing a homeowners' association's claims against a window manufacturer for lack of standing was interlocutory where claims against other defendants remained, but the order affected a substantial right and was immediately appealable because some of the claims against both sets of defendants involved overlapping factual allegations and, thus, there was a risk of inconsistent verdicts.

2. Associations—standing—homeowners' association—claims on behalf of members—varied damages

A townhome homeowners' association (HOA) lacked standing to bring claims on behalf of its members against a window company for damage to the exterior surfaces of the townhomes because the individual members suffered varied—not equal—damages. The Court of Appeals rejected an argument that the HOA was contractually obligated to repair the damages and had standing for that reason.

3. Associations—standing—homeowners' association—independent of members—abnormal damage

A townhome homeowners' association (HOA) lacked independent standing to bring claims against a window company for damages to the exterior surfaces of the townhomes where the association had no contractual obligation to repair abnormal damage and the association did not allege that any of the damaged property belonged to the association itself (as opposed to its individual members).

4. Jurisdiction—standing—assignments of right to sue—after lawsuit commenced

In a lawsuit brought by a townhome homeowners' association against a window company (defendant), the trial court properly declined to consider an affidavit certifying assignments (by individual members transferring to their homeowners' association their rights to sue the defendant) that occurred after the lawsuit had commenced. The assignments had no bearing on whether standing existed at the time the association filed the lawsuit.

Appeal by plaintiff from order entered 24 September 2018 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 7 August 2019.

Jordan Price Wall Gray Jones & Carlton PLLC, by Brian S. Edlin and H. Weldon Jones, III, for plaintiff-appellant.

Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr. and William H. Sturges, and The Sieving Law Firm, A.P.C., by Richard N. Sieving, for defendant-appellee JELD-WEN, Inc.

DIETZ, Judge.

Plaintiff Shearon Farms Townhome Owners Association II, Inc. is a homeowners' association in Wake County. In early 2018, some members of the association noticed that the siding of their homes was warped and distorted and looked as if it were melting.

After investigating the damage, the association brought tort and warranty claims against JELD-WEN, Inc., a window manufacturer, alleging that the damage was the result of defective windows installed in the townhomes. The trial court dismissed the association's claims against JELD-WEN after concluding that the association lacked standing to bring those claims either on its own behalf or on behalf of its members.

We affirm the dismissal for lack of standing. As explained below, this action seeks monetary recovery for damage to the exterior surfaces of townhomes owned by individual members of the association. Under settled standing precedent, those claims for individual money damages cannot be pursued by a homeowners' association under theories of associational standing.

Moreover, although the organizational declaration for the association obligates it to maintain and repair the exterior siding of those townhomes, that contractual obligation applies only to upkeep resulting from "normal usage and weathering." The declaration expressly excludes maintenance or repair resulting from the sort of unexpected damage alleged in this complaint.

Accordingly, the trial court properly determined that the association lacked standing to pursue the claims alleged against JELD-WEN because it had neither associational standing nor individual standing sufficient to confer a justiciable stake in the controversy. We therefore affirm the trial court's order.

Facts and Procedural History

Shearon Farms Townhome Owners Association II, Inc.[1] is a nonprofit homeowners' association incorporated in North Carolina. The association's members own townhomes in a community known as "Shearon Farms Townhomes II" within the Shearon Farms neighborhood in Wake County.

In early 2018, several townhome owners in the neighborhood reported to the association that the exterior siding on their townhomes

1. For ease of reference, we refer to Plaintiff Shearon Farms Townhome Owners Association II, Inc. as "Shearon Farms."

was severely damaged, as if it had melted. The association investigated and determined that this damage was "due to abnormal reflections of extremely high heat from the windows on townhome units." In May 2018, Shearon Farms filed this action against various parties involved in the construction of the townhomes and against JELD-WEN, Inc., the manufacturer of the windows installed in the townhomes.

JELD-WEN moved to dismiss the claims against it for lack of standing. After a hearing, the trial court granted the motion, finding a "lack of standing to pursue claims against Defendant JELD-WEN, INC. because Plaintiff is not legally entitled to assert claims pertaining to the windows and because the Plaintiff is not legally entitled to assert claims for warped, distorted, or melted siding." Shearon Farms timely appealed.

Analysis

I. Appealability

[1] Before we address the merits of this appeal, we must address a challenge to this Court's jurisdiction. Shearon Farms concedes that the challenged order is not a final judgment because the order dismissed its claims against JELD-WEN but not its claims against the other defendants named in the action. *See Pratt v. Staton*, 147 N.C. App. 771, 772–73, 556 S.E.2d 621, 623 (2001).

"Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court." *Crite v. Bussey*, 239 N.C. App. 19, 20, 767 S.E.2d 434, 435 (2015). "The reason for this rule is to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 76, 772 S.E.2d 93, 95 (2015).

There is a statutory exception to this general rule when an interlocutory order deprives the appellant of a substantial right which would be jeopardized absent immediate appellate review. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994); N.C. Gen. Stat §§ 1-277(a), 7A-27(b). Shearon Farms argues that the challenged order is immediately appealable under this "substantial rights doctrine" because there is a risk of inconsistent verdicts.

The inconsistent verdicts doctrine is a subset of the substantial rights doctrine and one that is often misunderstood. In general, there is no right to have all related claims decided in one proceeding. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 7, 362 S.E.2d

812, 816 (1987). Thus, the risk that a litigant may be forced to endure two trials, rather than one, does not by itself implicate a substantial right, even if those separate trials involve related issues or stem from the same underlying event.

But things are different when there is a risk of "inconsistent verdicts," meaning "a risk that different fact-finders would reach irreconcilable results when examining the same factual issues a second time." *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 19, 824 S.E.2d 436, 439 (2019). Importantly, not all claims involving the "same factual issues" create a risk of irreconcilable results when tried separately. For example, a fact may be relevant to two separate claims for two different reasons. In that circumstance, there is no substantial right to have those fact issues decided together. *See, e.g.*, *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 83–84, 711 S.E.2d 185, 192–93 (2011). But when the same fact is determinative of the same issue in multiple claims, there is a substantial right to have those factual issues determined by the same jury to avoid the risk that two juries decide that fact differently, leading to two judgments from the same initial lawsuit with incompatible outcomes. *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 25–26, 376 S.E.2d 488, 491–92 (1989).

Here, Shearon Farms brought claims against both JELD-WEN and a group of defendants involved in the construction of the townhomes. Many of the claims against the construction defendants are unrelated to JELD-WEN's windows. But some of the claims have overlapping factual allegations. Specifically, at least some claims against both sets of defendants involve questions of whether the windows are defective and caused the alleged damage to the siding of neighboring homes. The resolution of those fact questions is potentially determinative of both the claims against JELD-WEN and certain claims against other defendants that are still pending in the trial court. Thus, we agree with Shearon Farms that it has met its burden to show that there is a risk of inconsistent verdicts. Accordingly, we hold that the challenged order affects a substantial right and is immediately appealable.

II. Standing

Shearon Farms challenges the trial court's grant of a motion to dismiss for lack of standing. After reviewing the complaint and the recorded declaration attached to it, the trial court concluded as a matter of law that Shearon Farms lacked standing to pursue the negligence and warranty claims asserted against JELD-WEN:

> Defendant JELD-WEN, INC.'s Motion to Dismiss Plaintiff's Second Amended Complaint is GRANTED as a consequence of Plaintiff's lack of standing to pursue claims against Defendant JELD-WEN, INC. because Plaintiff is not legally entitled to assert claims pertaining to the windows and because the Plaintiff is not legally entitled to assert claims for warped, distorted, or melted siding.

At oral argument, Shearon Farms conceded that it understood the ruling to be one based on lack of standing. But in its briefing, Shearon Farms repeatedly refers to the standard for review of a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted. This is understandable because JELD-WEN brought its motion under Rule 12(b)(6) of the Rules of Civil Procedure, although it expressly asserted that the basis for the motion was that "Plaintiff lacks standing."

Standing is a question of "subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002). As a result, a "standing argument implicates Rule 12(b)(1)" of the Rules of Civil Procedure, which governs dismissals based on lack of subject matter jurisdiction. *Id.* at 113–14, 574 S.E.2d at 51. But, to be fair, this Court also has asserted in several cases that "lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted," creating confusion in our caselaw concerning the category of Rule 12 under which these claims should be pursued. *See SRS Arlington Offices 1, LLC v. Arlington Condo. Owners Ass'n, Inc.*, 234 N.C. App. 541, 545, 760 S.E.2d 330, 334 (2014).

Ultimately, this is irrelevant because this Court has held that a Rule 12 motion "is properly treated according to its substance rather than its label" and specifically has treated a Rule 12(b)(6) motion asserting jurisdictional issues as one brought under Rule 12(b)(1). *Williams v. New Hanover Cty. Bd. of Educ.*, 104 N.C. App. 425, 428, 409 S.E.2d 753, 755 (1991). Accordingly, in our analysis we treat the trial court's ruling as a decision on standing (as the court expressly stated in its order) and not as a dismissal on the merits for failure to state a claim on which relief can be granted.

We begin with an overview of our State's standing doctrine. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Fed. Point Yacht Club Ass'n, Inc. v. Moore*, 233 N.C. App. 298, 303, 758 S.E.2d 1, 4 (2014). "Standing is a necessary prerequisite to

a court's proper exercise of subject matter jurisdiction." *Neuse River Found.*, 155 N.C. App. at 113, 574 S.E.2d at 51.

Unlike the federal courts, our standing doctrine is not drawn from a constitutional "case or controversy" requirement. *Id.* at 114, 574 S.E.2d at 51–52. Instead, North Carolina's standing doctrine is grounded in the notion that a plaintiff must have suffered some injury sufficient to confer a genuine stake in a justiciable legal dispute:

> The rationale of the standing rule is that only one with a genuine grievance . . . can be trusted to battle the issue. The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues.

Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (brackets omitted).

As with other issues of subject matter jurisdiction, standing is a question of law. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). Where, as here, the trial court decided the standing question without making jurisdictional findings of fact, we review the legal question of standing *de novo* based on the record before the trial court. *Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 51.

A. Associational standing of Shearon Farms

[2] Shearon Farms first argues that it has standing under "the test articulated in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)." The principle articulated by the U.S. Supreme Court in *Hunt*, often referred to as "associational standing," confers standing on an association to bring suit on behalf of its members. Our Supreme Court adopted this federal test for use in North Carolina's standing doctrine. S*ee River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129–30, 388 S.E.2d 538, 555 (1990). As the Supreme Court explained in *River Birch*, the analysis of an associational standing claim involves three factors:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c)

> neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 130, 388 S.E.2d at 555.

The third factor of this test ordinarily is satisfied only when the association seeks declaratory or injunctive relief. This is so because "[w]hen an organization seeks declaratory or injunctive relief on behalf of its members, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Id.*

By contrast, this third factor ordinarily cannot be satisfied "where an association seeks to recover damages on behalf of its members" because individual damage claims by their nature are "not common to the entire membership, nor shared by all in equal degree." *Id.* Thus, in *River Birch*, the Supreme Court rejected a homeowners' association's claims for fraud and unfair trade practices on behalf of its members because those members did not share "the injury in equal degree" but instead had varying damages depending on how the alleged fraud and deceptive practices affected their property. *Id.* at 130–31, 388 S.E.2d at 555–56.

The same is true here. The association concedes that not all townhomes in the community suffered damage and that the damages to individual homes are not equal in degree. Thus, as with the Supreme Court in *River Birch*, "we cannot conclude that the damage claims are common to the entire membership." *Id.* at 130, 388 S.E.2d at 555.

But Shearon Farms argues that this case is distinguishable because the association is contractually obligated to repair the damage allegedly caused by JELD-WEN's windows and to then spread the costs of those repairs equally among the members of the association through assessments. Were that true, this would present a more difficult question of associational standing. But Shearon Farms is not contractually obligated to repair the damage to individual homeowners' property alleged in the complaint. The recorded declaration under which Shearon Farms contends that this contractual duty arises (and which Shearon Farms attached to its complaint) refutes this argument.

To be sure, as Shearon Farms contends, Article VIII of the declaration, in a section titled "Exterior Maintenance," imposes a contractual obligation on Shearon Farms to maintain and repair the exterior building surfaces of the individual townhomes:

> Section 1. Exterior Maintenance by Association. In addition to maintenance of the Townhome Common Elements, *the Association shall provide exterior maintenance upon each Living Unit which is subject to assessment hereunder, as follows*: paint, repair, replace and care for all roofs, gutters, downspouts, *exterior building surfaces*, trees, shrubs, grass, walks, mailboxes, fences installed by Declarant or approved by the Association, exterior post lights (excluding electricity therefor), and other exterior improvements.

(Emphasis added). But Article VIII of the declaration also includes another section that further defines the type of maintenance for which Shearon Farms is responsible and expressly excludes damages not caused by "normal usage and weathering":

> Section 4. Casualty Loss Not Included. Maintenance and repairs under this Article *arise from normal usage and weathering* and do not include maintenance and repairs made necessary by fire or other casualty *or damage*.

(Emphasis added).

We interpret this language in the declaration under ordinary contract principles subject only to an additional rule that we must strictly construe the declaration "in favor of the free use of land whenever strict construction does not contradict the plain and obvious purpose of the contracting parties." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 555, 633 S.E.2d 78, 85 (2006). Applying ordinary contract interpretation principles, the intent of this provision is clear and unambiguous: Shearon Farms is responsible for maintenance and repairs due to expected usage and weathering, but not for maintenance or repairs caused by unexpected damage, such as a fire.

We reach this interpretation by examining the plain language of the provision, beginning with the phrase "normal usage and weathering." The plain meaning of the word "normal" in this context means "regular, usual." *Normal*, *Oxford English Dictionary* (2nd ed. 1989). Thus, this first clause in Article VIII, Section 4 obligates the association to make repairs expected to occur through deterioration over time.

The second clause of Article VIII, Section 4 contrasts with the first by excluding "maintenance and repairs made necessary by fire or other casualty or damage." These three terms—"fire," "casualty," and

"damage"—all carry with them a meaning that indicates they are not normal and are not events that one would expect to occur simply given the passage of time. *See*, *e.g.*, *Fire*, *Oxford English Dictionary* (2nd ed. 1989); *Casualty*, *Oxford English Dictionary* (2nd ed. 1989); *Casualty*, *Black's Law Dictionary* (11th ed. 2019); *Damage*, *Oxford English Dictionary* (2nd ed. 1989); *Damage*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Thus, these two clauses draw a distinction between maintenance stemming from normal, expected "usage and weathering," and maintenance stemming from unexpected events that damage the property.

Here, the complaint does not allege any damage resulting from normal usage and weathering. The exterior surface damage described in the complaint is "melting" siding that was "severely damaged due to *abnormal* reflections of extremely high heat from the windows on townhome units." (Emphasis added). The claims against JELD-WEN seek recovery for these "abnormal" damages through various tort and warranty theories. Thus, under the plain language of the declaration, the association is not obligated by contract to repair this alleged damage, which is not due to normal usage or weathering.

Shearon Farms contends that we should ignore this plain language and instead interpret the provision to exclude only maintenance and repair costs that would be covered by the affected homeowners' standard property insurance policies. To support this argument, the association points to the phrase "casualty loss" in the subtitle of Article VIII, Section 4 and then to a separate section of the declaration that requires homeowners to maintain "casualty" insurance covering fire damage and other similar hazards. The association contends that, because "[d]efects from workmanship are not among those perils typically covered" by a standard property insurance policy, this Court should read these two separate provisions *in pari materia* and interpret Article VIII, Section 4 as excluding only property damage that would be covered by standard property insurance policies and accompanying endorsements.

This argument fails for two reasons. First, there are countless, simple ways to draft a provision that would exclude from the association's maintenance obligations any damage covered by homeowners' insurance policies. That is not what the plain, unambiguous language of Article VIII, Section 4 states. Rather than distinguishing between insured and uninsured damage, Article VIII distinguishes between expected maintenance and repairs—those resulting from "normal usage and weathering"—and unexpected maintenance and repairs resulting

from "fire or other casualty or damage." We must give meaning to this unambiguous language. *Hodgin v. Brighton*, 196 N.C. App. 126, 128–29, 674 S.E.2d 444, 446 (2009).

Second, the phrase "casualty loss" is not one used exclusively in the insurance context. For example, it is generally understood in the tax context to mean "the total or partial destruction of an asset resulting from *an unexpected or unusual event*, such as an automobile accident or a tornado." *Loss*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). And, more importantly, it has a meaning in ordinary English usage: a loss due to a "serious accident" or other "unfortunate occurrence." *Casualty*, *Oxford English Dictionary* (2nd ed. 1989). Nothing in the text or structure of Article VIII indicates that we should apply special meanings exclusive to the insurance field, rather than applying the plain meaning of the chosen words.

Moreover, the association's argument downplays the particular phrasing of Article VIII, which not only fails to mention insurance but also is not limited to the narrow definition of "casualty loss" that may be found in many homeowners' insurance policies. Instead, Article VIII broadly excludes from the association's maintenance obligations all "maintenance and repairs made necessary by fire or other casualty *or damage*." (Emphasis added). This phrasing indicates that casualty and damage are not entirely coextensive and that the drafter included both terms to achieve the desired scope of the provision. The association's interpretation of that provision would read the phrase "or damage" out of the clause, limiting it solely to "fire" and to "casualty" losses as that term is understood in the property insurance context. Again, this runs counter to settled principles of contract interpretation, which require us to give meaning to the phrase "or damage." *Hodgin*, 196 N.C. App. at 128–29, 674 S.E.2d at 446. Accordingly, we reject Shearon Farms' argument that Article VIII, Section 4 is limited to losses covered by property insurance.

Finally, the Supreme Court also made a separate observation about the standing of the homeowners' association in *River Birch* that is equally applicable here: the Court rejected the use of associational standing because it could deprive individual members of other legal remedies that may be available to them. 326 N.C. at 131, 388 S.E.2d at 556.

That concern also is present in this case. Homeowners whose siding is damaged by the windows in their neighbors' homes may have other claims beyond those asserted in this action—most notably, potential

claims against the neighbors whose windows are allegedly causing the damage. But the association, which represents all its members, cannot "be trusted to battle" that dispute. *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282. Moreover, those claims—some members of the association suing other members—unquestionably do not "inure to the benefit" of all association members equally. *River Birch*, 326 N.C. at 555, 388 S.E.2d at 130. In a case in which some neighbors contend that the windows of other neighbors' homes are damaging their property, an association representing all those members simply does not have the necessary stake in the outcome to ensure "concrete adverseness which sharpens the presentations of issues." *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282. We therefore hold that Shearon Farms has not met its burden to show that it can pursue its claims based on the doctrine of associational standing described in *Hunt* and *River Birch*.

B. Independent standing of Shearon Farms

[3] Shearon Farms next argues that it has independent legal standing—separate from principles of standing on behalf of its members—because the association itself is "obligated to maintain the exterior surfaces of the townhomes" under the terms of the declaration. As explained above, this argument is meritless. The declaration does not require the association to maintain or repair the damage to the exterior surfaces of the individual townhomes that is alleged in the complaint. Additionally, there are no allegations in the complaint of damage caused by JELD-WEN to any property of the association itself, such as the common elements of the community.[2] Accordingly, the trial court properly rejected Shearon Farms' arguments concerning its independent standing to pursue claims against JELD-WEN.

C. Affidavit evidencing assignment of homeowners' claims

[4] Lastly, Shearon Farms argues that the trial court erred by declining to accept an affidavit it submitted in opposition to JELD-WEN's motion to dismiss. That affidavit certified the accuracy of several assignments by homeowners who are members of the association, transferring their rights to causes of action against JELD-WEN to the association. Shearon Farms contends that this affidavit cured any defects with respect to

2. The complaint alleges damage to common elements but those damages are attributed to other defendants named in the complaint. Those defendants are not parties to this appeal, which concerns separate claims against JELD-WEN.

standing and that the trial court erred by not considering that affidavit in its standing analysis.

We reject this argument. "Our courts have repeatedly held that standing is measured at the time the pleadings are filed." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778 (2009). This is so, our Supreme Court has explained, because of the "basic rule that the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986). The affidavit that Shearon Farms sought to introduce into the trial record documented assignments that occurred *after* it commenced this lawsuit. The trial court properly declined to consider those assignments because they were not relevant to the question of whether the association had standing at the time it brought suit.

Conclusion

Plaintiff Shearon Farms Townhome Owners Association II, Inc. lacks standing to pursue the claims against JELD-WEN, Inc. asserted in the complaint. We therefore affirm the trial court's order dismissing those claims for lack of standing.

AFFIRMED.

Judges BRYANT and STROUD concur.

STATE OF NORTH CAROLINA
v.
ALLEN MAURICE MORRISON

No. COA19-1150

Filed 4 August 2020

1. Evidence—lay witness testimony—type of firearm used—rational basis of witness's perception

In a case involving multiple counts of discharging a weapon into an occupied vehicle, the trial court did not err in allowing a lay witness to testify that, based on its sound, the weapon used by defendant was semi-automatic rather than automatic. The testimony was rationally based on the witness's perception where the witness was driving the truck struck by the bullets and had first-hand knowledge of the incident, was a military veteran familiar with both automatic and semi-automatic weapons, had heard both types being fired and could differentiate between the two, and clearly heard the shots fired at his truck.

2. Appeal and Error—preservation of issues—double jeopardy argument—failure to object at trial

Defendant's argument on appeal—that sentencing him on multiple counts of discharging a weapon into an occupied vehicle violated his right to be free from double jeopardy—was dismissed where defendant failed to preserve the argument by objecting at trial and did not demonstrate exceptional circumstances for the Court of Appeals to exercise its discretion to review the argument on the merits.

3. Criminal Law—discharging a weapon into an occupied vehicle—multiple counts—evidentiary support of each count

Where defendant was charged with seven counts of discharging a weapon into an occupied vehicle, the trial court did not err by denying defendant's motion to dismiss six of the charges for insufficiency of the evidence based on his claim that the evidence only supported a single charge. Since the State presented substantial evidence that defendant used a semi-automatic weapon and that his actions did not constitute a single episode of rapid gunfire but were separate and distinct acts occurring over a period of time, the trial court correctly left it to the jury to determine whether the evidence supported seven convictions for discharging a weapon into an occupied vehicle.

STATE v. MORRISON

[272 N.C. App. 656 (2020)]

Appeal by Defendant from judgment and order entered 5 June 2017 by Judge Mary Ann Tally in Superior Court, Hoke County. Heard in the Court of Appeals 26 May 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Carella Legal Services, PLLC, by John F. Carella, for Defendant.

McGEE, Chief Judge.

Allen Maurice Morrison ("Defendant") appeals from judgment entered 5 June 2019 after a jury found him guilty on one count of possession of a firearm by a felon, three counts of assault with a deadly weapon, and seven out of eight counts of discharging a firearm into an occupied vehicle ("DWOV"). Defendant argues the trial court erred by: (1) admitting a lay witness' testimony when expert testimony was required; (2) violating his right to be free from double jeopardy under the United States and North Carolina Constitutions by sentencing him on multiple counts of DWOV; and (3) denying his motion to dismiss six of the seven counts of DWOV for which he was convicted. We find no error on appeal.

I. Factual and Procedural History

Gwendolyn Blue ("Ms. Blue") was Defendant's live-in girlfriend at his home in Raeford, North Carolina (the "house") on the evening of 13 January 2017. Jessica Oldham ("Ms. Oldham," together with Ms. Blue "the women") was visiting the house for the first time that evening, having just met Ms. Blue and having never met Defendant. Both the women testified that shortly after they arrived at the house, Ms. Blue and Defendant got into an argument and Defendant hit Ms. Blue in the face. Later, Ms. Oldham gave Defendant $200.00 "for him to make more money with[,]" presumably through some kind of drug transaction. However, the "money-making" event never occurred. Defendant and Ms. Blue eventually "laid down and took a nap" in Defendant's bedroom. Ms. Oldham also fell asleep in the house.

When Ms. Oldham awoke at approximately 2:00 a.m. on 14 January 2017, she went into Defendant's bedroom to ask Defendant to return her $200.00 so she could go home. Ms. Oldham testified that she gently woke Defendant to request the return of her money. Ms. Blue testified that, Defendant "got angry and jumped up and kicked [Ms. Oldham] in the stomach" so hard that she "flew through the door[,]" then Defendant

"threw some money at" Ms. Oldham. Ms. Oldham testified that Defendant "kicked me dead in my stomach harder than I've ever been kicked in my life[,]" sending her through the bedroom door and into the kitchen, where it took her awhile to catch her breath. Ms. Oldham testified that she told Defendant she just wanted her money so she could leave, and Defendant threw a rolled up wad of bills at her, hitting her in the face. Ms. Oldham left the house, joined by Ms. Blue, who had decided she also wanted to get away from Defendant. The women left on foot, since neither of them had a vehicle at the house.

The women were walking toward Highway 211, not yet far from the house, when they saw Defendant had come out onto the front porch of the house. Ms. Oldham testified she told Ms. Blue: " 'He's got a gun.' [So w]e took off running. He started shooting at us." Both women testified they saw Defendant standing on the porch of the house, holding a firearm and shooting it in their direction. Ms. Blue testified that the gun she saw Defendant shooting at her was a black "assault rifle," which she had seen Defendant shoot before. Ms. Oldham could not describe the gun other than suggesting it was not a handgun she had seen earlier that day in Defendant's Range Rover (the "Range Rover"). The women ran into nearby woods for cover, then continued to run toward Highway 211, which was nearby. Ms. Oldham testified that she heard "at least ten" bullets fired, hitting the trees as she "[ran] in a zigzag through the trees." The women reached Highway 211, screaming, waving their arms, and sometimes standing in the lane of oncoming traffic in an attempt to get help, but a number of vehicles drove around and past them.

Retired veteran Leslie A. Mortenson ("Mr. Mortenson"), a UPS contractor, was driving west on Highway 211 at approximately 2:00 a.m. on 14 January 2017, heading to his home in Raeford from a repair job in South Carolina.[1] As Mr. Mortenson was driving just west of central Raeford on Highway 211, he "c[a]me across two young ladies in the highway waving frantically for [him] to stop"—these two women were Ms. Oldham and Ms. Blue. Mr. Mortenson stopped his Ford Ranger pickup truck (the "truck") in the middle of the road and rolled down his front passenger window to talk to the women. The women told Mr. Mortenson that "someone was after them, was trying to hurt them," and when he asked who was "after them," "they told [him] the name of that person," was "Allen Morrison"—Defendant. Mr. Mortenson testified "at that time,

1. In the State's brief, it describes Mr. Mortenson as a "retired Special Forces veteran with twenty-six years and ten months military service," but we cannot find record evidence supporting this description of Mr. Mortenson as having been a member of "Special Forces."

I was sitting in the middle of the highway, so I pulled over onto the shoulder. [The women] started screaming frantically at that time that [Defendant] was . . . coming from Highway 211 behind me, [ ] then he pulled in front of me, blocking my exit." Ms. Oldham testified: "I could see the headlights of [Defendant's] Range Rover coming. So I was like, 'I think that's him,' you know. And I was just in a panic, basically."

Mr. Mortenson testified the Range Rover "pulled diagonally in front of me, so [Defendant's] passenger-door area of his vehicle[ ] was ['just a few feet' from the] front of my vehicle." Mr. Mortenson lowered his front driver's side window and stated that Defendant's "passenger window was down. The two [women] were standing behind my passenger door. There was words being said back and forth[, '[a] lot of profanity']." Ms. Oldham testified she told Mr. Mortenson, about Defendant, "[h]e's got a gun." Mr. Mortenson, a veteran, retrieved a .357 revolver from under his seat and "had it in [his] hand, ready – ready to return fire if fired upon." Ms. Oldham told Mr. Mortenson: " 'We're just trying to get away. [Defendant's] shooting at us,' you know, just kind of in a panic." Mr. Mortenson testified he heard Defendant say to the women: "You better get you[r] a---s in my vehicle. This s---'s fixing to get real."

Mr. Mortenson testified that Defendant was the only person in the Range Rover, and that he could clearly see Defendant's face as Defendant leaned over so that his face was visible through the open front passenger side window. "Then there was a rifle stuck out the passenger window of [the Range Rover], towards the [women]." Mr. Mortenson stated: "I could tell, because I was so close to it, that it was a smaller-caliber rifle, because I could see the tip of the barrel." Once Mr. Mortenson saw Defendant's rifle, he got "ready to return fire if fired upon" by "center[ing his left hand, holding the revolver,] on the mirror of my vehicle on the driver's door." Mr. Mortenson stated: "I was not worried about being shot, because the way the [Range Rover] was sitting and the door pillar of [the Range Rover], [Defendant] could not get the rifle pointed back towards me. But he did have a clear shot at the [women]."

Defendant continued screaming at and ordering the women to get into the Range Rover, mostly arguing with Ms. Blue, but the women refused to give up the relative security of their positions behind the open front passenger door of the truck and go with Defendant. Mr. Mortenson stated that one of the women "screamed at [Defendant] that I [also] had a weapon." Defendant then moved the Range Rover from its position perpendicular to the front of the truck and repositioned it perpendicular to the rear of the truck, approximately five to seven feet from the tailgate of the truck, thereby providing Defendant more freedom to fire the

rifle out of the open front driver's side window, and putting the women as well as Mr. Mortenson in Defendant's line of fire. Defendant's maneuver also severely limited Mr. Mortenson's ability to aim his revolver at Defendant. According to Mr. Mortenson: "That's when [Defendant] started shooting, and I floored the vehicle to exit the location, with one of the [women] still protruding from the vehicle." As Defendant was firing the rifle, "the [women] jumped in [the truck], because . . . at that point, that was their only protection."

Defendant continued to fire at the truck as it drove away, but Defendant did not chase the truck. Mr. Mortenson testified at trial that he heard approximately seven shots. Based on his prior experience with firearms in the military, Mr. Mortenson determined "they were individual shots but at a fairly rapid pace. [T]hey weren't as rapid as an automatic weapon[,]" and he further testified that Defendant was firing shots at them both before he pulled away, and after he sped away westbound on Highway 211. Ms. Oldham testified to hearing bullets hit the back of the truck as they drove away. Defendant made a hard turn through a ditch and drove off heading east on Highway 211, back in the direction of the house.

Mr. Mortenson drove the two women west on Highway 211 to a nearby convenience store where he parked and called 911. Sargent Sanchez ("Sargent Sanchez") and Detective Carlos Castaneda ("Detective Castaneda" and, with Sargent Sanchez, the "officers") of the Hoke County Sheriff's Office arrived at the convenience store within approximately "fifteen to twenty minutes."[2] The officers took statements from the women, then allowed them to leave with a friend. The officers also interviewed Mr. Mortenson, examined the back of the truck, and took photographs of "six impacts . . . where projectiles had hit the tailgate of the vehicle."

Mr. Mortenson also led the officers to the scene of the shooting where officers collected a discharged .22 caliber projectile from the road, and documented six .22 caliber shell casings, which they later collected. The officers then followed Mr. Mortenson home so that he could dismantle the tailgate of the truck. The officers recovered two projectiles from the tailgate of the truck, which Detective Castaneda identified as having "come from a .22-caliber rifle." On 17 January 2017, Mr. Mortenson called the Sheriff's Department to report that he had located two more bullet holes in the truck. Detective Castaneda returned to the

2. The first name of Sergeant Sanchez does not appear in the record on appeal.

scene of the shooting that afternoon and recovered an additional four spent .22 caliber shell casings, raising the total number of .22 caliber shell casings found at the site to ten.

Defendant moved for dismissal at the close of the State's evidence, which the trial court denied. Defendant presented no evidence at trial and, on 5 June 2019, the jury found Defendant guilty on seven of the eight counts of DWOV. Defendant was sentenced to active consecutive sentences of fifty-nine to eighty-three months for the first count of DWOV, fifty-nine to eighty-three months for the second DWOV count, and an additional fifty-nine to eighty-three months for the remaining five counts, which the trial court consolidated. Defendant was also given an active sentence of twelve to twenty-four months for possession of a firearm by a felon, to run consecutive to the DWOV judgments, but the trial court arrested judgment on the three counts of assault, finding they were "subsumed by the factual basis for the charge[s] of discharging a weapon into an occupied vehicle." Defendant appeals.

II. Analysis

A. *Admission of Lay Witness Testimony*

[1] Defendant argues: "The Trial Court Committed Plain Error by Admitting the Testimony of a Lay Witness that, Based Solely on its Sound, a Firearm that was Never Recovered was Semi-Automatic Rather than Automatic." We disagree.

Specifically, Defendant contends that Mr. Mortenson's testimony concerning the rapidity of the rifle shots as Defendant was shooting into the fleeing truck constituted expert testimony and, thus, should have only been given by an expert qualified under N.C. Gen. Stat. § 8C-1, Rule 702. Although Defendant failed to object to the testimony at trial, Defendant contends on appeal that admission of the now-challenged testimony constituted plain error and warrants a new trial.

1. Standard of Review

"[A] prerequisite to our engaging in a 'plain error' analysis is the determination that the [trial court's action] constitute[d] 'error' at all." *State v. Fisher*, 171 N.C. App. 201, 212–13, 614 S.E.2d 428, 436 (2005) (citation omitted). Because we find no error, we also find no plain error.

We review the trial court's decision to admit lay testimony for abuse of discretion. *State v. Hill*, 247 N.C. App. 342, 346, 785 S.E.2d 178, 181 (2016) (citing *State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000)). "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). Lay witness testimony is governed by N.C. Gen. Stat. § 8C-1, Rule 701:

> If 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.G.S. § 8C-1, Rule 701 (2019).

When a lay witness presents testimony based on opinion or inference, "a foundation must first be laid that the testimony is rationally based on the lay witness's perception." *State v. Mitchell*, __ N.C. App. __, 840 S.E.2d 276, 283 (N.C. Ct. App. 2020) (citation omitted); *see also State v. Givens*, 95 N.C. App. 72, 79, 381 S.E.2d 869, 873 (1989) (finding an officer's testimony about drug paraphernalia violated Rule 701 because the State failed to show the officer had "a basis of personal knowledge for his opinion."). However, this Court has repeatedly held that the ability of a witness to accurately assess the facts of a situation "is a question of credibility rather than a question of admissibility." *State v. Green*, 77 N.C. App. 429, 431, 335 S.E.2d 176, 177 (1985) (citation omitted) ("As long as the time and distance of the observation enable the witness to do more than hazard a guess, the testimony is admissible."); *see also State v. Norman*, 213 N.C. App. 114, 119, 711 S.E.2d 849, 854 (2011) (citations omitted) ("The conditions under which the witness observed the person, and the opportunity to observe him, go to the weight, not the admissibility, of the testimony."). There is no doubt that Mr. Mortenson's testimony concerning the speed with which Defendant fired the rifle was "helpful to . . . the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701(b). We therefore focus on N.C.G.S. § 8C-1, Rule 701(a).

2. Testimony Rationally Based on the Perception of the Witness

Because Mr. Mortenson was driving the truck that was hit by multiple .22 caliber projectiles, fired by Defendant, the State established Mr. Mortenson's first-hand knowledge of the shooting incident. Although the State could have been more thorough in laying the foundation for Mr. Mortenson's testimony differentiating between the sound of, and spacing between, automatic and semi-automatic rifle fire, the foundation laid was sufficient to support the testimony. Because Mr. Mortenson's testimony was properly admitted, there was no reason for the trial court to exclude it *sua sponte*. We find no error.

We also note that, had Defendant objected to the testimony, the State would have had the opportunity to further develop the foundation for this testimony at trial. Concerning the shots fired by Defendant, the following colloquy occurred between the State and Mr. Mortenson:

> Q. Can you describe the pace at which those shots—that you heard those shots?
>
> A. They were—they were individual shots but at a fairly rapid pace. It—they weren't as rapid as an automatic weapon.
>
> Q. Are you familiar with automatic-weapon fire from your time in the military?
>
> A. Yes, sir.
>
> Q. So you've heard that before?
>
> A. Yes, sir.
>
> Q. You've heard shots from a semiautomatic before?
>
> A. Yes, sir.
>
> Q. And is it your testimony that these shots were quick but not—not quick in the sense of fully automatic, one-trigger pulls? Right?
>
> A. Yes, sir. Yes, sir.

Mr. Mortenson testified to the following: he had served in the military for nearly twenty-seven years; he was familiar with both automatic and semi-automatic rifle fire; he had heard both types of weapons being fired; he could differentiate between the two; he clearly heard the shots that were fired; and the shots he heard were not from an automatic weapon (or, by inference, not from a weapon that was set to fire in "automatic" bursts). We hold the State laid a sufficient foundation "that [Mr. Mortenson's testimony was] rationally based on [his] perception." *Mitchell*, __ N.C. App. at __, 840 S.E.2d at 283 (citation omitted); *see also Fisher*, 171 N.C. App. at 214, 614 S.E.2d at 437.

Mr. Mortenson's presence at the scene of the crime qualified him to present his personal perception of the event, including his perception of the gunfire. Mr. Mortenson's prior military experience simply provided contextual support for a finding that his opinion was rationally based. N.C.G.S. § 8C-1, Rule 701. Furthermore, Mr. Mortenson's testimony was necessary to the determination of a fact in issue: whether Defendant

fired seven separate and distinct shots. *Id.* Mr. Mortenson's testimony was based on facts and circumstances that allowed him "to do more than hazard a guess[,]" was "a question of credibility [for the jury to decide] rather than a question of admissibility[,]" and, therefore, "the testimony [wa]s admissible." *Green*, 77 N.C. App. at 431, 335 S.E.2d at 177 (citations omitted). Defendant has failed to show error, much less plain error.

B. *Double Jeopardy*

[2] Defendant argues that the trial court sentenced Defendant in violation of his Fifth Amendment right to be free from double jeopardy. However, because Defendant did not preserve this argument by objection at trial, we dismiss it.

The North Carolina Rules of Appellate Procedure require a party to preserve an issue for appeal by "present[ing] to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C. R. App. P. 10. In this case Defendant did not raise any objection based on issues of double jeopardy. In failing to raise the issue of double jeopardy at trial, Defendant has not preserved the issue for appeal. *See State v. Kirkwood*, 229 N.C. App. 656, 664, 747 S.E.2d 730, 736 (2013) (citation omitted) ("Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal."). "The decision to review an unpreserved argument relating to double jeopardy is entirely discretionary[,]" *State v. Mulder*, 233 N.C. App. 82, 87, 755 S.E.2d 98, 101 (2014), but our Rules of Appellate Procedure counsel we exercise this discretion sparingly. *See* N.C. R. App. P. 2 (2019); *State v. Gayton-Barbosa*, 197 N.C. App. 129, 134, 676 S.E.2d 586, 589 (2009) (citation omitted) ("the Supreme Court has stated that this residual power to vary the default provisions of the appellate procedure rules should only be invoked rarely and in 'exceptional circumstances.' "); *see also Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008). Defendant has not demonstrated the exceptional circumstances required to support a decision by this Court to exercise our discretion for the purpose of considering the merits of Defendant's unpreserved double jeopardy argument. This argument is dismissed.[3]

3. We note that our analyses of Defendant's other arguments on appeal lead us to the conclusion that Defendant's double jeopardy argument was unlikely to succeed on the merits.

C. *Defendant's Motion to Dismiss for Insufficiency of Evidence*

[3] Defendant further argues: "The Trial Court Erred by Denying [Defendant's] Motion to Dismiss for Insufficiency of the Evidence as to Seven Charges of Discharging a Firearm into an Occupied Vehicle, Where the Evidence Supported Only a Single Charge." We disagree.

1. Standard of Review

Our standard of review on a defendant's motion to dismiss is well-settled:

> We review denial of a motion to dismiss criminal charges *de novo*, to determine "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." Substantial evidence is relevant evidence that a reasonable mind would find adequate to support a conclusion. We must consider evidence in a light most favorable to the State and give the State the benefit of every reasonable inference from the evidence.

State v. Mobley, 206 N.C. App. 285, 291, 696 S.E.2d 862, 866 (2010) (citations omitted). This Court has noted evidence that a reasonable mind might accept as adequate to support a conclusion:

> " 'Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' "

Kirkwood, 229 N.C. App. at 661–62, 747 S.E.2d at 734 (citations omitted). Further:

> "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss

> should be denied," however, if the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed[.]"

State v. Nobles, 350 N.C. 483, 504, 515 S.E.2d 885, 898 (1999) (citations omitted).

2. Discharging a Weapon into an Occupied Vehicle

In North Carolina, any person who "willfully or wantonly discharges a weapon . . . into any occupied vehicle . . . is guilty of a Class D felony." N.C. Gen. Stat. § 14-34.1(b) (2019). N.C.G.S. § 14-34.1(a) defines weapon as "any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second[.]" Defendant only contests six of his seven convictions for DWOV. Therefore, for the purposes of N.C.G.S. § 14-34.1(b), Defendant does not contest that the rifle he fired constituted a "weapon" or that he "discharged" the "weapon" seven times into "an occupied vehicle," *i.e.*, the truck. N.C.G.S. § 14-34.1(b). Further, Defendant acknowledges that the *first* shot fired into the truck *was* committed "willfully or wantonly." *Id.* Defendant's argument on appeal is limited to the question of whether the State failed to prove Defendant's six *additional* shots into the truck were "discharged" "willfully or wantonly." *Id.*

a. Automatic Rifle

Defendant states: "The trial court denied his motion and specifically allowed the eight separate counts of DWOV to go to the jury 'based on the testimony of Mr. Mortenson.' " Defendant primarily relies on his contention that there was insufficient evidence to dismiss the possibility Defendant used an automatic weapon in the shooting. Defendant contends that, if he did use an automatic weapon, then all seven projectiles that hit the truck were likely the result of a single pull of the rifle's trigger, and therefore constituted a single act, not seven distinct acts. *See State v. Rambert*, 341 N.C. 173, 176, 459 S.E.2d 510, 513 (1995); *Nobles*, 350 N.C. at 505, 515 S.E.2d at 899; *Kirkwood*, 229 N.C. App. at 667, 747 S.E.2d at 738.

However, Mr. Mortenson's testimony, which we have held was not improperly admitted, included testimony that he was familiar with both automatic and semi-automatic firearms from his nearly twenty-seven-year military career. Mr. Mortenson testified that he could tell the difference between the sound of automatic and semi-automatic gunfire, and the shots he heard as Defendant was firing a rifle into his fleeing,

occupied truck were from a semi-automatic weapon, not from an automatic weapon. Because this testimony was properly in evidence, the weight and credibility determinations concerning this testimony were for the jury to decide. *Kirkwood*, 229 N.C. App. at 661–62, 747 S.E.2d at 734. The jury, through its verdicts, determined that Defendant's acts of firing a weapon seven times into the occupied truck did *not* constitute a single act of automatic fire, but seven distinct and separate acts.

b. Semi-Automatic Rifle

Defendant further argues that even if he was firing a semi-automatic weapon into the occupied truck, the State still failed to prove more than one continuous act:

> Even if the weapon were a semi-automatic assault rifle, the lack of any clear separation among the rapid shots in direction or time indicates that the firing at [the] truck was a single act. In *Rambert*, *Nobles*, and *Kirkwood*, the character of the firearm – which was specifically identified in each case – was only one of several factors. Even on that factor, the State failed to meet its burden here. The allegedly semi-automatic sound of the unidentified firearm in this case did not provide substantial evidence that the function of the weapon "required that defendant employ his thought processes each time he fired the weapon." *Rambert*, 341 N.C. at 176-77, 459 S.E.2d at 513.

Initially, through Mr. Mortenson's testimony, the State presented substantial evidence "identifying" the weapon Defendant used as a semi-automatic .22 caliber rifle. Though it is possible to purchase or modify certain firearms so they can be set to fire in either automatic or semi-automatic modes, it was unnecessary for the State to prove that the .22 caliber rifle *could not* be used as an automatic rifle, only that Defendant *was not* using it as such when he repeatedly fired into the truck occupied by Mr. Mortenson and the women. A semi-automatic rifle requires the person using it to pull the trigger each and every time that person wants to shoot the rifle at a target. Defendant asks this Court to conclude that the State presented insufficient evidence that Defendant had the requisite intent—willfully and wantonly—to discharge his weapon into the occupied truck for the six shots Defendant fired subsequent to the first shot fired into the truck. Defendant continues:

> The State also failed to provide evidence identifying the firearm used and the nature of its firing mechanism – evidence critical to the decisions in *Rambert*, *Nobles*, and

> *Kirkwood*. Each of those cases involved a "revolver," while the two witnesses who claimed to see the weapon in this case described it as an "assault rifle" and definitely not a "handgun."

Defendant's focus on whether the weapon was a rifle or a handgun is misplaced, and we held above that Mr. Mortenson's testimony was proper and sufficient for the jury to determine the rifle Defendant used was semi-automatic—therefore requiring Defendant to pull the trigger each time he chose to fire another shot into the fleeing truck. It was not necessary to identify the exact "nature of its firing mechanism," only that a single trigger pull of the rifle Defendant was using released only a single projectile—*i.e.*, that the rifle was not firing on automatic. In *Rambert*, our Supreme Court held:

> [The] defendant's actions were three distinct and, therefore, separate events. *Each shot*, fired from a pistol, as opposed to a machine gun *or other automatic weapon*, required that defendant *employ his thought processes each time he fired the weapon*. Each act was distinct in time, and each bullet hit the vehicle in a different place. This decision is consistent with prior case law.

Rambert, 341 N.C. at 176–77, 459 S.E.2d at 513 (citation omitted). In *Nobles*, the presence of seven bullet holes in the victim's vehicle was heavily relied on by our Supreme Court to justify seven distinct charges of DWOV, even though witnesses testified that they heard only four gunshots and only four shell casings were recovered at the scene of the crime. *Nobles*, 350 N.C. 483, 515 S.E.2d 885. In *State v. Hagans*, this Court went even further to find it "conceivable that defendant could have been indicted for six counts of attempted discharge of a firearm into occupied property[,]" where "the State's evidence tended to show that seven shots were fired toward [the] car and that one bullet hole was found in [the] car." *State v. Hagans*, 188 N.C. App. 799, 805, 656 S.E.2d 704, 708 (2008). In *Kirkwood*, the evidence showed that "three gunshots were fired in quick succession. [Two witnesses] each heard three distinct although rapid gunshots." *Kirkwood*, 229 N.C. App. at 667–68, 747 S.E.2d at 738. Mr. Mortenson, a veteran, also heard "distinct although rapid gunshots[,]" *id.*, which prompted the women's quick entry into the truck, as well as his decision to press the accelerator of the truck and speed away as Defendant's bullets kept hitting the truck. Further, the evidence in *Kirkwood* did not establish the weapon used, or whether the defendant was the sole shooter:

> We note that, based on our review of the record, there are several scenarios of the shooting supported by the evidence. For example, it is possible that two gunmen in the SUV, each using a different gun, fired one or more shots into the house. It is further possible that one gunman used both guns while shooting. It is also possible, however, that a single gunman used only the revolver.
>
> However, despite this uncertainty as to the number of shooters and whether only the revolver rather than both guns was used in the shooting, the State's evidence nevertheless tended to show that each of the three shots for which [the] defendant [ ] was convicted was "distinct in time, and each bullet hit the [house] in a different place."

Id. at 668, 747 S.E.2d at 738 (citation omitted).

Applying the logic of *Rambert*, *Nobles*, and *Kirkwood*, because the weapon Defendant used was not "a machine gun or other automatic weapon," *Rambert*, 341 N.C. at 177, 459 S.E.2d at 513—it was a weapon that required Defendant to pull and release the trigger each time he decided to shoot into the occupied truck—Defendant's use of the semi-automatic rifle "required that defendant employ his thought processes each time he fired the weapon." *Id.*

Defendant further argues:

> The State did not present evidence of shots separated in time and fired into a vehicle from different angles, as in *Rambert* and *Nobles*. To the contrary, the State's evidence was that [Defendant] drove around the truck but only fired at it from behind as it was driving away. Every bullet entered the back of the truck. This was a single episode of "rapid" gunfire.

(citations omitted). It is elementary that every "shot" from a single weapon is "separated in time." Further, the Court in *Rambert* did not presume to establish a threshold for sufficient relevant evidence applicable to all similar crimes. Each set of facts is different and must be considered in context. There is certainly no holding in *Rambert* or *Nobles* that prevents multiple convictions for DWOV simply because the vehicle is racing away from the gunfire on a relatively straight roadway. If Defendant had started firing while he was still in front of the truck, and Mr. Mortenson had fled by driving past Defendant, the pattern of bullet holes in the truck might have more closely resembled those

in *Rambert*, but Defendant apparently did not decide to open fire on the truck until he was well positioned behind it. *Rambert*, 341 N.C. at 176–77, 459 S.E.2d at 513.

In addition, Mr. Mortenson testified that Defendant was firing at the truck before he "floored the truck to exit the situation," and that the shooting continued as he was trying to distance himself and the women from Defendant by speeding west down Highway 211. The reason Mr. Mortenson hit his accelerator is because Defendant had started shooting at them in the truck. Ms. Oldham's testimony corroborated Mr. Mortenson's, and she testified that Defendant started firing before she and Ms. Blue had entered the truck so she "just pushed her [Ms. Blue] in the truck," then Ms. Oldham "hop[ped] in as much as [she could,]" and told Mr. Mortenson "[g]o, go, go." Ms. Oldham continued: "And whenever we pulled off, you could just hear the bullets hitting the truck—the back of the truck." "[H]alf of my body was in the truck, and I was trying to get the door shut. But like I said, when we drove off, he just lit—I mean, [Defendant] shot up the back of the truck." Ms. Oldham stated that she was on the phone with her boyfriend during the incident, and further testified:

> [W]henever I had first got into [the] truck, I remember being on the phone with my boyfriend at the time and being like, "He's shooting at us." And he thought I was joking. Like, he thought that it was a joke. And I was like, "I'm serious." And then he heard gunshots, and he was like, "Oh, my God, babe. This is really happening." And I was like, "Yes."

Defendant argues that the State failed to present sufficient evidence pursuant to the requirements of *Rambert*, *Nobles*, and *Kirkwood* to prove seven separate acts of DWOV. Viewed in the light most favorable to the State and drawing all reasonable inferences in favor of the State, there was substantial evidence from which reasonable jurors could have determined seven of the shots Defendant fired into the occupied truck were done "willfully or wantonly." N.C.G.S. § 14–34.1. The State presented substantial evidence that Defendant's actions did not constitute "a single episode of 'rapid' gunfire" but, rather, "separate and distinct acts" that occurred over a period of time within which Defendant started firing, the women jumped into the truck, Ms. Oldham told Mr. Mortenson to "[g]o, go, go," then had a short exchange with her boyfriend on the phone before more shots were fired at the truck as it sped away. The trial court did not err in denying Defendant's motion to dismiss, and correctly left it to the jury to determine whether the evidence proved

beyond a reasonable doubt Defendant committed seven "separate acts" supporting seven convictions for DWOV.

IV. Conclusion

For the reasons stated above, we dismiss Defendant's double jeopardy argument and hold the trial court did not err in permitting Mr. Mortenson to testify to his opinion of the type of gunfire he heard, and did not err in denying Defendant's motion to dismiss. We therefore find no error.

NO ERROR.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JOSHUA VORNDRAN

No. COA19-889

Filed 4 August 2020

Sexual Offenders—secret peeping—sex offender registration—jurisdiction for different judge to order registration

After a conviction of felony secret peeping where the trial judge—with defendant's consent—delayed for twelve months a decision as to whether defendant would be required to register as a sex offender in order to allow defendant to show he was not a recidivist or a danger to the community, and defendant was later arrested for felony secret peeping of a nine-year-old child, an order entered by a different judge requiring defendant to register as a sex offender was affirmed. The second judge had jurisdiction to hold a registration hearing because the superior court where defendant was convicted—not the trial judge—retained jurisdiction, defendant had agreed to a subsequent hearing and was given proper notice of the hearing, and the second judge's order did not improperly overrule or alter a prior order of the original judge because the trial judge never determined that defendant was not required to register as a sex offender.

Appeal by Defendant from Order entered 20 December 2018 by Judge A. Graham Shirley in Wake County Superior Court. Heard in the Court of Appeals 12 May 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Rebecca E. Lem, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.

HAMPSON, Judge.

Factual and Procedural Background

Joshua Vorndran (Defendant) appeals from Order entered 20 December 2018 requiring Defendant to register on the sex offender registry for thirty years. The Record reflects the following relevant facts:

On 21 March 2018, Defendant entered a guilty plea to Felony Secret Peeping, a violation of N.C. Gen. Stat. § 14-202(e). Pursuant to the plea arrangement, Defendant received an 8-19 month suspended sentence with 48 months of supervised probation and was required to comply with enumerated conditions of probation, including that Defendant "not be unsupervised around any children under the age of 14." The plea arrangement provided at a later date "[a] hearing shall be held pursuant to [Section] 14-202(*l*) as to whether or not the defendant is a danger to the community and should therefore register as a sex offender." As a result of Defendant's guilty plea, the trial court dismissed the second charge of Taking Indecent Liberties with Children.

At an accompanying hearing also held on 21 March 2018, the trial court discussed Defendant's potential registration requirement provided for in N.C. Gen. Stat. § 14-202(*l*), noting Defendant's "conduct in this is extremely disturbing." The trial court continued: "It probably would further the purposes of the Article to have [Defendant] register, but . . . taking into account the fact that it occurred when he was 18 and that he's now 20, and taking into account the fact that it's not automatic registration, [it is] giving him a chance[.]" The trial court then announced it "retain[ed] jurisdiction of the hearing under [N.C. Gen. Stat. §] 14-202 in Wake County Superior Court . . . and there shall be a hearing conducted 12 months from [21 March 2018] to see if [Defendant is] in full compliance with probation," reasoning Defendant has "a year to show to the Court that he's not a recidivist or danger to the community." Counsel for both parties agreed to set the hearing on 18 March 2019, and the trial

court emphasized "if there's any noncompliance within the 12 months, that [Defendant's] hearing can be accelerated."

On 1 December 2018, Defendant was arrested in New Hanover County for Felony Secret Peeping involving a nine-year-old child. On 4 December 2018, the State notified Defendant that "based on his recent arrest" he should be required to register for his original conviction and in accordance with the terms of Defendant's plea arrangement, Defendant's registration hearing was being accelerated.

On 20 December 2018, Defendant came back before Wake County Superior Court, Judge A. Graham Shirley presiding. At the beginning of Defendant's hearing, defense counsel objected to the trial court's jurisdiction on the basis Judge Michael O'Foghludha, who presided over Defendant's 21 March 2018 hearing, was not presiding over his second hearing. The trial court noted Defendant's objection but proceeded with Defendant's registration hearing, remarking it was "concerned by a finding [of] probable cause to arrest [Defendant] with the exact same offense[.]" The trial court orally rendered findings Defendant "is above-average risk, he's been arrested for a crime which is similar to the crime [to which he pleaded guilty], the offenses are against children[,] and he at least violated, it appears, the terms of his probation by being unaccompanied in the presence of a nine-year-old." The trial court then ordered Defendant to "register on the sex offender registry for a period of 30 years." Defendant filed timely Notice of Appeal on 18 January 2019.

Issue

The sole issue on appeal is whether the trial court had jurisdiction over Defendant's second hearing to order Defendant to register as a sex offender pursuant to N.C. Gen. Stat. § 14-202(*l*).

Analysis

I. Jurisdiction

On appeal, Defendant contends the trial court lacked jurisdiction to order Defendant to register as a sex offender pursuant to N.C. Gen. Stat. § 14-202(*l*) because Judge Shirley did not preside over Defendant's initial hearing and therefore was not the "sentencing court" as contemplated by N.C. Gen. Stat. § 14-202(*l*). Challenges to the jurisdiction of the trial court are reviewed de novo. *State v. Marino*, 265 N.C. App. 546, 549, 828 S.E.2d 689, 692 (2019). "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. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

In the present case, Defendant entered a guilty plea to Felony Secret Peeping—a violation of N.C. Gen. Stat. § 14-202(e). Section 14-202(*l*) continues:

> When a person violates subsection . . . (e) . . . of this section . . . the sentencing court shall consider whether the person is a danger to the community and whether requiring the person to register as a sex offender pursuant to Article 27A of this Chapter would further the purposes of that Article . . . . If the sentencing court rules that the person is a danger to the community and that the person shall register, then an order shall be entered requiring the person to register.

N.C. Gen. Stat. § 14-202(*l*) (2019). Thus, registration is not automatic for a violation of N.C. Gen. Stat. § 14-202(e); instead, the trial court shall order registration if it determines "(1) the defendant is a danger to the community; and (2) the defendant's registration would further the purpose of the Article as stated in N.C. Gen. Stat. § 14-208.5[.]" *State v. Pell*, 211 N.C. App. 376, 379, 712 S.E.2d 189, 191 (2011).

Defendant argues "no statute authorized a different judge to impose registration for the peeping conviction at a subsequent hearing" and the "sentencing court" as stated in Section 14-202(*l*) was not Wake County Superior Court but was specifically Judge O'Foghludha. Defendant contends the trial court lacked jurisdiction to enter its Order requiring Defendant to register and therefore the Order should be vacated. In support of his argument, Defendant relies exclusively on our decision in *State v. Clayton* as analogous and instructive. 206 N.C. App. 300, 697 S.E.2d 428 (2010).

In *Clayton*, the defendant pleaded guilty to two counts of indecent liberties and was sentenced to two consecutive sentences, which were suspended pending thirty-six months of probation. *Id.* at 301, 697 S.E.2d at 430. At a separate hearing conducted pursuant to N.C. Gen. Stat. § 14-208.40B, the trial court determined the defendant was not required to submit to electronic monitoring. *Id.* A couple of months later, the defendant was charged with violating the terms of his probation. At a hearing expressly designated as a probation violation hearing, the trial court reconsidered the requirement that the defendant register for satellite-based monitoring (SBM) and ultimately ordered "defendant be placed on GPS monitoring for a period of ten years." *Id.* at 301-02, 697 S.E.2d at 430 (quotation marks omitted).

On appeal, this Court vacated the trial court's order requiring the defendant to enroll in SBM for lack of jurisdiction. *Id.* at 306, 697 S.E.2d at 433. This Court determined there was "no indication in the record that [the Department of Corrections] followed the notice requirements" or "ma[d]e the findings of fact" required by N.C. Gen. Stat. § 14-208.40B(b) and (c). *Id.* at 305, 697 S.E.2d at 432. Furthermore, the trial court had previously conducted a SBM hearing where it determined the defendant did not need to enroll in monitoring. *Id.* Accordingly, this Court concluded "the trial court did not have jurisdiction to conduct the 2009 SBM hearing or to order defendant to enroll in SBM for a period of 10 years." *Id.* (citation omitted).

We conclude *Clayton* is inapplicable to the present case and readily distinguishable. First, *Clayton* provides no support for Defendant's central assertion—only Judge O'Foghludha himself retained jurisdiction to preside over Defendant's subsequent hearing—and Defendant cites no other authority in support of this argument. *Cf. State v. Degree*, 110 N.C. App. 638, 642, 430 S.E.2d 491, 493-94 (1993) ("[I]t is not material that a trial judge different from the judge who presided over the taking of the guilty plea entered the sentence.").

Second, unlike in *Clayton*, Judge Shirley was not overruling or altering a prior order of Judge O'Foghludha. Here, the trial court had not previously determined Defendant was *not* required to register as a sex offender. Rather, the Record before us reflects at Defendant's March 2018 hearing, the trial court was concerned "[Defendant's] conduct in this [case] is extremely disturbing[.]" However, the trial court did not immediately require Defendant register as a sex offender, indicating it was "retain[ing] jurisdiction of the hearing . . . *in Wake County Superior Court*" but was "giving [Defendant] a chance" to "show to the Court that he's not a recidivist or danger to the community." (emphasis added). Defendant consented to a future hearing on the matter and, in fact, went as far as to set a date—18 March 2019—to return to Wake County Superior Court for the hearing.[1]

As a condition of probation, Defendant not only agreed to the subsequent hearing under N.C. Gen. Stat. § 14-202(*l*) but also agreed he "not be unsupervised around any children under the age of 14." Defendant consented to the condition his hearing may be accelerated "if there[

1. We acknowledge, unlike Section 14-208.40B, Section 14-202(*l*) does not expressly allow for a subsequent hearing to determine whether a defendant be required to register on the sex offender registry. However, Section 14-202(*l*) also does not disallow a delayed hearing. *Compare* N.C. Gen. Stat. § 14-202(*l*) *with* N.C. Gen. Stat. § 14-208.40B.

was] any noncompliance[.]" Accordingly, when Defendant was arrested on 1 December 2018 for felony secret peeping involving a nine-year-old child, he was in violation of the terms of his probation, and his hearing could be accelerated pursuant to his plea agreement.

In light of Defendant's purported noncompliance with the terms of his probation and in contrast to *Clayton*, the State provided Defendant with advance notice it was accelerating Defendant's registration hearing as provided in Defendant's plea. The State expressly notified Defendant it intended to argue he should be required to register for his original conviction as contemplated by N.C. Gen. Stat. § 14-202(*l*). Unlike in *Clayton*, Defendant's 20 December 2018 hearing was not and never purported to be a probation violation hearing. Instead, when Defendant appeared again before Wake County Superior Court on 20 December 2018, it was for the purpose of determining in the first instance if "(1) the defendant is a danger to the community; and (2) the defendant's registration would further the purpose of the Article as stated in N.C. Gen. Stat. § 14-208.5[.]" *Pell*, 211 N.C. App. at 379, 712 S.E.2d at 191.

Further, when Defendant returned for his hearing, the trial court rendered its findings on the Record before us, ordering Defendant to register on the sex offender registry pursuant to Section 14-202(*l*). *See id.* at 380-81, 712 S.E.2d at 192 (stating that the trial court's determination a defendant is a "danger to the community" will be reviewed to see if the findings "are supported by competent evidence" and the "conclusions of law to ensure that they reflect a correct application of law to the facts" (citation omitted)).

We conclude on the facts of this case, where Defendant expressly agreed to a subsequent hearing before the trial court to occur no more than twelve months after the date of the original hearing, where the postponement was for purposes of giving Defendant the opportunity to show "the Court that he's not a recidivist or danger to the community," and where Defendant was provided with adequate notice of the hearing and the State's arguments to be made therein, the Wake County Superior Court retained jurisdiction over Defendant's second hearing. Thus, the trial court's December 2018 Order ordering Defendant register as a sex offender for thirty years is affirmed.

II. Clerical Error

Defendant requests, in the event we decline to vacate the trial court's Order requiring registration, we remand the Order for the correction of a clerical error. On the preprinted Order entered 20 December 2018, the trial court appears to have erroneously checked box 1(b)—indicating

Defendant was convicted of "a sexually violent offense under [N.C. Gen. Stat. §] 208.6(5) or an attempt, solicitation, or conspiracy to commit such offense." However, Defendant pleaded guilty to Felony Secret Peeping pursuant to N.C. Gen. Stat. § 14-202(e), which is covered under box 1(d). "We realize that in the process of checking boxes on form orders, it is possible for the wrong box to be marked inadvertently, creating a clerical error which can be corrected upon remand." *State v. Yow*, 204 N.C. App. 203, 205, 693 S.E.2d 192, 194 (2010). Here, it appears the trial court mistakenly checked box 1(b) instead of box 1(d). Therefore, we remand this matter to the trial court "for the limited purpose of correcting the clerical error on Form AOC-CR-615" to reflect Defendant's plea under Section 14-202(e), as indicated by box 1(d). *State v. May*, 207 N.C. App. 260, 263, 700 S.E.2d 42, 44 (2010).

Conclusion

Accordingly, for the foregoing reasons, we conclude the trial court had jurisdiction over Defendant's second hearing and thus the Order entered 20 December 2018 requiring Defendant to register on the sex offender registry is affirmed. We remand this matter to the trial court for the limited purpose of correcting the clerical error noted herein.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Chief Judge McGEE and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
JEREMY JOHN WOHLERS, DEFENDANT

No. COA19-244

Filed 4 August 2020

1. Sexual Offenses—felonious child abuse by sexual act—definition of sexual act—jury instructions

The trial court did not err by instructing the jury that, for the charge of felonious child abuse by sexual act, a sexual act is "an immoral, improper or indecent touching or act by the defendant upon the child" (from the pattern jury instructions) rather than using the definition from N.C.G.S. § 14-27.20(4), which the Supreme Court had held was limited to crimes listed in Article 7B.

2. Sexual Offenses—credibility vouching—plain error analysis—defendant's admission to act

Even assuming arguendo that the trial court erred by failing to strike testimony that allegedly vouched impermissibly for a child sexual abuse victim's credibility, there was no plain error because defendant could not demonstrate a probable impact on the jury's finding of guilt. Defendant's own written statement admitting he had inappropriately touched the child independently supported the jury's verdict.

3. Sentencing—calculation—maximum term

The trial court properly calculated defendant's maximum term of imprisonment where it sentenced him to a minimum term of 64 months (the presumptive range of minimum durations was 51 to 64 months) and applied N.C.G.S. § 15A-1340.17(f) to calculate 137 months as the maximum term (64 months, plus twenty percent of 64 months, plus 60 months).

Appeal by Defendant from judgments entered 7 September 2018 by Judge Richard Kent Harrell in Superior Court, Onslow County. Heard in the Court of Appeals 12 November 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Deborah M. Greene, for the State.

Sean P. Vitrano for Defendant.

McGEE, Chief Judge.

I. Factual and Procedural History

Defendant and A.W. were married in July 2008. As of August 2017, Defendant and A.W. were living together in Richlands, North Carolina, with their daughters L.W. (age 8), Jo.W. (age 5), and Ja.W. (age 4), as well as A.W.'s daughter from a previous partner, M.K. (age 10), with whom A.W. was pregnant when she and Defendant began dating.

On 13 February 2018, a grand jury indicted Defendant on two counts of indecent liberties with a child, two counts of felony child abuse by sexual act, and two counts of statutory sexual offense with a child by an adult. The bill of indictment in case number 17 CRS 55834 stated the charges with respect to L.W. The indictment in case number 17 CRS 55835 stated the charges with respect to M.K. The cases were tried in Superior Court, Onslow County, on 4 September 2018.

At trial, A.W. testified that, around the beginning of August 2017, Defendant told A.W. that her best friend had reported that L.W. had searched for and watched pornography on her Kindle tablet. She testified they discussed the need to monitor the girls' use of electronic devices more closely. A.W. testified that later that week, Defendant told her he had been having an affair with her best friend and that he was leaving A.W. to be with her.

A.W. spoke with all four of her children on 21 August 2017 to explain that watching pornography was inappropriate. She testified she asked L.W. where she learned to watch pornography and L.W. replied that "Daddy showed us how to watch it, and every time you go to work or you go to school, Daddy makes the older three girls watch it." A.W. said to the girls that "if this happened, then they needed to tell somebody they trust[.]" A.W. also told them to tell an adult if someone touches them. At that point, M.K. said, "Well, Daddy touched me." M.K. told A.W. that, after the last cheerleading competition they participated in, "Daddy gave [Ja.W]. his phone and put her in another room, and that's when Daddy touched me." A.W. testified that there was a cheerleading competition in June 2017 in Greensboro, North Carolina, at which she had Jo.W. and L.W. in her car and Defendant had M.K. and Ja.W. in his car and, after staying the night and attending the cheerleading competition on the second day, Defendant left several hours early with M.K. and Ja.W. to return to their home to care for their dog.

After M.K. told A.W. that Defendant had touched her, A.W. contacted the Onslow County Sheriff's Department and asked to have

an officer come to their house so she could make a report. A deputy came to the house, along with Sue Barnett ("Ms. Barnett"), a social worker with Onslow County Department of Social Services. Denita Sims ("Ms. Sims"), another social worker investigating the case, testified that Ms. Barnett tried to interview the children outside of Defendant's presence, but they did not speak when spoken to and acted bashful and slightly annoyed by the questions. Ms. Sims testified that Defendant visited DSS the next day. According to Ms. Sims, Defendant indicated he had previously caught M.K. and L.W. looking at inappropriate pictures online and also that M.K. was a "problem child." Ms. Sims testified Defendant did not at that time deny any of the allegations that had been made.

Sara Ellis ("Ms. Ellis"), a forensic interviewer with the Child Advocacy Center of Onslow County, interviewed M.K. and L.W. at the Child Advocacy Center on 30 August 2017. Ms. Ellis testified that "[a] child forensic interview is a neutral, fact-finding conversation with a child" and she is "specially trained to have these conversations with children." In the interview with M.K., which was video-recorded and played at trial, M.K. said that Defendant had broken the no-touch rule more than once when they lived in both houses they had lived in in Richlands and their previous home in Jacksonville. In the interview, M.K. said during the most recent time after the cheerleading competition, Defendant broke the no-touch rule for "both" parts.

The State showed M.K. an anatomical diagram on which she had circled where Defendant had touched her. She identified the place Defendant touched her as the "private part" which she used to "[p]ee[.]" The prosecutor showed her another anatomical diagram of genitalia, including labels for the labia majora, labia minora, clitoris, urethra, vagina, and anus. She was then given a marker and asked to "color in" the area where Defendant touched her. The exhibit, which was published to the jury and included in the record on appeal, indicates she colored in the area of the vagina and the labia minora. M.K. testified Defendant touched her there with his hand more than one time.

Ms. Ellis testified she interviewed L.W. on 1 September 2017, and a video recording of the interview was also played at trial. In the interview, L.W. said she thought Defendant had touched M.K. once, but that M.K. had not told her he had. She said Defendant had not broken the no-touch rule with her.

Dr. Suzanne Stelmach ("Dr. Stelmach"), a volunteer physician at the Child Advocacy Center, conducted physical examinations of M.K. and L.W. after viewing the interviews with Ms. Ellis. She testified that, based on the alleged conduct being penetration by Defendant with his fingers,

her "anticipated results of the exam would have been a normal exam[,]" because "[t]hey did not describe anything that would have resulted in any evidence of trauma." She testified the examinations of both girls were in fact normal. Dr. Stelmach also testified regarding female anatomy using a three-dimensional model. She testified the clitoris is located interior to the labia majora and that she would consider touching of the clitoris to be penetration of the genital opening.

Keith Johnston ("Detective Johnston"), a detective with the Special Victims Unit of the Onslow County Sheriff's Office, interviewed Defendant on 13 September 2017 and a video of the recorded interview was played at trial. Defendant made a written statement that he touched L.W. "in privet [(sic)] area on out side area" at the house where he and the family used to live, when L.W. was 7. In the interview, he said L.W. was already in the bedroom using the computer when he came in and touched her on the outside near her clitoris. He said she said "no or something" and he realized what he was doing was wrong and he stopped after touching her for less than a minute.

Defendant also made a written statement saying he "touch[ed] M.K. in privet [(sic)] area on out side area" at the current house, when M.K. was 9. In the interview, Defendant said he called her into his bedroom, asked M.K. to take off her pants and he touched her in her private area, at the top where her clitoris would be. He said he touched her there for a few minutes. He said M.K. turned her head and only at that point did he realize what he was doing was wrong and stopped. Defendant denied exposing himself to M.K. or having an erection.

At the close of the State's case, the trial court dismissed the statutory sexual offense charge arising from the conduct against L.W. for insufficient evidence. After hearing all the evidence, the jury found Defendant not guilty of the statutory sexual offense charge in 17 CRS 55835, regarding M.K., and returned guilty verdicts as to the remaining charges of indecent liberties with a child and felony child abuse by sexual act as to both L.W. and M.K.

The trial court imposed two consecutive sentences of 64 to 137 months each and ordered Defendant to undergo risk assessment for a satellite-based monitoring determination and, upon the completion of his term in prison, to register as a sex offender for 30 years. Defendant appeals.

II. Analysis

Defendant argues three issues on appeal: (1) the trial court plainly erred in instructing the jury regarding charges of felonious child abuse by sexual act; (2) the trial court plainly erred in "permitting [Ms. Ellis]

to testify that M.K. had deliberately withheld information about sexual abuse during the interview and that she was a child whose disclosure was intended to stop the abuse"; and (3) that the trial court erred in calculating the maximum term of imprisonment during sentencing.

A. *Jury instruction for charges of felonious child abuse by sexual act*

[1] Defendant first argues that the trial court plainly erred in instructing the jury regarding the charges of felonious child abuse by sexual act. Defendant did not object to the instruction at trial and, therefore, it is not preserved; however, Defendant asks this court to review the jury instruction for plain error. This Court reviews unpreserved claims of error in jury instructions for plain error. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). A party arguing plain error on appeal must show "a fundamental error occurred at trial." *Id.* (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (citations omitted). "[B]ecause 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[.]' " *Id.* (internal citations omitted).

Defendant was charged with two counts of felonious child abuse by sexual act. N.C. Gen. Stat. § 14-318.4(a2) provides that "[a]ny parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any sexual act upon the child is guilty of a Class D felony." N.C. Gen. Stat. § 14-318.4(a2) (2017). This statute under which Defendant was charged does not specifically define "sexual act"; however, the trial court gave a jury instruction based on North Carolina Pattern Jury Instruction — Criminal 239.55B (hereafter N.C.P.I.—Crim. 239.55B), stating in pertinent part that "[a] sexual act is an immoral, improper or indecent touching or act by the defendant upon the child." Defendant argues giving this jury instruction was legal error, because the definition of "sexual act" that was given was "overbroad."

Defendant relies on *State v. Lark*, 198 N.C. App. 82, 678 S.E.2d 693 (2009), *disc. rev. denied*, 363 N.C. 808, 692 S.E.2d 111 (2010), and *State v. Stokes*, 216 N.C. App. 529, 718 S.E.2d 174 (2009), to argue that a more restrictive definition of "sexual act" should apply to the offense of felonious child abuse by sexual act. Specifically, Defendant argues that the following definition of "sexual act" in N.C. Gen. Stat. § 14-27.20(4) should apply to the offense in N.C.G.S. § 14-318.4(a2):

> Sexual act [means] [c]unnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. It is an affirmative defense that the penetration was for accepted medical purposes.

N.C. Gen. Stat. § 14-27.20(4) (2017).[1] Defendant argues this Court "applied the definition of 'sexual act' in . . . [N.C.G.S.] § 14-27.20(4)[] to [N.C.G.S.] § 14-318.4(a2)" in *Lark* and *Stokes*. The State, in turn, argues that although this Court cited the Article 7B definition of "sexual act" in these cases, in both instances that was *obiter dicta* because the question of the appropriate jury instruction for the "sexual act" element of felony child abuse by sexual act was not before the Court.

We need not determine whether this Court's citation to the Article 7B definition of "sexual act" in *Lark* and *Stokes* was *dicta*, however. Since the case before us was heard by this Court, the Supreme Court of North Carolina has directly resolved the question of whether, as Defendant argues here, giving the jury instruction in N.C.P.I.—Crim. 239.55B is error because the Article 7B definition of "sexual act" applies to and limits the use of that term in the offense of felony child abuse by sexual act in N.C.G.S. § 14-318.4(a2).

A panel of this Court held in *State v. Alonzo*, 261 N.C. App. 51, 54–55, 819 S.E.2d 584, 587 (2018), that *Lark*'s application of the definition of "sexual act" in N.C.G.S. § 14-27.20(4) (referenced therein in its prior codification as N.C.G.S. § 14-27.1(4)) to the offense of felony child abuse by sexual act under N.C.G.S. § 14-318.3(a2) was part of that decision's holding and thus binding on this Court. This Court thus held that the trial court erred in using the jury instruction in N.C.P.I.—Crim. 239.55B because "[w]hile the Pattern Jury Instruction allows a broader categorization of what qualifies as a 'sexual act,' our precedent defines the words more narrowly." *Id.* at 55, 819 S.E.2d at 587 (citation omitted). This Court in *Alonzo* called for N.C.P.I.—Crim. 239.55B to be updated to "conform with this Court's definition in *Lark*." *Id.* This Court held the

1. N.C.G.S. § 14-27.20(4) was recodified from N.C.G.S. § 14-27.1(4) in 2015. The article of which the statute was a subsection was also recodified in 2015 from Article 7A to Article 7B. *See* An Act to Reorganize, Rename, and Renumber Various Sexual Offenses to Make Them More Easily Distinguishable From One Another as Recommended by the North Carolina Court of Appeals in "State of North Carolina v. Slade Weston Hicks, Jr.," and to Make Other Technical Changes, S.L. 2015-181, §§1, 2, 2015 N.C. Sess. Laws 460, 460. For consistency, all references herein will refer to the recodified language at N.C.G.S. § 14-27.20(4) and Article 7B.

defendant in *Alonzo* was not prejudiced by the trial court's error. *Id.* at 56, 819 S.E.2d at 588.

Our Supreme Court allowed discretionary review of *Alonzo* and modified and affirmed this Court's decision. *State v. Alonzo*, 373 N.C. 437, 437, 838 S.E.2d 354, 355 (2020). The Supreme Court conducted a statutory analysis of the relevant provisions, noting that N.C.G.S. § 14-27.20 expressly limited the applicability of its definitions—including the definition of "sexual act"—to Article 7B. *Alonzo*, 373 N.C. at 441, 838 S.E.2d at 357. It further noted that "sexual act" as defined in N.C.G.S. § 14-27.20(4) has been interpreted "as arising from the specific elements of the crimes listed in Article 7[B,]" providing a further reason to conclude the definition was intended to apply only to first and second degree sexual offense within that article. *Id.* at 442, 838 S.E.2d at 358 (alteration reflecting recodification). Our Supreme Court concluded:

> [T]he legislative history demonstrates that from the time N.C.G.S. § 14-27.1 was enacted in 1980, until it took its current form in N.C.G.S. § 14-27.20, the legislature intended for the definitions in the statute to apply only within the respective article. Accordingly, it was error for the Court of Appeals to conclude that the definition of "sexual act" contained in N.C.G.S. § 14-27.[20](4) was applicable to offenses under N.C.G.S. § 14-318.4(a2), which is contained in a separate article, Article 39.

Id. Our Supreme Court has, therefore, rejected precisely the argument Defendant advances here. Based on *Alonzo*, we hold the trial court did not err, nor plainly err, in providing a jury instruction based on N.C.P.I.—Crim. 239.55B and not providing an instruction based on the definition of "sexual act" under N.C.G.S. § 14-27.20(4).

B. *Ms. Ellis's testimony about M.K.*

[2] Defendant next argues that the trial court erred by permitting Ms. Ellis to testify that she believed M.K. did not make a full disclosure and that "[her interview] w[as] a tentative disclosure," because under this Court's decision in *State v. Giddens*, 199 N.C. App. 151, 681 S.E.2d 504 (2009), Ms. Ellis was a witness impermissibly "vouch[ing] for the credibility of a victim." *State v. Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d 504, 508 (2009), *aff'd per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010). As Defendant did not timely object at trial, Defendant has requested we review this unpreserved issue for plain error. N.C. R. App. P. 10(a)(4) (2017); *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

In *Giddens*, the defendant was charged with multiple sexual offenses committed on his minor daughter and stepson. *Giddens*, 199 N.C. App. 115, 121, 681 S.E.2d at 505. A child protective services investigator assigned to the case interviewed the children and arranged a medical examination. *Id.* at 118, 681 S.E.2d at 506. At trial, the investigator testified that the defendant's actions were "substantiated," meaning that the examiners "found evidence throughout the course of their investigation to believe that the alleged abuse and neglect did occur." *Id.* (internal quotation marks and brackets omitted). The jury found the defendant guilty of all the charges. *Id.* at 119, 681 S.E.2d at 507. On appeal, this Court ordered a new trial, holding that the trial court plainly erred by permitting the investigator to testify that her investigation substantiated the children's abuse allegations. *Id.* at 123, 681 S.E.2d at 509. We reasoned that the investigator's testimony, which was based on more evidence than just the statements of the children, went beyond permissible corroboration by prior consistent statements and, furthermore, that "[o]ur case law has long held that a witness may not vouch for the credibility of a victim." *Id.* at 120–22, 681 S.E.2d at 507–08. This Court further held the trial court's error prejudiced the defendant because, "without [the investigator]'s testimony, the jury would have been left with only the children's testimony and the evidence corroborating their testimony[; t]hus . . . 'the central issue to be decided by the jury was the credibility of the victim[s].' " *Id.* at 123, 681 S.E.2d at 509.

In the present case, Ms. Ellis testified about forensic interview procedures in general and explained that children disclose abuse in various ways. Videos of the interviews she conducted were admitted into evidence and played to the jury, after which the prosecutor asked Ms. Ellis "[h]ow would you describe [M.K.]'s personality, now that we've all had a chance to sort of witness the interview?" She responded that M.K. was "a very quiet child," and that "a lot of the questions were answered with, 'I don't know,' and 'I don't remember' . . ." The transcript then shows the following exchange between the prosecutor and Ms. Ellis:

> Q: Did she seem at all on a mission to tell you much of anything?
>
> A: Nothing.
>
> Q: Much less make a full detailed disclosure like you've described some interviews do.
>
> A: Yes.
>
> Q: Would you describe [M.K.]'s disclosure—of the four you mentioned earlier, how would you describe her disclosure? What categories did that fit into?

> . . . .
>
> A: She would be a tentative disclosure. She—just based on my interaction with her and her lack of wanting to talk, she's a child who falls into the I want to tell someone so this will stop, but I don't really want it to go past that, and I just want it to be done.

Defense counsel did not object or move to strike the answer. The trial court excused the jury and asked the prosecutor whether the line of questioning would continue, in response to which the prosecutor offered to stop. The trial court said the following:

> Okay. I—the witness's answers to the question are going beyond, I believe, what the Supreme Court laid out in [*State v.*] *Towe* as that line that the doctor had crossed in that case as well. So without there being any physical findings and—I didn't—I think the questions earlier about the characteristics were proper, but when she starts trying to put this child into a specific category about disclosure—the jury has seen the interview. They've heard the child's statement, and they've seen her testify. It's for the jury to determine that credibility issue.

The court told the prosecutor not to ask further questions; however, when the jury returned, the court did not instruct the jury to disregard the previous testimony. Moreover, Defendant did not move to strike the testimony at that time.

Defendant now argues, relying on *Giddens*, that Ms. Ellis's testimony was impermissible vouching of M.K.'s credibility. We need not decide whether the trial court erred in failing to strike the testimony however, because even assuming, *arguendo*, that failing to strike the testimony was error, Defendant cannot show he was prejudiced by the error. Defendant here cannot show any error was fundamental—that it " '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). In particular, besides the interviews and the trial testimony of M.K., the record also shows Defendant's own written statement that he touched M.K.'s private area near her clitoris for a few minutes, which is itself consistent with M.K.'s testimony. Although Defendant specifically denied there was any digital penetration of M.K.'s genitalia in his statement, as we noted above, the restrictive definition of "sexual act" in N.C.G.S. § 14-27.20(4), on which Defendant relies for his argument that penetration is required to establish felony child abuse by sexual act under N.C.G.S. § 14-318.4(a2) does not apply to that offense. Regardless of Ms.

Ellis's testimony, Defendant's written statement and M.K.'s testimony independently support the jury's conclusion that Defendant committed the offense at issue. As Defendant cannot show Ms. Ellis's testimony had a probable impact on the jury's finding of guilt, he cannot show any error was fundamental and, therefore, we hold there was no plain error.

C. *Calculation of maximum term of imprisonment*

[3] Finally, Defendant argues the trial court committed clerical error in the calculation of the maximum term of imprisonment. Defendant was found guilty of two counts of taking indecent liberties with a child, each a Class F felony, and two counts of felony child abuse by sexual act, each a Class D felony. The trial court consolidated the Class D and F felonies in each case. As Defendant did not have any prior criminal history points, the trial court determined he was prior record level I. The trial court found the offenses were reportable convictions under N.C. Gen. Stat. § 14-208.6 and imposed a term of 64 to 137 months in each case.

Defendant argues the trial court erred in calculating the maximum sentence because N.C. Gen. Stat. § 15A-1340.17(f) provides that, for offenders sentenced for reportable convictions that are Class B1 through E felonies, the maximum term of imprisonment "shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months." N.C. Gen. Stat. § 15A-1340.17(f) (2017). Defendant argues that, because N.C.G.S. § 15A-1340.17(c) provides the mandatory minimum term of imprisonment for a Class D felony, prior record level I, is 51 months, the trial court should have used that term in computing the maximum term of imprisonment for his sentence, rather than the 64 months it used based on the minimum term actually imposed. Specifically, because 10.2 months is twenty percent of 51 months, which is in turn rounded up to 11, Defendant argues the trial court should have added 51 months plus 11 months plus 60 months to yield a maximum of 122 months.

Defendant relies on *State v. Parker*, 143 N.C. App. 680, 550 S.E.2d 174 (2001), to support the proposition that the Structured Sentencing Act permits discretion in setting a minimum, but "no discretion in the determination of maximum sentences." But the State correctly notes that the portion of *Parker* relied upon by Defendant in fact supports the contrary argument. In *Parker*, this Court held as follows:

> The Structured Sentencing Act clearly provides for judicial discretion in allowing the trial court to choose a minimum sentence within a specified range. However,

> the language of the Act provides for no such discretion in regard to maximum sentences. The legislature did not provide a range of possible maximum sentences nor did it create a vehicle to alter the maximum sentences based on the circumstances of the case as with minimum sentences. *Rather, the Act dictates that once a minimum sentence is determined, the "corresponding" maximum sentence is "specified" in a table set forth in the statute.*

State v. Parker, 143 N.C. App. 680, 685–86, 550 S.E.2d 174, 177 (2001) (citations omitted) (emphasis added). The "minimum term of imprisonment" used to determine the maximum term under N.C.G.S. § 15A-1340.17(f) is thus not the absolute minimum mandatory duration within the range identified in the chart set forth under N.C.G.S. § 15A-1340.17(c), but the minimum term of imprisonment actually imposed in the sentence.

The presumptive range of minimum durations for a Class D felony for an offender at prior record level I is 51 to 64 months. N.C. Gen. Stat. § 15A-1340.17(c) (2017). The trial court exercised its discretion to sentence Defendant at the top end of that presumptive range, to a minimum term of imprisonment of 64 months. Once that minimum was set, the trial court properly applied N.C.G.S. § 15A-1340.17(f), which provides that "the maximum term of imprisonment shall be equal to the sum of the minimum term of imprisonment and twenty percent (20%) of the minimum term of imprisonment, rounded to the next highest month, plus 60 additional months." N.C.G.S. § 15A-1340(f). As the minimum term of Defendant's imprisonment was set at 64 months, the trial court added 64 plus 13 (being twenty percent of 64, 12.8, rounded to the next highest month) plus 60, totaling 137 months. The trial court thus did not commit clerical error in sentencing Defendant to a maximum term of imprisonment of 137 months.

III. Conclusion

Defendant argued three issues on appeal. We hold the trial court did not plainly err in instructing the jury based on N.C.P.I.—Crim. 239.55B, instead of the definition of sexual act in N.C.G.S. § 14-27.20(4). We also hold the trial court did not plainly err in not striking Ms. Ellis's testimony characterizing M.K.'s interview, because even if it was error, Defendant cannot show the error was prejudicial. Finally, we hold the trial court did not commit clerical error in sentencing Defendant.

NO ERROR.

Judges BRYANT and BERGER concur.

TSONEV v. McAIR, INC.

[272 N.C. App. 689 (2020)]

DIANA TSONEV FOR THE ESTATE OF ROBERT SHEARER AND MINERVA SHEARER BY DIANA TSONEV, PLAINTIFFS
v.
MCAIR, INC. D/B/A OUTER BANKS HEATING & COOLING AND MCAIR, INC. D/B/A DR. ENERGY SAVER, DEFENDANT

No. COA19-674

Filed 4 August 2020

Contracts—express provision—limiting time to file action—HVAC remediation contract

Where plaintiffs hired two businesses (defendants) to remediate flood damage to their home's HVAC system and then sued defendants for negligence, breach of contract, and breach of warranty more than five years after defendants completed the work, the trial court properly granted a directed verdict in favor of defendants and dismissed the action as untimely because, although plaintiffs filed suit within the applicable statutes of limitations and repose, plaintiffs were bound by a clear, express provision in the parties' contract stating that they could not sue defendants more than two years after the remediation work was completed.

Appeal by plaintiffs from orders entered 20 March 2019 by Judge Alma Hinton in Dare County Superior Court. Heard in the Court of Appeals 7 January 2020.

The Wills Law Group, by Gregory E. Wills, for plaintiff-appellants.

McAngus Goudelock & Courie, PLLC, by Walt Rapp and Sean R. Madden, for defendant-appellees.

BRYANT, Judge.

Parties are generally free to contract as they see fit. Where, as here, the contract contains an express provision that no action may be brought more than two years after the completion of the work contracted, we affirm the trial court's directed verdict dismissing an action commenced more than five years after completion of the work.

PROCEDURAL HISTORY/ FACTS

Mr. and Mrs. Robert Shearer, represented by Diana Tsonev,[1] ("plaintiffs") filed a complaint against defendant McAir, Inc. d/b/a Outer Banks Heating and Cooling ("defendant McAir OBHC") and McAir, Inc, d/b/a Dr. Energy Saver ("defendant McAir DES") (collectively "defendants") on 29 November 2016 in Dare County Superior Court. Plaintiffs alleged that defendants did not properly remediate flood damage to their home and negligently caused damage in excess of $25,000. Plaintiffs sought recovery for negligence, negligent misrepresentation, breach of contract, breach of implied warranty, and breach of express warranty. On 28 January 2019, a jury trial commenced before the Honorable Alma Hinton, Judge presiding.

The evidence of record shows that plaintiffs owned a house in Kill Devil Hills, North Carolina. On 27 August 2011, the home was damaged by flood waters as a result of Hurricane Irene. Plaintiffs hired defendant McAir OBHC to repair the HVAC system, which included replacing the duct system under the house. Defendant McAir informed plaintiffs that their affiliated company, defendant McAir DES, could remediate other damage to the subfloor and crawlspace under the house. Defendant McAir DES submitted a proposal to plaintiffs detailing the scope of the work to be performed, which included six items. Defendant McAir DES would (1) remove all insulation under the home, (2) foam seal the chimney base and all penetrations of electrical or plumbing works, (3) treat all biochemical areas of the crawlspace, (4) install new R-19 bat insulation, (5) clean all wood in the crawlspace, and (6) clean up and remove all debris. The proposal stated that a chemical treatment and seal ("Aftershock") would be applied in order to stop existing mold growth. A number of terms and conditions provided that the contract would supply only the work specified and that all services performed and materials supplied would be free from defects for two years following installation. "[Defendant McAir DES] [is] not liable for any consequential, incidental, indirect, punitive, treble, speculative, or special damages of any kind whatsoever, and [purchasers] may not bring any action against [defendant McAir DES] more than two (2) years after the Completion Date." Finally, the proposal contained a merger clause which stated the following:

1. Upon the death of Robert Shearer his daughter, Diana Tsonev, was allowed to be substituted as plaintiff for Robert and allowed to represent Minerva Shearer as her attorney in fact.

> This Agreement (and all attachments) contain the entire, final agreement between you and us, and supersedes all prior written and oral agreements, proposals, and understandings. You (i) have had the opportunity to review it with an attorney of your choice, (ii) have read and understood each part, (iii) are satisfied with all of its provisions, and (iv) affirm that neither we, nor any of our representatives, have made, nor have you relied on any other representatives or promises, oral or otherwise, that are outside this Agreement. All waivers must be in writing to be effective.

Plaintiffs signed and accepted the proposal on 2 September 2011. The crawlspace remediation was completed at the end of September 2011.

Almost five years later, in July 2016, plaintiffs noticed that the floor of the residence was sagging. Thereafter, plaintiffs discovered that in the crawlspace, the wood which had been painted with Aftershock had rotted. A building inspector later examined the crawlspace. Floor joists and girders had failed and collapsed, and the rest were in the process of failing. The inspector condemned the house as being unsafe for human occupants.

Following the close of plaintiff's case-in-chief, the court rendered a directed verdict in favor of defendants. Plaintiffs filed a motion for a new trial. On 20 March 2019, the court entered its written order granting defendants' motion for directed verdict.

> [T]he [c]ourt . . . finds that there is a contract in this case that calls for any action to be taken within two years. That action was not taken. The contract was signed by [p]laintiff and it appears to be a valid contract acknowledged by [defendant McAir DES], or a representative thereof, that requires action to be taken within two years.

On 20 March 2019, the court also entered its order denying plaintiffs' motion for a new trial. Plaintiffs appeal both orders.

On appeal, plaintiffs contend the trial court erred by (I) failing to apply the "discovery rule," (II) excluding evidence in support of the claim for negligent misrepresentation, (III & IV) excluding expert witness testimony, and (V) entering a directed verdict and failing to grant plaintiffs' motion for a new trial.

Standard of Review

> When considering a motion for a directed verdict, a trial court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every reasonable inference arising from the evidence. Any conflicts and inconsistencies in the evidence must be resolved in favor of the non-moving party. If there is more than a scintilla of evidence supporting each element of the non-moving party's claim, the motion for a directed verdict should be denied.
>
> . . . [B]ecause the trial court's ruling on a motion for a directed verdict addressing the sufficiency of the evidence presents a question of law, it is reviewed de novo.

Bradley Woodcraft, Inc. v. Bodden, 251 N.C. App. 27, 31, 795 S.E.2d 253, 257 (2016) (citations omitted).

I

Plaintiffs argue that the trial court erred by granting the motion for a directed verdict and not applying the "discovery rule," pursuant to N.C. Gen. Stat. §§ 1-52(16) and 1-50(5) (describing periods of repose and limitation for the commencement of actions arising from improvements to real property). Plaintiffs contend that the directed verdict granted on the basis of their failure to bring this action within the two-year period expressed in the contract was improper as they commenced the action within the periods set by our statutes of limitation and repose as defined by sections 1-52(16) and -50(5). We disagree.

N.C. Gen. Stat. § 1-52(16) states that "unless otherwise provided by law, for . . . physical damage to claimant's property, the cause of action . . . shall not accrue until . . . physical damage to his property becomes apparent . . . ." N.C. Gen. Stat. § 1-52(16) (2019). Additionally, N.C. Gen. Stat. § 1-50(5) states that,

> [n]o action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

Id. § 1-50(5).

N.C. Gen. Stat. § 1-50(5) sets out a six-year statute of repose that is meant to provide "protection to those who make improvements to real property." *Christie v. Hartley Constr.*, 367 N.C. 534, 540, 766 S.E.2d 283, 288 (2014). In *Christie*, our Supreme Court reasoned that there was "no public policy reason why the beneficiary of a statute of repose cannot bargain away, or even waive, that benefit." *Id.* at 540, 766 S.E.2d 283, 287. "North Carolina has long recognized that parties generally are 'free to contract as they deem appropriate.' " *Id.* at 540, 766 S.E.2d 283, 287 (quoting *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C. 240, 244, 539 S.E.2d 274, 277 (2000)). This Court has also stated that when "the language of a contract 'is clear and only one reasonable interpretation exists, the courts must enforce the contract as written.' " *State ex rel. Utils. Comm'n v. Thrifty Call, Inc.*, 154 N.C. App. 58, 63, 571 S.E.2d 622, 626 (2002) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978)); *see also Hall v. Refining Co.*, 242 N.C. 707, 709, 89 S.E.2d 396, 397 (1955) ("While contracts exempting persons from liability for negligence are not favored by the law, and are strictly construed against those relying thereon nevertheless, the majority rule, to which we adhere, is that, subject to certain limitations . . . a person may effectively bargain against liability for harm caused by his ordinary negligence in the performance of a legal duty arising out of a contractual relation." (citations omitted)); *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 43–44, 626 S.E.2d 315, 323–24 (2006) (holding that the plaintiff's failure to adhere to the express provision of the contract—setting the period during which an action for damages could be brought—was controlling).

Agreements signed by plaintiffs can exempt defendants from liability for negligence alleged in the complaint. *See Hall*, 242 N.C. at 709, 89 S.E.2d at 397 ("[A] person may effectively bargain against liability for harm caused by his ordinary negligence in the performance of a legal duty arising out of a contractual relation." (citations omitted)). While we are not unsympathetic to the injury suffered to plaintiffs' real property and otherwise, our sympathy cannot displace our duty to apply the law. Had plaintiffs not signed the agreement which clearly limited the time in which an action could be brought, plaintiffs' claims could have gone forward subject to the discovery rule and/or the statute of repose. However, absent evidence of fraud or misrepresentation in the making of the contract, plaintiffs are bound by the language in the contract into which they entered. *See Herring v. Herring*, 231 N.C. App. 26, 28, 752 S.E.2d 190, 192 (2013) ("[A]ny . . . contract . . . may be set aside or reformed based on grounds such as fraud, mutual mistake of fact, or unilateral mistake of fact procured by fraud." (citations omitted)); *Top Line*

Constr. Co. v. J.W. Cook & Sons, Inc., 118 N.C. App. 429, 432–33, 455 S.E.2d 463, 465 (1995) (affirming summary judgment against the plaintiff who sought monetary damages for work completed but not compensated where the plaintiff expressly agreed to be bound by the decision of a third party architect or engineer as to the satisfaction, approval, or acceptance of the plaintiff's work).

In the instant case, the contract provided that the writing contained the entire, final agreement of the parties. The provisions of the contract included an express limitation: "[defendant is] not liable for any consequential, incidental, indirect, punitive, treble, speculative, or special damages of any kind whatsoever, and *you may not bring any action against us more than two (2) years after the Completion Date*." (emphasis added). The crawlspace remediation was completed in September 2011. Plaintiffs' brought suit in November 2016, more than five years later.

Because the express provision of the contract is clear, the contract must be enforced as written. *See Hall*, 242 N.C. at 709, 89 S.E.2d at 397; *Herring*, 231 N.C. App. at 28, 752 S.E.2d at 192; *Bob Timberlake Collection, Inc.*, 176 N.C. App. at 43–44, 626 S.E.2d at 323–24; *Thrifty Call, Inc.*, 154 N.C. App. at 63, 571 S.E.2d at 626; *Top Line Constr. Co.*, 118 N.C. App. at 432–33, 455 S.E.2d at 465. The trial court did not err by failing to apply the discovery rule in accordance with N.C. Gen. Stat. §§ 1-52(16) and 1-50(5), and thus, plaintiff's argument is overruled. Accordingly, we affirm the 20 March 2019 order of the trial court granting defendants' motion for a directed verdict.

As we affirm the court's 20 March 2019 order granting defendant's motion for a directed verdict based on the express limitation in the contract, we need not reach plaintiffs' remaining arguments.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 AUGUST 2020)

DAY v. TRAVELERS INS. CO. No. 19-705	N.C. Industrial Commission (14-714353)	Affirmed
IN RE A.L.M. No. 19-1086	Guilford (18JA279-280)	Affirmed
IN RE D.R. No. 19-845	Mecklenburg (18JA568-570)	Affirmed in part, Vacated in part and Remanded
IN RE L.N.H. No. 19-1020	Guilford (19JA312)	Reversed in part, vacated in part, and remanded
STATE v. CHARLES No. 18-945-2	Gaston (16CRS54022)	No Error
STATE v. CLARK No. 19-446	Onslow (17CRS57390)	No Error
STATE v. ECHOLS No. 19-1118	McDowell (15CRS51179-81) (15CRS51225)	Dismissed in part; No error in part.
STATE v. FRENCH No. 19-997	Person (18CRS00086) (18CRS50038)	NO PLAIN ERROR IN PART; NO ERROR IN PART.
STATE v. GIVENS No. 19-40	Mecklenburg (16CRS24680) (17CRS2507)	No Error
STATE v. JOHNSON No. 19-625	New Hanover (16CRS59007)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. LAVANDIER No. 19-954	Union (18CRS54012)	Dismissed
STATE v. MANLEY No. 19-921	Forsyth (17CRS56072) (17CRS56472) (18CRS360)	No Error in Part; Vacated and Remanded in Part

STATE v. McLAUGHLIN No. 19-779	Moore (17CRS50878) (17CRS527)	No Error
WILKINS v. BUCKNER No. 19-567	N.C. Industrial Commission (16-055077)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Adjudication of abuse—unexplained injuries—findings of fact—A trial court's order adjudicating an infant abused—based on fractures the child suffered in both legs for which there was no concrete explanation—contained findings of fact that were not supported by clear and convincing evidence, including that the child was in the sole and exclusive care of respondent-parents during the period of time when the fractures likely occurred. Other challenged findings were either an accurate reflection of the evidence or contained an immaterial error. **In re K.L., 30.**

Adjudication of neglect—adjudication of abuse of child's sibling reversed— The trial court's adjudication of a child as neglected based on a younger sibling's unexplained injuries was reversed. Since there was no evidence to establish where the sibling suffered the injuries, the court's findings that the sibling was injured in the home and that the child therefore lived in an injurious environment were unsupported. Further, the Court of Appeals reversed the sibling's abuse adjudication for lack of support and the trial court found no other factors that would support a conclusion of neglect. **In re K.L., 30.**

Adjudication of neglect—based on abuse of sibling—insufficient findings— The trial court erred by adjudicating a child neglected without sufficient findings that there was a substantial risk that abuse or neglect might occur in the future. The adjudication was based on a sibling being sexually abused, but there were no findings detailing how the sibling's abuse impacted the child or whether the child was at risk of similar abuse, and the only findings specifically pertaining to the child noted he was happy and had no health concerns. The matter was remanded for additional findings, based on new or existing evidence according to the trial court's discretion. **In re S.M.L., 499.**

Adjudication of neglect—findings of fact—sufficiency of evidence—An order adjudicating two children neglected (after the older child disclosed she was sexually abused by respondent-mother's boyfriend) contained findings of fact that were supported by clear and convincing evidence, except for one minor detail having to do with an incident in which law enforcement conducted a welfare check and discovered the presence of the boyfriend in the home (where he was not supposed to be). Even if the inaccurate detail was ignored, the remaining findings describing the incident and the aftermath were supported by evidence. **In re S.M.L., 499.**

Adjudication of neglect—probability of repetition of neglect—sufficiency of findings—The trial court's adjudication of a child as a neglected juvenile was proper, even though the court did not make a specific finding of the probability of repetition of neglect, because the court's conclusions that the child was neglected for lack of proper care and supervision and that she lived in an environment injurious to her welfare were supported not only by findings of sexual abuse (which the child disclosed was perpetrated by respondent-mother's boyfriend), but also by findings regarding respondent's conduct after the abuse disclosure and up to the adjudication hearing, including her failure to believe and support her daughter, active efforts to undermine her daughter's treatment, and unwillingness to protect her daughter from the boyfriend. **In re S.M.L., 499.**

Dependency—lack of suitable and stable housing—alternative care arrangement—findings of fact—The trial court's adjudication of a child as dependent based on respondent-mother's lack of suitable and stable housing was reversed because the findings of fact did not include findings related to the availability and suitability of alternative care and did not establish that respondent was unable to

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

provide for the child's care or supervision where respondent had made arrangements for her and the child to live with a friend and there was no evidence they could not continue to live with the friend for the foreseeable future. **In re M.H., 283.**

Discovery—deposition of social worker—applicability of Rules of Civil Procedure in juvenile proceeding—In an abuse and neglect hearing, the trial court did not err when it instructed respondent-father to cancel a notice of deposition and a subpoena issued to a social worker pursuant to Civil Procedure Rule 30 because the Juvenile Code provided for discovery—including depositions—and the Rules of Civil Procedure did not apply. The trial court did not improperly refuse to allow the father to depose the social worker, but instead instructed him to seek information under the sharing provisions of N.C.G.S. § 7B-700(a) and later, if necessary, file a motion for discovery requesting a deposition under N.C.G.S. § 7B-700(c). **In re M.M., 55.**

Dispositional order—electronic visitation only—DSS authority to expand visitation—abuse of discretion analysis—The trial court did not err by issuing a disposition order after an adjudication of abuse which limited respondent-mother's access to the children to electronic visitation and gave DSS discretion to grant face-to-face visitation in the future. No abuse of discretion was shown where the court was not required to hear additional evidence at the disposition hearing and findings made at the adjudication stage—that respondent-mother caused significant distress to the children, fostered anxiety and fear of the father, and exposed them to unnecessary medical interventions—were sufficient to support a finding that electronic visitation was in the best interests of the children. Further, a visitation order that sets out a visitation plan and allows DSS to expand visitation is not an abuse of discretion or an impermissible delegation of judicial authority. **In re K.W., 487.**

Dispositional order—visitation—failure to notify parent of right to move for review of visitation plan—Where a disposition order limited respondent-mother's visitation with her children after an adjudication of neglect and abuse, the trial court erred by failing to notify respondent of her right, pursuant to N.C.G.S. § 7B-905.1(b), to move for review of the visitation plan. The disposition order was vacated and remanded for entry of an order containing the required notification. **In re K.W., 487.**

Juvenile jurisdiction—termination—transfer to civil custody action—order—requisite statutory finding—After adjudicating the parties' child abused, neglected, and dependent, the trial court properly terminated the juvenile proceeding and transferred the case to the parties' ongoing civil custody action, where it entered a dispositional order containing the language required under N.C.G.S. § 7B-911(c)(2)(a) to terminate juvenile court jurisdiction and modify custody in a corresponding civil case. **In re E.P.-L.M., 585.**

Permanent plan of guardianship—nonrelatives—failure to consider placement with relative—required findings of fact—In a neglect and dependency case, the trial court erred in granting guardianship of respondent-father's minor daughter to nonrelatives (the daughter's second-grade teacher and her teacher's husband) at a permanency planning hearing without first considering placement with the child's grandmother and making the specific findings mandated under N.C.G.S. § 7B-903(a1)—which requires courts to consider placement with a relative before considering placement with a nonrelative—explaining whether the grandmother was willing and able to care for and provide a safe home for the child and whether placement with the grandmother would be contrary to the child's best interests. **In re A.N.T., 19.**

CHILD CUSTODY AND SUPPORT—Continued

modifying child custody in the parents' separate civil custody action after determining its adjudication of the child as abused, neglected, and dependent constituted a substantial change in circumstances. The court was not required to consider a prior custody order in the civil case where it based its "changed circumstances" conclusion on events occurring after that order was entered. Further, the court's findings—including that the mother submitted the child to numerous unnecessary and harmful medical procedures based on unsubstantiated allegations of sexual abuse by the father—supported that conclusion, and its determination of the child's best interests was based on sufficient evidence. **In re E.P.-L.M., 585.**

CHILD VISITATION

Juvenile proceeding—orders modifying visitation in separate civil case—ability to pay for supervised visitation—In a juvenile proceeding where the trial court entered an order under N.C.G.S. § 7B-911 and a disposition order modifying child custody in the parents' separate civil custody action, the provisions of those orders allowing the mother supervised visitation only were vacated because the court failed to make any findings regarding the mother's ability to pay costs associated with supervised visitation, as required under N.C.G.S. § 7B-905.1. The visitation issue was remanded for entry of these findings. **In re E.P.-L.M., 585.**

Permanency planning order—forbidding visitation with father—challenge dismissed without prejudice—In a neglect and dependency case, the Court of Appeals declined to review respondent-father's argument that the trial court improperly forbade him from having visitation with his minor daughter while he was incarcerated, where the permanency planning order forbidding visitation was vacated and remanded on appeal (on other grounds) and respondent-father was scheduled for release from prison during the same month as the appeal. The Court of Appeals dismissed respondent-father's argument without prejudice so that he could raise the visitation issue in the trial court after his release. **In re A.N.T., 19.**

CIVIL PROCEDURE

Motion to set aside—entry of default—default judgment—applicable standard—In a fraud lawsuit where defendant corporation moved pursuant to Civil Procedure Rules 55 and 60 to set aside either the entry of default or the subsequent default judgment entered against it, the trial court properly declined to analyze defendant's motion under the Rule 55(b) "good cause" standard for setting aside an entry of default because the default judgment had already been entered, and therefore the plain text of Rule 55(b) required the trial court to rule on defendant's motion under the standards set forth in Rule 60(b) for setting aside default judgments. **Judd v. Tilghman Med. Assocs., LLC, 520.**

Nonresident plaintiff—claim arising in other state—N.C.G.S. § 1-21—borrowing provision—After an Indiana resident (plaintiff) stepped on a nail and injured his foot at a home improvement store in Kentucky, the trial court properly dismissed plaintiff's negligence action filed in North Carolina against the store and its North Carolina-based parent companies (defendants) as barred under the "borrowing provision" of N.C.G.S. § 1-21, which provides that a claim arising in another jurisdiction will be barred in North Carolina if it is already barred in the other jurisdiction and the claimant is not a North Carolina resident. Plaintiff's claim was time-barred under Kentucky's one-year statute of limitations, and the fact that defendants were subject to personal jurisdiction under North Carolina's long-arm statute did

CRIMINAL LAW—Continued

JUDGMENTS

Default—discretionary written finding of fact—sufficiency—When denying defendant corporation's motion to set aside a default judgment under Civil Procedure Rule 60(b) for excusable neglect (among other grounds), the trial court did not err by making only one written finding of fact regarding defendant's excusable neglect argument without entering additional findings addressing all the evidence defendant presented in support of that argument. The trial court was not required to enter written findings on defendant's Rule 60(b) motion—because neither party requested written findings—but chose to do so in its own discretion; therefore, the court was not required to enter findings regarding every fact presented to it by the parties. Moreover, competent evidence supported the court's sole finding on excusable neglect despite defendant's evidence to the contrary. **Judd v. Tilghman Med. Assocs., LLC, 520.**

Default—excusable neglect—conclusion of law—sufficiency—recitation of evidence—In its order denying defendant corporation's motion to set aside a default judgment, the trial court's conclusion of law—stating that defendant had not established the requisite excusable neglect to set aside the judgment under Rule 60(b)(1) where he failed to respond to more than eighteen pleadings, motions, and other documentation relating to a lawsuit over a two-year period—was supported by the court's findings of fact and the evidence in the case. Further, the conclusion did not constitute a mere recitation of the evidence, but rather it properly referenced the facts upon which the court concluded defendant's neglect was inexcusable. **Judd v. Tilghman Med. Assocs., LLC, 520.**

Default—motion to set aside—Rule 60(b)(1)—excusable neglect—no follow-up with counsel—In a fraud lawsuit, the trial court did not abuse its discretion by declining to set aside a default judgment against defendant corporation under Rule 60(b)(1) where defendant failed to appear in the case over a two-year period and failed to show the judgment resulted from excusable neglect. Defendant asserted that it reasonably relied on its law firm of ten years to timely handle the case, but because defendant never followed up with its counsel about the lawsuit after providing the law firm with plaintiff's complaint, counsel's inexcusable neglect in handling the case was imputed to defendant. **Judd v. Tilghman Med. Assocs., LLC, 520.**

Default—motion to set aside—Rule 60(b)(6)—extraordinary circumstances —In a fraud lawsuit, the trial court did not abuse its discretion by declining to set aside a default judgment against defendant corporation under Rule 60(b)(6) where competent evidence showed that defendant's failure to appear in the case over a two-year period resulted from its own inexcusable neglect of its business affairs rather than from extraordinary circumstances (defendant never followed up with its then-counsel about the case after turning the complaint over to counsel). **Judd v. Tilghman Med. Assocs., LLC, 520.**

Subject matter jurisdiction—correction to criminal sentence—after oral notice of appeal—The trial court continued to have subject matter jurisdiction to correct defendant's criminal judgment pursuant to N.C.G.S. § 15A-1448, even though defendant gave oral notice of appeal in open court when his sentence was first pronounced, because the correction was made prior to the expiration of the fourteen-day time period for giving notice of appeal and it constituted a statutorily mandated sentencing requirement (application of habitual felon status to the second of two convictions). **State v. McMillan, 378.**